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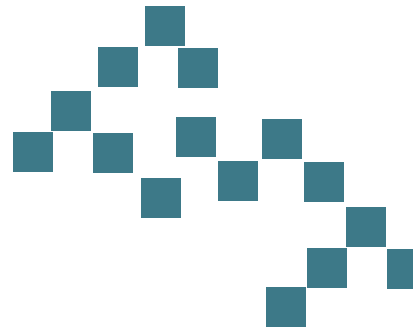

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TABLE OF CONTENTS

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Stare decisis and information abundance in a common law jurisdiction

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Abstract: In a common law jurisdiction, according to the principle of stare decisis judges are bound to interpret a constitutional or common law principle by applying authoritative cases already decided. Parties in disputes pending before the courts must find and assess the prior cases on which they can expect that judges will rely. Not very long ago, research for such precedent involved reviewing known cases and linking them to other cases using topical digests and citators. Success with this approach required a patient, persistent, thorough, and open-minded methodology. Modern information accessibility gives previously unimaginable quick access to cases, including with tools that promise to predict judicial tendencies. But this technological accessibility can have negative side effects, including a diminished research aptitude and a stilted capacity to synthesize information. It can also lead to an inadequate account of the human factors that often cause judges to depart from predictions based on logical inference from prior cases. This article considers the extent to which the identification of precedent is essential in legal analysis, yet is of limited value in predictability as a result of judges' unavoidably human perspectives. With examples from landmark cases, the article illustrates that judges sometimes make decisions

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based on considerations that will not be revealed in a mechanistic application of precedent. The article considers how evolving legal research tools and methods give access to precedent that in some respects makes the process more scientific, but in other respects can obscure the realities of how cases are decided. The article also gives examples of this paradox as demonstrated by today's students who are learning how to do research, drawn from years of the authors' teaching experience.

1. Introduction

In a common law jurisdiction, finding and assessing cases from the past is a foundation for understanding how judges are most likely to interpret a constitutional or statutory provision or common law principle. This foundation stems from the principle of stare decisis, which is Latin for "to stand by things decided"[1]. Not very long ago, research for precedent involved reviewing known cases and linking them to other cases using topical digests and citators. Success with this approach required a patient, persistent, thorough, and open-minded methodology, which led not only to potentially relevant cases, but also to a sense of how judges weighed them.

Now, the common way to do law research is much different. It is done with queries entered into search engines that use algorithms, which quickly produce lists of cases that match expectations based on known terms. In important ways the process is more efficient than prior research methods. It also tends to shortcut researchers' immersion in the humanistic element of judicial analysis and decision making.

This article describes the basic realities of stare decisis in a common law jurisdiction. It considers the extent to which the identification of precedent is essential in legal analysis, yet is of limited value in predictability as a result of judges' unavoidably human perspectives. With examples from landmark cases, the article illustrates that judges sometimes make decisions based on considerations that will not be revealed in a mechanistic application of precedent. The article next considers how evolving legal research tools and methods give access to precedent that in some respects makes the process more

1 Bryan A. Garner, *Black's Law Dictionary*, 9th ed. (St. Paul, MN: West, 2009), 1537.

scientific, but in other respects can obscure the realities of how cases are decided. The article also gives examples of this paradox as demonstrated by students learning how to do case research, drawn from years of the authors' teaching experience.

2. The predictive function of case law: precedent and stare decisis

The notion that we understand current law by knowing about prior court cases is foundational in the U.S. legal system. As U.S. Supreme Court Justice Louis Brandeis wrote, "Stare decisis is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right"[2]. U.S. Supreme Court Justice Amy Coney Barrett explained when she was a law professor that "stare decisis has two basic forms: vertical stare decisis, a court's obligation to follow the precedent of a superior court, and horizontal stare decisis, a court's obligation to follow its own precedent. Vertical stare decisis is an inflexible rule that admits of no exception"[3]. Analysis of horizontal precedent begins with identifying potentially applicable cases. In a legal classic that is on recommended reading lists for new law students, law professor Edward Levi aptly framed the nature of this kind of research and analysis. He called it "reasoning by example," by which "similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case"[4].

As Justice Coney Barrett also explained, "there is nothing inevitable about the shape of stare decisis"[5]. Judges can disagree about the extent to which they are bound to follow precedent and the legitimate reasons for departing from it. As the U.S. Supreme Court said more than a century ago, "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided"[6]. Justice Coney Barrett noted that

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2 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

3 Amy Coney Barrett, "Precedent and Jurisprudential Disagreement," *Texas Law Review* 91, no. 7 (2013): 1712.

4 Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 2.

5 Coney Barrett, "Precedent," 1713.

6 Hertz v. Woodman, 218 U. S. 205, 212 (1910).

some cases are especially well-settled precedent, which are sometimes called "super-precedent"[7]. As examples she included *Marbury v. Madison*[8], the foundation for the Supreme Court's power to hold an act of Congress to be unconstitutional, and *Brown v. Board of Education*[9], which held that states may not constitutionally maintain racially segregated public schools[10]. She also said that the force of such landmark cases stems from "the people, who have taken their validity off the Court's agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. … And without disagreement below about the precedent, the issue is unlikely to make it onto the Court's agenda"[11].

Considering what should guide this discretion has always been a central focus of legal analysis. Edward Levi, quoted above for his description of legal reasoning, stressed that legal research and analysis involves judgment from the start. He said that "the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was announced. The finding of similarity or difference is the key step in the legal process"[12]. He also observed that legal analysis is more than finding the best analogy. As he said, "Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities. Social theories and other changes in society will be relevant when the ambiguity has to be resolved for a particular case"[13].

More recently, federal judge and law scholar Richard A. Posner, while noting that "reasoning by analogy enjoys canonical status," also said that "what makes no sense is to try to determine which case the new one most closely 'resembles' without exploring policy, unless the cases are identical in the sense that the first case declared a rule that the second case is clearly

7 Coney Barrett, "Precedent," 1734.
8 4 U.S. (1 Wheat.) 133 (1803),
9 47 U.S. 483 (1954).
10 Coney Barrett, "Precedent," 1734.
11 Ibid. 1735.
12 Levi, *Introduction to Legal Reasoning*, 2.
13 Ibid. 104.

governed by"[14]. These observations echo back to the 1881 classic *The Common Law*, in which U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., wrote that to understand law "other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a lot more to do than the syllogism in determining the rules by which men should be governed"[15].

Some scholars seem unwilling to accept the unpredictable nature of judicial decision making about which these legal icons have spoken. They propose "doctrines" of stare decisis to bring together judicial approaches that differ on principle[16]. Such differences have been particularly evident in application of stare decisis to statutory interpretation. When a statute is unclear the courts look to the legislature's intent, which is not something that logically varies with a judge's moral and political theories. But as law professors Evan Criddle and Glen Staszewski summarized, "A prominent theme in recent scholarship on statutory interpretation is that the federal judiciary's current methodology is too complicated, inconsistent, and unpredictable"[17]. It also undermines law's predictability. As Justice Neil Gorsuch wrote in the recent U.S. Supreme Court case in the interpretation of a federal statute prohibiting discrimination on the basis of sex, "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives"[18].

One mechanism that has been suggested for reducing variation in statutory interpretation is to derive methods for judges to more closely align their

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14 Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), 181–183.

15 Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), 1.

16 Randy J. Kozel, "Stare Decisis in the Second-Best World," *California Law Review* 103, no. 5 (2015): 1145–1155.

17 Evan J. Criddle and Glen Staszewski, "Against Methodological Stare Decisis," *Georgetown Law Journal* 102, no. 5 (2014): 1576.

18 Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1738 (2020).

interpretations with what was expressed in the legislative drafting process[19]. However, such efforts have seemed to raise more questions than answers. For instance, the authors of one such effort noted, "not all of the canons may even be the same type of legal tools, as a jurisprudential matter, for the purpose of answering these questions"[20]. Criddle and Staszewski concluded that "it would be a serious mistake for courts to declare one approach to statutory interpretation—or one set of canons—as 'the winner' and freeze that approach into place through the application of stare decisis"[21].

While judges and scholars largely agree that the goal of statutory interpretation is to follow the legislature's intent, another aspect of judicial decision has been seen as more appropriate for judicial innovation: the common law itself. Common law is a matter of rules that judges develop when the legislature has not chosen to act, and judges therefore need not constrain their decisions within the expressions of constitutional framers or legislatures. Some state law fields are mostly based on common law, including such fundamental subjects as property ownership, contracts, and liability for personal injuries. California Supreme Court Justice Roger Traynor, known for common law decisions that created remedies for which there was no precedent, stated the case for innovation when he argued, "Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values"[22].

The kind of creativity for which Justice Traynor argued is readily apparent in some aspects of the law, including liability for defective products. For example, in *Greenman v. Yuba Power Products, Inc.*,[23] in an opinion that Justice Traynor wrote, the California Supreme Court imposed strict liability on the manufacturer of a defective product without requiring the injured person to prove negligence according to established law. The court did this as a matter of policy. According to the opinion, "The purpose of such liability

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19 Abbe R. Gluck and Lisa Schultz Bressman, "Statutory Interpretation from the Inside-An Empirical Study of Congressional Drafting, Delegation and the Canons: Part 1," *Stanford Law Review* 65, no. 5 (2013): 901–1026.

20 Ibid. 1019.

21 Criddle and Staszewski, "Against Methodological Stare Decisis," 1590.

22 Roger J. Traynor, "Law and Social Change in a Democratic Society," *University of Illinois Law Forum* 1956, no. 2 (1956): 232.

23 59 Cal.2d 57 (1963).

is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"[24]. Justice Traynor invoked a policy choice for which he had earlier argued when concurring in an opinion in favour of a woman injured by an exploding soft drink bottle. In *Escola v. Coca Cola Bottling Co.*[25], he said, "In my opinion, it should now be recognized that a manufacturer incurs an absolute liability when an article that he had placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings"[26]. For precedent, he relied on the 1916 opinion of a New York judge also known for making leaps in declaring new liability standards, Benjamin Cardozo, who, in *MacPherson v. Buick Motor Co.*[27], first held a manufacturer to be liable for a product defect without requiring a contractual relationship to the injured. Product liability of the sort adopted in *Greenman* has become entrenched in the common law throughout the country. It has also been the basis for other judicial innovation to impose liability where none previously existed. For example, in *Sindell v. Abbott Laboratories*[28], the California Supreme Court created a cause of action when a person claiming harm from a drug could not demonstrate that the party from whom compensation was claimed in fact manufactured the drug that was used. This was done based on a theory of "market-share liability," which enabled the claimant to recover in a percentage equal to the manufacturer's share among all who manufactured the drug. The court created this cause of action based on what it saw as fairness due to the manufacturer's superior information and control of the product. The extraordinary degree to which this judicially created cause of action departed from precedent is demonstrated by the refusal of most states to follow California's example[29].

These examples of judicial creativity have had a profound impact on the common law, but few judges have shown as much willingness as Justice

24 Ibid. 63.

25 24 Cal. 2d 453 (1944).

26 Ibid. 461 (Traynor, J., concurring).

27 217 N.Y. 382 (1916).

28 26 Cal. 3d 588 (1980).

29 Andrew B. Nace, "Market Share Liability: A Current Assessment of a Decade-Old Doctrine," *Vanderbilt Law Review* 44, no. 2 (1991): 395–439.

Traynor to decide cases free from stare decisis. As U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., once said, no judge is likely to feel at liberty to say a well-settled legal principle is "a bit of historical nonsense"[30]. As legal historian and law professor G. Edward White explained in a modern context, "Part of the burden of judicial opinion-writing, then, has been to show that a decision has not been grounded on other than 'legal' considerations, and that within that ambit it analyzes legal issues in an intelligible fashion. The legitimacy of a judicial decision in America is somehow linked with the degree to which it meets this requirement"[31]. U.S. Supreme Court Justice Coney Barrett also stressed the importance of stare decisis to the law's legitimacy. She said, "The gravitational pull of horizontal stare decisis is one means—and an important one—of encouraging stability. Even apart from that presumption, however, the system has features that temper the risk of swings in the Court's case law. These features also work toward ensuring that the law does not fluctuate simply because of the will of one justice, or even five, but because of an emerging sense among litigants and lower court judges that it might be time for the Court to change course"[32]. These observations show that while judicial decision making cannot be reduced to a mechanical application of stare decisis, neither should it be made without a solid grasp of precedent.

3. Humanism and inescapable unpredictability

The importance of a humanistic factor in important cases is readily apparent in constitutional interpretation. Justice Louis Brandeis said that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function"[33]. Understanding how courts decide cases therefore involves "the lessons of experience and the force of better reasoning", an analytical approach that is the focus of an American

30 Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
31 G. Edward White, *The American Judicial Tradition* (Oxford: Oxford University Press, 1988), 461.
32 Coney Barrett, "Precedent and Jurisprudential Disagreement," 1737.
33 Burnet v. Coronado Oil & Gas Co., 407–408.

law school education. In 1950, Harvard Law Professor Karl Llewellyn gave famous lectures describing this approach. He instructed that understanding how courts decide cases goes beyond "the realm of pure scientific observation and inference" [34]. He noted that pure logic can "give us no certainty as to *whether* the possibility embodied in the argument will be adopted by a given court"[35]. As to how to assess this possibility, he advised students of the law to "use all you know of individual judges, or of the trends in specific courts, or, indeed, of the trend in the line of business, or in the situation, or in the times at large—in anything you can expect to become apparent and important to the court in later cases"[36]. He warned that those who think precedent can be applied with certainty "simply do not know our system of precedent in which they live"[37]. The continuing truth in Professor Llewellyn's advice can be seen in examples from some of the most impactful U.S. Supreme Court cases.

The U.S. Supreme Court's 1965 majority opinion in *Griswold v. Connecticut*[38] set a foundation for later controversial cases about implied constitutional rights, including access to abortion. In *Griswold*, the Court considered the constitutionality of a state statute prohibiting advice about use of contraceptives. Although nearly all states had repealed such laws, the Connecticut state legislature and its courts repeatedly upheld its state's statute as a social policy choice within the power of the elected legislators, who were predominantly Catholic. At first blush, the issue seemed to be about free speech—the law prohibited medical providers from discussing contraception with their patients—and this was the primary argument made by counsel challenging the statute[39]. However, this was not the basis for the Court's decision. The majority opinion held that the statute violated a "right of privacy", which is nowhere mentioned in the Constitution. As for precedent, the opinion identified a variety of cases involving other express rights, and said, "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that

34 Karl N. Llewellyn, *The Bramble Bush* (Oxford: Oxford University Press, 2008), 63.

35 Ibid. (emphasis in original).

36 Ibid. 71.

37 Ibid.

38 381 U.S. 479 (1965).

39 John W. Johnson, Griswold v. Connecticut: *Birth Control and the Constitutional Right to Privacy* (Lawrence, KS: University Press of Kansas, 2005), 98.

help give them life and substance"[40]. In other words, the answer was to be found in an overall sense, not in any particular precedent.

The anti-formalist nature of the *Griswold* decision is reflected in the justice who wrote for the majority, William O. Douglas. He was sometimes called "Wild Bill" by his colleagues because of his reputation for personal life indiscretions, marriages to much younger women, and an inclination to forbid government from intrusions into what he deemed to be private matters[41]. Law Professor and Historian G. Edward White described Justice Douglas as "an anti-judge' in that he "rejected both of the principal twentieth-century devices designed to constrain subjective judicial lawmaking: fidelity to constitutional text or doctrine, and institutional deference"[42]. The majority who joined in his opinion showed they shared a basic sense of justice with Justice Douglas by agreeing to his loosely written opinion. Still, their unease was demonstrated when five of the six wrote concurring opinions pointing to what they saw as more solid precedent.

A second example of an impactful decision that was not neatly tied to precedent is a landmark case about use of race as a factor in university admissions policies, *Grutter v. Bollinger*[43]. In *Grutter*, a bare five-to-four majority of the U.S. Supreme Court justices rejected a white woman's challenge to an admission policy at the University of Michigan Law School that used race as a "plus factor". The Court's precedent, reviewed by Justice Sandra Day O'Connor in the majority opinion, required that racial classifications must be put to "strict scrutiny", which, the opinion said, "means that such classifications are unconstitutional only if they are narrowly tailored to further compelling governmental interests"[44]. As Justice O'Connor explained, "We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool"[45]. Despite this warning about the importance of being suspicious about motives when a state institution uses race

40 381 U.S. 484.

41 Johnson, Griswold v. Connecticut, 130.

42 G. Edward White, "The Anti-Judge: William O. Douglas and the Ambiguities of Individuality," *Virginia Law Review* 74, no. 1 (1988): 18.

43 539 U.S. 306 (2003).

44 Ibid. 326.

45 Ibid. (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)).

in decision making, the majority accepted the university's "educational judgment" that race was an appropriate consideration based on what they said was a "tradition of giving a degree of deference to a university's academic decisions"[46]. This drew angry dissents from four justices, including Chief Justice William Rehnquist who said, "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference"[47]. He pointed to the record showing the university's focus entirely on race to achieve a certain minimum number of minority applicants, which contradicted the university's claim that race was only one "plus factor" among many that contributed to a more diverse student body. The dissenting justices spoke harshly about the universities' claims to be acting in the public interest, to which the majority was deferring. What is not readily apparent is the extent to which Justice O'Connor, in writing an opinion that seemed unmoored from strict scrutiny precedent, considered broader, national concerns. The majority opinion noted a brief submitted by retired generals and admirals and former commandants of the service academies, which said, "'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps … is essential to the military's ability to fulfil its principle mission to provide national security'"[48]. The brief also said, "Currently, no alternative yet exists to the military's limited use of race-conscious recruiting and admissions policies to fulfil its compelling need for selectivity and diversity in its officer corps"[49]. While the majority's expressions of deference to an elite law school are subject to an understandable degree of disfavour, concerns about the nation's military leadership are of another order.

A final example of a case that was decided for reasons that were not logically predictable based on precedent is the recent controversial U.S. Supreme Court decision involving state law prohibitions against same-sex marriage, *Obergefell v. Hodges*[50]. For various reasons, most observers expected a split among eight of the nine justices, with Justice Anthony Kennedy to be

46 Ibid. 328.

47 Ibid. 379 (Rehnquist, C.J., dissenting).

48 Ibid. 331.

49 Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents (August 2012), 36, accessed October 22, 2021. https://www.scotusblog.com/wp-content/uploads/2016/08/11-345-respondent-amicus-becton.pdf.

50 576 U.S. 644 (2015).

the deciding vote. Justice Kennedy concluded that the same-sex marriage restrictions were unconstitutional, and wrote the five-to-four majority opinion. The majority acknowledged the usual deference to the democratic process for the pace of social change, but decided that same-sex marriage prohibitions violated rights in a general sense. The majority said same-sex couples have a right to marriage because marriage is an "institution at the center of so many facets of the legal and social order" in national life[51].

Justice Kennedy's opinion has compelling descriptions of the difficulties that same-sex marriage restrictions caused for couples and their children. The opinion is also conspicuous for the absence of compelling precedent. The dissenting justices did not argue about whether same-sex marriage was good policy. They saw the Court as not having the constitutional authority to overrule state law on the issue or having any precedential basis for declaring a right to marriage regardless of gender. As Chief Justice John Roberts said, those who founded the country "would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges"[52]. Even those who applauded the majority decision noted the lack of clearly articulated legal analysis. Law Professor Matthew Coles, who was director of the American Civil Liberty Union's national LGBT Project, applauded the outcome of Justice Kennedy's opinion yet added: "But to be honest, there isn't much of a jurisprudential legacy here. The biggest disappointment has to be the Court's failure to tell us how courts should look at laws that single LGBT people out for different treatment. … Are laws that discriminate presumptively constitutional subject to rational basis review? Or are they to some degree suspect? We just don't know"[53].

In his own reflections about *Obergefell*, Justice Kennedy has not explained his opinion as following from stare decisis. When asked in an interview whether he thought his opinion surprised others, he said "the honest answer is it surprised me"[54] given his Catholic upbringing. Justice Kennedy also said he was undecided until just a few days before he wrote the opinion,

51 Ibid. 670.

52 Ibid. 709 (Roberts, C.J., dissenting).

53 Matthew Coles, "The Profound Political but Elusive Legal Legacy of Justice Anthony Kennedy's LGBT Decisions," *Hastings Law Journal* 70, no. 5 (2019): 1201.

54 University of Virginia School of Law, "Retired Justice Kennedy Says His Gay Marriage Ruling 'Surprised' Him," November 28, 2018. https://www.youtube.com/watch?v=v8Ja8JKVYsA.

and became convinced to hold the marriage restriction unconstitutional when he thought about the plight of children whose parents were in a gay marriage that was not legally recognized[55]. Those who knew Justice Kennedy personally have commented on his noticeable tolerance for non-traditional relationships, even as they were inconsistent with his religious education as a one-time altar boy[56]. As Professor Coles described his view of Justice Kennedy's motivation, the opinion in *Obergefell* is among cases that "reflect the profound emotional commitment of a very decent human being to right a great historical wrong. For that moral commitment, one that likely overcame many of the values on which he was raised, we should respect and admire the man. I do"[57].

There can be serious, reasonable disagreement about the extent to which an individual judge should inject personal views about justice and social policy into deciding cases. Justice Antonin Scalia, in his dissent in *Obergefell*, warned of an existential threat to the constitutional framework. He said, "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves"[58]. Others see it as necessary to counter the tyranny of majorities, and to align generally expressed constitutional principles with contemporary society. What should not be a subject of disagreement is the influence of personal judgment on judges, especially in the most contentious cases. This is not something reducible to a predictive algorithm, nor should it be. Carl Sagan, a brilliant astronomer and physicist well-known for a rare ability to explain theoretical scientific principles in understandable terms, spoke and wrote about the threats to humanity from technology that can be turned to destructive ends. He once said, "Knowing a great deal is not the same as being smart; intelligence is not information alone but also judgment, the manner

55 Ibid.

56 Sheryl Gay Stolberg, "Justice Anthony Kennedy's Tolerance Is Seen in His Sacramento Roots," *New York Times,* June 21, 2015. https://www.nytimes.com/2015/06/22/us/kennedys-gay-rights-rulings-seen-in-his-sacramento-roots.html

57 Coles, "The Profound Political but Elusive Legal Legacy," 1205.

58 576 U.S. 714 (Scalia, J., dissenting).

in which information is collected and used"[59]. Judges entrusted with deciding our most important cases have good reasons to heed this warning and not withhold their human judgment from seeking and interpreting information that technology can so easily supply.

4. The utility and seductive lure of analytical tools

To understand the law, law students and legal professionals always have faced the harrowing reality of the massive scope of information necessary to appropriately research a legal matter and successfully synthesize the information into a valuable form. As described in the article above, the distinctly human component of the law, particularly judge-made common law, is also essential for legal professionals to consider to hopefully predict outcomes in court. With this mass of information, and since the law only grows in volume, not shrinks, researchers have had to develop ways of mechanizing legal research. The importance of some organizational structure for making sense of the law relates to a lawyer's obligation under rules of professional conduct to provide competent representation to a client[60], which includes, among other things, to be complete and up-to-date in research. Lawyers must confirm their arguments are, in fact, based in law that is "still good". What makes this task so difficult is the near impossibility for a researcher to know of every relevant case about a matter. This is where research tools like digests, controlled vocabularies, and citation indexes enter to assist in collecting and analyzing the complex web of law.

Citation indexes, or citators, are most useful in showing relationships between cases. Citation indexes provide historical information in two ways. Citators track the history of cases vertically, by showing how cases originated at the trial level and progressed upward through appellate courts. They also provide horizontal legal information, by showing how cases have been subsequently cited by other courts, with an indication of the nature of the citations. Scholars have recognized Simon Greenleaf's *A Collection of Cases Overruled, Doubted, or Limited in Their Application*, printed in 1821[61], as

59 Carl Sagan, *Cosmos* (New York: Random House, 1980), 270.

60 American Bar Association, Rules of Professional Conduct Rule 1.1 (2020).

61 Simon Greenleaf, *A Collection of Case Overruled, Doubted, or Limited in their Application* (Portland: Arthur Shirley, 1821).

the first true citator or citation index[62]. Greenleaf, an attorney, found it vital in his personal practice to keep track of rulings in his local court as well as rulings from other jurisdictions that would bind his arguments with jurisdictional precedent. His personal note-taking and case index is equivalent to the current dominating citators—LexisNexis's Shepard's Citations and Westlaw's KeyCite. Attorneys and legal researchers rely on these platforms to verify the currency of cases and search for countervailing authority. Legal professionals rely on citators to indicate jurisdictionally relevant court rulings. Citators note when courts cite prior rulings as persuasive authority, which are considered to be "positive" citations. Citators indicate "positive treatment" when a court has upheld the original court's ruling, followed it, or extended it. Positive treatment can be used to bolster reliance on a line of cases. Citators indicate "negative treatment" when a court has criticized the original court's ruling, narrowed it, or overruled it. Negative treatment in citation is also important for legal researchers because it signals potential use of a case to distinguish a prior decision that otherwise might be urged as precedent.

LexisNexis and Westlaw subscriptions are expensive, and therefore available, pragmatically, only to law firms and organizations with substantial budgets. Variations of these platforms have long been available to judges as research tools to supplement the authority cited in the advocates' briefs and otherwise identify possible precedent. The average individual does not have such access. Yet, these legal databases and their collections of primary legal materials play a strong role in guiding legal thought. Today's law professionals learn to craft arguments based on approaches embedded within LexisNexis or Westlaw. Citation indexes, classification schemes like headnotes and Westlaw Key Numbers, and supplementary annotations guide researchers in asking "the right questions", in a manner that expert indexers have structured for American common law. Their structure facilitates complex searching, using Boolean and other advanced operators to narrow results as well as natural language searching that aims at retrieving cases "about" a particular legal topic. Not only do these proprietary services help practitioners find the necessary cases for their pending matters, these services

[62] Patti J. Ogden, "'Mastering the Lawless Science of Our Law': A Story of Legal Citation Indexes," *Law Library Journal* 85, no. 1 (1993): 39–40.

also provide case recommendations and supplemental content that is often serendipitously useful. Individuals who can afford to purchase these information platforms are given an advantage in legal research.

The influence of Westlaw's Key Number and KeyCite System and LexisNexis' Shepard's Citations transcend popularity and convenience. Law research information professional Daniel Dabney observed how these dominating legal information tools do not bring only "certain questions to the fore by including them in the scheme's classification logic. The system also has a role in determining what basic ideas one can ask questions about"[63]. He explained that if an attorney has an idea that does not comport with an established topic in the Westlaw Key Number System, the idea is essentially an "unthinkable thought". This system of meticulous classification helps streamline legal research and analysis. It also necessarily imposes restrictions on how questions are connected to information organized within the system.

Costly proprietary legal information platforms have changed immensely since Greenleaf's original citation index in ways jurists and counsellors likely could never have predicted in the nineteenth and majority of the twentieth centuries. These companies have gone beyond tracking relevant precedent in local, state, and federal jurisdictions. Now, they promote litigation analytics tools aimed to support practitioners in their trial preparation and other legal matters like negotiation, contract drafting, and advocacy work. LexisNexis and Westlaw even promise to provide insights that go beyond the historical tracking of a case. These two predominant legal information providers, and their smaller-in-scale competitors, are racing to offer new artificial intelligence-driven information that can help law researchers. For instance, platforms aver the ability to answer such questions as: What is the likely outcome of a case? How likely is a judge to grant a motion? What language does a judge find persuasive? What cases does a judge rely on most?[64] LexisNexis and Westlaw even boast their ability to answer more humanist questions such as: How has the court previously ruled on cases like mine and why? [65]

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63 Daniel Dabney, "The Universe of Thinking Thoughts: Literary Warrant and West's Key Number System," *Law Library Journal* 99, no. 2 (2007): 236.

64 "Lexis Advance vs. Westlaw Edge: Legal Analytics Comparison," LexisNexis, accessed November 11, 2021,http://www.lexisnexis.com/pdf/legal-analytics/Legal_Analytics_Comparison-LexisNexis_v_Westlaw.pdf.

65 Ibid.

These legal research platforms can draw upon information from a judge's entire bench career, and no doubt can provide insight about prior judicial analysis in a way far more efficient than traditional methods for collecting and studying cases. They also rely on presumptions that if not fully appreciated could lead to unjustified weight given to the result produced by research algorithms. Components of the question itself—"cases like mine"—are deceptively simplistic; to effectively retrieve "cases like mine", researchers must search using terms that match the way the information retrieval tool has categorized and termed items. Certain query terms may seem appropriate, but might give unhelpful results because the particular term was not used by the court or indexed similarly. Furthermore, assertions that analysis of prior reported cases and reveal *why* courts have ruled in one way or another invite important questions. Precedent aside, what else drives a judge to reach his or her decision? The discussion in this article above shows that even in the most important cases judges acknowledge that *they* would not have predicted how they would apply precedent.

5. The paradoxically narrowing effect of information abundance

The endless cycle of idea and action,
Endless invention, endless experiment,
Brings knowledge of motion, but not of stillness;
Knowledge of speech, but not of silence;
Knowledge of words, and ignorance of the Word.
All our knowledge brings us nearer to our ignorance,
All our ignorance brings us nearer to death,
But nearness to death no nearer to God.
Where is the Life we have lost in living?
Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?

—T. S. Eliot, *The Rock*[66]

Information abundance is a blessing as well as a curse. In a matter of minutes, legal professionals can research case law, retrieve a statute, contact a county clerk for a recently filed complaint or other docketed documents, and

[66] T. S. Eliot, *The Rock* (New York: Harcourt, Brace, and Co., 1934), 7.

examine case analytics provided by legal information companies. But this modern information accessibility has negative side effects for users, including a diminished research aptitude and a stilted capacity to synthesize information for valuable use. The wealth of information that legal professionals have readily accessible can unfortunately lead to a blind trust of data gathered and organized by expert editors and artificial intelligence tools.

Bestselling author Nicholas Carr described changes in research and information-seeking behaviours as a result of affordances of modern technology in his book *The Shallows*[67]. Technological advances like hyperlinked digital materials and the browsing feature commonly referred to as "infinite scroll" foster speedy searching over methodical consumption and analysis of information. This browsing technology streamlines webpage loading in that users are fed information without the affirmative act of clicking to an entirely new webpage. Infinite scrolling allows for new content to be continuously added to the bottom of a search screen, hence the word "infinite." Users can hypothetically scroll forever, which is valuable to companies who wish to keep users' eye on their platforms for as long as possible. Intentional "deep-diving" into materials is rare, and behaviours of merely skimming the surface of the information waters have taken over[68]. Carr described how this feature takes advantage of humans' vital brain paths as paths of least resistance, which he said are "the paths that most of us will take most of the time, and the farther we proceed down them, the more difficult it becomes to turn back"[69]. Our brains stringently work to maintain habits; so, elasticity becomes less possible and less likely.

These common search capabilities provide a facade of ease and efficient search. This multimedia environment appearing on a single page or handheld screen results in "fragment[ing] content and disrupt[ing] our concentration" [with maybe] "a few chunks of text, a video or audio stream, a set of navigational tools, various advertisements, and several small software applications, or 'widgets', running in their own windows[70]. And these realities of research

67 Nicholas Carr, *The Shallows*: *What the Internet is Doing to our Brains* (New York: W.W. Norton, and Co., 2010).

68 Nicholas Carr, "Is Google Making us Stupid?: What the Internet is Doing to our Brains," *The Atlantic* (July/August 2008): 2 and 8.

69 Carr, *The Shallows*, 34.

70 Ibid. 91.

behaviours are intimately tied to how well we make sense of information[71]. Digital search, especially search that involves artificial intelligence-created content and organization, grabs researchers' attention with intentional stimuli, but then negatively affects working memory for researchers. As Carr stated, "it becomes harder to distinguish relevant information from irrelevant information"[72].

Changes in research aptitude are also affected by the sheer volume of information being made available. Practitioner and scholar Anne Goulding wrote about information overload as being one of the prevailing concerns for the information science field. Prior to her article, she argued, the professional field focused on individuals' lack of access to information—what is called "information poverty". Goulding pointed to a newer phenomenon termed "information fatigue syndrome", which inhibits analytical ability and increases anxiety and self-doubt in decision making[73], which she characterized as much or more of a problem than information poverty. Individuals are unable to absorb the accumulation of information and, thus, result to heuristic judgments and artificial intelligence-driven rank ordered results to approach research.

The field of information science, which is most simply defined as the study of information, humans, and technology, is rich with discussion regarding elements of technology and how these aspects have affected human behaviour in information-seeking. For example, Professor of Social Studies of Science and Technology Sherry Turkle summarized how users gather information in this way: technology promotes what is easy. After giving examples of how most common platforms aim to offer effortless and trouble-free searching, she addressed some of the negatives. She stated that in "the technology-induced pressure for volume and velocity, we confront a paradox. We insist that our world is increasingly complex, yet we have created a communications culture that has decreased the time available for us to sit and

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71 For a thorough definition and description of "sense-making", see Brenda Dervin, *"An overview of sense-making research: Concepts, methods and results." Paper presented at the annual meeting of the International Communication Association, Dallas, TX.* (1983).

72 Carr, *The Shallows*, 125.

73 Anne Goulding. "Information Poverty or Overload?", *Journal of Librarianship and Information Science* 33, no. 3 (2001): 109–111.

think uninterrupted" [74]. She further explained, "As we communicate in ways that ask for almost instantaneous responses, we don't allow sufficient space to consider complicated problems"[75]. Professional anthologist and acclaimed essayist Alberto Manguel has explained in depth the effect of information abundance and resulting behaviours of information-seekers in his novel *The Library at Night*[76]. He wrote that the current information environment accentuates "velocity over reflection and brevity over completion", highlights "news and bytes of facts over lengthy discussion and elaborate dossiers", and dilutes "informed opinion with reams of inane babble, ineffectual advice, inaccurate facts and trivial information"[77]. Essentially, information abundance causes the formation of perceptions and beliefs based on artificially-created "truths" and convincing data, and these perceptions and beliefs get reinforced over time, making change or reconsideration more difficult and taxing on the human brain. Understandably, faulty beliefs resulting from sloppy research habits become solidified and perpetuated.

The tendencies these scholars describe are particularly concerning for the legal field, in which teachers and expert practitioners have emphasized the importance of "thinking like a lawyer". The analytical thought and critical analysis required to think "like a lawyer" takes significant time and cognitive devotion. To look for shortcuts is a natural human tendency. Legal research platforms can offer the temptation of access to highly sophisticated organizers of the common law and sense-makers of legal thought. Yet, to believe that these artificial intelligence-driven tools can truly "get into the minds" of judges is a fool's errand. They can only provide information based on prior information, which is useful for that purpose. But the abundance of often artificial intelligence-generated data can blur the view of what also matters in legal analysis—the intellectually rigorous and logical investigation of precedent and other non-streamlined information, which is not accessible or categorized within proprietary systems.

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74 Sherry Turkle, *Alone Together: Why We Expect More from Technology and Less from Each Other* (New York: Basic Books, 2011), 166.

75 Ibid.

76 Alberto Manguel. *The Library at Night* (New Haven, CT: Yale University Press, 2009), 222–233.

77 Ibid. 227.

6. Challenges in learning legal analysis

In his 1950 lecture about stare decisis, Professor Karl Llewellyn said, "Logic and science can tell us, and tell us with some certainty, what the *doctrinal possibilities* are"[78]. Those who want to understand the path of the law will need to research and analyse those possibilities. Professor Llewellyn pointed out that while there can never be complete certainty in outcome, "a skilled, experienced guess (though only a guess) is yet a better bet than the guess of the ignorant"[79]. As this article has discussed, case study must occur on more than one level. In addition to collecting reported cases, researchers must be attuned to the reality that cases often turn on humanistic factors that may not be readily apparent in the portrayal of precedent. Reliance on algorithmic answers, now possible through use of search engines, as if they are wholly predictive will give only an incomplete sense of how law develops. Consequently, those who are immersed in the conveniences of readily available answers may be ill-prepared for the kind of research that will reveal the considerations on which judges are most likely to focus. Recent experience in law research learning environments gives reason for this concern.

Both of the authors of this article have many years of experience teaching legal research to undergraduate, graduate, and law school students. The following discussion about the challenges in learning legal analysis relies upon these years of teaching experience and collegial discussions. Teaching how to identify and analyse relevant cases is among the most difficult challenges in these courses. In this experience, the authors have seen distinct trends among the students. In general, they increasingly tend to be ill-disposed to learning a way of approaching research that is different than that to which they are accustomed. They also tend to persist with known approaches even when evidence should alert them that something different is needed. The following briefly illustrates the basis for these observations.

The authors use assigned readings, lectures, and demonstrations to show how legal research is different than most other research. They also introduce some of the searchable databases of cases and other primary authority. Students have ample opportunity in class and individually to ask clarifying questions. To apply their learning, they must complete exercises that require

78 Llewellyn, *The Bramble Bush*, 63 (emphasis in original).

79 Karl N. Llewellyn, *Common LawTradition: Deciding Appeals* (Boston: Little, Brown, 1960), 17.

them to find specific cases or other primary authority based on information about an issue and the nature of the authority. However, the questions are phrased in a way that does not allow a simple term-match search. For example, the first part of a question requires a response to the following: "Within the past ten years, the U.S. Supreme Court held that a state statute setting a residency requirement for obtaining a license to sell liquor violated the U.S. Constitution". To give students a guidepost to know when they are completing the research successfully, for the second part of the question students must provide information found only by reading the authority found for the first part. For example, the second part to the previously quoted question is: "Give the citation to the state statute that was declared unconstitutional". Students who do not find this answer should realize that the authority they gave in response to the first part was incorrect, and resume the research.

Although most students eventually get most of the answers to the questions in the exercises, surprisingly some of them will give a wrong answer to the first part even though they do not find confirmation in the second part. That is, they stick with an apparently correct answer even when further study would disconfirm it. Tellingly, some students will give incorrect information in response to the second part even though they gave the correct citation in the first part. The regularity with which this happens reveals a basic impatience with carefully reading the authority. When asked how this happens, students give two reasons. One is that they did not read the entire authority for the exactly correct answer—instead they gave as an answer the first thing they thought was close enough to being correct. The second is that instead of taking the time to read the authority carefully, they did another search to find a possible answer. For example, when asked to give the statutory citation in the court case, they did a search of the statutes, rather than spend the time to read the whole opinion. These kinds of errors suggest a preference to rely on the quick and usual way to find answers, rather than to apply what seemed a more laborious approach that accounts for the uniqueness of legal authority.

Student feedback also suggests other tendencies that interfere with successful legal research. We stress that the goal is not to find *an answer*, but rather to find the *single best answer* as derived from a complete consideration of the applicable authority. For example, looking at a single passage in the case, without also studying its context within an opinion and its relation to other

authority applied or distinguished in the case, will lead to an incomplete and possibly misleading interpretation. Students new to legal research rarely apply this kind of thoroughness. This is evident even in straightforward statutory research. Students will commonly give the first statute they identify that seems relevant to a question, rather than methodically look at all possible applicable statutes. The authors warn students with the metaphor that "with legal research you cannot rely on being able to parachute into an answer". In this situation, the researcher must first learn about the possibly relevant topics and terminology, and based on what is revealed refine the research for what is possibly more directly applicable. The best way to find an applicable statutory provision, for example, may require identifying relevant topics, examining the components of chapters or subparts, and then piecing together individual provisions and their definitions, cross-references, and exceptions. To do this a researcher must be patient and methodical—traits that are not cultivated by use of the typical search techniques and platforms.

Another example of this tendency to take the shortest path to an answer is an assignment that asks students to choose a case of national importance and write an analysis of the completeness, fairness, and soundness of published reports about it. Even after students are urged to take time to choose a case of particular interest to them that might not be the most notorious, which has a good variety of competing published reports for critical analysis, most students will choose the same case—the one that is the first and most popular result in a Google search for "pending nationally important cases". Despite the readily apparent educational benefits of following a different path as stressed to them in the assignment instructions, the lure of taking a supplied answer, which has been the way they are accustomed to getting their information, seems too hard to resist.

Of course impatience is not limited to students of law. Faced with a mountain of unfamiliar information, students are prone to deploy corner-cutting behaviours to reduce the cognitive overload they are experiencing. For instance, with assignments in a variety of subjects that ask for well-developed analytical reasoning, both authors commonly have students submit assignments with bullet-pointed items as their main explanation of the assigned task. Students seem most comfortable with an approach of seizing upon results from search platforms and concluding "this must be good enough". Similarly, when students ask questions about assignments,

they often fixate on the question: "How many references are required?", as if the thoroughness of research is best demonstrated with itemization. Such a focus indicates a fundamental under-appreciation of the twists and turns of analytical exploration.

Today's students of legal research are fortunate that they have access to research tools that give them immediate access to a case that they can specifically identify, and that with artificial intelligence can produce a list of cases that most researchers would want to see in response to a well-phrased question. A challenge they face is that this ease of access does little to teach how there is much more to finding and analysing the true depth and breadth of legal authority.

7. Conclusion

Those who have earnestly studied case law have learned two truths. One truth is that there is much to know when researching the precedent on which a court might base a decision. The other is that there are other factors besides precedent that may be decisive. Computer scientist Jaron Lanier was one of the creators of digital reality, and an influential critic of the manner in which culture embraces technology. He described the difficulty of measuring how well a computer can imitate human intellect when he said that when you think it has achieved that state, "You can't tell if a machine has gotten smarter or if you've just lowered your own standards of intelligence to such a degree that the machine seems smart"[80]. Unquestionably modern technologies offer previously unimaginable ease of access to abundant information that can help us answer our legal research questions. This comfort should not lure us into believing such ease relieves us from the effort it takes to try to understand the full scope of stare decisis and the human judgment that continues to be essential to a legitimate and just decision making.

[80] Jaron Lanier, *You Are Not a Gadget* (New York: Alfred A. Knopf, 2010), 32.

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Legal status of youth councils in Poland and France in the light of new legal regulations

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legal system

Abstract: The subject of the paper is the legal status of consultative bodies dedicated to young people, which are established both in Polish local government and in the French local government community. In both legal orders these bodies have a consultative and advisory character. However, there are some differences in their structure and forms of action, which may constitute a field of reflection on their legal status. In Poland and in France, there is a noticeable trend towards expanding the importance and tasks of these bodies in self-governing communities, which indicates a good direction of change. Due to an increase in civic awareness, youth structures in Polish and French local government are becoming an essential element in the creation of democratic administrative structures.

1. Introduction

In both the Polish and French legal orders, the involvement of young people in the affairs of a given local community constitutes a form of participatory democracy, which is the basis for the creation of an informed civil society to which one should aspire.

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The subject of the paper is the legal status of consultative bodies dedicated to young people, which are established both in Polish local government and in the French local government community. In both legal orders these bodies have a consultative and advisory character. They are a fundamental instrument of public participation of an educational nature. However, there are some differences in their structure and forms of action, which may constitute a field of reflection on their legal status, *de facto* their importance in contemporary local government. In both legal orders, there is a noticeable trend towards expanding the importance and tasks of these bodies in self-governing communities, which indicates a good direction of change. The question is whether it is still sufficient to fully implement the principle of subsidiarity in local communities.

Instruments of social participation are an important issue of contemporary local government, which corresponds to the concept of quality of democratisation of this community. Thus, the presentation of the legal status of the consultative bodies dedicated to the youth of the community will make it possible to draw conclusions and indicate directions for change in the research area in question.

Legal-dogmatic and comparative legal methods have been used in this paper.

2. The concept of youth consultative bodies in both legal orders and their normative context

In the Polish legal order, youth commune councils have so far existed only in communes and towns with county rights. Before the introduction of the Act of 8 March 1990 on municipal self-government[1] with the form of the addition of Article 5b[2], jurisprudence and doctrine regarded the establishment of such a structure solely on the basis of the provisions on associations[3]. However, the legislator by virtue of Article 2 of the Act of

[1] See Act of 8 March 1990 on Municipal Self-Government (i.e. Journal of Laws 2021, item 1372, as amended. - hereinafter referred to as the u.s.g.).

[2] Article 5b was added by Article 1 point 7 of the Act of 11 April 2001. (Dz.U.01.45.497) amending the above Act as of 30 May 2001.

[3] See Supreme Administrative Court, Judgement of 21 May 1997, SA/Rz 139/97 LEX no. 32555. In the decision in question, the Court stated: "if, on the other hand, it were to be accepted that this Council is an organisation operating outside the structures of

20 April 2021 amending the Act on municipal self-government, the Act on county self-government, the Act on provincial self-government and the Act on public benefit activity and volunteerism[4] introduced this instrument of social participation also in other units of local self-government. Thus, the *promotion and dissemination of the idea of self-government became a task carried out at all levels of local government. The 2021 amendment* came into force 23 June 2021 and introduced this mechanism of social participation among young people as an optional instrument of social participation in all units of the basic territorial division of the state. It should be noted that the lack of regulations concerning the functioning of youth consultative and advisory bodies at the level of county (powiat) and voivodeship (województwo) self-governments has limited the possibilities of a wider implementation of the idea of self-governance by interested youth communities. Therefore, the actions of the legislator in this regard should be assessed positively. Currently, the legal basis for the organisation and operation of youth councils and regional assemblies are the provisions of local government system acts and the statutes of these bodies, adopted by resolutions of the governing bodies of the various units of the country's territorial division. Youth councils and youth regional assemblies remain optional forms, depending on the will of the councillors of the community to be established. It is ultimately up to the municipal, district and voivodship councillors to decide whether it is appropriate to establish this form of social participation among young people, which should also operate on the basis of statutory regulations. The statutes of these youth bodies shall be adopted by the constituent bodies of the local authorities.

The legislator unambiguously strengthens the legal position of youth councils/ assemblies by specifying in a normative manner the framework

local self-government, it would fall within the concept of a body of a social organisation. The right to associate in such organisations derives from Article 84(1) of the Constitution, which provides that in order to develop political, social, economic and cultural activities, the Republic of Poland shall ensure the right of citizens to associate. The term 'social organisation' is used in everyday language, the legislature and doctrine.".

4 See the Act of 20 April 2021 on amending the Act on municipal self-government, the Act on county self-government, the Act on province self-government and the Act on public benefit activity and volunteerism (Journal of Laws 2021.1038) - hereinafter referred to as the 2021 amendment.

of their functioning in local government system acts. This provides a basis for increasing the powers and statutorily defined competences assigned to these bodies within the local government structure, which strengthens the framework within which the mechanisms in question operate. At the same time, it leaves room for some freedom to shape their legal status through statutory regulations.

The purpose of establishing youth councils and assemblies is to support and disseminate the idea of self-government among the inhabitants of a given community, including young people in particular. This constitutes the implementation of one of the basic tasks of local government units (see, e.g. Article 7(1)(17) of the Act on local government). This provision is a norm of a task-oriented nature, and not of a competence-oriented nature, and as such it cannot be the basis for any authoritative actions of a municipal authority, in particular the basis for the establishment of e.g. a social youth council by the executive body of the municipality[5]. The task of supporting and disseminating the idea of self-government among the inhabitants of a given community also involves promoting public life (including implementation of the subsidiarity principle), influencing the local community through various participatory mechanisms, e.g. municipal youth councils, consultations, local referenda or co-creating local law[6].

In the French legal order, youth councils are not part of the bodies of the local authority concerned. They have been classified as optional forms of public participation, having the character of an instrument of pro-citizen democracy. They are not a mechanism for co-production of public services. Youth councils (like their counterparts in Polish law) have not been endowed with the attribute of legal personality, like e.g. territorial

5 Provincial Administrative Court in Gliwice, Judgment of 27 July 2021, Ref. No. III SA/Gl 620/21, LEX no. 3224022.

6 Promotion of the municipality and the idea of territorial self-governance can be realised by organising and carrying out pro-social, consultative and advisory activities as well as taking up civic initiatives, e.g. the local initiative. One of the forms of implementing the dissemination of the local government idea among the municipality inhabitants is the possibility of establishing a communal youth council and a communal council for senior citizens. - Monika Augustyniak, "Comment to Art. 7," in *Ustawa o samorządzie gminnym. Comments, ver. III*, ed. Bogdan Dolnicki (Warsaw: WoltersKluwer, 2021), 206.

communities, operating on the basis of the principle of decentralisation[7]. In both legal orders, these structures have an internal and subsidiary character, as they enable the implementation of the basic task of the self-governing community, i.e. dissemination of the idea of self-government among the inhabitants of a given community.

In the French legal order, until 2017 there was no explicitly expressed legal basis in the General Code of Territorial Communities (hereinafter CGCT) that allows for the establishment of a youth council (le Conseil des Jeunes). However, these bodies were created on a legal basis dedicated to the creation of so-called consultative committees set up on any matter of municipal interest (e.g. on pro-social issues of young people)[8]. Therefore, based on this standard, it was possible to establish youth councils functioning in municipalities. The youth municipal councils, established on this legal basis, were then chaired by the mayor (the executive body of the municipality) or one of his deputies.

However, the French legislator in January 2017 decided to clarify the legal basis for the establishment of youth councils in the CGCT by introducing Art. L. 1112–23 CGCT, which became the direct legal basis for the possibility of the constituent bodies of territorial communities to create these structures. This provision was introduced by Law n°2017–86 of 27 January 2017 concerning equality and citizenship (LOI n° 2017–86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté)[9]According to this provision, a territorial community (including the Lyon Metropolis[10]) or an inter-municipal cooperation unit (un établissement public de coopération intercommunale) may set up a youth council to give an opinion on decisions relating in particular to youth policy. Currently there is no

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7 See Jacques Petit and Pierre-Laurent Frier, *Droit Administartif* (Paris: LGDJ, 2020),183. See Philippe Ardant and Bertrand Mathieu, *Droit constitutionnel et institutions politiques* (*Paris:* LGDJ, 2015), 338.

8 See Marie-Hélène Bacqué and Yves Sintomer, *La démocratie participative. Histoires et généalogies (Paris:* La Découverte, 2011), 75.

9 LOI n° 2017–86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté (NOR: LHAL1528110L, JORF n°0024 du 28 janvier 2017).

10 For more on this, see Monika Augustyniak," Pozycja ustrojowa organów Metropolii Lyońskiej- kierunki zmian," in *Pozycja ustrojowa organów jednostek samorządu terytorialnego*, ed. Bogdan Dolnicki (Warsaw: WoltersKluwer, 2021), 35.

requirement for the council to be chaired by a councillor appointed by the mayor or by the chairman of the council concerned. This body may also formulate proposals for action for the benefit of young people in the community. A youth council shall be composed of young people under the age of thirty who reside in the territory of the municipality or inter-municipal cooperation unit concerned and who attend annual secondary or post-secondary education at an educational institution located in the same territory. The difference between the number of women and men in the composition of the Board should not be more than one. This means that the French legislator introduces gender parity in participation mechanisms, which is somewhat a novelty.

The organisation and functioning of youth councils shall be determined by a resolution of the decision-making body of the territorial community or inter-municipal cooperation unit concerned.

The youth councils of the territorial communities concerned also operate on the basis of rules of procedure (e.g. Règlement intérieur du Conseil départemental des jeunes 06[11]) which specify the organisation and functioning of these bodies. An example is the Lyon Metropolitan Youth Council *(Le Conseil métropolitain des Jeunes*), which is made up of young people from 35–40 secondary schools in the Lyon metropolitan area, meeting one Wednesday a month for joint deliberations. This youth council of the Lyon Metropolis is made up of around 40 representatives, whose term of office lasts two years. Youth representatives from the Lyon Metropolitan area work in committees and in plenary meetings. They also participate in the work of the metropolitan authorities and its units, as well as in French and European institutions.

Thus, under the new legislation, youth councils may be established in all local government communities, not excluding the Lyon Metropolis, which is also endowed with the status of a territorial community (see Article 72(1) of the Constitution of the French Republic)[12]. It is argued in French

11 "Reglament interieur du conseil departamental des jeunes," Google, accessed January 6, 2022, https://www.departement06.fr/documents/Le-Conseil-general/CGJ/dpt06-cdj_reglement-interieur.pdf

12 See Laetitia Janicot and Michel Verpeaux, *Droit des collectivités territoriales* (Paris: LGDJ, 2019), 137.

administrative law doctrine that the interpretation of Article L. 2143–2 du Code Général des Collectivités Territoriales (CGCT)[13] does not exclude the coexistence of both a youth council of a municipality and a youth council of an inter-municipal association, cooperating in different fields on youth policy measures[14].

Youth councils in the French Republic are set up as a space for the exchange of experiences, as a forum for consultation on matters concerning young people and other matters referred to them by the community authorities for opinion or consultation. It also provides a meeting place for young people learning about community organisation and functioning. It is an opportunity to express your own ideas, local and supra-local projects. As an educational and self-governmental platform, it provides an opportunity to present proposals and projects to public authorities at the self-governmental level in matters which directly affect them. A youth council is also a form of cooperation with local community bodies on projects concerning the entire local community, including inter-municipal cooperation units.

It is worth noting that in the French legal system, in addition to youth councils, municipal children's councils are increasingly being set up at municipal level, involving the youngest generations in the process of social participation in the local community. These are often participatory education projects. An example is the Children's Council of Paris (District No. 9), established for a period of two years (2021–2022). The members of the council are children aged between 9 and 11 (50 in number), elected in elections held in public and private primary schools in the 9th district of Paris. The aim of these bodies is to practice civic life and present projects to serve this group of young Parisians.

Participation in the elections is entirely voluntary. Children deliberate in plenary councils and work in thematic groups, inviting representatives of the authorities to discuss a specific local government topic. As D. Schnapper points out, the concept of school society provides the child with the opportunity to understand and assimilate the concept of

[13] Code général des collectivités territoriales (General Code of Territorial Communi-ties, CGCT), accessed January 6, 2022. https://www.legifrance.gouv.fr.

[14] See Camille Morio, *Guide pratique de la démocratie participative locale* (Paris: Berger Levraut, 2020), 92.

political society[15]. Hence, this institution appears as an important element of pro-citizenship education.

In the Polish legal order, these new educational and participatory instruments are being used more and more often, although they still do not have their legal basis in local government acts.

3. Internal organisation of youth councils- Polish and French experiences

The establishment of a youth structure shall be decided by the constituent body of the local authority concerned, which shall establish it by means of a resolution. It may set up such a body on its own initiative. However, the legislator allows the executive body of the local self-government unit to make the request. Entities representing interested circles, in particular student self-government or student self-government from a given municipality/ county/ province, were also allowed to submit an application. The group of these entities also includes non-governmental organisations or entities specified in Article 3(3) of the Act of 24 April 2003 on public benefit activity and volunteer work[16], provided that they operate in the territory of a given local government unit.

If a request for the establishment of a youth council/youth assembly is submitted, the decision-making body shall consider the request within no more than 3 months of its submission. The expiry of the afore mentioned time limit, in the case of inactivity by the decision-making body, is unfortunately penalty-free. On the other hand, the legislator decided that in the case of rejection of an application by the constituting body, another application may be submitted by the same entity not earlier than after the lapse of 6 months from the date of rejection of the previous application. However, this regulation does not limit the possibility of submitting proposals by interested entities, while leaving the freedom to the decision-making body to establish this form of social participation in a given local government unit. The introduction of these provisions allows entities that are interested in

[15] See Dominique Schnapper and Christian Bachelier, *Qu'est-ce que la citoyenneté*? (Paris: Gallimard, 2000), 156.

[16] See Act on Public Benefit and Volunteer Work, Journal of Laws of 2020, item 1057, as amended.

establishing a youth structure to articulate such a need, and the governing body of the municipality, county or province will be obliged to respond to such a demand. This constitutes a form of social control over local government bodies, to which the current direction of residents' expectations, in terms of meeting their community needs, is indicated.

The constituting authority, when setting up a youth council/assembly, shall lay down its statutes. This act defines in particular the rules of operation of the municipal/county and regional youth council, the procedure and criteria for the election of its members and the rules for the expiry of the mandate and dismissal of a member of the municipal/county/regional youth council. All these elements are obligatory, *ergo* their absence will result in the statute being declared invalid by the supervisory authority, i.e. the voivode. The statute of the youth council/provincial assembly has the character of an act of local law, as it contains norms of an abstract-general nature. It is an act that regulates the rights and obligations of the inhabitants of a given unit of local government and produces legal effects outside the organisational structures of local government communities[17]. The statute belongs to the constitutional and organisational acts and is subject to publication in the relevant provincial official journal.

It is necessary to include in the statutes of the youth council/youth assembly regulations on the principles of cooperation of this body with the authorities of the local government unit, including the possibility of cooperation with other youth structures operating within the local government community.

In the French legal order, youth councils (this also applies to children's councils and bodies called "Youth Forum") are created under Article L. 1112–23 CGCT and resolutions of the constituent bodies of the territorial community concerned. At the same time, these youth structures function on the basis of internal regulations given to them. Residents may take the initiative to set up a youth council, but the request shall be addressed to the authorities of the community concerned. It is up to the councillors of the local authority concerned to decide on the need and legitimacy of setting up consultative and advisory bodies. With regard to

[17] Cf. supervisory decision of the Lower Silesian Voivod of 19 January 2010, NK.II. PK1.0911–1/10, Dolno.2010/14/218).

the composition of the membership, the legislator introduces only gender parity, which does not exclude that the youth council may include young representatives of associations, young experts or representatives of party youth, while complying with the conditions laid down in the CGCT Act. Furthermore, it is not excluded that the composition will be based on voluntary work or a draw of lots[18]. This should be decided by the internal rules of these bodies, which also determine the length of the term of office of the council in question. The term of office is usually two years, but there is nothing to prevent it from being the same as the term of office of regional and local authorities.

In the French legal order, youth councils are composed of middle, secondary and post-secondary school students under 30 years of age who live in the community or are studying in an educational establishment located in the community. The age limit for the members of the councils and the rules for their election depend on the regulation of bylaws adopted by resolution by the constituent body of the community. However, they must not be contrary to Articles L. 1112–23 CGCT.

In the Polish legal order, the legislator does not define the age limit for members of youth councils/sejmiks, leaving it to the statutory regulations. There is also no gender parity as a condition affecting the composition of a given board, which could be considered for introduction in Polish regulations.

In both legal orders, the members of the youth council/youth assembly are young people who, in accordance with the statutory regulations, have the passive right of election to the bodies of this body, as determined by the statutes. However, in French local government the maximum age limit has been set in the CGCT. These members have certain rights. One of these is the entitlement to attend youth council/youth assembly meetings with the possibility to vote. This includes the opportunity to speak at the session, to propose motions and questions. In addition, a member of the youth council/youth assembly is entitled to reimbursement of travel expenses incurred in the performance of their duties. These provisions have been introduced into Polish local government statutes, which enables their

[18] See Camille Morio, *Guide pratique de la démocratie participative locale* (Paris: Berger Levraut, 2020), 93.

implementation in this participatory mechanism. Until now, the use of reimbursement has been limited due to the lack of a statutory standard in this respect. If a member of a youth council/youth assembly attends a youth council/youth assembly meeting or an organised event at which he/she is representing that body, travel expenses within the country for the purpose of attending the youth council/youth assembly meeting or the organised event at which he/she is representing the youth council/youth assembly shall be reimbursed on request. Reimbursement shall also apply to the parent or legal guardian in the case of a minor member of the youth council/youth assembly. These regulations should be assessed positively, as they increase the mobility of young local government activists and widen the circle of cooperation with other representatives of youth structures.

Reimbursement shall be made on the basis of documents, in particular receipts, invoices or tickets, confirming the expenditure incurred or information on the amount of car travel costs. The detailed rules for reimbursement of expenses and the rules for delegating representatives of local youth structures shall be laid down in the statutes of the youth council/seat concerned. These norms are intended to increase the activity of cooperation in the self-government forum. Members of the youth council/youth assembly shall retain the right to reimbursement of costs and expenses incurred in the exercise of their functions and not by reason of the mere fact of being such[19]. Similar regulations in this respect have been provided for in the French legal order, however, not under the provisions of the law, but under internal regulations concerning the organisation and functioning of youth councils. Thus, it should be recognised that Polish regulations create a stronger framework for the protection of the rights of individual participants in youth councils/sejmiks.

In both legal orders, the social character of the exercise of public functions in youth councils/ assemblies means that the persons who are members of these bodies do not have an employment relationship on this account and therefore do not receive remuneration for performing these functions. However, the exercise of their functions involves incurring certain costs, such as travel expenses. The overheads associated with

[19] See Provincial Administrative Court in Poznań, Judgment of 22 October 2019, Ref. No. II SA/Po 555/19, LEX no. 2744600.

the exercise of public functions in local government may be compensated for by the allowances which the members of the youth council/ local council do not receive. On the other hand, expenses related to travel undertaken in the performance of these functions - as part of the reimbursement of business travel expenses - are granted in accordance with the procedures and rules laid down in the statutes within the framework of the statutory delegation. This also applies to French regulations, in particular the rules of procedure of local youth councils, which provide for the possibility of paying transport costs for participation in the meetings of the councils and community bodies concerned[20].

It should be emphasised that the legal provisions which provide for the compensation of travel expenses do not override the social character of the functions in connection with the performance of which they are paid[21].

The municipal/county youth council and the regional youth assembly may have a guardian. The guardian should be an adult. The statutes of the youth council/youth assembly may lay down specific requirements to be met by the guardian, his/her duties and the rules for his/her dismissal. The appointment of the guardian, on the other hand, falls within the remit of the decision-making body of the local authority concerned, but from among the candidates nominated by the youth council/youth assembly. Thus, both bodies have influence on the selection of the tutor, which is important in fulfilling the educational role at the level of pro-citizen democracy. French youth councils also appoint an adult (un correspondant adulte) who participates throughout his or her mandate to each youth representative - a member of the youth council - to provide substantive support and to help implement specific projects. It does so with the support of the Director of the educational establishment concerned throughout its mandate. On the other hand, the decision to select a particular person is placed on the educational establishment from which the representative comes. Regulations in this respect are not provided for by law, but by internal regulations.

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20 See article 24of Règlement intérieur du Conseil départemental des jeunes 06 – Mandat 2018 – 2020, accessed January 6, 2022, https://www.departement06.fr/documents/Le-Conseil-general/CGJ/dpt06-cdj_reglement-interieur.pdf-

21 Cf. Provincial Administrative Court in Gorzów Wielkopolski, Judgment of 21 March 2018, Ref. No. II SA/Go 42/18, LEX no. 2467191.

In addition, the French youth councils' internal regulations provide for the establishment of obligatory committees within their structure, which are a place for debate and reflection. These committees make it possible, in particular, to examine and study the projects envisaged by the young elected representatives, approve them and then put them to work preparing their distribution in the educational establishments they represent. As a collegiate body, youth councils as a rule work *in pleno* at plenary sessions and in thematic groups, which are chaired by a designated coordinator, also a member of the council. In addition to meetings of the council and thematic groups (problem committees), a distinction can be made between plenary meetings of the council, which are held with the participation of, for example, the mayor[22].

The administrative and office services for the municipal/county youth council and the youth assembly are provided by the auxiliary apparatus of the local authority concerned, which also covers the service costs of these bodies. Therefore, the respective municipality, district administration or marshal's office will provide substantive, organisational and technical support to these youth structures. In the French legal order, the running costs of a given youth council are covered by the budget of the territorial community concerned, in the section dedicated to the functioning of the governing bodies. This also applies to costs related to the implementation and support for the preparation of specific projects and initiatives and costs within the framework of disseminating projects in the community. These costs also include the reimbursement of travel expenses related to the functions of the young council members.

The process of electoral education begins quite early in the French local community (as children's councils are allowed), by instilling the principles and values of the French Republic. It should be stressed that the role of youth (children's) councils is, however, limited in that it consists of expressing opinions and making proposals. These councils do not have

22 "Reglament interieur du conseil des jeunes de palaiseau," accessed January 6, 2022, https://www.ville-palaiseau.fr/fileadmin/medias/PRATIQUE/Familles/Jeunesse/Conseil_des_jeunes/Reglement_interieur_CDJ.pdf

any self-organising power, as confirmed by the judicature[23]. Moreover, as it is pointed out in French administrative law doctrine, the opinions expressed by these bodies are not binding on the constituting bodies[24], which form them.

4. Tasks and competences of youth councils- Polish and French experiences

In the Polish legal order youth councils/ local assemblies (*sejmik*) have a consultative, advisory and initiative character. It is not a body of local self-government, nor does it have a legislative, controlling or adjudicating function. On the other hand, it has an initiative character, as the legislator has equipped youth councils/ assemblies with the possibility of filing a motion for taking a resolution initiative. This power does not correspond, however, with the possibility of direct presentation of a draft resolution for deliberation by the municipal/county council and the provincial assembly. Thus, youth councils/youth assemblies do not have the right of initiative to pass resolutions, but only to make a proposal that will trigger the whole legislative initiative. The procedure for submitting a request for a legislative initiative shall be determined by the statutes of the local government unit concerned or by a separate resolution of the decision-making body.

The youth council/youth assembly may address questions or requests in the form of a resolution to the executive body. As the youth council/ youth assembly is a collegial body, its decisions should take the form of resolutions. The resolution shall include a brief statement of the facts at issue and the questions arising therefrom. The executive body of the municipality, the head of the county or the provincial marshal, or the person designated by them, shall be obliged to respond no later than within 30 days from the date of receipt of the resolution. The response should be in writing.

The legislator limited the possibility of submitting queries and motions only to the executive bodies, forgetting about the possibility of submitting them to the constitutive bodies of the entity. It seems appropriate to

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23 Administrative Court, Judgment in Montreuil of. 24 march 2011, M.D., AJDA 2012. 1005, nota B. Pauvert).

24 See Jacques Ferstenbert, François Priet, and Paule Quilichini, *Droit des collectivités territoriales* (Paris: Dalloz, 2016), 377.

broaden the circle of entities in respect of which an enquiry or application may be submitted to the decision-making body of a given local or regional authority.

It should be stressed that motions or questions may not be tabled by an individual member of the youth council/sejmik, but by the entire collegial body. The legislator has treated the subjective scope for making enquiries differently in relation to councillors of local government units, granting them this right for individual use.

The legislator has indicated that the tasks of the youth council/selective council include, in particular:

- giving its opinion on draft resolutions concerning young people;
- participation in the development of the strategic documents of the municipality/village and the strategic activities of the county in favour of young people;
- monitoring the implementation of strategic documents of the municipality/county and strategic activities of the voivodeship in favour of young people (monitoring takes the form of constant control of the stages of implementation of the documents or activities in question);
- taking action for the benefit of young people, in particular in the area of civic education, in accordance with the arrangements laid down by the decision-making authority.

Indicating an open catalogue of tasks increases the participation of young people in creating or giving opinions on legal acts at the local government level which concern the future of the younger generation.

In the French legal order, the scope of action and the forms of implementation of this youth council are defined in its rules of procedure and subordinated to the purpose of its establishment. The Council is an advisory body. It may give an opinion or make proposals to the bodies of the community concerned or to another youth council. This is done either on its own initiative or at the request of the above-mentioned entities.

The youth council is a space for the implementation of public projects of general interest to the community. The aim of this council is to involve young people in the decisions of community bodies that affect them. It is also important that young people have the ability to carry out public service projects. Their task is to promote citizenship learning by giving young

people the opportunity to be citizens in motion/youth councils represent the community in discussions with other youth councils at municipal, departmental or regional level at home and abroad.

The catalogue of tasks of the youth council includes in particular:

- meetings of youth council members with representatives of the authorities of the municipality concerned and with experts;
- proposing solutions, projects and initiatives to promote and disseminate the idea of *self-government among young people*;
- participating in the work of thematic groups, set up within the Board, on specific issues and putting forward specific ideas and solutions to problems, opinions and proposals on these issues;
- the implementation of projects in educational establishments as a result of youth council meetings;
- cooperation with other youth structures, including representation of councils in the National Association of Children and Youth Councils (Association Nationale des Conseils d'enfants et de jeunes)[25].

The youth council cannot substitute itself for the authorities of the territorial community concerned and therefore cannot issue administrative decisions[26].

5. Conclusions and requests

The activity of young people in Polish and French local self-government at all levels of local self-government as civic activity relies on the proper creation of conditions for self-government education. Learning about the structures of public administration is aimed at a more complete understanding of the basis of organisation and functioning of the self-government community.

A youth council is a form of social participation aimed at young people, operating on a voluntary basis with the aim of involving young people in the process of participating in the affairs of their local community. This form has a clear legal basis in the Polish and French legal systems. It should be noted that French legislature defined *ex lege* the upper age limit of

[25] Accessed January 6, 2022, http://www.cnajep.asso.fr/membre/anacej/.

[26] See Camille Morio, *Guide pratique de la démocratie participative locale* (Paris: Berger Levraut, 2020), 95.

a youth council member, *a contrario* to Polish legal solutions, which leave this issue to be regulated in the statutes. It is therefore worth drawing on the French experience in this area.

In both legal orders, youth councils operate on the basis of sub-statutory legislative acts (statutes, regulations) defining their election procedure and rules of organisation and functioning. These acts are adopted by the constituent bodies in the form of a resolution, which guarantees them a kind of strong position among the participatory actors in the structure of a given community. It should be noted that the French legislator introduces gender parity in participation mechanisms, which is an element worth considering in terms of Polish regulations on youth structures.

In both legal orders, the organisation and scope of activities of youth councils, fulfilling the objectives of their establishment, teaching citizenship, becoming a very desirable form of participation of young people in creating their own public space. It is worth noting that under the *Amendment of 2021 the Polish legislator has significantly broadened the scope of activities and principles of operation of youth councils/ assemblies, establishing even a minimum catalogue of tasks of an obligatory nature under the Act, the lack of which should be noted in French legal solutions. I view this action by the Polish legislator positively.*

The process of citizen and electoral education begins quite early in the French local community (e.g. children's municipal councils), by instilling the principles and values of the French Republic. It is worth following this pattern, which is a kind of *de lege ferenda* postulate, inter alia, for the creation in the Polish legal order of children's municipal councils as the first school of social participation under the law.

The introduction of a mechanism of participation of youth structures at the level of all units of the basic territorial division of the country should be considered a right step by the legislator, strengthening the educational platform of civic attitudes among young inhabitants of local communities. The introduction of a catalogue of tasks has also increased the hitherto very limited powers and competences of these bodies, while still placing greater emphasis on keeping this form within the instruments of participatory democracy rather than co-management, which should also be viewed positively. The regulations introduced by the 2021 Amendment serve to

improve the functioning of existing youth councils by broadening their subject and object scope.

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General Rules on Invalidity of Contracts in Serbia

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Keywords:
Serbian contract law, invalidity of contracts, nullity, voidability, non-existent contracts

Abstract: The Serbian Law on Obligations in the most part retained the general rules on invalidity of contracts from the federal Law on Obligations from 1978. The Law explicitly differentiates two categories of invalid contracts: null and void contracts, on the one hand, and voidable contracts, on the other. Whereas the general legal consequences of both categories are principally the same, restitutio in integrum, null and void contracts have some other, more stringent legal consequences as well. The most important is the ban of restitution of performance of the party who acted in bad faith, which in cases when the contract grossly violates good morals may be supplemented by the forfeiture of the object of performance. The effective Serbian Law on Obligations, namely, still contains the rule retained from the federal Law from 1978, according to which the court may order the party who acted in bad faith to transfer the object of his/her performance to the municipality of his/her residence or domicile. Voidable are considered contracts with flawed contractual intention, such as contracts concluded in mistake, deceit or under threat. In addition, voidable are contracts of minors older than 14 years concluded without the consent of their natural or legal guardian, or contracts of adults whose capacity is not completely excluded, but only partially reduced, concluded outside their capacity or without the consent of their legal guardian. Furthermore, since *leasio* is considered a case of mistake making the contractual intention flawed, the remedy is also the voidability of the contract. In Serbian law, a contract is null and void, if it infringes public order, imperative rules or good morals, unless something else is

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prescribed by the law or the purpose of the infringed rule implies a different remedy. The illegality and immorality of a contract is scrutinised through its object (content) and cause. Aside from these general rules, the Law on Obligations specifically qualifies usurious contracts as null. Yet, there are several means of „saving" a contract from the consequences of invalidity, primarily by performance, convalidation and partial invalidity. Non-existent contracts are clearly distinguished in the doctrine, but it is questionable whether the Law on Obligations envisages a separate legal regime applicable to this category, distinct from the one applicable to null and void contracts. The law, namely, uses wording or implies in certain cases as if the contract had not been conlcuded at all. However, in the rules pertaining to legal consequences of invalidity refers only to null and void, and voidable contracts. The doctrinal standpoints differ whether a separate legal regime applicable only to non-existent contracts could be implied from the general rules, regardless that no specific set of rules on non-existent contracts exists in the Law on Obligations.

1. Introductory remarks

In this study a brief overview of the general rules of invalidity of contracts in Serbian law is given. These rules are contained in the part of the federal Law of Obligations (*Zakon o obligacionim odnosima* – hereinafter: LO) from 1978 pertaining to the general rules of contract law, which are in the most part still effective in Serbian law. Aside from these rules, there are many other statutes regulating specific contract-types, prescribing special rules of their invalidity. For instance, naming only the most important, the Consumer Protection Act (*Zakon o zaštiti potrošača*) from 2021 and the Law on the Protection of the Users of Financial Services (*Zakon o zaštiti korisnika finansijskih usluga*) from 2011 prescribe special rules relating to consumer contracts and consumer credit and financial contracts, the infringement of which results in invalidity of the contract or some of its terms. Similarly, the Law on the Protection of Users of Financial Services in Distance Contracts (*Zakon o zaštiti korisnika finansijskih usluga kod ugovora na daljinu*) from 2018 also has special rules on invalidity. By the same token,

the 1995 Law on Inheritance (*Zakon o nasleđivanju*) regulates lifelong maintenance contract and contract on distribution of the estate to heirs during the life of the devisor, whereas the 2005 Family Act (*Porodični zakon* – hereinafter: FA) regulates the nuptial agreement and other contracts relating to proprietary regime of spouses, both envisaging special rules of invalidity of such contracts. According to the well-established principle of lex specialis derogat legi generali, in all cases not specifically regulated by these special statutes, the general rules of invalidity laid down in the LO apply.

The LO in the part pertaining to the general rules of invalidity of contracts differentiates explicitly only two categories of invalid contracts: nullity and voidability. This statutory dichotomy raises the question whether the LO recognizes non-existent contract as a special subcategory within nullity with a special set of rules applicable. The objective of the paper is to shed light on the different legal consequences of null and void, voidable and non-existent contracts in Serbian law. The research methods applied are the normative and teleological interpretation of statutory norms, with regard to the relevant and representative Serbian legal literature.

2. Null and void contracts

The LO prescribes that a contract infringing imperative rules, public order or good morals is null and void, unless the purpose of the infringed norm implies otherwise else or the law prescribes different legal consequences for the given case.[1] However, if the prohibition applies only to one of the parties, the contract shall be considered valid, unless the law prescribes something else, whereby the party infringing statutory prohibition shall face appropriate legal consequences.[2]

The nullity of a contract is determined either by its object (content) or its cause. The LO prescribes that a contract is null and void if its object is impossible, unlawful, undetermined or undeterminable.[3] The federal LO clearly followed the French Code civil in the wording applicable at the time[4], and the effective LO still does, since it prescribes explicitly

1 LO, Article 103(1).
2 LO, Article 103(2).
3 LO, Article 47.
4 The reforms of the French Code civil from 2016 repealed the rules on the cause of contract.

that a contract must have a valid cause.[5] Moreover, it has even more detailed rules on the cause of contract than the French Code civil had before its reforms in 2016. It regulates separately cause in its objective (basis of contract) and subjective meaning (motives for conclusion of the contract). The LO prescribes that a contractual obligation must have valid cause, whereby the cause is considered such if it does not infringe imperative rules, public order or good morals.[6] The LO further specifies that a contract is null and void if its cause is inexistent or invalid.[7] Motives, however, that is the cause of contract in its subjective meaning, generally do not influence the validity of a contract.[8] This applies to lawful motives. Unlawful motives render an onerous contract null and void[9] only if the counterparty acted in bad faith, that is if he/she knew or should had been aware that the first party concluded the contract under the influence of an unlawful motive.[10] Conversely, unlawful motives always make a gratuitous contract null and void.[11] Aside from these rules pertaining to the cause of contract, as one of the preconditions of conclusion of a valid contract, it comes to surface in relation to several other legal institutions as well.[12]

The basic legal consequence of the declaration of a contract null and void is *restitutio in integrum*. The Law, namely, prescribes that both parties

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5 For more details on the role of cause of contract in Serbian contract law see Jožef Salma, "Kauza obligacionih ugovora," [Cause of Contract], *Zbornik radova Pravnog fakulteta u Novom Sadu* 40, no. 2 (2006): 177–200.; József Szalma, "Causa (Rechtsgrundlage) bei den Obligationsverträgen," *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae*, Sectio Juridica, 48, (2007): 257–282.; Attila Dudás, "A szerződés célja (kauzája) az európai és a magyar jogban," [The purpose (cause) of contract in European and Hungarian Law] *FORVM – Acta Juridica et Politica* 2, no. 2 (2012): 87–100.; Atila Dudaš, "Kauza ugovorne obaveze – francuski uticaj na Zakon o obligacionim odnosima Republike Srbije," [Cause of contractual obligation – French influence on to the Law on Obligations of the Republic of Serbia] *Zbornik radova pravnog fakulteta u Novom Sadu* 45, no. 3 (2011): 663–680.

6 LO, Article 51(1–2).

7 LO, Article 52.

8 LO, Article 53(1).

9 The LO uses the formulation "without effect", but it is construed as a case of nullity.

10 LO, Article 53(2).

11 LO, Article 53(3).

12 See Atila Dudaš, "Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima," [Cause of contractual obligation according to the Serbian Law on Obligations] *Zbornik radova pravnog fakulteta u Novom Sadu* 44, no. 1 (2010): 145–169.

are obliged to restore the benefits conferred based on a null and void contract. The restoration is primarily to be achieved in kind. However, if that is not possible, or the restitution in kind is not compatible with the nature of the benefits conferred, appropriate monetary compensation shall be paid, according to the market prices valid at the time of delivering the court decision, unless the law prescribes something else.[13] The additional legal consequence of nullity is the liability for damage. The LO prescribes that the party whom the ground of nullity of the contract is attributable shall be held liable to the counterparty for the damage sustained in relation to nullity, provided he/she acted in good faith, i.e. he/she did not know, neither should have been aware of the ground of nullity, taking into account the circumstances of the given case.[14] The liability for damage in relation to the nullity of the contract is considered the second major area to which the notion of *culpa in contrahendo* is applied, beside the liability for conducting negotiations in bad faith.[15]

The nullity of the contract may, however, trigger special legal consequences as well. The LO retained the rule from the federal law on obligations prescribing that if a contract is null and void because it is contrary to imperative rules, public order or good customs, taking into account its content or the purpose the parties intended to achieve, the court may reject, in whole or in part, the request of the party who acted in bad faith for the restoration of the object of performance from the other party.[16] This rule is known as unilateral restitution, since the party who acted in good faith is entitled to restitution while the other, who acted in bad faith, is barred of this right. The doctrine considers this rule the application of the principle of *nemo auditur propriam turpitudinem allegans*.[17] Moreover, the court may decide to order the party who acted in good faith to hand over what he/

13 LO, Article 104(1).

14 LO, Article 108.

15 Borislav Blagojević in *Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law on Obligations], edited by Borislav Blagojević and Vrleta Krulj, Vol I. 1st. (Beograd: Savremena administracija, 1980), 315.

16 LO, Article 104(2).

17 Jožef Salma, "Načelo nemo auditur propriam turpitudinem allegans i ništavost ugovora," [The Principle of Nemo Auditur propriam Turpitudinem Allegans and the Nullity of Contract] *Anali Pravnog fakulteta u Beogradu* 52, no. 3–4 (2004): 491.

she received on the basis of the unlawful contract to the municipality on whose territory it has its seat, i.e. residence, or domicile.[18] In making such decision, the court takes into account whether the parties acted in good or bad faith, the importance of the endangered asset or interest, as well as the morals of society.[19]

The LO explicitly specifies that the right to request from the court to have the contract declared null and void does not cease by the lapse of time.[20] In terms of the range of persons entitled to request the declaration of nullity of the contract, the LO sets that the court controls ex officio whether the contract is null and any interested person may give initiative for the judicial declaration of the nullity of a contract.[21] The LO explicitly entitles the prosecutor to request the judicial declaration of the nullity as well.[22] The rule, according to which any interested party may request the declaration of the nullity of a contract, should be interpreted in the sense that the claimant must demonstrate their own meaningful legal interest in the declaration of the nullity.[23] For instance, the creditors of the decedent have legal interest to request the declaration of the nullity of a lifelong maintenance contract concluded by the decedent, since by that the value of the inheritance estate might increase, hence the chances of a successful collection of creditors' claims also increase.[24] The phrase "any interested party" comprises the parties themselves. However, it was debated in the doctrine if the party who acted in bad faith (that is who knew or should had been aware of the reason of nullity) should have the right to request the declaration of nullity. The principle of *nemo auditur*, if applied consequently, would mandate such conclusion. However, since the initiative for the declaration of nullity originates regularly from the parties, such outcome would de facto render the null and void contract valid, if the other party, who acted in good faith did not make an initiative for declaration

18 LO, Article 104(2) in fine.
19 LO, Article 104(3).
20 LO, Article 110.
21 LO, Article 109(1).
22 LO, Article 109(2).
23 Atila Dudaš in Bojan Pajtić, Sanja Radovanović and Atila Dudaš, *Obligaciono pravo* [The Law of Obligations] (Novi Sad: Pravni fakultet u Novom Sadu, 2018), 389.
24 Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 389.

of nullity. Therefore, the majority opinion in the doctrine is that the claim of the party, who acted in bad faith, for the declaration of nullity shall be granted, but some consequences of the nullity may be rejected (for instance his/her claim for restoration of the benefits conferred).[25]

The infringement of imperative norms, however, does not need to result in the nullity of a contract in all cases, still less in the harsh consequences of unilateral restitution or forfeiture of the object of the performance in favour of a municipality. There are several legal institutions in the LO the purpose of which is to save the contract from the legal consequence of invalidity.

First, the contract is invalid if it has not been concluded in the statutory essential form. However, a form-defective contract may be convalidated by *performance*. The LO, namely, prescribes that such contract shall still be considered valid if both parties performed their obligations, entirely or in preponderant part, unless it clearly follows otherwise from the purpose for which the formal requisites have been instituted.[26] If the purpose for which formal requisites have been prescribed was predominantly the protection of the parties' private interests, the performance may convalesce the formal defects. However, if its purpose was to protect the public interest, the performance cannot render the contract valid.[27] The performance of a contract may convalidate its nullity in case of subsequent cessation of prohibition as well. Generally, the subsequent cessation of the prohibition or the cause of nullity does not render the contract valid, regardless whether the parties performed their contractual obligations or not.[28] However, the LO specifies, if the prohibition was of minor relevance and ceased in the meantime, the performance of parties' obligations shall render the contract valid.[29] In addition, a usurious contract may also be convalidated, regardless of the nullity, which is its primary legal consequence. Similarly to *leasio*, as shall be demonstrated later, there is no principle reason to uphold the nullity of a usurious contract if the discrepancy in the values of the performance and the counterperformance is removed, which is the key reason

25 Salma, "Nemo auditur," 491.
26 LO, Article 73.
27 Bogdan Loza in Blagojević and Krulj, *Kommentar*, 221.
28 LO, Article 107(1).
29 LO, Article 107(2).

of its nullity.[30] Thus, the LO prescribes that the aggrieved party may uphold the contract by requesting the court to reduce his/her obligation to a level that may be qualified as just.[31] The aggrieved party may file such a claim in 5 years from the day of the conclusion of the contract.[32] By the lapse of this time-limit, the usurious contract cannot be convalidated anymore – the nullity becomes permanent.[33]

Secondly, a contract may be declared null and void only *partially*. The LO prescribes that the nullity of a specific clause does not render the contract null and void entirely, if it can sustain without the invalid clause, unless it was a condition of the contract or a decisive motive for which the contract has been concluded.[34] However, the LO states that the contract shall still be considered valid, even when the invalid clause was a condition of the contract or the decisive motive of the parties, if the nullity was established in order to have the contract released from that provision and be valid without it.[35] The first condition is mandatory: the remainder of the content of the contract must represent a meaningful whole. The other two conditions are prescribed, however, alternatively. The doctrine examined the question of the qualification of the term "decisive motive" in the list of conditions of the partial invalidity. The majority opinion is that it represents cause of contract in its subjective meaning.[36]

Finally, the LO explicitly regulates the legal institution of *conversion*. It prescribes that when a null and void contract satisfies the conditions of the validity of another contract, then that other contract will be considered valid among the contractors, if it would be in accordance with the purpose they had in mind when they concluded the contract and if it can be taken that they would had concluded that contract, had they known of the nullity of their contract.[37] The conversion is applied by the court, ex officio, since the court is entrusted with the task to determine the relevance

30 Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 399–400.
31 LO, Article 141(3).
32 LO, Article 141(4).
33 Dudaš, "Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima," 155.
34 LO, Article 105(1).
35 LO, Article 105(2).
36 Dudaš, "Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima," 155.
37 LO, Article 106.

of the infringement of the public order and whether it could be convalesced by converting the contract into another one.[38] Nonetheless, the initiative for conversion comes from the parties.[39] In converting the contract the court must ascertain whether the other contract, into which the null and void contract is being converted, is in line with the objective cause of contract that the parties intended to achieve. Traditionally, the conversion of an invalid contract of sale to a valid lease contract is usually mentioned in the literature as an example.[40]

3. Non- existent contracts

The Serbian literature differentiates non-existent contracts from null and void contracts. In contrast to the latter, non-existent contracts do not contravene public interests, but one of their essential elements simply does not exist.[41] Some assert that, while null and void contracts de facto exist until the court declared their invalidity, that cannot be said for non-existent contracts.[42]

Nonetheless, the LO does not specify a separate legal regime for non-existent contracts in the part pertaining to the general rules of invalidity. It differentiates only nullity and voidability. However, at some places uses wording different from the wording used in the case of contracts that are undoubtedly null and void. For instance, it specifies that a contract concluded by a legal person outside its legal capacity *does not produce legal effect*.[43] Similarly, if the contract was concluded without the consent of the competent organ, it shall be considered as *if it were not concluded at all*.[44] By the same token, the LO prescribes that a sham contract does *not*

38 Salama, "Nemo auditur," 488.

39 Vladimir Vodinelić, *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava* [Civil Law: Introduction to Civil Law and General Part of Civil Law] (Beograd: Pravni fakultet Univerziteta Union: Službeni glasnik, 2012), 463.

40 Jožef Salma, *Obligaciono pravo* [Law of Obligations], 6th (Novi Sad: Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, 2009), 432.

41 Slobodan Perović, *Obligaciono pravo* [Law of Obligations]. 6th (Beograd: Službeni list SFRJ, 1986). 449.

42 Perović, ibid.

43 LO, Article 54(2).

44 LO, Article 55(4).

produce legal effect between the parties.[45] If a sham contract disguises another one, a simulated contract, that the parties really intended to conclude, the latter shall be considered formed, provided the conditions of its validity are met.[46] However, the non-existence of a sham or simulated contract is confined to the legal relationship between the contracting parties. The LO duly takes into account the interests of third parties who relied on a sham or simulated contract in good faith. Therefore, it prescribes that a claim for the determination of non-existence of such contracts cannot be addressed to a third party who acted in good faith.[47] The same wording that the contract "does not produce legal effect" is used in relation to formal contracts not concluded in the required form, unless a different consequence is mandated by the purpose for which the formal requirement was established.[48] In relation to the agreed form, the LO prescribes that a form-defective contract does not produce legal effect, if the parties conditioned the validity of the contract on a special, agreed form.[49] Finally, in the case of misunderstanding (dissensus), that is when the parties believe that they have reached an agreement, but have different assumptions relating to the cause, object or the legal nature of the contract, the contract is *not concluded*.[50] Similarly, the LO considers the contract as if it had not been concluded at all, if it was concluded by an agent without the consent or authorisation of the principal, and the latter does not approve the contract subsequently.[51]

In addition, there are cases in relation to which the LO does not use any wording implying specific legal consequence (or does not regulate them at all), but the literature asserts that such contracts should be considered non-existent. Such is, first and foremost, a contract concluded under coercion. The LO, as it shall be explained later, regulates explicitly only threat, the legal consequence of which is voidability. Nonetheless, the doctrine is of the opinion that such contract is non-existent, since it lacks one of the prerequisites of conclusion of a contract (freely formed contractual

45 LO, Article 66(1).
46 LO, Article 66(2).
47 LO, Article 66(3).
48 LO, Article 70(1).
49 LO, Article 70(2).
50 LO, Article 63.
51 LO, Article 88(3).

intention).[52] Similarly, the LO specifies that parties must have the required capacity[53], but prescribes only the consequences of concluding a contract by a natural person with limited capacity, without the consent of his/her natural or legal guardian.[54] There is no rule on the consequences of concluding a contract by a natural person who does not have capacity to contract at all. Since an essential prerequisite for concluding a contract lacks, the doctrine is of the standpoint that such contracts are non-existent.[55]

The critical issue in relation to non-existent contracts is whether they trigger legal consequences different from the consequences of nullity, or the rules of the LO on nullity apply both to null and void, and to non-existent contracts. Some assert that there are several points on which the consequences of non-existent contracts differ. First, anyone proving legal interest has a right to initiate the declaration of the nullity of a contract, whereby in the case of non-existent contracts only the contracting parties have such right.[56] Secondly, there is a difference between the nature of legal remedy: in the case of nullity the parties may request both the declaration of nullity and the restoration of benefits conferred, while in the case of non-existent contracts only a claim for restoration is admissible, since there is no contract at all, hence there is nothing to declare null/non-existent.[57] Thirdly, a difference exists between the legal grounds of restitution of the benefits conferred: in case of nullity the parties are entitled to restitution on the grounds of a specific rule entitling them to such remedy (LO Art. 104), whereby in the case of non-existent contracts the legal ground of the restitution are the rules on unjustified enrichment.[58] Fourthly, the claim for damages in relation to nullity are to be determined according to the aforementioned rule pertaining to nullity (LO Art. 108), whereby a claim for damages in case of non-existent contract should be assessed according to the rules on

52 Krulj in Blagojević and Krulj, *Kommentar*, 299.
53 LO, Article 56(1).
54 LO, Article 56(3).
55 Krulj in Blagojević and Krulj, *Kommentar*, 298–299.
56 Leposava Karamarković, "Apsolutno ništavi ugovori." [Null and Void Contracts] *Pravni život* 44, No. 10 (1995): 407.
57 Karamarković, "Apsolutno ništavi ugovori", 407–408.
58 Karamarković, ibid., 408–409.

the liability for conducting negotiations in bad faith (LO Art. 30).[59] Finally, it is asserted that convalidation or conversion of a contract could only be applied to non-existent contracts, since the infringement of public policy in the case of nullity excludes the possibility of their application.[60] Though these arguments bear some merits, differing, not rarely opposing arguments can also be raised. Nonetheless, the conclusion may be inferred that the distinction between the null and void, on the one hand, and non-existent contracts, on the other, is perhaps one of the most obscure debates in the doctrine of the law of obligations. The case law is also rather rambling on this issue. There are decisions in which the courts do not differentiate non-existent from null and void contracts, decisions in which nominally the distinction is made, but the legal consequences are equated to those of the nullity, and decisions clearly differentiating the consequences of the two categories.[61] For these reasons, a standpoint articulated in the recent literature may be strongly supported that the dubious notion of „non-existent contract" should be extrapolated completely from the conceptual confines of the invalidity of contracts and analysed within the theoretical frame of the conclusion of contract, rather as a state of „non-existence of contract".[62]

4. Voidable contracts

The LO specifies that a contract is considered voidable, if it has been concluded by a party whose contractual capacity is limited, if the contractual intention of either party was flawed, or when the LO or another statute so prescribes.[63]

The LO itself does not prescribe when natural persons acquire capacity to contract. It regulates only the consequences of limitations of the capacity. The rules on obtaining the capacity to contract by natural persons are set in the Family Act (FA). The FA prescribes that a minor obtains limited capacity to contract at the age of 14. Until then he/she may conclude only juridical

59 Karamarković, ibid., 409.

60 Karamarković, ibid., 409–412.

61 For the detailed analysis of the case law see Katarina Dolović Bojić, *Pravno nepostojeći ugovori* [Legally Non-existing Contracts] (Beograd: Centar za izdavaštvo i informisanje Pravnog fakulteta u Beogradu, 2021), 58–60.

62 Dolović Bojić, ibid., 238.

63 LO, Article 111.

acts by which he/she obtains only rights, juridical acts by which he/she obtains neither rights, nor assumes obligations[64], or juridical acts of small value.[65] Apart from these juridical acts, they have no contractual capacity. Minors older than 14 years, however, may, beside the aforementioned, conclude any other juridical act, provided their natural or legal guardian consents to.[66] Since the age restriction for concluding a labour contract is set to 15 years, the FA prescribes explicitly an exception to minors who are in valid labour relation: they may dispose freely over their wage and property gained in the course of labour relation.[67] Such contracts are valid without the consent of the natural or legal guardian.

Adults regularly have unlimited capacity to contract. However, due to a mental illness or disorder in psycho-physical development, they may be deprived of their capacity to contract, fully or partially. If the deprivation of the capacity is only partial, the court may determine which juridical acts may still be concluded by the person with reduced capacity, without the consent of the legal guardian. In relation to other juridical acts, the position of an adult partially deprived of his/her capacity to contract is equated to that of a minor older than 14 years.[68] This means that any other contract concluded by an adult whose capacity is partially reduced requires the consent of the legal guardian. As indicated earlier, contracts concluded by minors below the age of 14 (except the three categories already mentioned) or by adults completely deprived of their capacity to contract are considered non-existent, hence triggering the consequences of nullity.

The cases of flawed contractual intention in the LO leading to voidability of contract are threat, mistake and deceit.[69] In addition, *leasio* is also considered a case of flawed contractual intent in the Serbian law, since the aggrieved party's false assumption regarding the value of the performance or

64 These are usually called neutral juridical acts. See Vodinelić, *Građansko pravo*, 356; Radovanović in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 218.

65 FA, Article 64(1).

66 FA, Article 64(2).

67 FA, Article 64(3).

68 FA, Article 147.

69 LO, Articles 60–62, 65.

counterperformance is an essential element of the legal institution, thus results in the voidability of the contract.[70]

A contract may be avoided by the party in whose interest the voidability is established.[71] This is in all cases but one, the party whose contractual intent is flawed. However, in a contract concluded by a minor older than 14 years, or by an adult partially deprived of capacity, without the consent of the natural or legal guardian, the right to avoid the contract belongs to the guardian.[72] In addition, the LO prescribes that a party with limited capacity also has the right to avoid the contract, concluded without the consent of the guardian, in three months from the day when he/she (re)gained his/her full capacity.[73] Exceptionally, the initiative to avoid the contract may shift to the counterparty. He/she may request from the party entitled to avoid the contract to declare, in a deadline no shorter than 30 days, whether he/she would use his/her right to avoid the contract. If the party entitled to avoid the contract does not reply in the indicated deadline or declares that he/she does not stay by the contract, it shall be considered avoided.[74]

The time-limit for avoiding a contract is one year from the day when the party entitled to request avoidance gained knowledge of the ground of voidability, or when the threat ceased, respectively. In the case of mistake or deceit, the phrase "gaining knowledge of the ground of voidability" means that the mistaken party ascertained the true circumstances, i.e. when his/her false assumption of the relevant facts ceased.[75] However, the right to avoid a contract definitely ceases in three years from the time of the conclusion of the contract.[76] Since the first time-limit commences from the moment of gaining knowledge of a relevant circumstance by the party entitled to void the contract, it is usually called a "subjective" time-limit, while the other is known as an "objective" time-limit, because it commences from a moment independent from the subjective perception of either party (the time of

70 LO, Article 139(1–2).
71 LO, Article 112(1).
72 Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 402.
73 LO, Article 59.
74 LO, Article 112(2–3).
75 Krulj in Blagojević and Krulj, *Komentar*, 231.
76 LO, Article 117.

the conclusion of the contract).[77] In the case of leasio the time-limit is one year starting from the day of the conclusion of contract.[78] Therefore, in this case there is no "subjective" time-limit, whereas the "objective" is only one year. Failing to avoid the contract in the mentioned time-limits results in the so-called tacit convalidation of the contract: by lapse of time the avoidable contract "heals" or "convalesces" regardless of its defect.[79] Similarly, a voidable contract may be convalidated by performance, provided that the party entitled to voidance of the contract knew of the voidability, when he/she performed the contract.[80] The convalidation can also be explicit, whereby the party entitled to avoidance of the contract declares that he/she waves the right to void the contract.[81] Convalidation is also possible in the case of *leasio*, though not by statement of the entitled party or by lapse of time, but by re-establishing the equivalence between the performance and the counterperformance. Regardless of the existence of mistake concerning the true value of the performance or the counterperformance, the justification of *leasio* is the disturbance in proportionality between the value of the performance and counterperformance. If this disturbance is removed, the justification for the voidability of the contract due to *leasio* disappears. For this reason the LO prescribes that the counterparty may prevent the avoidance of the contract by proffering counterperformance meeting the value of the aggrieved party's performance.[82] The major difference between the same means of convalidation of a voidable contract in the case of *leasio* and a usurious contract, which is null and void, is that in the former case the counterparty is entitled to request convalidation, while in the latter the aggrieved party.

The basic legal consequence of avoiding a contract is *restitutio in integrum*, i.e. both parties are relieved from their obligations. Generally speaking, in terms of restitution, the consequences of avoiding a contract are the same as those of the nullity. If one of the parties performed, the other party is obliged to restore the benefits conferred. If both performed, both

77 Salma, *Obligaciono pravo*, 415.
78 LO, Article 139(2).
79 Perović, *Obligaciono pravo*, 478.
80 Perović, *Obligaciono pravo*, 477.
81 Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 405.
82 LO, Article 139(4).

are to restore the performance received from the other party.[83] The objects of performance are primarily to be restored in kind. If, however, the object perished or its nature is incompatible with the idea of restoration in kind, appropriate pecuniary compensation is to be paid.[84] In the latter case, the amount of compensation is to be determined in accordance with the market prices at the time of restoration, or the delivery of court decision, respectively.[85] The LO, however, contains an important exception regarding the scope of the restoration of the benefits conferred, when it comes to voidability due to limited capacity to contract. It prescribes that the counterparty in this case may request the restoration of only those benefits conferred on the party with limited capacity, which are still in his/her possession, consumed in his/her interest or deliberately destroyed or alienated.[86] The restitutio in integrum in the case of voidability, therefore, has an *ex tunc* effect in general, but since it is a remedy for the infringement of parties' private interests there are no reasons against their agreement to limit the scope of the restoration only to the future (*ex nunc* effect).[87]

The ancillary legal consequence of the avoidance of a contract is liability for damage. The LO prescribes that the party responsible for the emergence of the ground of voidability is liable to the counterparty for the damage accrued in relation to the avoidance of the contract, if the counterparty did not know and neither should had known of the ground of avoidance.[88] In case of mistake this means that the party avoiding the contract may be held liable to the counterparty, since the mistake is not attributable to the latter. In the case of deceit or threat the counterparty or a third party may be held liable for damage, depending to whom is the deceit or threat attributable.[89] In addition, the LO prescribes a specific ground of liability for a party with limited capacity. He/she may, as the LO says, cunningly mislead the counterparty that he/she has full capacity for the conclusion of

83 Perović, *Obligaciono pravo*, 473.
84 LO, Article 113(1).
85 LO, Article 113(2).
86 LO, Article 114.
87 Perović, *Obligaciono pravo*, 473.
88 LO, Article 115.
89 Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 404.

the contract. If the contract is still avoided by the guardian, the party with limited capacity shall be held liable for damages to the counterparty.[90]

5. Conclusions

The Serbian Law on Obligations in the part pertaining to general rules of invalidity of contracts differentiates explicitly two categories of invalid contracts: null and void, on the one hand, and voidable contracts, on the other. Null and void are contracts infringing imperative rules, public order or good morals. Whether a contract contravenes any of the three general confines of the freedom of contract is determined through its content (object) and cause. Aside from these rules, in the general part of contract law the LO specifically names usurious contract as null and void contracts. The regular legal consequence of the declaration of nullity is restitutio in integrum and liability for damage of the party who acted in bad faith. In the most serious cases the court may decline the request for the restitution of the object of the performance of the party who acted in bad faith and may, truly exceptionally, order the forfeiture of the object of performance in favour of the respective municipality. The contract may exceptionally be saved from nullity by convalidation by performance, conversion and partial invalidity.

A specific issue in relation to the nullity of contracts represents the question whether the LO recognises non-existent contracts or should they be treated as cases of null and void contracts. Although at many instances the LO uses wording implying such conclusion (such as the "contract does not emerge", the "contract does not produce legal effect", the "contract is considered as not concluded at all" etc.), the consequences of nullity apply. According to the majority view in the doctrine, a contract concluded under coercion, in misunderstanding, by a party lacking capacity to contract, concluded by an agent without the subsequent approval of the principal, sham and simulated contracts are considered non-existent. The doctrine and the case law demonstrate diverse, sometimes contradicting standpoints. Some even tried to distinguish rules of invalidity of contracts that are being applied differently to null and void, on the one hand, and non-existent contracts, on the other hand.

[90] LO, Article 116.

When a contract infringes predominantly private interests of the contracting parties, it is voidable. This is the case with flaws of contractual intent (mistake, deceit and threat), limited capacity of contract and *leasio*. In the light of the well-established principles of contract law, a contract may be avoided only by a contracting or a third party in favour of which the right to avoid the contract was established. The right may be exercised only in strict time-limits. Under the Serbian LO the time-limit for the avoidance of contract is one year from the cessation of the ground of voidability and three years from the formation of the contract. *Leasio* is an exception in this regard, since in this case a contract may be avoided in one year from the formation of contract. In Serbian law conversion cannot be applied to a voidable contract, while the application of partial invalidity by analogy to the rules on nullity can be supported, though a direct statutory legal ground is lacking. However, convalidation is the usual way of rectification of flaws in voidable contracts, which may occur tacitly by lapse of prescribed time-limits, by performance or by explicit statement of the person in favour of which the right to avoidance was established.

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References to jurisprudence of foreign constitutional courts in judgments and decisions of the Constitutional Tribunal of the Republic of Poland

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The Constitutional Tribunal of the Republic of Poland, comparative legal method, constitutional jurisprudence, reasons for the ruling, judicial globalization

Abstract: In its jurisprudence, the Constitutional Tribunal of the Republic of Poland often uses the comparative law method. For it, comparative material is not only the normative acts in force in other countries, but also foreign jurisprudence. This article presents the results of a quantitative and qualitative study of the judgments of the Polish Constitutional Tribunal in terms of the presence of references to the judgments of other constitutional courts. Reference by the Tribunal to foreign constitutional jurisprudence is a relatively rare practice, but not an occasional one. It was intensified after Poland's accession to the European Union. Although the main point of reference for the Tribunal in its comparative analysis is still the jurisprudence of the German Federal Constitutional Court and constitutional courts of other Western countries, it also increasingly frequently reaches to the judgments of the constitutional courts of Central European and Baltic countries. The subject issue is part of the progressive process of the so-called transnational judicial discourse or judicial globalization. The reluctance of the Tribunal to reach in its rulings to judgments of foreign constitutional courts, which has been observed since 2017, may be the beginning of its assumption of an exceptionalistic attitude similar to the U.S. Supreme Court.

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1. Introduction

For about two decades, in legal scholarship, including Polish, increased attention has been paid to the complex phenomenon of interactions between judges and courts, both international and national, from different countries[1]. Several terms are used to describe it, especially such as "judicial globalization" or transnational or supranational "judicial discourse (dialogue, conversation)"[2]. Judicial interactions take a diversified form, which is reflected in their various typologies. One of the types of interaction are face-to-face meetings of judges, e.g. during scientific conferences, workshops, and study visits. The exchange of views and experiences between judges also takes place indirectly through e-platforms and internet blogs. Another type of interaction, which raises many more questions of a legal nature, is the impact of the court judgments of one legal order on the judicial decision-making process in another legal order. Interactions of this kind are intrinsically heterogeneous, in scale, form, or causes. This broad category of interactions includes the reference in judgments of domestic and international courts to decisions of "foreign" courts[3]. The increase of citing foreign law – both

[1] Przemysław Florjanowicz-Błachut and Marta Kulikowska and Piotr Wróbel, *Metody interakcji sądowych w sprawach dotyczących europejskich praw podstawowych* (Warszawa: Naczelny Sąd Administracyjny, 2014), 41–43.

[2] See: Anne Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40 (2000): 1103–1124; Francis G. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice," *Texas International Law Journal* 38, no. 3 (2003): 547–556; Yuval Shany, *Regulating Jurisdictional relations between National and International Courts* (Oxford: Oxford University Press, 2009); Lech Gardocki and Janusz Godyń and Michał Hudzik and Lech Paprzycki, *Dialog między sądami i trybunałami* (Warszawa: Sąd Najwyższy, 2010); Monica Claes et al., *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Mortsel: Intersentia, 2012); Olga Frishman, "Transnational Judicial Dialogue as an Organisation Field," *European Law Journal* 19, no. 6 (2013): 739–758; Lech Garlicki, "Ochrona praw jednostki w XXI w. (globalizacja – standardy lokalne – dialog między sądami)," in *25 lat transformacji ustrojowej w Polsce i Europie Środkowo-Wschodniej*, ed. Ewa Gdulewicz and Wojciech Orłowski and Sławomir Patyra (Lublin: Wydawnictwo UMCS, 2015): 160–180. Evangelia Psychogiopoulou, "Judicial Dialogue in Social Media Cases in Europe: Exploring the Role of Peers in Judicial Adjudication," *German Law Journal* 22, no. 7 (2021): 915–935; Klodian Rado, *The Transnational Judicial Dialogue of the Supreme Court of Canada and its Impact* (Toronto: York University, 2018, dissertation thesis).

[3] See: Basil Markesinis and Jorg Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (London: Routledge Taylor & Francis Group, 2006); Tania Groppi and Marie-Claire Ponthoreau, ed. *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart, 2013);

normative legal acts and judicial decisions – in the reasons of judgments explains the lively interest of legal scholarship and academic circles in the issue of the comparative method in the operative interpretation of law[4].

Legal scholars indicate a number of purposes that the comparative method serves in the judicial process, such as:

„– to demonstrate that the domestic law is fully in line with modern international trends;
– to complement the historical method of interpretation of domestic law;
– to discover and demonstrate the diversity of solutions from which the courts may choose;
– to benefit from experiences made abroad and to avoid reinventing the wheel again and again;
– to sharpen one's own understanding of certain legal problems and to compare the national solution with differing foreign solutions in order to highlight the particularities of the domestic law;
– to counter arguments that a given solution will lead to harmful or disastrous results;
– to find legal support for a value judgment by the court; and finally,
– to justify changes to domestic case law or to confront new problems, introduce new institutions or remedies"[5].

In Polish jurisprudence, the issue of the impact of the judgements of foreign courts on the decision-making process of domestic courts has been subject to a broader scientific exploration, especially in the context of the multicentrism phenomenon of the legal system or legal order, considered mainly against the background of the processes of European

Martin Gelter and Mathias Siess, "Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe," *Supreme Court Economic Review* 21, no. (2013): 215–269; Gábor Halmai, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law* (Hague: Eleven International Publishing, 2014).

4 See: Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013); Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law* (Oxford: Oxford University Press, 2019).

5 Thomas Kadner Graziano, "Is it legitimate and beneficial for judges to compare?," in *Courts and Comparative Law*, ed. Duncan Fairgrieve and Mads Andenas (Oxford: Oxford University Press, 2015): 52.

integration within the European Union and the Council of Europe[6]. The relations between the judgments of domestic courts and the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights have raised some questions concerning the issues of fundamental, both legal and political, importance, e.g. the understanding of law and the limits of its autonomy, the system of sources of law, and the understanding of the political sovereignty of the Nation. In light of the multicentric nature of the legal system, it becomes debatable to define the Luxembourg and Strasbourg jurisprudence as "foreign" or heteronomous for the Polish judicative. On the other hand, cases of Polish courts citing judgments of foreign courts other than the CJEU and the ECtHR have attracted to a lesser extent the attention of the Polish legal doctrine.

The article presents and assesses the practice of the Constitutional Tribunal of the Republic of Poland (PCT) to refer to the decisions of constitutional courts and tribunals of other countries[7]. The study of the PCT's jurisprudence combines the quantitative and qualitative character, although with the predominance of a quantitative analysis. The intention behind this paper is to answer the following questions:

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6 See: Mirosław Granat, "Comparative Analysis in the Case Law of the Constitutional Tribunal of Poland," in *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, ed. Giuseppe Franco Ferrari (Leiden: Brill, 2019): 567–588. Ewa Łętowska, "Między Scyllą a Charybdą – sędzia polski między Strasburgiem i Luksemburgiem," *Europejski Przegląd Sądowy* 1 (2005): 3–10. Ewa Łętowska, "Multicentryczność współczesnego systemu prawa i jej konsekwencje," *Państwo i Prawo* 4 (2005): 3–10. Anna Kalisz, "Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4 (2007): 35–49. Anna Pudło, "Dialog między Trybunałem Konstytucyjnym a sądami europejskimi (Europejskim Trybunałem Praw Człowieka i Trybunałem Sprawiedliwości Unii Europejskiej)," *Sprawy Międzynarodowe* 1 (2014): 83–104. Adam Wiśniewski, "Nowe podstawy formalnoprawne dla dialogu pomiędzy sądami krajowymi a Europejskim Trybunałem Praw Człowieka," *Gdańskie Studia Prawnicze* 33 (2015): 415–424. Grzegorz Maroń, "References to Common Law in the Reasons for Judgments by Polish Courts," *Review of European and Comparative Law* 1 (2020): 131–161.

7 This does not mean that the importance of foreign jurisprudence for the PCT comes down solely to its direct quotation. In many cases, decisions of foreign constitutional courts are consulted in the judicial deliberation preceding the issuance of the Tribunal's own judgment.

- what is the actual scale of the phenomenon of referring in the decisions of the PCT to foreign constitutional jurisprudence?
- how does the practice of invoking foreign constitutional jurisprudence look like in a chronological aspect?
- is the reference to foreign constitutional jurisprudence to a greater extent the practice of the Tribunal itself or of individual judges as authors of dissenting opinions?
- what is the geopolitical diversity of the cited foreign constitutional jurisprudence and the case law of which countries can be considered as preferred by the Tribunal?
- does the Tribunal respond to foreign constitutional jurisprudence cited by a participant in the proceedings in its argumentation?
- what is the operationalization of the use of foreign constitutional jurisprudence by the Tribunal in terms of the precision of marking the cited judgments and reasons for the selection of comparative material?
- what factors influence the dynamics of the title issue?

Anticipating the above research questions has been dictated by my willingness to respond to those issues that have not been addressed in detail in the reference literature yet. For this reason, the issue of the functional characteristics of references to foreign jurisprudence in judgments and decisions of the PCT, already discussed in the Polish legal literature, is beyond the scope of the study[8].

A quantitative study of the entirety of the Constitutional Tribunal's jurisprudence will make it possible to present the title issues in a more authoritative manner. Its analysis based on judgments only selected or recognized as examples condemns the researcher to formulating very approximate estimates and partially intuitive conclusions, and thus not necessarily representative. For example, while the Author of one of the studies described the cases of the PCT's reference to the decisions of other constitutional

[8] Ada Paprocka, "Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego," *Państwo i Prawo* 7 (2017): 37–53. Magdalena Bainczyk, "Odwołania do prawa obcego w orzecznictwie Trybunału Konstytucyjnego w sprawach związanych z integracją europejską," in *Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa,* ed. Arkadiusz Wudarski (Warszawa-Frankfurt nad Odrą: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2016): 505–532. Piotr Chybalski, "Wykładnia komparatystyczna w orzecznictwie konstytucyjnym – zarys problemu," *Temidium* 2 (2019): 33–36.

courts as "sporadic"[9], another Author takes the position that "the Constitutional Tribunal relatively eagerly uses references to materials concerning foreign law", where she also includes "judgments of foreign courts and tribunals" into foreign law[10].

The scope of the research covers judgments and decisions of the PCT issued from 1986 to the end of 2021. They have been analysed in terms of explicit referring to the decisions of constitutional courts of other countries[11], but not the decisions of international courts, even if legal scholars see significant analogies in the judicial practice of the latter courts to the activities of national constitutional courts[12]. For this reason, the study has not considered the cases of reference by the PCT to the judgments of the ECtHR and the CJEU. For the research, I have used the search engine on the Internet Portal of the Constitutional Tribunal Rulings[13].

2. Quantitative characteristics of references to foreign constitutional jurisprudence

References to foreign constitutional jurisprudence appear in at least 78 rulings of the Polish Constitutional Tribunal, while in 71 cases the ruling took

9 Jakub Królikowski, "Uzasadnienia orzeczeń Trybunału Konstytucyjnego," in *Uzasadnienia decyzji stosowania prawa*, ed. Mateusz Grochowski and Iwona Rzucidło-Grochowska (Warszawa: Wolters Kluwer, 2015), 436. Similarly, Tomasz Stawecki and Wiesław Staśkiewicz and Jan Winczorek, *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny* (Warszawa: Ernst & Young 2008), 25.

10 Paprocka, "Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego," 46 and 48.

11 The Tribunal sometimes invokes judgments of courts of other states which are not constitutional courts. Cf. e.g. PCT, Judgment of 21 June 2005, P 25/02, OTK-A 2005, no. 6, item 65 (pt. III.4.6) (the French Court of Appeal); PCT, Judgment of 3 June 2008, K 42/07, OTK-A 2008, no. 5, item 77 (pt. III.4) (the French Court of Cassation).

12 For example, Robert Harmsen, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform," in *Judges, transition, and human rights,* eds. John Morison, Kieran McEvoy, Gordon Anthony (New York: Oxford University Press, 2007), 33–53.

13 Online Portal of the Rulings of the Constitutional Tribunal of the Republic of Poland (Internetowy Portal Orzeczeń Trybunału Konstytucyjnego), accessed January 31, 2022, https://ipo.trybunal.gov.pl/ipo/Szukaj?cid=1.

the form of a judgment, and in 7 cases – of a decision[14]. In 11 of these rulings, the reference was of a general nature without giving a specific ruling by a constitutional court of another country[15]. In total, the Tribunal referred to nearly 200 judgments of foreign constitutional courts.

In proportional terms, the Tribunal refers to the constitutional jurisprudence of other countries relatively rarely, but not sporadically. Said 78 rulings constitute about 2.4% of all the rulings made by the PCT between 1986 and 2021 (excluding decisions made in the context of preliminary control). However, if the estimates are limited only to judgments (and before 16 October 1997 also nominally to "resolutions" and "rulings"), it turns out that references to foreign constitutional jurisprudence appear in almost 4.6% of the Tribunal's judgments.

Foreign constitutional jurisprudence was mentioned in 15 dissenting opinions submitted to 14 rulings of the PCT. In two cases, references to the decisions of constitutional courts of other countries were included both in the ruling of the Constitutional Tribunal and in a dissenting opinion to it.

Chronologically, the first case of reference to foreign constitutional jurisprudence was recognized in the ruling of 30 January 1991[16]. Until the end of the 1990s, such references appeared in 13 rulings. In the years 2000–2009 references were identified in 29 rulings, and in the years 2010–2021 in 36 rulings.

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14 The given number does not take into account those judgments in which the Tribunal only reported that the participant in the proceedings referred to foreign constitutional jurisprudence in his argumentation. See PCT, Decision of 8 March 2011, K 29/08, OTK-A 2009, no. 2, item 14 (pt I.1); PCT, Judgment of 12 May 2008, SK 43/05, OTK-A 2008, no. 4, item 57 (pt. I.1.5); PCT, Judgment of 16 October 2007, K 28/06, OTK-A 2007, no. 9, item 104 (pt. I.3); PCT, Judgment of 3 November 2006, K 31/06, OTK-A 2006, no. 10, item 147 (pt. III.4.3); PCT, Judgment of 16 January 2006, SK 30/05, OTK-A 2006, no. 1, item 2 (pt. I.8.2).

15 The statistics do not consider two decisions, pursuant to which the PCT corrected an obvious error consisting in the erroneous marking of rulings by the Hungarian and German Constitutional Courts in its previous judgments. PCT, Decision of 5 June 2012, K 11/10, OTK-A 2012, no. 6, item 68; PCT, Decision of 10 January 2012, SK 45/09, OTK-A 2012, no. 1, item 8.

16 PCT, Judgment of 30 January 1991, K 11/90, OTK 1991, no. 1, item 2 (pt. II.2).

The main factor intensifying the reference by the Constitutional Tribunal to foreign constitutional jurisprudence seems to be Poland's accession to the European Union. Such references have been included in 56 rulings of the PCT issued after 1 May 2004. Until then, the Tribunal, for over 18 years of its activity, had mentioned foreign constitutional jurisprudence in 23 judgments. This statistic confirms the correctness of the statement that "The membership of a State in the European Union causes not only the Europeanization of national law … but also the opening of this law to the legal systems of other Member States"[17].

However, it would be an oversimplification to see only the accession to the EU as a factor responsible for the intensification of the practice of using foreign jurisprudence by the Tribunal. Other possible relevant factors in this regard are, for example, the judicial globalization process, the current easy access to foreign law (including case law) or familiarity of judge-rapporteur as a legal scholar with foreign law.

The adoption of the new Constitution did not have a major impact on the discussed practice. Before the entry into force of the Basic Law (17 October 1997), references to judgments of constitutional courts of other countries were identified in 11 rulings, and from that moment until the accession to the European Union in 12 rulings.

The Tribunal most frequently by far reaches to the decisions of the German Federal Constitutional Court (FCC). It did so in 61 rulings, in which it mentioned a total of 84 judgments and decisions of the FCC. In 10 of these 61 rulings, the Tribunal referred to German constitutional jurisprudence in general, without quoting specific judgments. Considering the fact that there have been 38 in total of the Tribunal's rulings containing references to the judgments of constitutional courts of other countries, it can be said that the FCC's decisions have dominated the comparative analysis of the Polish Constitutional Tribunal. This state of affairs gives rise to ambivalent assessments. On the one hand, the inclination of the Tribunal to look at the FCC's decisions is explained by the historical ties between Polish law and German law[18], taking advantage of the German constitutional system

[17] Bainczyk, "Odwołania do prawa," 505.

[18] See: Agnieszka Liszewska and Krzysztof Skotnicki, *Związki prawa polskiego z prawem niemieckim* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2006).

experience in creating the Polish constitution and shaping the competences of the Polish Constitutional Tribunal [19] as well as the rich achievements of the FCC and the authority that it commonly enjoys in the legal community in Europe and in the world[20]. On the other hand, treating almost *a priori* the FCC's jurisprudence as a natural and often the only point of reference calls into question the reliability or representativeness of the results of the comparative considerations and findings of the Tribunal. In 36 rulings of the PCT, the only cited foreign constitutional jurisprudence was the position of the FCC. Meanwhile, the point of view of the *Bundesverfassungsgericht* on a number of issues is only "one of" and not "the unique" or even not necessarily "dominant" in the constitutional jurisprudence of European states. Not uncommon confining only to citing the German constitutional jurisprudence, combined with the practice of not explaining the reasons for the choice of such and not another comparative material, makes the comparative analysis highly selective, and thus weakens its argumentative value and persuasive power. It must be admitted, however, that the German Federal Constitutional Court is the most frequently cited foreign constitutional court in the constitutional jurisprudence of many other European countries[21].

The judgments and decisions of the PCT refer to the constitutional jurisprudence of 27 countries. Most of these states are European countries included in the culture of continental statutory law, and at the same time – with the exception of Moldova and Switzerland – belonging to the European Union. Among the European countries, to whose constitutional

19 Allan Tatham, *Central European Constitutional Courts in the Face of EU Membership. The Influence of German Model in Hungary and Poland* (Leiden: Nijhoff, 2013), 41–63.

20 The Federal Constitutional Court has sometimes been described as the "most influential" constitutional court in the world. Christine Landfried, "The Impact of the German Federal Constitutional Court on Politics and Policy Output," *Government and Opposition* 20, no. 4 (1985): 522. Peter Quint, "The Most Extraordinarily Powerful Court of Law the World has Ever Known? - Judicial Review in the United States and Germany," *Maryland Law Review* 65, no. 1 (2006): 153. Cf. also, Stephen Gardbaum, "What Makes for More or Less Powerful Constitutional Courts?," *Duke Journal of Comparative & International Law* 29, no. 1 (2018): 1–40.

21 Christoph Grabenwarter, "The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives," *Bulletin on Constitutional Case-Law* (2014):XXI–XXIV; Luis Lopez Guerra, "Constitutional court judges' roundtable," *International Journal of Constitutional Law* 3, no. 4 (2005): 567–569.

jurisprudence the PCT referred to are both Western countries with rich achievements in the field of constitutional review of law (especially Austria, Germany, France, Spain, and Italy), and countries which share with Poland the common historical experience of the People's "democracy" and the socialist command and distribution economy (Bulgaria, Croatia, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, and Slovenia).

It draws attention, and at the same time deserves approval, that the Tribunal in its decisions has not referred yet to the judgments of the constitutional courts of those European countries whose democratic condition and independence of the judiciary raise serious reservations, such as Belarus, Russia, Ukraine or Turkey.

In case of non-European countries, the Tribunal most often referred to the rulings of the Supreme Court of the United States. In 11 of its own rulings 8 judgments of the U.S. Supreme Court have been noted[22]. The inclusion of the U.S. *case law* by the Tribunal proves that the constitutional jurisprudence from common-law countries also shows the usefulness for a comparative legal analysis. In two other rulings, the Tribunal has also referred to two judgments rendered by the UK House of Lords[23], and a judgment of the Supreme Court of Canada.

Occasionally, the Tribunal reaches in its comparative legal considerations to the constitutional jurisprudence of countries outside Western

[22] The lack of exclusivity of the federal Supreme Court in the control of the constitutionality of the law in the United States explains the fact that the Tribunal also relies on judgments of state courts and federal courts of appeals. However, these cases were not included in the quantitative analysis for the purposes of this article. See PCT, Judgment of 10 December 2013, U 5/13, OTK-A 2013, no. 5, item 136 (pt. III.2.5); PCT, Judgment of 9 June 2009, SK 48/05 OTK-A 2009, no. 7, item 108 (pt. III.1.4).

[23] On the "weak" form of the constitutional review of law in the UK, cf. Marta Przygoda, "Ewolucja modelu kontroli konstytucyjności prawa w Wielkiej Brytanii," *Politeja* 21 (2012): 377–386. Mark Tushnet, "The Rise of Weak-Form Judicial Review", in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward Elgar, 2011): 321–333. Piotr Mikuli, *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007).

civilization[24]. The only identified cases have been references to the jurisprudence of Israel and the Republic of South Africa. The lack of references to the judgments of the constitutional courts of Latin American and Asian countries is noteworthy[25].

In 10 rulings, the Tribunal noted that a participant in the proceedings (the applicant, the Speaker of the Sejm, the Public Prosecutor General, the Ombudsman, the Helsinki Foundation for Human Rights) referred to foreign constitutional jurisprudence, including that only in 4 cases the Tribunal indicated specific judgments. The lack of a precise indication of foreign judicial decisions – invoked by a participant in the proceedings – in Part I (the so-called "historical") of the reasons for the judgment, should be considered justified whenever the Tribunal itself does not refer or respond to them in Part III of the reasoning. The argumentative economy speaks for this, the more so that the pleadings have been available on the Tribunal's website[26].

3. Qualitative assessment of references to foreign constitutional courts' ruligns

The generally positive assessment of the practice of referring to foreign constitutional jurisprudence in the reasons for judgments and decisions by the Constitutional Tribunal of the Republic of Poland does not mean that

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24 The assignment of states to individual civilizations is given by me after Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster Paperbacks, 2011): 51–55.

25 Germany (61/84), France (14/22), The USA (11/8), Austria (10/7), Spain (8/9), The Czech Republic (6/8), Italy (5/11), Estonia (4/5), Slovakia (3/3), Belgium (3/2), Hungary (3/2), Bulgaria (2/2), Denmark (2/2), Romania (2/2), Slovenia (2/2), Latvia (2/1), Switzerland (2/1), Israel (1/3), Lithuania (1/3), Ireland (1/2), The UK (1/2), Cyprus (1/1), Canada (1/1), Croatia (1/1) Moldova (1/1), Portugal (1/1), The RSA (1/0). Firstly, the number of rulings of the Constitutional Tribunal, and then the number of rulings of foreign constitutional courts cited in these rulings are given in parentheses. The digit "O" in the second position indicates that the PCT referred generally to the constitutional jurisprudence of a given state, without indicating any specific judgments. The French constitutional jurisprudence includes not only the rulings of the Constitutional Council, but also of the Council of State. Cf. Radosław Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji* (Warszawa: Uniwersytet Warszawski, 2017, the doctoral dissertation).

26 Królikowski, "Uzasadnienia orzeczeń Trybunału Konstytucyjnego," 430.

the form of this practice does not raise any objections. Critical attention should be paid to, fortunately few, cases of referring generally to the constitutional jurisprudence of a given state, and, even more so, to foreign constitutional jurisprudence as such[27]. Failure to mark specific judgments does not allow for verification whether the Tribunal correctly established the law appropriate for a given state. In a way, the reader is "doomed" to believe the Tribunal "on its word". The laconic reference to foreign jurisprudence only gives the appearance of argumentation, *de facto* being only a stylistic device[28]. The specific blank references to foreign jurisprudence has been shared by both the Tribunal itself[29], and individual judges as authors of dissenting opinions[30].

The source of reservations is also the general reference by the PCT to foreign court decisions by means of quoting monographs or scientific articles. Identifying specific judgments that the Tribunal had in mind then requires referring to the cited reference literature. While such cases could

27 PCT, Judgment of 7 May 2014, K 43/12, OTK-A 2014, no. 5, item 50 (pt. III.3.3.1).

28 Similarly, in the context of the enigmatic reference by courts to the "doctrine of law" or the "position of doctrine", cf. Tomasz Stawecki, "Dorobek nauki prawa w uzasadnieniach decyzji sądowych," in *Uzasadnienia decyzji stosowania prawa*, ed. Mateusz Grochowski and Iwona Rzucidło-Grochowska (Warszawa: Wolters Kluwer, 2015), 136.

29 PCT, Decision of 16 January 2013, Ts 22/11, OTK-B 2013, no. 4, item 311; PCT, Judgment of 4 December 2001, SK 18/00, OTK 2001, no. 8, item 256 (pt. IV.3); PCT, Judgment of 26 April 1995, K 11/94, OTK 1995, no. 1, item 12 (pt. III.2). We deal with another situation in the reasons for PCT, Judgment of 23 November 2016, K 6/14, OTK-A 2016, item 98 (pt. III.4.3.13), where the Tribunal refers to "the constitutional review in Belgium, the Czech Republic, Estonia, France, Germany and the USA", and then it quotes no Belgian, French or US ruling.

30 Cf. PCT, Judgment of 20 April 1993, U 12/92 (Czesław Bakalarski, dissent), OTK 1993, no. 1, item 9; PCT, Judgment of 28 May 1997, K 26/96 (Wojciech Sokolewicz, dissent), OTK 1997, no. 2, item 19; PCT, Judgment of 10 July 2000, SK 21/99 (Lech Garlicki, dissent), OTK 2000, no. 5, item 144; PCT, Judgment of 30 September 2015 r., K 3/13 (Wojciech Hermeliński, dissent), OTK-A 2015, no. 8, item 125; PCT, Judgment of 10 July 2019, K 3/16 (Piotr Tuleja, dissent), OTK-A 2019, item 40 ("jurisprudence of the European constitutional courts"). Sometimes, on the basis of a contextual analysis, it is possible to arrive at a conclusion which foreign judgment the judge had in mind, e.g. Judge L. Garlicki, writing in a dissenting opinion to judgment K 26/96 that the case law of the US Supreme Court "since 1973, had recognized the existence of a constitutional right of the mother to terminate an unwanted pregnancy", thus implicitly referring in this way to the ruling in the case of *Roe v. Wade*, 410 US 113 (1973).

to some extent be justified in the first two decades of the Tribunal's operation, in times of the difficult access to databases of foreign jurisprudence[31], in the era of online availability of jurisprudence resources, one can expect the Tribunal to refer directly to individual judgments of constitutional courts of other countries and their individualized designation in the reasoning[32]. The indication of scholar studies in which these judgments were discussed in the reasoning may, however, be complementary[33]. Occasionally, the PCT provides a link to the cited foreign ruling as well as its Polish or English translation[34].

Another drawback is the inaccuracy of marking foreign rulings cited by the Tribunal. It would be optimal to provide the name of the court, the date of the ruling, the case number and the official publisher. While the omission of the publisher is acceptable, failure to provide the date or reference number of the judgment should be treated in terms of unreliability, and it has been the case in both the older[35] and the more recent decisions of the PCT[36].

The extension of foreign constitutional jurisprudence, considered for comparative aims by the PCT, to the judgments of the constitutional courts of Central European countries should be assessed positively. Common historical experiences, with regard to the political, economic and social system, have meant that the constitutional courts there have often subjected their assessment to the same issues that have had to be examined also

31 PCT, Judgment of 19 June 1992, U 6/92, OTK 1992, no. 1, item 13 (pt. III.3).

32 Cf. PCT, Judgment of 7 October 2015, K 12/14, OTK-A 2015, no. 9, item 143 (pt. III.3.3.1); PCT, Judgment of 25 May 2004, SK 44/03, OTK-A 2004, no. 5, item 46 (pt. VI.5); PCT, Judgment of 12 April 2000, K 8/98, OTK 2000, no. 3, item 87 (pt. V.4).

33 Presenting the relevant Polish-language reference literature next to a foreign ruling may facilitate the reader's perception of the Tribunal's argumentation, in a situation where in the reasoning the ruling was more mentioned than analysed. Such a practice may also be helpful for people who do not speak the language in which the ruling cited by the Tribunal was originally formulated.

34 PCT, Judgment of 2 April 2015, P 31/12, OTK-A 2015, no. 4, item 44 (pt. III.8.2); PCT, Judgment of 10 December 2013 r., U 5/13, OTK-A 2013/9/136 (pt. III.2.5).

35 For example, U 6/92 (pt. III.3); PCT, Judgment of 22 November 1995, K 19/95, OTK 1995, no. 3, item 16 (pt. III.4).

36 For example, PCT, Judgment of 3 December 2015, K 34/15, OTK-A 2015, no. 11, item 185 (pt. III.1.1).

by the Polish Constitutional Tribunal. In such cases, the jurisprudence of the constitutional courts of, e.g. the Czech Republic, Slovakia, Hungary, Lithuania or Estonia seems to be a more adequate comparative material for the Polish Tribunal than, for example, the jurisprudence of the French Constitutional Council or the Austrian Constitutional Tribunal. Even if the constitutional courts of Western countries dealt with a particular constitutional and legal issue, which the Polish Constitutional Tribunal was faced with in time, the different historical, political or social background creating the context for this constitutional and legal problem in these countries means that the argumentation and conclusions of the constitutional courts from that part of Europe may have a limited potential for the Polish Constitutional Tribunal. With the passing of years, it is less and less convincing to argue that some preference to refer to the constitutional jurisprudence of Western countries is supported by the "maturity" of the democracies of these countries. While in the 1990s, in the period of deep political and economic transformation, it was somewhat natural for the Tribunal to focus its comparative considerations on the jurisprudence of Germany or France, 30 years after the 1989 milestone, the achievements of the constitutional courts in the states of Central Europe and the Baltic countries are equally valuable – from the viewpoint of the comparative law method – for the Polish Constitutional Tribunal[37].

This statement should not be interpreted as a postulate of abandoning or even limiting further reference to the constitutional jurisprudence of Western countries. It only expresses an approval and justification for a greater diversification of the comparative materials taken into account and the "non-hierarchization" of it based on the criterion of the origin of

[37] It seems that the Tribunal sometimes classifies some countries too apriorily as "countries with mature democracy, well-established understanding of the separation of powers, and a high legal and political culture" in opposition to the so-called young democracies with "the unfixed democratic custom and lower professional efficiency of the state apparatus, and especially the mechanism of separation of powers, which is only just being polished", thus explaining the preferences in the comparative reflection for law and jurisprudence of Western countries. PCT, Judgment of 28 November 2007, K 39/07, OTK-A 2007, no. 10, item 129 (pt. III.10.1). This does not mean, however, that this preference is categorical. Cf. e.g. PCT, Judgment of 24 November 2010, K 32/09, OTK-A 2010/9/108 (pt. III.2.6).

the constitutional court from Western or Central Europe, which has been visible in the rulings of the PCT for several years[38].

Rarely, the PCT formulates methodological comments as to its reference to foreign law, including foreign jurisprudence. In one of the judgments, it stated that "The analysis by the Constitutional Tribunal of foreign domestic law, as well as jurisprudence in the field of public international law – which results from the fact that modern legal systems have become closer to each other – must be preceded by a reservation that it requires meeting various conditions and maintaining awareness of a different context. … It should be additionally noted that in the event that the Tribunal refers to foreign domestic law, it is necessary to determine the adequacy of using foreign models for the interpretation of Polish law. In particular, it is necessary to take particular care to 'choose' the legal system to which the reference is made". It is significant that the following sentence of the reasoning after the quoted excerpt reads: "In the case under consideration, it is appropriate to refer to the legal solutions functioning in Germany and to the jurisprudence of the European Court of Human Rights"[39]. However, the Tribunal did not explain in any way why the German solutions were the "appropriate" comparative material.

The Tribunal can be expected to justify the adoption of a specific law or foreign jurisprudence for a comparative analysis. «The court should explain on the basis of which comparative method it makes its findings and according to which criteria it selects the reference legal system with which it compares its own decision»[40]. The explanation of the selection criteria for

[38] The Tribunal referred for the first time to constitutional jurisprudence of a post-communist country, *in concreto* of Hungary, in 2004 (PCT, Judgment of 25 May 2004, SK 44/03, OTK-A 2004, no. 5, item 46 (pt. VI.5)). However, only since 2008, in the framework of its comparative legal analysis, the Tribunal has begun to recognize the constitutional jurisprudence of Central European countries more widely.

[39] PCT, Judgment of 3 July 2008, K 38/07, OTK-A 2008, no. 6, item 102 (pt. III.4).

[40] Fryderyk Zoll, "Argumentacja komparatystyczna w polskich sądach," in *Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa,* ed. Arkadiusz Wudarski (Warszawa-Frankfurt nad Odrą: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2016), 127. Likewise, Paprocka, "Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego," 52–53.

the comparative material is important, since the selection of this material is translated into some conclusions obtained in the comparative analysis[41].

The justification by the PCT of the choice of a particular foreign law as a comparative source is – if it exists at all – brief and quite general. The Tribunal refers, for example, to the criterion of "similarity" or "closeness" of the foreign legal system to "the Polish legal culture"[42]. It emphasizes the fact that specific foreign legal systems "have had a significant impact on the shaping of contemporary Polish law, as well as the legal systems of other democracies"[43]. Sometimes the selection of foreign law and constitutional jurisprudence is dictated by the similarity of the "historical experiences" of Poland and other countries[44]. Another time, the Tribunal emphasizes the "maturity" or "consolidation" of democracy or "stability of the market economy" of these countries, to whose law or jurisprudence it refers comparatively[45].

The use of the comparative method by the Tribunal has very rarely been the subject of objections by the PCT judges as the authors of dissents. For example, in the context of the constitutionality of ritual slaughter, Judge Mirosław Granat, in a dissent, argued that the Tribunal's statement that "the protection of animals does not have priority over the provisions of the Constitution guaranteeing freedom of religion", at best "is based on quoting the administrative or constitutional jurisprudence of other countries"[46].

It happens that the Tribunal, by reporting the fact of a reference of a participant of the proceedings to foreign jurisprudence, at the same time evaluates indirectly the quality of these judicial decisions, and thus their

41 Cf. PCT, Judgment of 30 October 2006, P 10/06, OTK-A 2006, no. 9, item 128 (pt. III.2.2), where both the Tribunal and Judge Ewa Łętowska, as the author of a dissent, found support in the comparative arguments for the thesis about the constitutionality and unconstitutionality of Art. 212 of the Penal Code penalizing slander.

42 PCT, Judgment of 15 January 2009, K 45/07, OTK-A 2009, no. 1, item 3 (pt. III.2.4).

43 *Ibidem.*

44 PCT, Judgment of 19 July 2011, K 11/10, OTK-A 2011, no. 6, item 60 (pt. III.3.2).

45 PCT, Judgment of 30 October 2006, P 10/06, OTK-A 2006, no. 9, item 128 (pt. III.2.2); PCT, Judgment of 28 November 2007, K 39/07, OTK-A 2007, no. 10, item 129 (pt. III.10.1); PCT, Judgment of 14 March 1995, K 13/94, OTK 1995, no. 1, item 6 (pt. III).

46 PCT, Judgment of 10 December 2014, K 52/13 (Mirosław Granat, dissent), OTK-A 2014, no. 11, item 118.

adequacy for the case under examination, e.g. by including them among the judgments of "states of the so-called immature democracies (Hungary, Slovakia)"[47]. The use of the term "immature democracy" was not merely descriptive.

The comparative analysis is not an integral or inseparable element of the reasons for the rulings of the Polish Constitutional Tribunal. Sometimes, however, the Tribunal presents the consideration of the comparative legal context in terms of a procedure necessary for the proper examination and adjudication of a case[48]. This does not mean, of course, that the Tribunal then treats the legal solution adopted in another state as prejudging its own conclusions and decisions[49].

Some authors combine the practice of the PCT to refer to the law and jurisprudence of other EU countries with the existence of a European «constitutional community in a horizontal dimension, within which there is an increasingly intense exchange of constitutional ideas»[50]. Other representatives of the legal doctrine argue that "The assumptions of existence of a common European legal tradition as a binding, even subsidiarily, normative order is a wonderful idea and may constitute a kind of philosophical postulate for Western countries. However, it is rather an expression of a certain romantic mythodology that would be difficult to apply in legal practice. For now, we are experiencing a deep crisis in the integration process"[51].

The phenomenon of transnational judicial discourse or dialogue mentioned in the introduction to the article – one of the manifestations of which is the reference to foreign law and jurisprudence in the ruling reasonings – finds an explanation not only in the processes of Europeanization

47 PCT, Judgment of 12 May 2008, SK 43/05, OTK-A 2008, no. 4, item 57 (pt. I.1.5).

48 PCT, Judgment of 16 March 2010, K 17/09, OTK-A 2010, no. 3, item 21 (pt. III.1.4); PCT, Judgment of 3 June 2008, K 42/07, OTK-A 2008, no. 5, item 77 (pt. III.4); PCT, Judgment of 23 November 2016, K 6/14, OTK-A 2016, item 98 (pt. III.4.3.12).

49 Cf. PCT, Judgment of 12 December 2005, K 32/04, OTK-A 2005, no. 11, item 132 (pt. III.3.1) ["The comparative argument that similar measures happen to be used at all in other countries is also irrelevant"]; PCT, Judgment of 14 May 2009, K 21/08, OTK-A 2009, no. 5, item 67 (pt. IV.6.4.1) ["The experiences of other Member States of the European Union, although not without significance, cannot determine the accuracy of the adopted solutions"].

50 Bainczyk, "Odwołania do prawa obcego," 506.

51 Zoll, "Argumentacja komparatystyczna w polskich sądach," 130.

or, more broadly, globalization and multicentricity of law[52]. Reference or non-reference to foreign jurisprudence by courts is also related to the style of justifying judicial decisions, appropriate for a given legal order. Citing foreign jurisprudence in the texts of court judgments is characteristic for the German style, but not for the French one[53]. The French style is featured by the categorical utterance of the court presenting the ruling as the only possible result of a syllogistic subsumption of the actual facts to a meaningfully unquestionable legal norm decoded from the text of a normative legal act. The German style, on the other hand, is of a discursive rather than magisterial character. Its discursiveness is manifested in the fact that "the judge, by showing various points of view, interpretation options and possibilities of decision," thus communicates that he or she "has a space for manoeuvres and that he or she has a choice among several options, all of which 'can be defended' against the background of the text that served him or her as the basis for the decision"[54].

However, the style of reasoning does not always determine the willingness of courts to invoke judgments of other countries' courts, as evidenced by the decision-making practice of courts in common law countries for which the Anglo-American style is appropriate. While American courts, and especially the federal Supreme Court, relatively rarely refer to both foreign law and jurisprudence, the courts of other common law countries show a much greater readiness to quote foreign law and jurisprudence in the reasons for their own judgments[55]. Moreover, the cases of using the comparative argumentation are a subject of deep controversy in American

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52 Jan Wawrzyniak, "O potrzebie uprawiania prawa konstytucyjnego porównawczego," *Państwo i Prawo* 9 (2020): 119.

53 For more on the styles of reasoning, cf. Iwona Rzucidło-Grochowska, "Wcześniejsza decyzja sądowa jako argument uzasadnienia orzeczenia sądowego," in *Precedens sądowy w polskim porządku prawnym*, ed. Bartosz Liżewski, Adam Szot, Leszek Leszczyński (Warszawa: C.H. Beck, 2018), 244–252.

54 Ewa Łętowska, "Pozaprocesowe znaczenie uzasadnienia sądowego," *Państwo i Prawo* 5 (1997): 4.

55 Cf. Elaine Mak, "Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices", *Utrecht Law Review* 8, no. 2 (2012): 20–34. Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation", *University of Toronto Faculty of Law Review* 62, no. 2 (2004): 99–148.

jurisprudence itself and in American legal scholarship. Exceptionism, inherent for the U.S. judiciary, or even isolationism, prevents the courts from applying more widely the comparative method whenever the comparative material is to be non-U.S. law and jurisprudence, both international and national[56].

It is an assessment matter to assign the form of reasons for Polish courts' rulings to one of the styles. Legal scholars indicate that "the Polish practice of providing reasons is somewhere in the middle" between the German and French styles[57]. It seems, however, that over the three decades after 1989, it has been possible to observe a certain transformation in the style of providing reasons for judgments of Polish courts, which "shifts on the scale from French rulings to German rulings", i.e. from "authoritarian" to "more discursive" argumentation[58].

From the very beginning of its operation, the reasons for rulings of the PCT have had elements of the German style. Although comparative legal considerations did not occur – as already mentioned – in the judgments from the second half of the 1980s, even then the Tribunal also referred to the views of legal scholars, including those expressed in the form of expert opinions.

The PCT's reference to foreign constitutional jurisprudence has also been influenced by the increasing ease of access to this jurisprudence. The emergence of online digital databases of jurisprudence, sometimes even including English translations of some of the rulings of the constitutional courts of individual countries, has facilitated significantly comparative analysis.

Moreover, the fact that most of its judges belong to the academic legal community is a favourable circumstance conducive to making use of legal-comparative analysis by the PCT. Experiences in using the comparative

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56 Cf. Gráinne de Búrca, "International law before the Courts: the EU and the US compared", *Virginia Journal of International Law* 3 (55) (2015): 685–728; Steven G. Calabresi, "«A Shining City on a Hill»: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law", *Boston University Law Review* 86, no. 5 (2006): 1335–1416.

57 Artur Kotowski, "Operatywna wykładnia prawa w warunkach multicentryzmu," *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 104 (2016): 212.

58 Zoll, "Argumentacja komparatystyczna w polskich sądach," 120.

method in research and academic teaching activities increase the readiness to include this method in judicial activity.

Determining the specific functions or objectives of references to jurisprudence of foreign constitutional courts would require a separate analysis of each of the Tribunal's judgments in which such references appear. However, making a simplified generalization, it can be legitimately stated that in most cases foreign jurisprudence plays the role of persuasive authority. Therefore, foreign judgments neither determine the Tribunal's decision, nor does their mentioning boil down to eristic ornamentation, but are part of the rationalization of the Tribunal's conclusions. In other words, they constitute an additional argument for the accuracy of the Tribunal's own autonomous findings.

4. Conclusion

During over 30 years of the Polish Constitutional Tribunal's activity, the operationalization of the comparative legal method in its jurisprudence has undergone a significant evolution. Until the end of the 1980s, the Tribunal did not refer to foreign law and jurisprudence in its rulings. It started to use comparative argumentation in the early 1990s in the new geopolitical, constitutional and socio-economic conditions. From then on, the frequency of referring to foreign constitutional jurisprudence by the PCT remained at a similar level until Poland's accession to the European Union. Poland's participation in the process of European integration has intensified the practice of comparative reference by the PCT to the rulings of constitutional courts of other countries, usually European ones. However, the assessment of the contemporary condition of the European integration and its translation into the title issues remains a controversial question.

Recent years show that, the practice of citing foreign constitutional jurisprudence may be strongly influenced by political factors, reflected in the selection by the parliamentary majority of persons appointed as judges of the Polish Constitutional Tribunal. In 2017–2020, there was no case of a reference by the PCT to a judgment of a foreign constitutional court. In 2019 and 2020, such references appeared only in dissenting opinions to 4 rulings. This situation is a certain phenomenon, considering the fact that almost continuously since 1991 every year (with the exception of 1996) in at least one of its rulings, and usually even in several, the Tribunal referred

to judgments of other constitutional courts. The explanation for this state of affairs may be the profound changes in the composition of the Tribunal that took place in 2015–2017. However, in the judgment of 14 July 2021 – regarding EU Court of Justice issuing interim measures relating to the system and jurisdiction of Polish courts and the procedure before Polish courts – the Tribunal referred to a total of 31 decisions of constitutional courts of 12 countries. With this in mind, it is still difficult to predict whether a certain regression in taking into account foreign constitutional jurisprudence in the comparative legal analysis carried out by the PCT is temporary, or is a harbinger of a more permanent reorientation in its jurisprudence to the resemblance to the exceptionalism inherent for the U.S. Supreme Court[59]. Time will tell.

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[59] Another observed trend is the decrease in the number of the issued judgments starting from 2016. In 2018, the Court issued 72 rulings, which was the lowest number since 1999. In 2019 and 2020, the Court issued 70 rulings each year and from 2021 there are 75 judgments.

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The ECHR Preamble vs. the European Arrest Warrant: balancing Human Rights protection and the principle of mutual trust in EU Criminal Law?

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Abstract: As stated in the European Convention on Human Rights Preamble, the aim of the Council of Europe is the achievement of *greater unity between its members* through the *maintenance and realisation of Human Rights and Fundamental Freedoms*. Nowadays, the European Union includes the majority of the ECHR signatories (27 of 47) and incorporates the key legal instrument of judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision. Nevertheless, the possible effects of the EAWFD on the practice of the European Court of Human Rights remain understudied – despite the crucial need to properly balance the enforcement of the principle of mutual recognition and Human Rights protection in the European Union. Since the first attempts to approach the EAWFD, the Strasbourg Court preferred to find the applications inadmissible (*Pianese, Monedero Angora*, *Stapleton*) or to establish a very high threshold for establishing a Convention violation within this context (*Pirozzi*). It will be argued that the newly developing Strasbourg Court's case-law on the EAWFD (*Castano, Bivolaru/Moldovan, Alosa*) could potentially mark a new step in the judicial dialogue between two European Courts. In the *Castano and Bivolaru/Moldovan* rulings, the ECtHR – for the first time – found that the EU Member States had breached their obligations under Arts. 2 (*´right to life´*) and 3 (*´prohibition of torture´*) ECHR

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within the European Arrest Warrant context (murder/trafficking in human beings charges). At the same time, this interpretation opens the floor for discussion on potential applicability of other Convention provisions (Arts. 4, 5, 8, 13) to other offences listed in Art. 2(2) of the EAWFD (such as, for instance, corruption, fraud, computer-related crime etc.). Even though the Strasbourg Court has transposed the CJEU's benchmarks of the EAW refusals legality assessment – i.e. a risk of *inhuman or degrading treatment* in the requesting State (*Aranyosi/Căldăraru)*, the EU Member States´ courts are now forced – *de facto* – to consider an additional (ECHR-based) criterion for assessing the legality of refusals to execute the European Arrest Warrants. This can arguably pose further questions upon the entry into force of Protocol No. 15 ECHR which aims at the most effective realisation of the *´subsidiarity´* principle in the European Convention system.

1. Introduction

Art. 31 «*General rule of interpretation*» of the Vienna Convention on the Law of Treaties prominently proclaims that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context. Hence, the text of the legal act including its preamble and annexes is the starting point for determining the object and purpose of treaty drafting and implementation.[1] By underlining the aims of the treaty, the preambles could be of both *contextual* and *teleological* significance,[2] as it has been demonstrated in the early decisions of the European Commission of Human Rights.[3] In *Austria v. Italy*, the analysis of the European Convention on Human Rights (Convention, ECHR) Preamble allowed

1 Vienna Convention on the Law of Treaties adopted on 23 May 1969, U.N.T.S. 331, 1155 (1969).

2 Oliver Dörr, "Article 31: General rule of interpretation," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach, 2nd ed. (Berlin/Heidelberg: Springer, 2018), 583.

3 William Schabas, "Preamble," in *The European Convention on Human Rights: A Commentary,* ed. William Schabas, 1st ed. (Oxford: Oxford University Press, 2015), 54.

to conclude that «*the purpose of the High Contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law*».[4]

Indeed, as stated in the Convention Preamble, the aim of the Council of Europe (CoE) is the achievement of greater unity between its members through the maintenance and realisation of Human Rights and Fundamental Freedoms.[5] This premise is of great importance for the development of effective transnational cooperation in criminal matters which – by its nature – is aimed at the effective protection of Human Rights.[6] Nowadays, the European Union includes the majority of the ECHR signatories (27 of 47) and incorporates the key legal instrument of judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision (EAWFD).[7] Nevertheless, the possible effects of the EAWFD on the practice of the European Court of Human Rights (Strasbourg Court, ECtHR) remain understudied – despite the crucial need to properly balance the application of the principle of mutual recognition and Human Rights protection in the European Union. Importantly, the development of the EU/Member States' liability doctrine for the alleged ECHR violations led to the formation of the so-called *presumption of equivalent protection* – or the «*Bosphorus*» *doctrine* (2005) – which allowed the ECtHR to exercise full judicial review only if the protection under EU Law has proved

4 Commission's decision on the admissibility of 11 January 1961, Case *Austria v. Italy*, application no. 788/60, hudoc.int, 18.

5 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 (European Convention on Human Rights).

6 Koen Lenaerts, "The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice," *International and Comparative Law Quarterly* 59, no. 2 (2010): 255, 268, 298–301.

7 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA, OJ L 81.

in the case before it to be «*manifestly deficient*».[8] Hence, the practice of the Strasbourg Court on the European Arrest Warrant always remained comparably scarce, presumably demonstrating the lack of intention to undermine the interpretative authority of the Court of Justice of the European Union (Luxembourg Court, CJEU). Since the first attempts to approach the EAWFD, the Strasbourg Court preferred to find the applications inadmissible (*Monedero Angora*,[9] *Stapleton*,[10] *Pianese*).[11] The new challenges for the development of the judicial dialogue between the two European Courts in the «*mutual trust*» area were brought by the CJEU's *Opinion 2/13 precluding the EU from the accession to the European Convention*[12] – with the corresponding developments in the ECtHR's *Bosphorus* doctrine (*Avotins*).[13] The *Avotins* case demonstrated the «*viability*» of the *presumption of equivalent protection* and the Strasbourg Court's intention to retain a very high threshold for the rebuttal.[14] In light of the active development of the CJEU's case-law on the EAW Framework Decision with the strong Charter of Fundamental Rights of the European Union component

8 ECtHR Judgement of 30 June 2005, Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* application no. 45036/98, hudoc.int. In this sense, see for example Tawhida Ahmed, "The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?," in *Adjudicating International Human Rights Essays in Honour of Sandy Ghandhi,* ed. James Green and Christopher Waters (Leiden: Brill Nijhoff, 2014), 99–118; Paul Gragl, "An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to *Opinion 2/13* in the Avotins Case: ECtHR 23 May 2016, Case No. 17502/07, Avotins v. Latvia," *European Constitutional Law Review* 13, no. 3 (2017): 551–567.

9 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int.

10 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int.

11 ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

12 CJEU Opinion of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case Opinion 2/13 *(Opinion 2/13)*, ECLI:EU:C:2014:2454.

13 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int.

14 Giacomo Biagioni, "Avotins v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights," *European Papers* 1, no. 2 (2016): 584–585.

(*Aranyosi*/*Caldararu*),[15] this statement gave rise to discussion on the further limitation of the scope of the Strasbourg Court's review in this area,[16] and enhancing the risk of competition with the CJEU exercising its jurisdiction in the form of preliminary rulings.[17]

The aim of this paper is to shed light on the way these premises influenced the development of the Strasbourg Court's jurisprudence with the European Arrest Warrant element, given the spirit and premises of the European Convention Preamble. The main argument presented is that the newly developing ECtHR case-law on the EAWFD (*Castano,*[18]

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15 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198. In this sense, see for example Szilárd Gáspár-Szilágyi, "Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant," *European Journal of Crime, Criminal Law and Criminal Justice 24*, no. 2 (2016): 197–219; Koen Bovend'Eerdt, "The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?," *Utrecht Journal of International and European Law* 32, no. 83 (2016):112–121; Fisnik Korenica and Doli Dren, "No more unconditional 'mutual trust' between the Member States: an analysis of the landmark decision of the CJEU in *Aranyosi* and *Caldararu*," *European Human Rights Law Review* 5 (2016): 542–555; Grainne de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?," *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 168–170; Niilo Jaaskinen, "The Place of the EU Charter within the Tradition of Fundamental and Human Rights," in *Fundamental Rights in the EU: A Matter for Two Courts*, ed. Sonia *Morano-Foadi* and Lucy *Vickers* (Oxford: Hart Publishing, 2015), 12.

16 Martin Kuijer, "The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession," *The International Journal of Human Rights* 24, no. 7 (2020): 1001–1003.

17 Noreen O'Meara, "Lisbon, via Stockholm, Strasbourg and Opinion 2/13: Prospects for citizen-centred protection of fundamental rights?," in *The Human Face of the European Union: Are EU Law and Policy Humane Enough?,* ed. *Nuno Ferreira* and Dora *Kostakopoulou* (Cambridge: Cambridge University Press, 2016), 75–80; Jannika Jahn, "Normative Guidance from Strasbourg Through Advisory Opinions: Deprivation or Relocation of the Convention's Core?," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74, no. 4 (2014):826, 844; Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford: Oxford University Press, 2016) 325–326.

18 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

Bivolaru/Moldovan)[19] could potentially mark a new step in the judicial dialogue between two European Courts. In the *Romeo Castano* ruling (9 July 2019), the ECtHR – for the first time – found unanimously that Belgium had breached its obligations under Art. 2 ECHR («*right to life*», procedural limb). The *Bivolaru/Moldovan* judgment continued and nuanced the *Castano* approach, which allowed a violation of Art. 3 («*Prohibition of torture*») of the European Convention within the European Arrest Warrant context. By adopting this approach, the European Court of Human Rights developed a doctrine of positive obligations – proposing an interpretation of Arts. 2 and 3 ECHR which is binding for the European Union Convention signatories due to the *res interpretata* legal force of the ECtHR´s judgments,[20] hence potentially limiting their discretion in the European Arrest Warrant matters and questioning the rationales of the *subsidiarity* principle incorporation in the amended Convention Preamble (Protocol No. 15).

To illustrate these developments, the earlier Strasbourg case-law the European Arrest Warrant is analysed in view of its origins, namely the strong impact of the *Soering* jurisprudence. This paper then probes the reasoning adopted by the European Court of Human Rights in the *Castano*. The concluding part of the paper contains the author's final remarks on the deriving challenges for the legal systems of the (non-) EU Convention signatories. The author does not, in this paper, pretend to investigate fully the simultaneously developing body of CJEU with the European Arrest Warrant component, but rather focuses on the possible impact of the EAW Framework Decision and pertinent CJEU practice on the ECtHR's «*subsidiarity*» and «*margin of appreciation*» doctrines – to demonstrate if and how this EU Law instrument may be reflected within the future jurisprudence of the Strasbourg Court.

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19 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int.

20 In this sense, see for example Oddný Mjöll Arnardóttir, "Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights," *The European Journal of International Law* 28, no. 3 (2017): 819–843.

2. The Strasbourg Court vs. EAW before Castano: a 'non-interference' strategy?

Since the CJEU's judgment in *Cassis de Dijon*, mutual recognition in the European Union has been described as the «*core*» of the CJEU's strategy of achieving market integration.[21] This principle later served as a basis to achieve the recognition and enforcement of judicial decisions by the authorities of different EU Member States, hence contributing significantly to the procedural unification in Europe. Mutual recognition is based on the principle of mutual trust,[22] stemming from the assumption that all EU Member States keep an equal level of common values, based on their communal culture of rights, but more importantly in the *protection thereof by the European Convention of Human Rights*.[23]

Reflecting the premises brought by the Amsterdam/Nice Treaty Preambles, namely the intention to facilitate the free movement of people, *by establishing an area of freedom, security and justice,* the European Arrest Warrant Framework Decision was adopted on 13 June 2002, and entered into force on 1 January 2004 after the transposition into national law.[24] Art. 1(3) (sometimes referred to as the «*European ordre public*» clause),[25] read together with Recs. 12 and 13 of the EAW FD Preamble, clarify that Human Rights – as guaranteed by Art. 6 TEU and by the EU Charter of Fundamental Rights – should be respected in course of the EAW execution. However, the «*pro-free movement*» objectives of the Framework Decision

21 Julian Ghosh, "Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition," *Cambridge Yearbook of European Legal Studies* 16 (2014): 190.

22 Valsamis Mitsilegas, "The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice," *New Journal of European Criminal Law* 4 (2015): 457.

23 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001), OJ C12/10.

24 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA (2002), OJ L 81.

25 Martin Bose, "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant," in *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty,* ed. Stefano Ruggeri (Heidelberg: Springer, 2015), 144.

become evident from Rec. 10 of the EAW FD Preamble which states that the European Arrest Warrant mechanism is based on a *high level of confidence* between the EU Member States, stemming from the «*mutual trust*» in each other's compliance with common international obligations.[26] For these reasons, the compulsory/optional refusal grounds are limited to those listed in Arts. 3, 4 and 4(a) of the Framework Decision; these provisions do not contain any provision on non-execution on the basis of a breach of the requested EU Individual's Human Rights in the issuing EU Member State (except for *in absentia* trials).[27]

In light of these considerations, it comes as no surprise that the CJEU´s EAW case-law with the Human Rights component remained rather scarce for quite a while after the Framework Decision adoption due to the lack of political will to invade into this sensitive area – closely intertwined with the application of national Criminal Law.[28] In the seminal *Advocaten voor de Wereld* case, the CJEU prominently confirmed the validity of the instrument in light of the principles of legality and non-discrimination. The judges stated that the European Arrest Warrant system did not seek to harmonise the criminal offences in question, hence aiming at preventing the double criminality check by its nature. Hence, only the law of the Warrant issuing EU Member State shall be taken into account while defining the offences and penalties in course of the Warrant execution.[29]

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26 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001), OJ C12/10.

27 The mandatory grounds for non-execution comprise amnesty, *ne bis in idem*, not reaching the age of criminal responsibility (Art. 3), while the grounds for optional non-execution are the lack of double criminality, prosecution pending in the executing Member State, prosecution for the same offence precluded in the executing Member State, prosecution or punishment statute-barred, final judgment in a third State, the executing Member State undertakes the execution of the sentence, extraterritoriality (Art. 4), or *in absentia* trials (Art. 4a).

28 In this sense, see for example Samuli Miettinen, *Criminal Law and Policy in the European Union* (London: Routledge, 2013), 145–147; Ton Van den Brink, "The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations," *Cambridge Yearbook of European Legal Studies* 19 (2017): 212–215.

29 CJEU Judgment of 3 May 2007, *Advocaten voor de Wereld VZW. v. Leden van de Ministerraad*, Case C-303/ 05, ECLI:EU:C:2007:261, paras. 45–61.

Even though the *Advocaten voor de Wereld* statement fuelled the discussion on the potential inconsistency of this approach with the ECHR guarantees,[30] the Strasbourg Court seems to have «*mirrored*» the Luxembourg jurisprudence, finding the first EAW-related applications inadmissible – and hence avoiding a direct scrutiny of the EAW Framework Decision provisions, or the related national practices.[31] It could be seen as a predictable manoeuvre, considering the development of the *presumption of equivalent protection* (or the «*Bosphorus*» doctrine), which *de facto* guaranteed the CJEU's independence from the Strasbourg system interferences. In accordance with this doctrine, if the EU Member State has had no margin of discretion in the implementation of the EU Law provision in question, a rebuttable presumption of equivalent protection applies, allowing the ECtHR to exercise full judicial review *only* if the protection under European Law has proved to be «*manifestly deficient*» in the individual case.[32]

Another reason for this choice could be the proportionality test developed in the famous *Soering* judgment. In this case, the ECtHR ruled that, firstly, the extradition could in principle violate Art. 3 («*Prohibition of torture*»), and, secondly, Art. 6 («*Right to a fair trial*») of the European Convention – if the requested person «*has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*».[33] By linking Human Rights and extradition – in particular by the «*flagrant denial of justice*» test – the ECtHR has *de facto* created a possibility for the assessment of

30 In this sense, see for instance Libor Klimek, *European Arrest Warrant* (Heidelberg: Springer 2014), 59; Andrew Sanger, "Force of Circumstance: The European Arrest Warrant and Human Rights," *Democracy and Security 6*, no. 1 (2010): 43; Nina Marlene Schallmoser, "The European Arrest Warrant and Fundamental: Risks of Violation of Fundamental Rights through the EU Framework Decision in Light of the ECHR," *European Journal of Crime, Criminal Law and Criminal Justice* 22, no. 2 (2014): 143–145.

31 In this sense, see for example ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int; ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int; ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

32 ECtHR Judgement of 30 June 2005, Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* application no. 45036/98, hudoc.int, paras. 150–156.

33 ECtHR Judgement of *07 July 1989*, Case *Soering v. The United Kingdom,* application no. *14038/88,* hudoc.int, para 113.

the (potential) violation which could take place *outside* the jurisdiction of the state processing the extradition request (i.e. in the territory of the requesting state)[34] – a premise which could be considered rather problematic within the «*pro-free movement*» European Arrest Warrant context.

For instance, the ECtHR has had the first occasion to examine a complaint relating to the EAW Framework Decision in *Monedero Angora v. Spain*. In this case, the Court was asked to rule on the European Arrest Warrant issued by the French judicial authorities against Monedero Angora, a Spanish national, for executing a custodial sentence (five years' imprisonment) for a drug-related offence. Firstly, the applicant relied on Art. 5 of the Convention, claiming that he had been deprived of his liberty during the procedure for surrendering him under the European Arrest Warrant. Secondly, he alleged a violation of the principle of legality (Art. 7), as well as one of the presumption of innocence and of his right to a fair trial before an independent and impartial court within a reasonable time (Art. 6 ECHR).[35] In the eyes of the ECtHR judges, the substance of the EAW Framework decision could be considered similar to one of the extradition treaties: the European Arrest Warrant serves the same purpose, having no impact on individual criminal liability, but is designed to facilitate the execution of a decision taken in respect of the convicted person.

It was underlined that – just like the extradition – the implementation of the EAW Framework decision «*does not concern the determination of a criminal charge*» and «*the surrender of the applicant to the [competent] authorities [is] not a penalty inflicted on him for committing an offence, but a procedure intended to permit the execution of a judgment*».[36] In light of these considerations, the application of Mr. Monedero Angora was declared inadmissible *ratione materiae* (Art. 35 ECHR), because the procedure did not concern the determination of a criminal charge within the meaning of national law provisions (Arts. 6–7 ECHR), also mentioning that Art. 5

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34 Battjes Hemme, "The Soering Threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law," *European Journal of Migration and Law* 11, no. 3 (2009): 205–207.

35 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int, Section A '*The circumstances of the case*'.

36 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int, Section B '*Relevant domestic law*'.

(«*Right to liberty and security*») would not necessarily apply to a related hearing in the executing State. Hence, it could be stated that the ECtHR has carefully avoided discussion on the «*flagrant denial of justice*» test application within this context, mentioning that the execution of the European Arrest Warrant is practically automatic, with the executing authority not engaging in a new examination of the Warrant to verify its conformity with its own national law.[37]

It could be submitted here that the EAW jurisprudence of both European Courts shall be seen in light of evolving legal context. Mirroring an intention «*to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union*» in its Preamble,[38] the Treaty of Lisbon became one of the milestones in the history of the AFSJ development. The amended text – with its two complementary achievements of a legally binding character of the Charter of Fundamental Rights of the European Union (and in particular Arts. 47–50 CFREU) and a commitment by the EU to accede to the European Convention – had an immediate impact on the CJEU's perception of the ECHR procedural rights, resulting *in a significant decrease* in the number of CJEU references to the European Convention corresponding provisions.[39]

Besides that, the implementation of the EAW Framework Decision proved to be not as simple as expected, due to the intention of some of the EU Member States to insert additional grounds for the Warrant refusal in national legislation, and the need to coordinate the application of the corresponding Human Rights provisions of the national Constitutions,

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37 Siofra O'Leary, "Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU," *Irish Jurist* 56 (2016): 35.

38 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), *OJ C 306*.

39 In this sense, see for instance Sionaidh Douglas-Scott, "The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon," in *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, ed. Sybe *de Vries*, Ulf *Bernitz*, Stephen *Weatherill* (London: Hart Publishing, 2015), 42; Fisnik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Heidelberg: Springer, 2015), 63; Grainne de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" *Maastricht Journal of European and Comparative Law* 20, no.2 (2013): 169.

CFREU and the ECHR within this specific context.[40] The cumulation of these factors has led to an increasing number of individual applications to the Strasbourg Court, as all EU Member States were simultaneously Convention signatories.[41] This made the post-Lisbon wave of the ECtHR´s EAW-related jurisprudence surprisingly profound, and fuelled a discussion on the need to reconsider the previously established *Monedero Angora* «*exclusionary*» approach.[42]

In the subsequent *Stapleton* case the application concerning the European Arrest Warrant surrender following fraud charges was considered inadmissible (Arts. 5, 6, 8 and Art. 2 of Protocol No. 4 to the Convention).[43] The reasoning of the decision however is quite different from the one chosen in *Monedero Angora*: the Court preferred to make a sharp distinction between the European Convention signatories and third states. It was emphasised that the compliance with Art. 6 ECHR in the United Kingdom (as an ECHR signatory and not a third state) is already partly guaranteed by the Convention transposition of the Human Rights Act.[44] So, the executing state shall not go beyond the *Soering* «*flagrant denial*» requirement, moving into the deeper analysis of an unfairness in the criminal proceedings in

40 In this sense, see for example Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (London: Hart Publishing, 2016), 154; Jacob Öberg, "Legal Diversity, Subsidiarity and Harmonization of EU Regulatory Criminal Law," in *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice,* ed. Renaud Colson, Stewart Field (Cambridge: Cambridge University Press, 2016), 119; Martin Bose, "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant," in *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, ed. Stefano Ruggeri (Heidelberg: Springer, 2015), 144.

41 Lorena Bachmaier Winter, "New Developments in EU Law in the Field of *In Absentia* National Proceedings. The Directive 2016/343/EU in the Light of the ECtHR Case Law," 641–667 or Stefano Ruggeri, "Participatory Rights in Criminal Proceedings. A Comparative-Law Analysis from a Human Rights Perspective," 671–742 in *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, ed. Serena Quattrocolo, Stefano Ruggeri (Heidelberg: Springer, 2019).

42 O'Leary, "Courts," 35–38.

43 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int*, paras. 1–16.*

44 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int*,* paras. 21–33.

the EAW issuing state.[45] The subsequent *Mann* admissibility decision allows for the applicability of the «*flagrant denial of justice*» test in case of the EAW surrender between the EU-ECHR signatories (Arts. 5, 6, 13 ECHR) in a similar manner.[46] An attempt was also made by the applicant to transpose the *Soering* approach to the Art. 5 («*Right to liberty and security*») interpretation in *Pianese* – the application was however considered inadmissible as well – being out of time and manifestly ill-founded.[47]

The issue of the *detention conditions* in course of the EAW execution was discussed in *Ciobanu* – leading to finding the violation of Arts. 3 and 5 ECHR within this context, even though the Strasbourg Court preferred to skip the extradition issue, focusing on the Art. 3 ECHR *´severity´* threshold.[48] The *Ignaoua* case was related to the return of Tunisians to Italy under the European Arrest Warrant where they would be at risk of being returned to Tunisia: the ECtHR skipped the analysis of Arts. 3 and 13 within this context, having stated that «*the mutual trust and confidence underpinning measures of police and judicial cooperation among EU Member States*» in itself supports «*the Court's own general assumption*» that the EU-ECHR signatories already respect their international law obligations, including ones stemming from the European Convention.[49] In *E.B.*, the claimant tried to invoke Art. 8 ECHR («*Right to respect for private and family life*») as a ground for the refusal to execute the Warrant issued against a Polish citizen residing in the United Kingdom – as she was a mother of five children, four of whom were minors. However, since the case evidence demonstrated that the minors were subject to a care order by the local authorities for reasons unrelated to the EAW execution,

45 Vincent Glerum, Klaas Rozemond and Elies van Sliedregt, "Lessons of the European Arrest Warrant," in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenge*, ed. Larissa van den *Herik* and Nico *Schrijver* (Cambridge: Cambridge University Press, 2013), 205–206.

46 ECtHR Decision on the admissibility of *1 February 2011*, Case *Mann v. United Kingdom* and *Portugal*, application no. *360/10*, hudoc.int.

47 ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

48 ECtHR Judgment of 9 July 2013, Case *Ciobanu v. Romania and Italy,* application no. 4509/08, hudoc.int.

49 ECtHR Decision on the admissibility of 18 March 2014, Case *Habib Ignaoua and Others v United Kingdom*, application no. 46706/08, hudoc.int.

and that the eldest child was independent, the application was considered manifestly unfounded and discontinued.[50]

Finally, the *Gray* case concerned the scope of the positive obligation to investigate the medical negligence of a German doctor that resulted in the death of a patient in the United Kingdom – followed by the European Arrest Warrant proceedings initiated by the UK courts. The family of the deceased (two British nationals) complained, under the substantive aspect of Art. 2 ECHR («*Right to life*»), the shortcomings in the British healthcare system had led to their father's death, and the investigations conducted both in the United Kingdom and in Germany had not complied with the procedural requirements inherent in Art. 2 («*an obligation to investigate*») of the Convention.[51] The Strasbourg Court rejected the complaint relating to Art. 2 ECHR, while – *de facto* – incidentally (1) recognising the existence of extraterritorial Human Rights obligations[52] and (2) shifting the issue of participation in criminal proceedings to individuals other than the accused (such as the family members) within this specific context.[53]

3. Romeo Castano: questioning the spirit of the amended ECHR Preamble?

Simultaneously, the so-called «*Interlaken process*» was initiated within the Strasbourg system of Human Rights protection, in order to address the issue of the growing number of individual applications to the European Court of Human Rights,[54] which – as mentioned above – originated from the cases appearing in the EU «*mutual trust*» area as well. The subsidiarity concept was seen as one of the key tools to address these challenges,

50 ECtHR Decision on the admissibility of 20 May 2014, Case *E.B. v UK,* application no. 63019/10, hudoc.int.

51 ECtHR Judgment of 22 May 2014, Case *Gray v Germany,* application no. 49278/09, hudoc.int.

52 Ibrahim Kanalan, "Extraterritorial State Obligations Beyond the Concept of Jurisdiction," *German Law Journal* 19, no. 1 (2018): 44, 47.

53 Stefano Ruggeri, "*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU: Responses of the European Courts and New Perspectives of EU Law," *The European Criminal Law Associations Forum* 1 (2016): 49.

54 Marija Pejčinović Burić, *The Interlaken process: measures taken from 2010 to 2019 to secure the effective implementation of the European Convention on Human Rights* (Strasbourg: *Council of Europe Publishing,* 2020), 22–23.

as the structural and systemic issues appearing in the CoE´s national legal systems required the proper and well-balanced allocation of the tasks between the national and international institutions.[55] The ongoing reform of the Strasbourg Court was hence likely to mark a new step in the development of the judicial dialogue between two European Courts, and culminated in the adoption of Protocols No. 15 (*incorporating the principle of subsidiarity into the Convention Preamble*) and 16 (*allowing national courts to ask advisory opinions to the Strasbourg Court*).[56] The particularly sensitive nature of the changes brought by Protocol No. 15 ECHR caused significant delay with its entry into force.[57] On 21 April 2021, Italy – as the last State Party – finally deposited its instrument of ratification, thereby bringing Protocol No. 15 ECHR into force for all Council of Europe Member States with effect from 1 August 2021.[58]

At the same time, the Strasbourg Court´s perception of the European Arrest Warrant shall presumably be seen in light of the parallel developments in the Luxembourg Court´s jurisprudence. The delivery of *Opinion 2/13* precluding the EU from accession to the European Convention has reopened the debate on «*mutual trust*» within the context of the EAW enforcement.[59] The CJEU described the principle of mutual trust as the EU´s «*raison d'être*» and suggested that the EU Member States were obliged to safeguard the effectiveness of the EAW Framework Decision, even at

55 Andreas Follesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law," *Global Constitutionalism* 2 (2013): 62.

56 In this sense, see for example David Milner, "Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road," *Zeitschrift für europarechtliche Studien* 17, no. 1 (2014): 19–51.

57 Stefania Ardito, "Protocollo n. 15 alla Convenzione europea dei diritti dell'uomo," Unionedirittiumani, accessed September 20, 2021, https://www.unionedirittiumani.it/protocollo-n-15-alla-convenzione-europea-dei-diritti-delluomo.

58 Chart of signatures and ratifications of Treaty 213, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, accessed September 20, 2021, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=ckgLoEXn.

59 Eduardo Gill-Pedro and Xavier Groussot, "The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?," *Nordic Journal of Human Rights* 35, no. 3 (2017): 260.

the cost of protecting Fundamental Rights.[60] As this strong statement – predictably – attracted a lot of critique in academia and among practitioners, the CJEU was forced to respond to the concerns revolving around the Fundamental Rights-related grounds for non-execution of the European Arrest Warrant[61] in the joined cases of *Aranyosi and Caldararu*[62] – rather soon after the CJEU *Opinion 2/13* release. In this judgment, the CJEU ruled that the mutual trust principle may be – in principle – reviewable both when executing the Warrant for prosecution or custodial sentence purposes and, as a result, an execution of an EAW may be postponed/abandoned in an exceptional case – thus recognising that the «*mutual trust (in the EU) must not be confused with blind trust*».[63]

In both cases, the CJEU was asked to clarify whether the national judicial authority may or shall refuse *tout court* execution where there is solid evidence that detention conditions in the issuing EU Member State are incompatible with fundamental rights, in particular with Art. 4 («*prohibition of inhuman or degrading treatment*») in conjunction with Arts. 6 («*right to liberty and security*») and 48 («*presumption of innocence and rights of defence*») CFREU. The CJEU heavily relied on the abovementioned EU Charter provisions to conclude that if an *executing* judicial authority has evidence which demonstrates that there is a *real risk* that detention conditions

60 CJEU Opinion of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case Opinion 2/13 *(Opinion 2/13)*, ECLI:EU:C:2014:2454, paras. 166–172, 191–195.

61 In this sense, see for example Alex Tinsley, "The Reference in Case C-396/11 *Radu:* When does the Protection of Fundamental Rights Require Non-execution of a European Arrest Warrant?," *European Criminal Law Review* 2 (2012): 338– 352; Emily Smith, "Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security," *New Journal of European Criminal Law* 1 (2013): 82–98; Tomasz Ostropolski, "The CJEU as Defender of Mutual Trust," *New Journal of European Criminal Law* 2 (2015): 166–178.

62 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

63 Koen Lenaerts, "The Principle of Mutual Recognition in the EU's Area of Freedom, Security and Justice: The fourth annual lecture in honour of Sir Jeremy Lever, 30 January 2015," accessed September 20, 2021, https://www.law.ox.ac.uk/news/2015–02–18-principle-mutual-recognition-eus-area-freedom-security-and-justice-judge-lenaerts, 29.

in the *issuing* Member State infringe Art. 4 of the Charter, the *executing* judicial authority must assess that risk using a two-stage test.[64]

Firstly, the executing judicial authority must assess whether *general* detention circumstances in the issuing Member State constitute a real risk of an Art. 4 CFREU violation;[65] such an assessment in itself is not sufficient to render surrender impermissible.[66] Several sources can be used, *such as the decisions of the ECtHR*, the decisions of courts of the issuing Member State or *reports drawn up by the organs of the Council of Europe* or the UN.[67] *Secondly*, the executing judicial authority judges whether there are substantial grounds for believing that *the requested person in question* will be subjected to a real risk of Art. 4 CFREU violations.[68] If, after its two-stage assessment, the executing judicial authority finds that there is *a real risk* of an Art. 4 CFREU violation for the requested person once surrendered, the executing judicial authority is in principle enabled to decide whether or not to postpone/terminate the EAW procedure.[69]

It could be said that the *Aranyosi and Căldăraru* judgment is one of «*reconciliation*» between various competing values and interests as well as a step towards thawing the relationship between the CJEU and the ECtHR, following *Opinion 2/13,* however aimed at strengthening the EU Charter position within the EU legal order architecture. The judgment presumably

64 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 88.

65 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 89.

66 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 91, 93.

67 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 88–89.

68 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 92.

69 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 104.

revealed the intention of the CJEU to bring its case-law on Art. 4 of the EU Charter in line with the ECtHR's jurisprudence on Art. 3 ECHR in accordance with Art. 52(3) of the Charter. It could be stated however that the EU Court of Justice also nuanced the meaning of *mutual trust* on the basis of Arts. 4, 6 and 48 CFREU, as it had done before in EU Asylum Law (*N.S.* line of reasoning)[70] and opted for an *alternative* interpretation in which Fundamental Rights violations (can) constitute an exception to this trust.[71]

Moreover, the parallel response to *Opinion 2/13* «*mutual trust*» concerns was given by the European Court of Human Rights in the *Avotins* case – which originated in an application by a Latvian national complaining about the violation of Art. 6 of the European Convention on Human Which, allegedly occurred in the course of proceedings for the declaration of enforceability of a Cypriot judicial decision before Latvian courts.[72] The *Avotins* judgment reiterated the *Bosphorus* orthodoxy, mentioning that the two criteria shall still be considered for the possibility of the Strasbourg intervention: (1) the «*absence of any margin of manoeuvre*» on the part of the domestic authorities implementing the EU Law obligation, and (2) the «*deployment of the full potential of the supervisory mechanism*» provided for under EU Law.[73] While reaffirming its commitment to the needs of European cooperation, the European Court of Human Rights expressed its general concern about the compatibility of mutual recognition mechanisms established under EU Law with the European Convention, insofar as they are to be «*applied automatically and mechanically*».[74]

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70 CJEU Judgment of 21 December 2011, *N. S. v. Secretary of State for the Home Department. and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

71 In this sense, see for example Fisnik Korenica and Doli Dren, "No more unconditional 'mutual trust' between the Member States: an analysis of the landmark decision of the CJEU in *Aranyosi* and *Caldararu*," *European Human Rights Law Review* 5 (2016): 542; Koen Bovend'Eerdt, "The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?," *Utrecht Journal of International and European Law* 32, no. 83 (2016): 112.

72 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int.

73 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 105.

74 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 116.

However, the specific circumstances – and in particular the applicant's inactivity – defined the conclusion that the protection of Human Rights by the Latvian judges *was not manifestly incomplete*.[75] Consequently, the *Bosphorus* presumption was not rebutted and, therefore, no violation of Art. 6 ECHR was established against the defendant State.[76] This statement – presumably – reflects the spirit of the ECHR Preamble as amended by Protocol No. 15 text, limiting the scope of the Strasbourg Court's review in respect to the EU Member States ('*subsidiarity*'). This may be justified since the EU ensures, independently, at the judicial level, the protection of the rights guaranteed by the ECHR; in general, it is reasonable to assume that fundamental rights, including the right to a fair trial guaranteed by Art. 6 of the European Convention within the EU-specific «*mutual trust*» legal context, are respected.[77]

It could be submitted that these premises created a background for the Strasbourg Court´s intervention in the most sensitive area indicated by *Opinion 2/13* and the «*cornerstone*» of the EU's judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision. In *Pirozzi,* the claimant raised an issue of the standard of protection to be afforded by Art. 6 ECHR in course of the EAW execution in case of the *in absentia* trials.[78] The Strasbourg Court took this opportunity to respond to the concerns expressed by *Opinion 2/13,* and – at least partly – to the questions raised by the post-*Monedero Angora* case-law *(*such as *Stapleton, Mann* or *Pianese),* by developing further the proportionality test for assessing violations within this context. The *Pirozzi* case concerned the applicant's detention by the Belgian authorities and his surrender to

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75 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, paras. 124–125.

76 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, paras. 126–127.

77 In this sense, see for example Dissenting Opinion of Judge Andras Sajò, ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 7: *´It is indeed reasonable to assume that where States transfer their sovereignty to an international organisation that recognises the fundamental rights of the Convention. As provided for in the directly applicable Charter of Fundamental Rights (Art. 52(3)), the rights will be protected´*.

78 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int.

the Italian authorities under a European Arrest Warrant with a view to enforcing a conviction for drug-related crimes.[79]

The applicant complained that the Belgian authorities had failed to review the EAW legality, although it had been based on a conviction resulting from a trial during which he had not been present, even though being notified properly of the trial in question, and his position was represented by defence counsel. The Strasbourg Court recognised that arrest for the purposes of extradition, such as the EAW proceedings, is in principle covered by Art. 5,[80] the judges seemed to have given weight to the abovementioned arguments, hence finding no violation of Arts. 5 and 6 of the European Convention.[81] Having referred to the *Soering* lines of reasoning, the ECtHR has also held that the surrender of the plaintiff under the case facts cannot be considered a «*flagrant denial of justice*» – and the EAW execution by the Belgian courts had not been manifestly deficient – at least within the meaning of the *Bosphorus* presumption of equivalent protection.[82] In so doing, the Court has confirmed that – in principle – the domestic courts are enabled to review the risk of Fundamental Rights violations in the requesting State in course of the EAW Framework Decision implementation.[83]

Finally, in the prominent *Castaño* case,[84] the Strasbourg Court was requested to check compliance of the refusal to enforce a European Arrest Warrant with the procedural obligations stemming from Arts. 2 («*Right to life*») and 6 («*Right* to a *fair trial*») ECHR. The application originated

79 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, paras. 1–23.

80 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, para. 45.

81 Jan Wouters, Michal Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford: Oxford University Press, 2021), 264.

82 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, paras. 57–72.

83 In this sense, see for instance Johan Callewaert, "Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences," *Common Market Law Review* 55, no. 6 (2018): 1705 or Florentino-Gregorio Ruiz Yamuza, "LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner," *ERA Forum* 20 (2020): 388–392.

84 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

in the Belgian authorities' refusal to execute a European Arrest Warrant issued by Spain for the purposes of prosecution of a Spanish national who was residing in Belgium. The applicants - Spanish nationals residing in Spain – complained that their right to an effective investigation under Art. 2 ECHR («*Right to life*») had been breached as a result of the Belgian authorities' refusal to execute the European Arrest Warrants issued by Spain in 2004 and 2005 in respect of an individual (referred to in the judgment as 'N.J.E.') suspected of shooting their father in 1981 by a commando unit claiming to belong to the terrorist organisation ETA (or «*Euskadi Ta Askatasuna*», a Basque separatist group).

Moreover, relying on Art. 6 of the Convention, the applicants also see in this situation a problem of access to the Belgian courts. All other members of the commando unit were already sentenced in Spain in 2007, while N.J.E. had fled to Mexico and then moved to Belgium. Referring to a report by the European Committee for the Prevention of Torture (CPT) concerning the latter's periodic visit to Spain, the Belgian courts refused the surrender as there were serious grounds for believing that the execution of the European Arrest Warrant would have the effect of infringing the applicant´s Fundamental Rights under Art. 6 TEU, presumably amounting to the breach of Art. 3 («*The prohibition of torture*») ECHR.[85]

The Strasbourg Court prominently preferred to discuss the case facts from the perspective of Art. 2 («*Right to life*»), namely that the Belgian authorities' refusal to execute the EAW made impossible the prosecution of their father's alleged murderer.[86] It was suggested to consider *Castano* in light of the recent *Güzelyurtlu* judgment concerning criminal investigations with a transnational dimension, entailing an obligation on States to cooperate effectively.[87] The factors which arguably convinced the judges to choose this strategy could be the similarities in the factual

[85] ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 1–22.

[86] Mattia Pinto, "Romeo Castaño: ‹meticulously elaborated interpretations› for the sake of prosecution," Strasbourgobservers, accessed September 20, 2021, https://strasbourgobservers.com/2019/09/10/romeo-castano-meticulously-elaborated-interpretations-for-the-sake-of-prosecution.

[87] ECtHR Judgement of 29 January 2019, Case *Güzelyurtlu and others v. Cyprus and Turkey,* application no. 36925/07, hudoc.int, paras. 232–233.

circumstances of these cases: in *Güzelyurtlu,* the applicants were the relatives of the deceased victims, who complained that both the Cypriot and Turkish authorities have failed to co-operate and conduct an effective investigation into the killing of their family members.[88] Moreover, the ECtHR could be willing to avoid the discussion on the potential applicability of the *Soering*/*Bosphorus* formulae within the European Arrest Warrant context (which seemed possible in light of the *Avotins*/*Pirozzi* outcomes).

The reasoning of the *Castano* judgment hence presents a special interest: basing itself on *Güzelyurtlu*, the Court developed its case-law on the scope of a State's procedural obligation to cooperate with another State investigating a crime committed within the latter's jurisdiction – within the context of the European Arrest Warrant enforcement.[89] At the same time, the Court *de facto* transposed the *Aranayosi*/*Caldararu* benchmarks developed in the EU's legal order – which can be considered a further step towards a symmetry between the interpretation of the EU Charter and the ECHR rights.[90] The Strasbourg judges emphasised that *Castano* continues to follow not only the *Güzelyurtlu* but the *Pirozzi* line of reasoning as well – which however shall be interpreted in light of the parallel developments in EU Law, and in particular the CJEU´s jurisprudence. Direct reference was made to the *Aranayosi*/*Caldararu* judgment in the «*Relevant Domestic Law And Practice*» section, in order to shed light on the assessment test which the executing EU Member State had to undertake where it had evidence pointing to systemic or generalised deficiencies with regard to the conditions of detention in prisons in the EAW issuing State, in light of Art. 4 CFREU («*Prohibition of torture and inhuman or degrading treatment or punishment*») – as interpreted by the EU Court of Justice.[91] Even

88 ECtHR Judgement of 29 January 2019, Case *Güzelyurtlu and others v. Cyprus and Turkey,* application no. 36925/07, hudoc.int, paras. 10–136.

89 Matteo Zamboni, "Romeo Castaño v Belgium and the Duty to Cooperate under the ECHR," Ejiltalk, accessed September 20, 2021, https://www.ejiltalk.org/romeo-castano-v-belgium-and-the-duty-to-cooperate-under-the-echr.

90 Eva Neumann, "Europäische Einigkeit in Action: Menschenwürde im Strafvollzug: EuGH konkretisiert Mindestanforderungen für Haftbedingungen im Kontext des Europäischen Haftbefehls," Voelkerrechtsblog, accessed September 20, 2021, https://voelkerrechtsblog.org/de/europaische-einigkeit-in-action-menschenwurde-im-strafvollzug.

91 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 23–24.

though the children of Colonel Romeo focused primarily on the violations of the right to a fair trial in their application (Art. 6), the Strasbourg Court prominently switched the focus on the infringement of Art. 2 («*The right to life*») of the European Convention.[92]

Importantly, the judges made a statement concerning the *ratione loci* objection raised by the Belgian Government: a *jurisdictional link* with Belgium was established, due to «*the context of the mutual undertakings given by the two States in the sphere of cooperation in criminal matters, in this instance under the European arrest warrant scheme… the Belgian authorities were subsequently informed of the Spanish authorities' intention to institute criminal proceedings against N.J.E., and were requested to arrest and surrender her*».[93] In view of these considerations, the Strasbourg Court proposed to apply the *two-stage proportionality test* in order to assess if the Belgian authorities responded properly to the Spanish request for the surrender on the basis of the EAW Framework Decision, and whether the refusal to cooperate could be considered legitimate.[94] It will be submitted that the judges – predictably – made all effort to avoid possible conflict and the clash of jurisdictions with the EU Court of Justice, referring to the *Aranyosi/Căldăraru* criteria of the assessment for the legality of the EAW refusals.[95]

Considering these criteria, the Strasbourg judges assessed if the refusal of the Belgian authorities to extradite N.J.E. was compatible with obligations

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92 Erin Lovall, "European Court of Human Rights Released Judgment in Romeo Castaño v. Belgium Case Holding Belgium Failed to Uphold Obligations Under Article 2 of the European Convention on Human Rights," ASIL, accessed September 20, 2021, https://www.asil.org/ILIB/european-court-human-rights-released-judgment-romeo-casta%C3%B1o-v-belgium-case-holding-belgium.

93 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 41. In this sense, see for example Hélène Tigroudja, "Procedural Developments at International Human Rights Courts and Bodies," *The Law & Practice of International Courts and Tribunals* 19, no. 2 (2020): 326.

94 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

95 In this sense, see for instance Luc von Danwitz, "In Rights We Trust: The ECtHR's judgment in Romeo Castaño v. Belgium and the relationship between the ECHR and the principle of mutual trust in EU law," Verfassungsblog, accessed 20 September, 2021, https://verfassungsblog.de/in-rights-we-trust; Callewaert, Johan, "Judgment of the ECHR in Romeo Castaño v. Belgium," Johan Callewaert, accessed September 20, 2021, https://johan-callewaert.eu/de/judgment-of-the-echr-in-romeo-castano-v-belgium.

stemming from the procedural limb of Art. 2 of the European Convention. Firstly, the ECtHR examined whether the European Arrest Warrant request issued by Spanish courts was granted a proper response.[96] As regards the first question, the Court found that the Belgian authorities provided their Spanish counterparts with a sufficient legal reasoning – on the basis of the implementing national legislation, i.e. section 4(5) of the Belgian European Arrest Warrant Act and the observations previously made by the Human Rights Committee (HRC) in 2015 which demonstrated *the potential risk* that N.J.E. would be detained in Spain in conditions contrary to Art. 3 («*The prohibition of torture*») ECHR. The Belgian authorities' conduct was also found compliant with the requirements of the previous EAW jurisprudence (*Pirozzi*, *Avotiņš*) which underlined that the EU's mutual recognition mechanism should not be applied automatically to the detriment of fundamental rights.[97]

Secondly, the legitimacy of the grounds for such a refusal – in particular a sufficient factual basis in the case at hand – was assessed.[98] The Court stated that the Belgian courts based their decisions mainly on international reports and on the context of Spain's contemporary political history, considering the abovementioned HRC documentation. However, in the eyes of the ECtHR, the Belgian authorities failed to conduct a detailed and updated examination of the situation prevailing in 2016 and hence did not seek to identify *a real and individualised risk* of a detainee's Convention rights or any structural shortcomings with regard to conditions of detention in Spain. Moreover, it was emphasized that the N.J.E. EAW was handled differently in comparison with the previous Warrants issued by Spain in respect of suspected members of ETA: they had been executed by Belgium successfully and without identifying any risk of a violation of the Fundamental Rights of the persons being surrendered.[99] In light of

96 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

97 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 83–84.

98 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

99 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 86–88.

these concerns, the Strasbourg judges found it possible to conclude that the conduct of the Belgian authorities handling the European Arrest Warrant issued by Spain for the surrender of N.J.E. was contrary to the positive obligations stemming from the procedural limb of Art. 2 («*The Right to Life*») of the European Convention.[100]

Even though the judgment is unanimous, the Concurring Opinion of Judges Spano and Pavli presumably sheds light on the underpinning rationales of the choice made by the Strasbourg Court. Two judges underlined the pressing nature of the 27 versus 47 discourse, and the deriving need to harmonise the minimum standard of protection guaranteed by the Convention with one proposed by the Charter of Fundamental Rights of the European Union, in cases invloving the interpetation of the corresponding rights.[101] Despite the lack of the judges' intention to reconsider their well-established «*exclusionary*» approach to Art. 6 ECHR guarantees within the European Arrest Warrant context, this outcome presumably opens a possibility for extending the *Castano* approach to other categories of crimes covered by the EAW Framework Decision (Art. 2), such as for instance participation in a criminal organisation, terrorism, trafficking in human beings, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, rape *etc*. At the same time, the pre-*Castano* Strasbourg case-law has already demonstrated the (predictable) intention of the persons being requested in course of the European Arrest Warrant proceedings to defend their rights which are potentially affected by its execution (*E.B., Mann, Ciobanu*). Since the number of the EAW-related applications to the Strasbourg Court is likely to increase significantly after *Castano*, the floor is open for the applications related, for instance the prohibition of torture (Art. 3), right to liberty and security (Art. 5), the right to respect for private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10), freedom of assembly and association (Art. 11), the right to an effective remedy (Art. 13) *etc*.

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100 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 89–92.

101 Concurring Opinion of Judge Spano joined by Judge Pavli, ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

The recent case of *Bivolaru and Moldovan*[102] seems to confirm these statements, as the Strasbourg Court recognised for the first time that the EAW execution can lead to the violation of Art. 3 of the European Convention («*The prohibition of torture*»). In both cases, the applicants (Romanian nationals) claimed that the surrender from France on the basis of the Warrants would expose them to inhuman and degrading treatment in Romania.[103] Importantly, the ECtHR judges – unlike in *Castano* – decided to apply the *Bosphorus* doctrine to the European Arrest Warrant area, and thus prominently shed light on the degree of the national margin of manoeuvre in relation to the EU Law obligation for establishing a potential «*manifest deficiency*» within this context.[104] The profound references to the Luxembourg Court's jurisprudence seems to have paved the way to the *Bivolaru and Moldovan* conclusions. The *Aranayosi/Caldararu* case, as well as the more recent (and controversial) *ML*[105] and *Dorobantu*[106], that *develop the* abovementioned *two-stage test for the assessment of (possible) systemic or generalised deficiencies* in the detention conditions in the EAW issuing EU Member State, were cited in the «*Relevant Legal Framework And Practice*» section.[107] Even though the ECtHR generally transposed the *Castano* approach, the emphasis was made on the second step, namely the assessment of the *individualised risk* to which the Warrant detainee could be potentially exposed.[108]

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102 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int.

103 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 2–39.

104 Thomas Wahl, "ECtHR: EAW Cannot be Automatically Executed," EUCRIM, accessed September 20, 2021, https://eucrim.eu/news/ecthr-eaw-cannot-be-automatically-executed.

105 CJEU Judgment of 25 July 2018, *ML (*intervener: *Generalstaatsanwaltschaft Bremen),* Case C220/18 PPU, ECLI:EU:C:2018:589.

106 CJEU Judgment of 15 October 2019, *Dorobantu*, Case C-128/18, ECLI:EU:C:2019:857.

107 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 49–55.

108 Johan Callewaert, "Manifest deficiency in the execution of a European arrest warrant – judgment of the European Court of Human Rights in the case of Bivolaru and Moldovan v. France," Johan Callewaert, accessed September 20, 2021, https://johan-callewaert.eu/de/manifest-deficiency-in-the-execution-of-a-european-arrest-warrant-judgment-of-the-european-court-of-human-rights-in-the-case-of-bivolaru-and-moldovan-v-france.

In case of Mr. Moldovan (charged with trafficking in human beings), the Strasbourg Court ruled that the *Bosphorus* presumption was applicable as the French authorities were not afforded any margin of manoeuvre acting within the strict *Aranyosi/Căldăraru* (Art. 4 CFREU-based) framework, and the scope of protection afforded by this two-stage test was in principle equivalent to one proposed by Art. 3 ECHR.[109] However, shortcomings were established leading to the violation of Art. 3 ECHR, as the French courts failed to request and examine additional information on the Romanian detention conditions in light of the previously formed ECtHR case-law. This was considered problematic as several early Strasbourg rulings (*Stanciu, Porumb, Pop*) had already showed that some of the Romanian prisons were overcrowded and that there was a *real risk* that the applicant would be detained in a prison cell where he would have less than 3 square meters of personal space, lack of hygiene, inadequate ventilation or lighting *etc*.[110] In light of these considerations, the French courts presumably failed to investigate properly a *sufficiently reliable factual basis* – given *the personal situation* of Mr. Moldovan – which demonstrated the *existence of a real risk* that the applicant would be exposed to inhuman and degrading treatment as a result of his detention conditions in Romania.[111]

In the *Bivolaru* case (related to the accusations of sexual relations with a minor), the ECtHR concluded that the *presumption of equivalent protection* was not applicable. The Strasbourg judges emphasised that the factual circumstances posed new questions of EU Law, in particular the fact that the applicant had previously been granted asylum by Sweden prior to Romania's accession to the EU, and Romania was now seeking his surrender under the European Arrest Warrant Framework Decision. As this circumstance presumably required submitting the request for a preliminary reference to the Court of Justice of the European Union (which was not done), the *full potential in the protection of the applicant's Fundamental*

109 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 112–116.

110 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 111–116.

111 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 117–126.

Rights under EU Law was hence not deployed.[112] However, no violation of Art. 3 ECHR was established in respect of Mr. Bivolaru, since the executing French judicial authorities had carried out a proper and complete investigation of the *claimant's personal situation* on the basis of information requested from the Swedish authorities.[113] Moreover, the ECtHR also noted that the applicant himself failed to explain properly which factors could potentially expose him to a degrading/inhuman treatment contrary to Art. 3 of the Convention (such as the persecution on religious grounds in Romania)[114] – which could be seen as the (indirect) shifting of the burden of proof in the European Arrest Warrant-related jurisprudence to the claimants.[115]

Moreover, the applicants in the pending *Alosa* case[116] have already requested to interpret Art. 2 («*Right to life*») and 13 («*Right to an effective remedy*») of the European Convention in light of the grounds for non-execution of the European Arrest Warrant (Art. 4(6) EAWFD), thus presumably pushing the European Court of Human Rights to further develop this new proportionality test. Apart from the unclear perspectives of the *Castano* doctrine application after the entry into force of Protocol No. 15 to the European Convention, the *Soering* approach – where the Strasbourg Court allowed the national courts to prioritise Human Rights protection over the cooperation in criminal matters only in exceptional cases – seems to be nuanced to some extent.[117]

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112 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 130–132.

113 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 138–140.

114 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 142–145.

115 Jasper Krommendijk, "Bivolaru t. Frankrijk (EHRM, nr. 40324/16) – Bosphorus bijt in Bivolaru: over EHRM-toetsing tenuitvoerlegging EU-arrestatiebevelen," *EHRC,* accessed September 20, 2021, https://www.ehrc-updates.nl/commentaar/211497?skip_boomportal_auth=1.

116 ECtHR application communicated to the Italian and German Governments on 3 November 2019, Case *Alosa and Others v. Italy and Germany*, application no. 20004/18, hudoc.int.

117 In this sense, see for example Sibel Top and Paul De Hert, "Castaño avoids a clash between the ECtHR and the CJEU, but erodes Soering. Thinking human rights transnationally," *New Journal of European Criminal Law* 12, no. 1 (2021): 52–68.

One could hence ask the question of how the *Castano* judgment could influence the *Aranyosi/Caldararu* formula where the CJEU clarified that the list of the refusal grounds is exhaustive, and maintained this position in the subsequent judgments. Even though the references *to Castano* have already appeared sporadically in several CJEU acts,[118] the Luxembourg Court judges seem to avoid the profound analysis of this problematic Strasbourg judgment – the *Dorobantu*[119] judgment can be mentioned in this regard. However, regardless of the unclear future of the *Castano* formula in the ECtHR´s/CJEU´s case-law, one could definitely state that this judgment could be seen as an attempt to coordinate the CFREU/ECHR standards of protection in the European Arrest Warrant area – in order to strengthen a link between the Convention and Union Laws, and to defend the rights of the EU individual in a more coherent and efficient manner.[120]

4. Conclusion

In this paper, an attempt was made to shed some light on the proportionality tests being proposed by the European Court of Human Rights case-law with the European Arrest Warrant component, in light of the corresponding developments in the EU Court of Justice practice (*Aranyosi/Căldăraru*). The main argument presented was that the recent *Castano/Bivolaru and Moldovan* rulings of the Strasbourg Court seem to indicate a new step in the judicial dialogue between two European courts as they incorporated a new proportionality test in the Law of the European Convention, at least in the EAW-related lines of reasoning.

Even though the Strasbourg Court refused to reconsider the «*exclusionary*» approach to the applications of Art. 6 («*The Right to a Fair Trial*») ECHR within the EAW context, it was recognised in *Castano* that the requested State should have still fulfilled its *procedural obligation to cooperate under* Art. 2 *(«The Right to Life»)* ECHR. It was interpreted within this

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118 In this sense, see for example Opinion of Advocate General Campos Sánchez-Bordona delivered on 12 November, 2020, *L. and P.* (*intervener: Openbaar Ministerie)*, Joined Cases C354/20 PPU and C412/20 PPU, ECLI:EU:C:2020:925.

119 CJEU Judgment of 15 October 2019, *Dorobantu*, Case C-128/18, ECLI:EU:C:2019:857, para 57.

120 In this sense, see Concurring Opinion of Judge Spano joined by Judge Pavli, ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

context as a need to support the investigation in the requesting State by conducting the two-stage assessment of the situation of the EAW detainee in light of Art. 3 («*The prohibition of torture*») ECHR severity threshold by (1) assessing the factual basis demonstrating the risk of the ill treatment in the requesting State and (2) the exposure of the Warrant detainee to this risk under the factual circumstances of the case.

Hence, one could conclude that the CJEU's benchmarks of the EAW refusals legality assessment – i.e. a risk of *inhuman or degrading treatment* in the requesting State (*Aranyosi/Căldăraru)* – were transposed to the Strasbourg practice in *Castano.* This presumably demonstrates the ECtHR´s unwillingness to conflict with the CJEU in a sensitive area (i.e. a «*cornerstone*» of judicial cooperation in the European Union). The subsequent *Bivolaru and Moldovan* judgment developed the *Castano* formula, by demonstrating the applicability of the «*Bosphorus*» *doctrine* to the European Arrest Warrant-related cases and even the rebuttal of the presumption of equivalent protection within this context.

For now, the scrutiny concerns only the charges of murder, manslaughter, trafficking in human beings, sexual assault and terrorism (*Castano, Bivolaru and Moldovan, Alosa*). At the same time, this interpretation opens the floor to the discussion on potential applicability of other Convention provisions within this context (Arts. 4, 5, 8) to other offences listed in Art. 2(2) of the EAWFD (such as, for instance, corruption, fraud, computer-related crime etc.). Hence, the EU Member States´ courts can be forced – *de facto* – to consider an additional (ECHR-based) criterion for assessing the legality of refusals to execute an EAW as an integral part of the (CFREU-based) *Aranyosi/Căldăraru* formula.

This can arguably pose further questions upon the entry into force of Protocol No. 15 ECHR (August, 2021), as it amends the ECHR Preamble in order to favour the most effective realisation of the «*subsidiarity*» principle within the Convention system. From the broader perspective, it could be stated here that the Strasbourg Court *de facto* reflected the spirit of the TEU Preamble («*facilitating) the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice*'),[121] while – maybe – undermining to some ex-

[121] Consolidated version of the Treaty on European Union (2012), 2012/C 326/01, *26 October 2012*.

tent the spirit of the ECHR Preamble as amended by Protocol No. 15 («*the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation*»).[122]

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[122] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, E.T.S No. 213.

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So-called "dangerous prisoners" – selected issues from the perspective of individual's rights protection

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Abstract: The issue of "dangerous" prisoners is of utmost importance, mainly regarding the restrictions imposed on offenders of this category. The restrictions in question introduce significant limitations of the statutory rights of individuals and alter the purposes of the penalty of deprivation of liberty. For this reason, it is necessary to align the Polish law, and above all penitentiary practice, with the international standards of human rights protection. This paper analyses both the Polish legislation and practice in terms of the qualification and treatment of "dangerous" prisoners. The paper points to the obscurity of certain legal regulations and the broad limits of discretion in applying and extending "dangerous prisoner" status. Furthermore, the paper evaluates the concept of distinguishing the category of "dangerous prisoners" and the operation of "N" wards from the perspective of the impact that such heightened isolation exerts on the individual, but also on the society and the penal institution.

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1. Introduction

The issue of so-called "dangerous prisoners", even though they do not represent a significant percentage of the prison population, is of extraordinary importance as it involves a major interference with the rights and freedoms of an individual serving the penalty of deprivation of liberty by placing the individual under a high-security regime and further restricting their communication with other prisoners and the external world. In view of this, there is a need for continuous monitoring of whether the Polish regulations and, above all, the realities of handling "the dangerous" are consistent with international standards of handling prisoners of this category. This paper aims to indicate the size of this group of prisoners, draw attention to the practical aspects of the classification procedure, and indicate the multi-faceted consequences carried by "dangerous prisoner" status, both from the perspective of the penal institution and the individual in question. In line with these assumptions, this paper goes beyond an analysis of available statistical data, views of legal scholars and commentators, and judicial decisions to also include an analysis of information collected by the Polish Central Board of Prison Service.

2. International standards of handling "dangerous" prisoners

Considering that the existence and application of special regulations concerning so-called "dangerous" prisoners leads to placing them under numerous restrictions and constraints over the course of their penalty of deprivation of liberty or when on remand, these matters continue to be a point of interest for international authorities, particularly those united around human rights protection.

European Prison Rules[1] emphasise that restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed (Rule 3). Special high security or safety measures shall only be applied in exceptional circumstances, under clear procedures specifying the manner of handling the prisoner (Rule 53).

[1] Council of Europe, Recommendation Rec(2006)2 of the Committee of Ministers to member states, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, accessed July 30, 2021, ttps://rm.coe.int/16804bfde1.

The issue of so-called dangerous prisoners has a special place in Recommendation No. R (82) 17 of the Committee of Ministers of the Council of Europe concerning the custody and treatment of dangerous prisoners[2]. The authors started with the premise that dangerous prisoners should also be provided with appropriate treatment and security measures must be applied in a manner respectful of human dignity and human rights. The Convention points to the need for a reasonable approach to security, which includes the application of security measures only to the extent to which they are necessarily required, and the need for varying these measures in line with the type of danger involved. The Recommendation emphasises that a "dangerous prisoner" should also submit to social rehabilitation, which requires appropriate measures in reinforced security conditions. Another matter of critical importance is the introduction of national regulations allowing for continuous supervision over the enforcement of the sentences in special conditions and, consequently, a regular review of the need for (and the scope of) the measures applied.

Judgments of the European Court of Human Rights reveal that handling "dangerous prisoners" often leads to violations of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms[3]. That being said, note that the Court does not challenge the acceptability of imposing special rules on certain categories of offenders, but obliges the State to provide such prisoners with conditions that are not contrary to human dignity and protect against the severity of punishment greater than necessarily required. Many decisions of the Court point to the need for a readjustment of the array of measures applied to the degree of real rather than the potential threat posed by the prisoner. The Court emphasises that the authorities are obliged to present sufficient, material and specific reasons to legitimize the severity of measures inflicted upon a dangerous prisoners to safeguard the security of the penal institution. Furthermore, the Court accentuates that the penalty of deprivation of liberty should be

[2] Recommendation adopted by the Committee of Ministers on 24 September 1982 at the 350th meeting of the Ministers' Deputies, accessed July, 30, 2021, http://prison.eu.org/recommendation-rec-82-17-custody .

[3] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8, and completed by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284.

served under a special regime only in exceptional cases and on a temporary basis. The judgments explicitly state that a prolonged continuation of a high-security regime imposed on the prisoner solely on the grounds stated in the initial classification decision is unacceptable. Decisions on extending the "dangerous prisoner" status cannot be "a pure formality, limited to a repetition of the same grounds in each successive decision"[4].

3. Legal basis for the institution of so-called dangerous prisoners in Poland

In Poland, the first norms concerning so-called dangerous prisoners were introduced in 1995[5]. The establishment of the category of dangerous prisoners, as well as wards and cells designated for their custody in closed-type penal institutions, was related to the concept of combating the most serious crimes, with particular emphasis on organised crime, adopted after 1990. The construction of wards for "N" offenders[6] in closed-type penal institutions commenced after 2000, although concerns regarding the large cost of the investment and its later maintenance were raised from the start[7].

The term "dangerous prisoner" comes from the field of criminology rather than law. It raises both linguistic and ethical concerns in source

4 Judgments of the European Court of Human Rights: of 21 March 2017, Case Korgul v. Poland, application no. 36140/11; of 19 April 2016, Case Karwowski v. Poland, application no. 29869/13; of 16 February 2016, Case Świderski v. Poland, application no. 5532/10; of 12 January 2016, Case Romaniuk v. Poland, application no. 59285/12; of 17 April 2012, Case Piechowicz v. Poland, application no. 20071/07; of 17 April 2012, Case Horych v. Poland, application no. 13621/08; of 30 October 2012, Case Pawlak v. Poland, application no. 13421/03; of 30 October 2012, Case Głowacki v. Poland, application no. 1608/08, accessed July 28, 2021, http://www.echr.coe.int.

5 Act of 12 July 1995 amending the Criminal Code and the Executive Penal Code and increasing the lower and upper limits of fines and compensation in criminal law, Journal of Laws of 1995 No. 95, item 475. For more on the history of Polish regulations, see: Ryszard Godyla and Leszek Bogunia, " Niektóre problemy kwalifikowania skazanych i tymczasowo aresztowanych do grupy osadzonych niebezpiecznych," in *Postępowanie z wybranymi grupami skazanych w polskim systemie penitencjarnym. Aspekty prawne*, ed. Adam Kwieciński (Warszawa: Wolters Kluwer, 2013), 21–25.

6 Translator's note: "N" stands for "dangerous" (*niebezpieczny* in Polish).

7 Jerzy Nikołajew, "Wolność sumienia i religii sprawców szczególnie niebezpiecznych (art. 88a i 88b k.k.w.)," *Studia z Prawa Wyznaniowego,* no 23 (2020): 253.

literature[8]. Nevertheless, it has become a common expression and a permanent element of the Polish legal and criminological vocabulary[9]. It refers to a convict who represents a major threat to society or to the security of the penal institution, placed in a ward or cell designated for their custody in a closed-type penal institution, in conditions that reinforce the security of both society and the institution, under a decision issued by the Penitentiary Committee.

The Polish executive penal law provides detailed regulations on the qualification procedure and status review of prisoners representing a major threat to society or the security of penal institutions, i.e. so-called "dangerous" prisoners. Current regulations are contained in the Executive Penal Code since 2003, wherein they were included under the Act of 24 July 2003 on amending the Executive Penal Code and certain other acts[10]. Previously, these regulations were contained in the Regulation of the Minister of Justice of 12 August 1998 on the rules and regulations of administering a penalty of deprivation of liberty[11]. That solution was incompatible with the requirements of either the Constitution of the Republic of Poland or international standards on human rights and freedoms protection, for all limitations on constitutional rights and freedoms of the citizens may be imposed only by way of statutory legislation. Consequently, it was necessary to transfer the regulations on deprivation of liberty and remand, including the additional restrictions imposed on so-called dangerous prisoners, to a statutory act of law[12]. These regulations are regularly updated. Many a time, the need for changes arises from inspections performed by national and international organisations or institutions concerned with human rights protection or the judgments of the European Court of Human

8 Zbigniew Lasocik, "Funkcjonowanie oddziałów dla tzw. „więźniów niebezpiecznych" w Polsce," *Archiwum Kryminologii,* no. XXXI (2009): 310.

9 For more information on the diverse usage of the term "dangerous offender" in various legal systems, see: Jörg-Martin Jehle, Chris Lewis, Marleen Nagtegaal, Nina Palmowski, Małgorzata Pyrcak-Górowska, Michiel van der Wolf and Josef Zila, "Dealing with Dangerous Offenders in Europe. A Comparative Study of Provisions in England and Wales, Germany, the Netherlands, Poland and Sweden," *Criminal Law Forum,* no. 32 (2021): 181–245.

10 Journal of Laws 2003, No. 142, item 1380.

11 Journal of Laws 1998, No. 111, item 699.

12 Teodor Szymanowski, " Zmiany prawa karnego wykonawczego (o potrzebie i zbędności nowelizacji przepisów)," *Państwo i Prawo,* no. 2 (2012): 47.

Rights[13]. Although these revisions aim to reinforce the security of the society and the prison population from prisoners who represent a major threat to society or to the security of the penal institution, they are also introduced to guarantee that deprivation of liberty and remand are administered in conditions compatible with the applicable standards of treatment of persons deprived of their liberty.

4. Premises for the qualification as a "dangerous" prisoner

An extremely important element in the procedure of qualifying a prisoner as dangerous is the assessment of whether the prisoner satisfies the premises for qualification set forth in Art. 88a§1 of the Executive Penal Code. It should be emphasised that the fundamental premise therein is the presence of a major threat to the community or a major threat to the security of the penal institution, which would require the application of special measures on the prisoner. The legislation distinguishes three groups of prisoners which may be qualified as dangerous.

The first group includes offenders sentenced for an offence of significant harm to the community. The legislation lists the offences that satisfy this criterion. An offender may be classified as dangerous when sentenced for acting against the Republic of Poland or its defensive power (a coup d'état, an attempt on the constitutional system or national authorities, an attempt on the President, an attempt on a unit of the Armed Forces), an offence of taking or holding a hostage, an offence committed in relation to taking a hostage, the hijacking of a naval vessel or an aircraft, air vessel, an offence committed with particular cruelty, with the use of firearms, explosives or flammable materials. It should be noted that the list is non-exhaustive, which means that other offences may also be found to cause significant harm to the community. However, legal scholars and commentators

[13] Reports to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): CPT/Inf (98) 13, Strasbourg, 24 September 1998; CPT/Inf (2002) 9, Strasbourg, 23 May 2002; CPT/Inf (2006) 11, Strasbourg, 2 March 2006; CPT/Inf (2011) 20, Strasbourg, 12 July 2011; CPT/Inf (2014) 21, Strasbourg, 25 June 2014, accessed July 28, 2021, http://www.coe.int/en/web/cpt/poland; judgments of the European Court of Human Rights issued i.a. of 17 April 2012, Case Piechowicz v. Poland, application no. 20071/07; of 17 April 2012, Case Horych v. Poland, application no. 13621/08.

provide the apt observation that this sort of assessment should be made at sentencing rather than during the exercise of the sentence[14]. On the other hand, let us emphasise that condemnation for a particular type of offence does not, in itself, constitute sufficient grounds for a determination that the prisoner poses a major threat to society or the security of the penal institution. Furthermore, the wording of the premise remains vague, which leaves the assessment of the harm to the community to the Penitentiary Committee.

The second premise for qualification to the group of "dangerous" prisoners is conviction for an offence committed in an organised group or in an association whose purpose is to commit offences, particularly when the perpetrator served a leading or major role within the group or association.

The third premise which may indicate a major threat to society or the security of the penal institution is unrelated to the grounds for conviction and concerns the prisoner's behaviour when in a penal institution or a remand centre. A prisoner may be deemed dangerous if, at the time of their previous or current deprivation of liberty, they posed a threat to the security of the penal institution or the remand centre in such a way that: they were an organiser or an active participant in a mass action at the penal institution or the remand centre, committed an active assault on a police officer or another person employed at the penal institution or the remand centre; committed rape, caused a major bodily injury or abused a person convicted, punished, or on remand; escaped or attempted to escape from a closed-type penal institution or a remand centre during transport outside the premises of such an institution or centre[15].

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14 Nikołajew, "Wolność sumienia i religii sprawców," 248.

15 Compare i.a.: Appellate Court in Poznan, Judgment of 1 March 2018, Ref. No. I ACa 962/17, LEX no. 2891803, which has confirmed that such behaviour may include, i.a. an act of spitting on an officer of the Prison Service when being cuffed, destruction of property by breaking a window with a door removed from a sanitary corner, a fight with another prisoner. See also: ECtHR Judgement of 12 January 2016, Case Karykowski v. Poland, application no. 653/12, which observes that the Committee wrongly classified a prisoner as "dangerous" because of a "protest letter" found in his cell, which was signed by around 135 prisoners and criticised the changes to the Executive Penal Code. The letter was addressed to the Minister of Justice and the authorities assumed that the prisoners would organise a collective remonstrance once the new law enters into force. Meanwhile, research

The "dangerous prisoner" status is not assigned automatically upon the determination that the offender has been sentenced for a particular statutory offence, or even that they displayed reprehensible behaviour in a penal institution. It is necessary to conclude that the prisoner poses a major threat to society or the security of the penal institution, and therefore there are legitimate grounds for the application of measures that reinforce the security of both society and the institution. Such an assessment requires the consideration of many factors and circumstances which may testify to the existence of a major threat represented by the prisoner. They involve matters related to the offence, the demeanour of the offender after committing the offence, and others, bearing no direct connection to the offence or the conviction. The first group of factors includes motivations and demeanour at the time of perpetration, the type and scale of detrimental effects of the offence. The other – demeanour of the prisoner in the penal institution and social rehabilitation progress. If the offender is sentenced for an offence committed as part of an organised group or an association whose purpose is to commit offences, the assessment should also consider the threat to the legal order, which may arise as a result of unlawful communications between the offender and other members of the group, and particularly a threat to human life or health or for the activities aimed at disclosing property that constitutes gain from the offence, and the fact that other members of the group or association are free. An assessment of the threat should also consider (a third group of factors) the characteristics and personal situation of the offender and their degree of depravity.

These criteria for assessing whether an offender poses a major threat apply not only during the initial qualification but also the review of these premises over the term of the penalty of deprivation of liberty. That is because the Penitentiary Committee is obliged to review its decision at least once every three months. It should be emphasised that, in line with

conducted by S. Przybyliński indicates that the most common reason for classifying a prisoner as "dangerous" is a conviction (or charges pressed) in relation to an offence committed with particular cruelty, and rape or abuse of another prisoner. Compare: Sławomir Przybyliński, *Więźniowie „niebezpieczni" – ukryty świat penitencjarny* (Kraków: Oficyna Wydawnicza Impuls, 2012), 334.

the multiple observations of the ECHR, the Committee deciding upon the prolongation of the "dangerous prisoner" status is obliged to provide a justification, which cannot be limited to the reiteration of grounds stated in the initial qualification decision[16].

As a guarantee of respect for prisoners' rights and a preventive measure against abuse, the offender or their lawyer have the right to file a motion (no more than once per three months) to disclose the grounds for the classification of the offender as a person posing a major threat to society or the security of the penal institution.

The offender has the right to challenge the decisions of the Penitentiary Committee regarding the initial or prolonged imposition of the "dangerous prisoner" status by filing a complaint with the Penitentiary Court. The Court shall examine the "unlawfulness" of the decision issued by the Penitentiary Committee. Notably, the investigation should be broad-based and go beyond the competence of the authority and the decision-making procedure to cover the substantive-law bases for the decision, i.e. cases of transgressing the limits of discretion, unreasonable action of the authority, or even ill will on its part[17]. It is a matter of utmost importance since existing research demonstrates that, in practice, judicial review is limited to examining the lawfulness of the decision in the formal sense and to the reiteration of the statements and conclusions of the Committee[18]. The oversight of the lawfulness and accuracy of imposing the "dangerous prisoner" status is also the responsibility of the penitentiary judge, who must be notified about the decision on the offender's qualification.

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16 For more information, see: ECtHR Judgement of 16 February 2016, Case Paluch v. Poland, application no. 57292/12; ECtHR Judgement of 12 January 2016, Case Romaniuk v. Poland, application no. 59285/12; ECtHR Judgement of 12 January 2016, Case Karykowski v. Poland, application no. 653/12; ECtHR Judgement of 12 January 2016, Case Prus v. Poland, application no. 5136/11, accessed July 28, 2021, http://www.echr.coe.int. Similar conclusions may be drawn from the research of Przybyliński, *Więźniowie „niebezpieczni" – ukryty świat penitencjarny*, 338.

17 Maria Niełaczna, "Człowiek w akwarium" – postępowanie z więźniami "niebezpiecznymi" w oddziałach o specjalnych zabezpieczeniach," *Archiwum Kryminologii,* no. XXXVI (2014): 37.

18 Niełaczna, "Człowiek w akwarium," 37–38.

5. Special conditions of serving a penalty of deprivation of liberty by a so-called dangerous prisoner

The application of the "dangerous prisoner" status forces the offender to serve a sentence in a designated ward or cell of a closed-type penal institution, in conditions that reinforce the security of both society and the penal institution. Extra restrictions involve the installation of appropriate technical and protective security solutions in the place of custody (in particular, additional furnishings in a residential cell include: interior bars installed behind the door and in front of the windows; meshes and screens mounted in the windows; window bars with reinforced resistance to cutting or an electronic security system; fixed residential equipment[19]); more frequent cell searches, keeping the cells locked round-the-clock, restricted access to areas outside the ward (for purposes such as learning or work), reinforced oversight when moving across the penal institution, restricted communication with the external world (including visitations), a ban on using own clothes and shoes, and mandatory personal checks anytime the prisoner leaves or enters the cell. Notably, in accordance with the position of the European Court of Human Rights, the unconditional application of the full array of measures available to the authorities in the treatment of "dangerous prisoners" over a long time is not necessary for the security of a penal institution[20]. Checks and searches should not be routine but dictated by security concerns. Furthermore, the authorities are obliged to counteract the effects of heightened isolation by providing the prisoner with the necessary mental and physical stimulation. In practice, the rights of the prisoner in this regard are limited to solitary walks in a designated area, which the Court deemed insufficient.[21]

A "dangerous" offender's behaviour must be continuously monitored. It should be emphasised that the monitoring covers both the residential

19 Ordinance of the Minister of Justice of 17th October 2016 on means of protection of organisational units of the Prison Service, Journal of Laws 2016, item 1804, §94.

20 ECtHR Judgement of 14 June 2016, Case *Pugžlys* v. Poland, application no. 446/10, accessed July 28, 2021, http://www.echr.coe.int.

21 ECtHR Judgement of 21 March 2017, Korgul v. Poland, application no. 36140/11; ECtHR Judgement of 14 June 2016, Pugžlys v. Poland, application no. 446/10, accessed July 28, 2021, http://www.echr.coe.int .

area, including the part designated for the purposes of sanitation and personal hygiene, and the rooms designated for work, learning, walks, visitations, religious services, religious meetings, religious education, or classes exploring culture and education, physical culture or sports. The monitored sounds or images are recorded. The recorded sounds or images are stored for a minimum of seven days, whereupon they are automatically destroyed[22].

As a result of the foregoing restrictions, dangerous prisoners serve their sentences in conditions significantly different from those of other offenders held in a closed-type penal institution. They are assessed to create a phenomenon of "a prison within a prison", "second-degree prison"[23], or "prison ghettoes"[24]. The establishment of separate wards for offenders of this category exemplifies the implementation of "an idea to create multi-level isolation of varying scope and intensity"[25].

The assessment and qualification of the prisoner as "dangerous" falls within the purview of the Penitentiary Committee. In order to curb automaticity in all actions and to advance an individual approach to every offender, the Committee may impose only some of all the restrictions used in the treatment of "dangerous" prisoners. The principle has been enshrined in the Polish legal system only since 2015[26], in the wake of the judgments of the ECHR in the cases of Piechowicz v. Poland and Horych v. Poland[27].

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22 Ordinance of Minister of Justice of 16th October 2009 on devices and technical means to transmit, reproduce, and fix images and sounds from prison monitoring systems, Journal of Laws 2009, No 175, item 1360, §3 (6).

23 Danuta Gajdus, Bożena Gronowska, *Europejskie standardy traktowania więźniów* (Toruń: TNOiK, 1998), 169; Stefan Lelental, *Kodeks karny wykonawczy. Komentarz* (Warszawa: C.H.Beck, 2020), accessed: 30.07.2021, SIP LEGALIS- nb. 4.

24 Joanna Hołda, Zbigniew Hołda, Beata Żórawska, *Prawo karne wykonawcze* (Warszawa: Wolters Kluwer, 2012), 93.

25 Teodor Bulenda, Ryszard Musidłowski, "O więźniach niebezpiecznych w kontekście ochrony praw człowieka," *Przegląd Więziennictwa Polskiego*, no. 60 (2008): 35.

26 Act of 10 September 2015 amending the Executive Penal Code, Journal of Laws 2015, item 1573.

27 For more information, see: Tomasz Artaszewicz-Zawisza, "Problematyka kwalifikowania osadzonych do kategorii tzw. więźniów niebezpiecznych w świetle obowiązującego ustawodawstwa i planowanych zmian w prawie karnym wykonawczym", *Palestra*, no. 3 (2016): 56–63.

The amendment is based on the sound assumption that such a solution should lead to a more flexible application of a high-security regime in respect of the offender posing a major threat to society or the security of the penal institution.

6. "Dangerous" prisoners in statistical

The Polish Central Board of Prison Service collects information on the number of "dangerous" prisoners, which it publishes in monthly reports. Additional data on the topic was obtained under the Access to Public Information Act. However, no data was obtained in regard to the grounds for qualifying the prisoners as "dangerous" in the operating practice of Penitentiary Committees.

In accordance with statistical data of the Central Board of Prison Service, over the years 2001–2020 in Poland, the share of so-called dangerous prisoners in the population of offenders serving the penalty of deprivation of liberty was under 0.5%. Detailed data on the subject are shown in Tab. 1.

Tab. 1. The number of "dangerous" prisoners in Poland over the years 2001–2021

Year	Number of dangerous prisoners	Share of "dangerous" prisoners in prison population (in %)
2001	162	0.30
2002	179	0.30
2003	216	0.36
2004	235	0.37
2005	215	0.31
2006	257	0.35
2007	255	0.33
2008	261	0.34
2009	248	0.44
2010	257	0.34
2011	238	0.32

Year	Number of dangerous prisoners	Share of "dangerous" prisoners in prison population (in %)
2012	223	0.29
2013	161	0.20
2014	152	0.21
2015	156	0.22
2016	123	0.17
2017	113	0.15
2018	142	0.20
2019	143	0.19
2020	139	0.20
2021 (as on 30 June)	141	0.20

Source: Data for years 2001–2008 as in: Ryszard Godyla, Leszek Bogunia, „Niektóre problemy kwalifikowania skazanych i tymczasowo aresztowanych do grupy osadzonych niebezpiecznych", in *Postępowanie z wybranymi grupami skazanych w polskim systemie penitencjarnym. Aspekty prawne*, ed. Adam Kwieciński (Warszawa: Wolters Kluwer, 2013), 35–36. Data for years 2009–2014 as in: Grażyna Barbara Szczygieł, „Kwalifikowanie skazanego jako „skazanego niebezpiecznego" z perspektywy Rekomendacji Rady Europy i prawa krajowego", *Forum Prawnicze*, no 2 (2021): 34. Data for years 2015–2020 – own research on the basis of data obtained from the Polish Central Board of Prison Service.

The situation in Poland does not deviate from that observed in other European countries in which the number of so-called dangerous prisoners is comparable. The data presented by G.B. Szczygieł reveal that the figure ranges from 0.31% in the Czech Republic to 4.5% in Austria[28].

In accordance with the applicable regulations, the "dangerous" status may be applied to both persons serving a penalty of deprivation of liberty and those on remand. The proportions of the two groups are shown in Tab. 2.

[28] Grażyna Barbara Szczygieł, "Kwalifikowanie skazanego jako „skazanego niebezpiecznego" z perspektywy Rekomendacji Rady Europy i prawa krajowego," *Forum Prawnicze*, no. 2 (2021): 34.

Tab. 2. The distribution of convicts and persons on remand in the total number of "dangerous" prisoners

Year	Convicts	Persons on remand	Convicts and persons on remand in total
2015	121	35	156
2016	95	28	123
2017	79	34	113
2018	110	32	142
2019	105	38	143
2020	95	44	139
2021 (as on 30 June)	104	37	141

Source: Own research on the basis of data obtained from the Polish Central Board of Prison Service.

The presented data reveals that convicts represent a vast majority of the "dangerous" prisoners. In the examined period, they made up from 68.34% (in 2020) up to 77.56% (in 2015) of the prison population with that status.

An analysis of the gender distribution of so-called dangerous prisoners also leads to interesting conclusions. Records for the examined period (2015–2021) contain singular cases of qualifying women into the "dangerous" category. Detailed data are shown in Table 3.

Tab. 3 Number of dangerous prisoners by gender in years 2015–2021

Year	Women	Men
2015	0	156
2016	0	123
2017	2	111
2018	0	142
2019	1	142
2020	1	138
2021 (as on 30 June)	1	140

Source: Own research on the basis of data obtained from the Polish Central Board of Prison Service.

The gender data reveal incidental cases of women being qualified as "dangerous". This is justifiable by applicable regulations which oblige female convicts to serve the penalty of deprivation of liberty in a semi-open penal institution, unless the degree of depravity or security concerns provide grounds for placement in a closed-type penal institution (compare: Art. 87 of the Executive Penal Code), where the "dangerous" wards are established. Separate regulations apply to pregnant women and nursing mothers[29]. Commentators emphasise that, in contrast to men, women tend not to represent a threat to society or the penal institution[30]. Yet, it should be noted that in recent years, the number of female prisoners has clearly been on the rise. In 2015, women represented 3.35% of all prisoners. In 2018, their percentage exceeded 4% (4.07%) and increased to 4.67% in June 2021[31]. However, the growing number of women in penal institutions does not translate to a surge in decisions classifying them as "dangerous".

7. The consequences of "dangerous prisoner" status from the perspective of the individual and the penal institution

First and foremost, let us note that the separation of the offender from the prison community and severe limitation of their rights and freedoms of communication with the external world, particularly with the family, also has a detrimental effect on the mental condition of the prisoners and their receptiveness to attitude changes. Furthermore, the restrictions inevitably impair the effectiveness of the basis correctional means used in a penal institution, such as work, learning, cultural or educational activity, or communication with the external world[32]. The potential for social rehabilitation in conditions of reinforced security is minimal, while isolation

[29] For more information, see i.a.: Irena Dybalska, " Wybrane regulacje prawne dotyczące problematyki kobiet w polskich zakładach karnych i aresztach śledczych," in *Kobieta w więzieniu – polski system penitencjarny wobec kobiet w latach 1998–2008,* ed. Irena Dybalska (Warszawa: Instytut Rozwoju Służb Społecznych, 2009), 39–41.

[30] Teodor Szymanowski and Zofia Świda, *Kodeks karny wykonawczy. Komentarz* (Warszawa: LIBRATA, 1998), 192.

[31] Data are based on the contents of monthly statistics (as at the end of December of each year) of the Polish Central Board of Prison Service for years 2015–2021.

[32] Gajdus and Gronowska, *Europejskie standardy traktowania więźniów*, 169; Lelental, *Kodeks karny wykonawczy. Komentarz*.- (komentarz do art. 88b),numer boczny 4.

and security become the overriding and clearly dominating purposes in the treatment of such prisoners, in detachment from the main missions behind the administration of a penalty of deprivation of liberty. Such a level of isolation is degrading, limits stimulation, and invites mental numbness and a sense of helplessness[33]. Furthermore, "dangerous prisoner" status is observed to carry a certain stigma and add to the severity of punishment[34].

It is emphasised that the perpetuation of the "dangerous prisoner" status for a long time, often for the whole duration of the penalty of deprivation of liberty, frustrates a real assessment of the threat and prevents testing the prisoner's functioning in the conditions of a regular ward in a closed-type penal institution.

A separate issue concerns the choice of the most effective form of organisation in the treatment of so-called dangerous prisoners. The validity of the "N" wards in their current shape is brought into question for several reasons. First and foremost, there are the costs and technical difficulties related to the increased surveillance of dangerous prisoners. Inspections in Polish penal institutions reveal a growing number of vacancies, particularly in the security departments, which is a matter of utmost importance, considering the augmented staffing requirements needed in "N" wards (double number of wardens, need for assistance from other officers). Continuous monitoring poses a technical problem, as video quality is at times lacking (especially during night hours), which entails the necessity to invest in high-quality equipment. Furthermore, continuous monitoring requires a team of staff; the job is tiresome and demands a high level of focus and alertness, which means that one person should not be responsible for the monitoring of too many cameras[35]. Moreover, some of the space reserved for "dangerous" prisoners was found not to be filled to capacity, which led to claims of the deficiency of the adopted system. An attempt

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33 Lasocik, „Funkcjonowanie oddziałów dla tzw. więźniów niebezpiecznych w Polsce", 336.

34 For instance, the European Court of Human Rights found that the simultaneous application of two security measures, i.e. a cage and shackles, during court hearings constituted a particularly stigmatizing treatment of a convict classified as a "dangerous prisoner". For more information, see: ECtHR Judgement of 14 June 2016, Pugžlys v. Poland, application no. 446/10 accessed July 28, 2021, http://www.echr.coe.int.

35 A report on the findings of an audit performed by Polish Supreme Audit Office, *Bezpieczeństwo osadzonych* (Warszawa: Supreme Audit Office, 2020), 14–17.

to counter this accusation brought about a "forced" influx of prisoners to the special wards, which evidently involved a broad interpretation of the premises for qualification. This intolerable practice was further confirmed when a slowdown in major crime dynamics led to a rise in "N" ward placements for reasons related to prison behaviour[36]. This indicates that the high-security regime of serving a penalty of deprivation of liberty was applied illegitimately, which constitutes abuse and unlawful restriction of human rights and freedoms.

8. Conclusions

Special "N" wards have been operating in Poland for more than 20 years. The time frame seems sufficient to modify the imperfections of the law and practice in this regard. The practice exposes the weaknesses of the current system. The gravest of these include the lack of methods for risk estimation, i.e. assessing the degree of real threat to society and the security of the institution, the lack of an effective model for the treatment of dangerous prisoners, the lack of methods for reviewing the necessity for the prolonged continuation of "dangerous prisoner" status, and the unlimited freedom to prolong this status, oftentimes even for more than a decade, until the end of the penalty of deprivation of liberty. The automatic prolongation of the status by the Penitentiary Committee is indicated as one of the gravest faults of prison administration in the treatment of "dangerous" prisoners.

It is necessary to develop procedures for the qualification and treatment of "dangerous" prisoners that are compatible with the principle of respect for human dignity of the prisoner, guarantee a proportional application of security measures and vary these measures in conformity with the type of real (rather than only potential) threat. It is also necessary to regulate control over the Penitentiary Committee decisions regarding the security classification of prisoners since these decisions play a part in the imposition of significant limitations on the prisoner's rights in many areas of their life on the premises of the institution and outside.

It should be emphasised that the soundness of legal changes introduced to advance an individual approach in the treatment of every prisoner and

[36] Lasocik, " Funkcjonowanie oddziałów dla tzw. „więźniów niebezpiecznych" w Polsce," 332 and the following.

reinforce protection against automaticity in the application and prolongation of the "dangerous prisoner" status. A particularly noteworthy revision in this regard was introduced in 2015 – and opened the way to impose a selected set of the special measures and restrictions used in the treatment of "the dangerous" serving the penalty of deprivation of liberty with the right to reimpose the conditions lifted or modify their scope.

In this regard, the revision of 2015 should be noted. First and foremost, it empowered the Penitentiary Committee to impose a selected set of the special measures and restrictions used in the treatment of "the dangerous" during their penalty of deprivation of liberty, with the right to reimpose the conditions lifted or modify their scope. Indubitably, this solution will allow for a more flexible application of reinforced security measures, corresponding to the prisoner's behaviour and the degree of the threat posed[37].

Considering the foregoing consequences of the operation of "N" wards for the penal institutions involved, there is a proposition for a systemic change, which would involve the establishment of a new type of penal institution accepting prisoners under a judgment of conviction[38]. On the other hand, such a solution would complexify the proper implementation of the principle of the individualisation of correctional means, as juvenile, first-time, and recidivists, would all live in the same ward[39].

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37 The purpose, which was to create a legal avenue for a gradual relaxation of the high-security regime was stated in the Explanatory Statement to the Deputies' bill on amending the Executive Penal Code,accessed July 20, 2021, http://orka.sejm.gov.pl/.Druki7ka.nsf/0/A4B8BC1EC2B4E008C1257D8700379736/%24File/2874.pdf.

38 Magdalena Całus, "Kwalifikacja i weryfikacja statusu osadzonych „niebezpiecznych" – analiza rozwiązań kodeksowych w kontekście celów wykonywania kary pozbawienia wolności," in *Prawo wobec wyzwań współczesności: z zagadnień nauk penalnych*, ed. Joanna Helios, Wioletta Jedlecka and Adam Kwieciński (Wrocław: Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2019), 37, 39.

39 Nikołajew, „Wolność sumienia i religii sprawców szczególnie niebezpiecznych (art. 88a i 88b k.k.w.)," 253.

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A Few Remarks About Challenges in Application of Restorative Justice: A Case Study of Bosnia and Herzegovina

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Criminal Law, Restorative Justice, Bosnia and Herzegovina, justice system, juveniles

Abstract: Restorative justice is without any doubt one of the most important steps in the development of criminal law, which at the same time increased the level of humanity in the approach towards perpetrators and victims and managed to achieve the principle goals of criminal law. A few decades have passed since its idea and approach was borrowed from the traditional communities that among themselves applied it for centuries and it was transformed into the new approach of justice offering many benefits to the community where it is established. Formally, it has been more than 20 years since Bosnia and Herzegovina embraced restorative justice within its criminal law. This paper aims to discuss how much de facto it has been applied in this country and to present results of interviews with representatives from legal theory and practice where they refer to restorative justice and its major challenges for application and propose mechanisms for overcoming existing difficulties. In this article, the authors use normative, descriptive scientific methods and statistics and interviews as tools for the collection of data.

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1. Introduction

After centuries of ignoring the victim[1] and their role in the conflict that resulted from the crime, and the application of primarily a retributive attitude towards the perpetrator[2], adopting the approach that had been present in many traditional communities[3], as the concept of restorative justice, meant a revolution in the approach to the perpetrator and the victim. Just as Christie[4] indicated in 1977 and later on with the spread of the restorative justice in the world, the possibility of returning the conflict to its rightful bearers was opened, with the intention of overcoming it and creating a situation as if there was no crime. This is what restorative justice, along with a number of other achievements, has managed to achieve conceptually. And yet, it is much more than that. Marshall finds restorative justice to be a "problem-solving approach to crime which involves parties themselves, and the community generally, in an active relationship with statutory agencies" [5]. So, apart from the perpetrator and victim, it includes the community in the solution of the conflict. Therefore, in the *UN Handbook on Restorative Justice Programs*[6], it is seen as "a way of responding to criminal behavior by balancing the needs of the community, the victim and the offender", while veterans of restorative justice Zehr and Gohar define it as "a process to

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1 The role of victim was usually consumed with the role of witness within the criminal procedure. Upon giving testimony within the criminal procedure, they did not play any role in the decision making process regarding the type and duration of criminal sanction.

2 See more about the criticism of retributive justice in: Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice: An introduction to Restorative Justice* (New Jersey: Routledge, 2014), 9–14 and about the concept of three Rs in Janine Natalia Clark, "The Three Rs: Retributive Justice, Restorative Justice and Reconciliation," *Contemporary Justice Review, vol. 11*, no. 4 (November 2008): 3. Accessed August 5, 2021. http://www.tandfonline.com/toc/gcjr20/11/4. DOI: https://doi.org/10.1080/10282580802482603.

3 Many traditional societies such are Aboriginals, Native Americans, Africans, and other indigenous people used to solve the conflicts within their communities in the manner that represents the nature and idea of restorative justice. See more at: "The Origins of Restorative Justice," last modified August 1, 2021. http://www.restorativeapproaches.eu/origins.

4 Nils Christie, "Conflict as Property," *The British Journal of Criminology,* no. 17, issue 1 (January 1977): 3.

5 Tony Marshal, *Restorative Justice: an overview* (USA: Research Development and Statistics Directorate, 1999), 8.

6 United Nations, *UN Handbook on RJ Program* (New York: United Nation Office on Drugs and Crime, 2006), 6. Accessed August 5, 2021. https://digitallibrary.un.org/record/617572

involve, to the extent possible, those who have a stake in a specific offence to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible" [7].

Just as O'Brian indicates, restorative justice "is a social movement which promises to do justice differently and perhaps better" [8]. Laxminarayan correctly notices that "while other models – for example that of criminal justice or rehabilitation – may be able to partially tend to victim and offender needs, the restorative justice paradigm's focus on restoration and reparation takes an even more inclusive and humane approach."[9]

In the Report of the European Forum for Restorative Justice[10] which is referring to the effectiveness of restorative justice, a number of benefits of restorative justice have been determined, with the emphasis on the impact it produces for both victim and perpetrator. Victims in some cases want to meet the offender as they may have questions about their victimization and also, they may present their interest for reparation[11]. Perpetrators may also show their interest in meeting with victims, as many of them wish to express regret for the harm they have caused[12]. In addition to that, they see restorative justice as an alternative[13] approach to the classical criminal

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7 Howard Zehr and Ali Gohar, *The Little Book on Restorative Justice* (USA: Good Books, 2003), 40.

8 Sandra Pavelka O'Brien, "Restorative Justice: Principles, Practices and Application," *The Prevention Researcher,* vol. 14 (December 2007): 2, accessed August 14, 2021, https://link.gale.com/apps/doc/A173513899/AONE?u=anon~fb1236a5&sid=googleScholar&xid=f4be597a

9 Malini Laxminarayan, *Accessibility and Initiation Of Restorative Justice* (Leuven: European Forum for Restorative Justice, 2011), 12, accessed August 14, 2021, https://www.euforumrj.org/sites/default/files/2019–11/accessibility_and_initiation_of_rj_website.pdf.

10 *Effectiveness of restorative justice practices. An overview of empirical research on restorative justice practices in Europe* (Leuven: EFRJ, 2017), 1, accessed August 5, 2021, www.efrj.org.

11 Ibid., 1.

12 Ibid., 2.

13 Jones notices that "Alternative sentencing is desirable because it theoretically reduces recidivism through allowing the offenders to avoid institutionalization and become a contributing member of society, while drastically reducing state corrections costs". See more in: Cooper Jones, "Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis," *Xavier Journal of Politics* 5 (2014–2015): 19, accessed August 5, 2021, https://www.xavier.edu/xjop/documents/vol5_2014/XJOP_Vol_V_2014_Jones.pdf. The reason why many see it as a an approach alternative to traditional sanctions is because alternatives to sanctions are often

procedure, or coexisting type of justice to the traditional one[14]. And indeed, many legislatures accepted some forms of restorative justice as alternatives to sanctions.

From 1977, the year that is noted as a year of birth of the restorative justice concept in the modern context, until now, many countries introduced it in their criminal legislation (with different interpretations of it and its different programs and forms) or they are in the process of accepting it[15]. Although some of those programs include, but are not limited tp: victim-offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, and reparative probation"[16], many would agree that victim-offender mediation is the most often used form of

being used within juvenile justice, and restorative justice is often used in the context of juveniles. See more: Ineke Pruin et al., "The Implementation Of Alternative Sanctions And Measures Into Juvenile Justice Systems," *Romanian Journal of Sociology*, no. 1–2 (2011): 5. In the same paper, they name most notorious types of alternative sanctions: "1. Warnings, reprimands, conviction without sentence, educational "directives"; 2. Fines, community service, reparation orders, mediation; 3. Social training courses and other more intensive educational sanctions; 4. Mixed sentences, combination orders (which can be characterized as a more "repressive" way of dealing with juvenile offenders); 5. Suspended sentences without supervision by the Probation Service; 6. Probation; 7. Suspended sentences with supervision by the Probation Service, electronic monitoring; 8. Educational residential care, youth imprisonment and similar forms of deprivation of liberty".

14 Gravielides quotes Dignan (2002) and correctly reminds on discussion whether restorative justice is a sole concept – "a distinctive type of decision-making process", or part of the existing criminal justice. See more about these two different approaches in: Theo Gravielides, "Restorative justice—the perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement," *Criminology and Criminal Justice*, vol. 8(2) (May 2008): 27. DOI: 10.1177/1748895808088993.

15 Borbala Fellegi in 2005, in the report *Meeting The Challenges Of Introducing Victim-Offender Mediation In Central And Eastern Europe*, correctly notices that due to the shift from communism to another type of governance, restorative justice acceptance and forms are disputable in Central and Eastern Europe (when compared with Western Europe). See more in: Borbala Fellegi, *Meeting The Challenges Of Introducing Victim-Offender Mediation In Central And Eastern Europe* (Leuven: EFRJ, 2005), 4. So, Laxminarayan in *Accessibility and Initiation Of Restorative* Justice, at p. 8, concludes that "high level of democracy combined with intensive social polarisation would lead to a greater need for vengeance whereas intensive civic engagement combined with social trust would lead to a mix of restorative and restrictive approaches".

16 *UN Handbook on RJ Programs* (New York: United Nations Office for Drugs and Crime, 2006), 14–15.

restorative justice in the world[17]. Maryfield et al. (remind that originally it was used "in the juvenile justice system with first-time offenders of minor crimes"[18], while nowadays it is increasingly used in "adult cases as a diversion from prosecution or alternative to incarceration for more serious offences"[19].

Regardless to which form(s) of restorative justice are being accepted within the criminal law, its objectives, according to Marshall[20] are:

- "To attend fully the victims needs (material, financial, emotional, social);
- To prevent re-offending by reintegrating offenders into the community;
- To enable offenders to assume active responsibility for their actions;
- To recreate working communities that support the rehabilitation of offender and victim is active in preventing the crime;
- To provide means of avoiding escalation of costs of justice and associate delays"[21].

However, Zehr and Gohar in their work "A Little Book on Restorative Justice", explicitly name what restorative justice is not:

- "…primarily about forgiveness or reconciliation, as it is being applied on a voluntary basis;
- mediation;
- Created to reduce recidivism, but it is its byproduct;
- Particular program;
- Primarily for minors of first time offenders;
- New development;
- Replacing the legal system;
- Opposing to retribution…"[22].

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17 Laxminarayan , *Accessibility and Initiation Of Restorative* Justice, 17.

18 Bailey Maryfield, Roger Przybylski, and Mark Myrent, *Research on Restorative Justice Practices. USA: Justice Research and Statistics Association's Brief Report* (USA: Justice Research and Statistics Association, 2020), 2, accessed September 1, 2021, https://www.jrsa.org/pubs/factsheets/jrsa-research-brief-restorative-justice.pdf.

19 Ibid., 2.

20 Tony Marshall, *Restorative Justice: an overview*, 9.

21 Ibid., 9.

22 Zehr and Gohar, *The Little Book on Restorative Justice*, 6–11.

Having all this said, it is important to wonder if in the countries that introduced it into their legislation, it achieved success in a sense that it satisfied the expectations, became *de facto* applicable and hence achieved its goals. Laxminarayan[23]in her research from 2011, that included many countries of Europe, concluded that even though restorative justice is included in the legislation of many countries, it is not practiced enough and that is has not reached its full potential[24]. She names unwillingness to embrace something foreign, or softer than the classical punitive response is[25], or the limited awareness about restorative justice and its benefits within the public and referrals[26] as the main reasons for that.

With same questions in mind, the authors will point the discourse of the paper to Bosnia and Herzegovina, and after establishing existing forms of restorative justice and statistics about its applications in that country, they will present the results of their quantitative research. Namely, they conducted interviews[27] with ten correspondents who are involved in the restorative justice practice or theory, and who through these interviews revealed potential challenges in application of restorative justice and proposed the measures for its improvement. In this paper normative, descriptive legal scientific methods have been used, and quantitative research has been conducted through interviews.

2. Embracing Restorative Justice in the Criminal Law of Bosnia and Harzegovina

De iure, restorative justice became a part of the legal system of Bosnia and Herzegovina when its certain forms have been prescribed within a set of criminal substantive and procedure codes. Dating from 1998 and 2003 with

23 Laxminarayan, *Accessibility and Initiation Of Restorative Justice*, 8.

24 In that sense: Ibid. 8, through Shapland et al., 2004.

25 In that sense: Ibid, 8.

26 Ibid., 8.

27 The interviews that will be presented here had been conducted within the project "Methodology for Mapping - Criminal Justice Systems in CEE", by the authors of this article, and haven't been published before. The results of interviews represent experts opinions on the topic and are not intended to offend any person or any institution by any means. Authors use the opportunity to thank all the participants of interviews and CEOs of their respectible institutions for collaboration, without which this research would not be possible to conduct.

the creation of the *legi generali*[28] in the criminal law field, and continuing with 2010 and 2014 with *legi speciali*[29], restorative justice was embraced indirectly. The term "restorative justice" is not even mentioned, however, in order to establish if it is present as a form of justice in those codes or not, one has to analyze all the institutes, statuses of subjects, and types of sanctions carefully, and led by the known theoretical definition of restorative justice, its principles, aims and nature, and then compare them and make a conclusion whether or not there is the spirit of restorative justice in them. Based on that kind of approach, forms of restorative justice for adults and for juveniles may be identified[30]. When it comes to the adult offenders, the

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28 Those are criminal substantive and procedural codes that are being applied in Bosnia and Herzegovina: Criminal Code of Brčko District of Bosnia And Herzegovina ("Official Gazette of Brčko District of Bosnia and Herzegovina", No: 10/03, 45/04, 6/05, 21/10, 47/11, 52/11, 33/13); Criminal Code of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No:3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18); Criminal Code of Federation of Bosnia and Herzegovina ("Official Gazette of Federation of Bosnia and Herzegovina", No: 36/06, 37,03 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17); Criminal Code of Republic of Srpska ("Official Gazette of Republic of Srpska", No: 64/17); Code on Criminal Procedure of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18); Code on Criminal Procedure of Brčko District of Bosnia and Herzegovina ("Official Gazette of Brčko District of Bosnia and Herzegovina", No: 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09, 9/13); Code on Criminal Procedure of Federation of Bosnia and Herzegovina ("Official Gazette of Federation of Bosnia and Herzegovina", No: 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14); Code on Criminal Procedure of Republic of Srpska ("Official Gazette of Republika Srpska", No: 53/12);

29 Among many others, most notorious ones are related with juveniles in conflict with law, as forms of restorative justice are most visible in those cases. These are the following codes: Code on Protection and Dealing With Juveniles in Criminal Procedure in Republika Srpska (*Official Gazette of Republic of Srpska*, no.13/10, 61/13); Code on Protection and Dealing With Juveniles in Criminal Procedure in Brčko District of Bosnia and Herzegovina (*Official Gazette of Brčko District of Bosnia and Herzegovina*, no. 44/11); Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia and Herzegovina (*Official Gazette of Federation of Bosnia and Herzegovina*, no. 7/14);

30 Rialda Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: Faculty of Law of University of Sarajevo, 2018), 56; and Ena Kazić and Rialda Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina" in *Restorative Approach and Social Innovation: From theoretical Grounds to Sustainable Practices*, ed. Giovanni Grandi and Simone Grigoletto

nature of restorative justice may be identified in cases: "when the victim submits a property claim for damages as a result of the offense, when requiring community service as an alternative to a prison sentence, and when requiring the offender to fulfill certain obligations as a condition of probation"[31]. While the property claim opens an opportunity for mediation[32] between perpatrator and victim, which is not compulsory, the other two may reflect the idea of restorative justice through certain activities perpetrator must conduct in favor of the victim or community[33]. Restorative justice for juveniles, which is dominant in Bosnia and Herzegovina, may be identified in educational recommendations, police warnings, and educational measures (obligations of juvenile)[34]. All above-mentioned forms of restorative justice are found to have a restorative impact, as they involve both perpetrator and victims in their realisation, and are directed into overcoming the harm done with the perpetration of a criminal offence. When compared with the criteria of their application, mostly they are prescribed to be used for more lenient criminal offences[35].

When it comes to data about the application of restorative justice forms in Bosnia and Herzegovina, it is evident there is no specific database about

(Padua: University Press, 2019), 171–180; and Ena Kazić and Rialda Ćorović, "Is Restorative Justice an appropriate legal remediation for Sexual Violence," *Review of European and Comparative Law,* XXXVII (June 2019): 82–83. DOI 10.31743/recl.4774.

31 Ibid., 171 and 84–85.

32 Articles 193–204 of the Code on Criminal Procedure of Bosnia and Herzegovina.

33 Articles 43,58–65 of Criminal Code of Bosnia and Herzegovina, Articles 44, 62–68 of Criminal Code of Federation of Bosnia and Herzegovina, Articles 34, 46–52. of Criminal Code of Republic of Srpska, Articles 44, 59–68. of Criminal Code of Brčko District of Bosnia and Herzegovina.

34 Kazić and Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina," 174.

35 For application of some of them objective and subjective criteria has to be fulfilled. For instance, regarding the educational recommendations, in order for them to be used, objective criteria is that the criminal offence is punishable with imprisonment of up to three years or with money fine, and subjective criteria: juvenile plead guilty, plea was voluntary, there is enough evidence that the crime had been perpetrated, juvenile in written form expresses the readiness to make up with the victim, both victim and juvenile give their written approval for application of educational recommendation. See article 24(2) of the *Code On Protection And Dealing With Juveniles In Criminal Procedure In Federation Of Bosnia And Herzegovina.*

the frequency of application of these programs[36]. Instead, researchers usually depend on semi-annual or annual bulletins from the statistic institutions of Bosnia and Herzegovina and its entities, and the data delivered by the judicial institutions per request. This is the reason why collecting all this data with unique parameters is a challenging process.

However, Ćorović[37] collected the data for the period 2004–2015 about the statistics related to the application of restorative justice in Bosnia and Herzegovina. At the level of the Federation of Bosnia and Herzegovina (merged data for all cantons), educational recommendations are dominantly prescribed by prosecutors (441)[38], and in 18 cases by the municipality courts[39]. Republika Srpska shows the opposite trend since courts decided the most frequently about the educational recommendations (93 cases)[40] and the prosecutors office in 11 cases[41]. These data shows no educational recommendations applied in Brčko District BH[42]. Additionally, the applicability for the most populated canton in Bosnia and Herzegovina, Canton Sarajevo was also tested[43], and it was found there was no educational recommendation being applied by Prosecutorial Office nor Municipality Court of Canton Sarajevo, for the period 2006–2015[44]. The same trend is confirmed for the period 2012–2017 in that Canton for educational recommendations[45].

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36 Rialda Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: University of Sarajevo, 2018), 56; and Kazić and Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina", 181.

37 Rialda Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: University of Sarajevo, 2018), 175.

38 Ibid., 175.

39 Ibid., 175.

40 Ibid., 175.

41 Ibid., 175.

42 Ibid., 175.

43 This canton is one of the most populated cantons in Bosnia and Herzegovina with the highest rates of the crime. That was the reason for selecting it.

44 Kazić and Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina," 181, and Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa,* 179.

45 Ena Kazić and Dževad Mahmutović and Mirza Ljubović, *Primjena odgojnih preporuka kao oblika restorativne pravde u Kantonu Sarajevo u periodu 2012–2017 [Application of*

The retrieved data for the analyzed period, regarding the police warning, shows that it had been most often used in Republika Srpska (243 cases), while only in 14 cases in Federation of Bosnia and Herzegovina and 18 cases Brčko District BH[46]. On other hand, work for the common good at liberty was most often used in the Federation of Bosnia and Herzegovina (244 cases), in Brčko District in 16 cases, while only in one case in Republika Srpska[47].

2.1. The application and challenges of Restorative Justice in Bosnia and Herzegovina: the interviews

With these statistics, it is easy to conclude that although the legislator managed to identify the importance and benefits of restorative justice, it is present in the traces and it is not easily recognizable. Even when its component is recognized as a form of restorative justice, just as many researchers and statistics indicate, it is rarely or not applied at all. That brings questions on what makes it challenging to apply and what is its real perspective.

Those questions are of importance not only for Bosnia and Herzegovina but apparently, they appear to be important in the region as well. The Albanian Foundation for Conflict Resolution and Reconciliation of Disputes implemented the research as a part of the project named "Methodology for Mapping - Criminal Justice Systems in CEE". The project consisted of mapping that was composed of a desk review and qualitative interviews, with an aim to gather data and insights on the criminal justice systems and its stakeholders in seven CEE countries, respectively in Albania, Croatia, Bosnia and Herzegovina, Ukraine, Hungary, Czech Republic, and Slovakia[48]. The results of this research, including the ones for Bosnia and Herzegovina, were never published or presented. Therefore, as the problem of application of restorative justice in the practice has been above indicated, further, in this article, we will present results of interviews that were part of the

Educational Recommendations as a form of Restorative Justice in the Canton Sarajevo for the period 2012–2017], (Sarajevo: International University of Sarajevo, 2019), 66–67.

46 Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa,* 175–195.

47 Ibid., 175–195.

48 The authors of this paper were national consultants for Bosnia and Herzegovina within this project.

mapping process for Bosnia and Herzegovina, which may help in revealing and understanding the problems and potential solutions.

2.2. Methodology

Interviews had been conducted with 10 participants who are closely involved in the application of restorative justice. They either directly practice restorative justice and criminal justice or restorative justice is an object of their scientific research. As most of them declared they wished to stay anonymous, here we will not reveal their identity, instead, we will name their positions within institutions they are affiliated to: Legal Advisor at The High Judicial and Prosecutorial Council of Bosnia and Herzegovina; Assistant Minister of The Ministry of Justice of Bosnia And Herzegovina; Expert Advisor (Psychologist) of The Cantonal Prosecutor's Office of Canton Sarajevo; Cantonal Prosecutor of Cantonal Prosecutorial Office of Canton Sarajevo; Prosecutor of Federal Prosecutorial Office; Retired Judge of the State Court of Bosnia and Herzegovina (who worked with juveniles throughout their judicial career), Judge for Juveniles of the Municipality Court of Sarajevo and two professors from the Faculty of Law of University of Sarajevo. Clearly, they are representatives of judicial and executive power, and of legal science in this country.

The interview was a *semi-structured, open questions* type of interview, that was conducted through conversation. It consisted of three parts, but related to the topic of the paper, we will present only two parts (as the second was about vulnerable groups, a topic that doesn't fit in the aim of this paper).

First part was named "Attitudes and roles towards 'alternatives" and it consisted of these questions:

a) *Who are the governmental and non-governmental actors involved in rehabilitation and reintegration programs, as well as in promoting restorative practices?*
b) *What do you know about the attitudes of actors involved in the policy of criminal justice reform towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*
c) *Which legal actors have an important role in creating obstacles or supporting the development of such policies and practices?*

d) *Is there any research done on general attitudes of criminal justice actors towards victims and offenders?*
e) *What do you know about the attitude of people in your country towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*
f) *Is there any research done on general attitudes of people in your country towards victims and offenders?*

The third part was named "Challenges and Opportunities" and it consisted of these questions:

a) *What are some of the challenges, obstacles and deficiencies in the legislation and/or implementation of restorative justice measures?*
b) *At what level the challenges and deficiencies of the implementation of restorative practices occur? E.g.: legislative framework, enforcement / implementation in practice, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?*
c) *At what level do you think these challenges could be resolved? E.g.: legislative framework, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?*
d) *Are you aware of/can you tell us success stories in applying alternative measures used for offenders and good examples of applying restorative justice involving victims and offenders?*
e) *Where do you think intervention is most needed, and where would it make the most difference?*

2.3 Results

Further, we will in details represent the findings from the interviews.

I a) Who are the governmental and non-governmental actors involved in rehabilitation and reintegration programs, as well as in promoting restorative practices?

All participants of the interview unanimously underlined the importance of the Center for Social Work as the institution involved in rehabilitation and reintegration programs and emphasized that that institution is the only one that works extensively on this topic. The importance of educational institutions (such are faculties) in the promotion of restorative justice

practices was high lightened by the professors of law, while Cantonal Prosecutor recalled on good collaboration and practice of Gerontology Centre and Service for family aid and disabled people aid "Give us a chance".

When it comes to NGOs, these are the actors participants mentioned: UNICEF, Bureau for Human Rights Tuzla, Ministry for Human Rights and Refugees, Mediators Association of Mediators, Body of Coordination of Restorative Justice Strategy within the Council of Ministries, NGO named PROACTA and through projects related to the execution of sanctions of the USA, Great Britain, Switzerland.

I b) *What do you know about the attitudes of actors involved in the policy of criminal justice reform towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*

While scholars noticed that the majority of the Restorative justice-related actors are very skeptical towards the concept of restorative justice, alternatives and rehabilitation policies since they rather believe in a classical, retributive approach, other interviewees find that the general approach of these actors is that alternative measures bring positive results. The juvenile judge thinks that judges lean on alternatives because there they exclude institutionalization, while the Ministry of Justice representative thinks there is a big international influence on those actors to accept restorative justice related reforms.

I c) *Which legal actors have an important role in creating obstacles or supporting the development of such policies and practices?*

Within this question, there is a diversity of opinions. Participants from Cantonal Prosecution Office and Juvenile Judge agreed that there is a problem in the implementation of restorative justice and alternatives in criminal procedure because of the lack of institutions for its implementation. According to Federal Prosecutor, ministries as legal actors have an important role in creating obstacles, since the implementation of restorative justice and alternatives depends on their opinions about it. Similarly, professors find courts and prosecutors as legal actors who make obstacles since they prefer more the traditional approach of justice and that judicial institutions don't promote these policies and practices enough.

I d) *Is there any research done on general attitudes of criminal justice actors towards victims and offenders?*

All participants except of professors agreed they were not aware of any of these research. Professors stated that these kind of research might have been done through master and Ph.D. theses, and within the course Victimology that is being thought at the law schools throughout Bosnia and Herzegovina.

I e) What do you know about the attitude of people in your country towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?

In this question, there is a diversity of responses. While representatives of academia and of the Ministry of Justice think that the attitude of people is positive, and in even 80% it is supported by them, others think people know very poorly about restorative justice. Namely, education that exist are made primarily for experts, not for the general public. Cantonal Prosecutorial Office Psychologist's opinion about this is divided: people support it when it is applied to minors, but don't understand its application and importance of use for adults. The juvenile Judge is very skeptical about public understanding of restorative justice. Namely, according to her, people think that criminal politics is too mild and even probation shouldn't be applied as much it is already applied. The judge in retirement gave an example of a lack of understanding of restorative justice among people, through the problematic process Code for minors had gone through in its creation process, since most of the people didn't support the idea of maximum sanction for juveniles imprisonment to be decreased.

I f) *Is there any research done on general attitudes of people in your country towards victims and offenders?*

All the interviewees stated they were not aware if such research had been conducted and think experts should be more engaged in the research. However, professors find OSCE and UNDP as important institutions where such research might have been conducted.

III a) *What are some of the challenges, obstacles and deficiencies in the legislation and/or implementation of restorative justice measures?*

Most of the participants agreed that deficiencies in the criminal legislature and in implementation acts are the biggest obstacles in the implementation of restorative justice measures. Together with that, Cantonal Prosecutor noted that prosecutors should have more jurisdiction within the criminal procedure because she thinks that educational recommendations would be used more if the jurisdiction of the Prosecutor would be wider. The juvenile judge also referred to one of the biggest deficiencies in our criminal legislation. Namely, there is no clear structural emphasis in code nor title named restorative justice, restorative justice for juveniles or adults. Instead, institutes should be analyzed in detail, and in that way, restorative justice elements can be found. Professor finds that the Directive on the application of educational recommendations is written in too many details. The true challenge is to release the burden on criminal justice. Opposite to these opinions, the Representative of High Judicial and Prosecutorial Council of Bosnia and Herzegovina thinks there are no challenges, obstacles nor deficiencies in the legislation of restorative justice measures, while the Representative of Ministry of Justice of Bosnia and Herzegovina stated that restorative justice is more or less new in criminal justice of BH, and all the needs related to it are observed.

III b) At what level the challenges and deficiencies of the implementation of restorative practices occur? E.g.: legislative framework, enforcement / implementation in practice, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?

Many participants answered that one of the biggest challenges and obstacles occur at the legislative level. Bylaws such as the Statute on the application of educational recommendations are that much written in detail, that actually is very difficult to apply[49]. Moreover, there is a need for harmonization of all legal acts at the entities and State levels. The juvenile judge reminded on the financial side of the problem and pointed out that mediation is too expensive what causes it to be less used. Few participants

[49] Kazić and Mahmutović and Ljubović, *Primjena odgojnih preporuka,* 72.

determined a lack of understanding of restorative justice, together with the lack of motivation for its use as a challenge in its application.

III c) At what level do you think these challenges could be resolved? E.g.: legislative framework, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?

Half of the participants agreed that education plays a vital role in spreading the idea about restorative justice, and education would help in raising the awareness of the importance of its application in practice. Four of the participants agreed that legislative changes should be also made, in order to overcome challenges. Together with education and raising awareness, it is important to establish better collaboration among institutions and it is vital to motivate judges and prosecutors to apply restorative justice, through the positive valuation of their work when they apply it. Finally, the representative from the High Judicial and Prosecutorial Council of Bosnia and Herzegovina said that it is important to promote restorative justice, to widen human resources working in those cases.

III d) Are you aware of/can you tell us success stories in applying alternative measures used for offenders and good examples of applying restorative justice involving victims and offenders?

Retired and juvenile judges and professor presented examples on good practice of restorative justice. Retired Judge, named a case of 16 years old juvenile who had his best friend, who was 9 years old. He was working at the farm and driving a tractor. His young friend asked him to allow him to drive with him, and he allowed him to do that. Unfortunately, there was an accident and the younger child died. 16 years old friend was found guilty of a criminal offense. Parents of the child asked the judge not to punish him, but instead, to make him work for them at the farm. He accepted that as well and worked for them, almost as a member of the family, for ages.[50] The juvenile Judge generally mentioned that the communication established in one different case, helped all parties to establish their broken relationship. Professor mentioned the case of an old lady that was a victim of a criminal

[50] In that sense: Kazić and Mahmutović and Ljubović, *Primjena odgojnih,* 40.

offence of theft committed by a juvenile. The judge decided in that case that the most suitable measure for the juvenile would be for him to buy newspapers out of his pocket for the granny every day, for years. Both victim and perpetrator agreed on that and eventually they managed to overcome the negative effects of the criminal offence.

III e) Where do you think intervention is most needed, and where would it make the most difference?

Most of the participants of this interview agreed that the most important intervention required would be in the field of education. It is crucial for the public to understand the point of both restorative justice and alternatives in order to create a better environment for its further application. The education is required among practitioners as well, because it takes time for them to move away from traditional, retributive justice. Together with education, according to many participants (4), building up the infrastructure would be an important step forward, since some forms of restorative justice and alternatives that are introduced in our criminal justice face difficulties in their application since there is a lack of infrastructural support. Federal Prosecutor pointed out the importance of harmonization of *lex specialis* with *lex generalis*, while cantonal prosecutors stressed that prosecutors should be given wider jurisdiction in deciding upon restorative justice and alternative measures. Finally, the professor said that it would be good if changes in executive legislation would be made, in order to widen a number of restorative justice forms, including restorative justice in prisons and post prison.

3. Conclusion

Restorative justice with all its benefits for the parties of the conflict and for societies they belong to, has been recognized throughout the world and confirmed in Bosnia and Herzegovina as well. It has been recognized at the legislative level and interpretatively, some of its forms may be identified. Some of them are set to be applied for juveniles (educational recommendations, police warning, educational measures-obligations), and some for adults (property claim-related mediation, community service, probation). However, the state in practice shows that it is facing challenges in its

application as many of its forms remained just as an option *de iure*, but not applied *de facto*. Statistics show that the highest number of educational recommendations for the analyzed period had been used in the Federation of Bosnia and Herzegovina, and mostly by the prosecutorial offices. In one of the most populated cantons – Canton Sarajevo no educational recommendation have been applied recently. Similar is the situation with Brčko District BH. Republika Srpska appears to be very devoted in the application of police warnings (243) within the analyzed period, while a very low number of them is being applied in the Federation of Bosnia and Herzegovina and Brčko District BH. The opposite trend is present when it comes to work for the common good at liberty (community service), as the Federation applied it in 244 cases, Brčko District in 16, and Republika Srpska only in one case. It can be concluded that there is an inconsistency of the rates and the tendencies of application of restorative justice forms in the territory of Bosnia and Herzegovina.

Ten interviews that had been conducted with the leaders in restorative justice practice and theory, helped in establishing main concerns, challenges, and recommendations for better application of restorative justice. Our correspondents agreed that the problems related to restorative justice are of legislative, infrastructural, financial, but of motivational nature as well. The traditional attitude towards the sanctions is what prevails in the wider public and among practitioners. While the random public knows very poorly about restorative justice, practitioners face a lack of motivation in applying restorative justice forms. Although the legislative framework provides certain forms of restorative justice, the formulation lacks restorative justice terminology. Many interviewees agreed that other forms of restorative justice should be introduced in the Bosnian and Herzegovinian law. Bylaws should be prescribed in a more clear manner and details such are being prescribed for the time being are simply excluding the innovation in practice and adjustment of restorative justice forms for different cases. Mediation, one of the most notorious forms of restorative justice in the world, is not being used very often in Bosnia and Herzegovina, not only because it is not obligatory, but also because it is expensive in its application.

The interviewees recommend modifications of the legislative framework and the establishment of other forms of restorative justice. They all agree it would be necessary to create a better environment for the application

of restorative justice, which includes harmonization of *legi generali* and *legi speciali*, educations and motivation of practitioners, promotion of the concept of restorative justice, and raising the awareness about it and its benefits among the wider population, wider jurisdiction of prosecutors in the application of restorative justice.

All these recommendations may be of use for overcoming the barriers to effective and efficient use of restorative justice.

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Legal solutions of lake monitoring systems in Poland in compliance with the Water Framework Directive

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monitoring system,
lake ecological status

Abstract: The Water Framework Directive 2000/60/EC is considered a very modern strategy of water management in the EU. The purpose is to establish a framework for the protection of inland surface waters by preventing further deterioration and protecting the condition of aquatic ecosystems, as well as increasing the protection and improvement of the condition of the aquatic environment by limiting emissions and losses of priority substances. It was considered that changes in the water law in Poland during the process of implementing the guidelines of the Water Framework Directive may have contributed to widening and strengthening the monitoring system of lakes and changes in their quality, especially their ecological state. This article aims to determine the changes in legal regulations in the field of water quality/ecologically state of lakes in Poland as a result of the implementation of the WFD. The EC reports indicate that some requirements are too rigorous and complicated for Member States to implement. Water monitoring was significantly expanded and modernised which lead to improvement of lake water quality in Poland. The five-grade ecological status of lake waters and standardised biological indicators were introduced. It was highlighted that the improvement of the WFD implementation process allowed for more effective water management and the development of effective strategies for the protection of lakes in Poland and other EU countries.

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1. Introduction

The Water Framework Directive 2000/60/EC (WFD)[1] is the fundamental legislative instrument in the European Union for the use and protection of water resources and may be called the water constitution of this region. Since 2004 Poland has been a Member State of the European Union and therefore has been obliged to implementation regulations of this directive. For the main premise indicated in the WFD preamble is as follows "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such". The purpose is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater by i.e. preventing further deterioration, and protecting and enhancing the condition of aquatic ecosystems; promoting the sustainable use of water based on the long-term protection of available water resources; increasing the protection and improvement of the condition of the aquatic environment by limiting emissions and losses of priority substances, as well as ensuring progressive reduction of groundwater pollution (Article 1). Pursuant to Article 4, Member States were obliged to implement the necessary measures for surface waters to prevent the deterioration of the status of all surface water bodies, both natural and artificial and heavily modified. They should also take measures to gradually reduce pollution from priority substances and to cease or gradually reduce emissions, discharges and losses of priority hazardous substances. Thus, the WFD reflects new directions in water management, taking into account the basic principles of environmental law and has the following key objectives: the procurement of an integrated EU policy regarding the long-term sustainable use of water ensuring the principle of subsidiarity; achievement of "good status" for all waters to 2015 or preserving such status; water management based on river basins with a "combined approach" of emission limit values and quality standards; regulation of prices for water use ensuring the 'polluter pays' principle and more efficient legislation in water protection[2].

[1] Water Framework Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 2.12.2000, 1–73).

[2] See more: European Commission, Water Quality in EU: Introduction to the new EU Water Framework Directive, 2000, accessed February 23, 2021, http://www.europa.eu.int/comm/environment/water/water framework/overview.html; Muhammad M. Rahaman, Olli Varis,

The directive established principles to limit deterioration of water bodies and achieve 'good status' lakes by 2015 in EU countries. Moreover, the directive recognizes that some water bodies may take longer to achieve good status. For this reason, Member States can take advantage of the exemption under the natural conditions of a water body and extend the deadline to 2027. The deadline for achieving good water status may also be extended if this is technically impossible or disproportionately expensive. Where exemptions apply, the WFD requires Member States to justify and explain the reasons for using an exemption in their river basin management plans[3]. To reach 'good status' lakes, an integrated approach to water protection is of great importance. In international law, there is the concept of ecological integrity of waters, which is equivalent to the formula for good ecological status of waters. Ecological integrity means the natural conditions of waters and other resources sufficient to ensure the biological, chemical and physical integrity of the aquatic environment[4]. To achieve this purpose, the first step is to determine the quality status of these water reservoirs through monitoring. Monitoring is an essential part of the implementation of the whole range of EU water legislation, including, in particular, the WFD. However, the implementation of the provisions of the WFD has caused many difficulties in EU member states. Many authors have described organisational methods and solutions supporting this process, especially in

Tommi K. Rahaman, "EU Water Framework Directive vs. Integrated Water Resources Management: The Seven Mismatches," *Water Resources Development 20*, no. 4 (2004): 567. DOI: 10.1080/07900620412331319199; Ryan Stoa, "Subsidiarity in Principle: Decentralization of Water Resources Management," *Utrecht Law Review 10*, no. 2 (2014): 35. DOI: https://doi.org/10.18352/ulr.267; Elżbieta Zębek, "Międzynarodowe i krajowe podstawy prawne i bioindykatory (glony) oceny stanu jakości wód powierzchniowych," in *Odpowiedzialność za środowisko w ujęciu normatywnym*, ed. Elżbieta Zębek, Michał Hejbudzki (Olsztyn: Wydawnictwo UWM, 2017), 119–138; Elżbieta Zębek, "Legal protection of waters in the context of human rights," *Themis Polska Nova 1*, no.13 (2018): 14–24; Elżbieta Zębek, Agnieszka Napiórkowska-Krzebietke, "Rozwój przepisów prawnych w zakresie bioindykacji środowiskowej a stan jakości wód jeziorowych," *Studia Prawnoustrojowe* 43 (2019): 375–393. DOI: https://doi.org/10.31648/sp.4616.

3 Sprawozdanie Komisji dla Parlamentu Europejskiego i Rady w sprawie wykonania ramowej dyrektywy wodnej (2000/60/WE) Plany gospodarowania wodami w dorzeczu, 2012 (COM/2012/0670 final).

4 Janina Ciechanowicz-McLean, "Wpływ ramowej dyrektywy wodnej na bezpieczeństwo ekologiczne morza bałtyckiego," *Gdańskie Studia Prawnicze* 32 (2014): 87.

the field of water monitoring[5]. In Poland, the provisions of the WFD have been implemented to the Water Law Act of 2001[6] and in the Water Law Act of 2017[7]. It is considered that changes in the water law in Poland during the process of implementing the guidelines of the Water Framework Directive may have contributed to widening and strengthening the monitoring system of lakes and changes in their quality, especially their ecological state. This article aims to determine the changes in legal regulations in the field of water quality/ecological state of lakes in Poland as a result of the implementation of the WFD. The article uses the legal dogmatic method through presenting and analysing the regulatory acts and EC reports in the field of water quality.

2. Implementation of the Water Framework Directive in EU Countries

2.1. General guidelines of the WFD on water quality and monitoring system

Directive 2000/60/EC advises the management of surface waters including lakes in accordance to River Basin Management Plans. The European

5 Ralf Boscheck, "The EU Water Framework Directive: meeting the global call for regulatory guidance?," *Intereconomics Review of European Economic Policy* (2006): 41. DOI: https://doi.org/10.1007/s10272–006–0196–1; Ho-Sik Chon, Dieudonne-Guy Ohandja, Nikolaos Voulvoulis, "Implementation of E.U. Water Framework Directive: source assessment of metallic substances at catchment levels," *Journal of Environmental Monitoring* 12 (2010): 36–47. DOI: https://doi.org/10.1039/B90785; Maro Vlachopoulou, Deborah Coughlin, David M. Forrow, Stuart Kirk, Paul Logan, Nikolaos Voulvoulis, "The potential of using the Ecosystem Approach in the implementation of the EU Water Framework Directive," *Science of the Total Environment* 470–471(2014): 684–694. DOI: https://doi.org/10.1016/j.scitotenv.2013.09.072; Gabrielle Bouleau, Didier Pont, "Did You Say Reference Conditions? Ecological and Socioeconomic Perspectives on the European Water Framework Directive," *Environmental Science and Policy* 47(2015): 32–41. DOI: https://doi.org/10.1016/j.envsci.2014.10.012; Blandine Boeuf, Oliver Fritsch, Julia Martin-Ortega, "Undermining European environmental policy goals? The EU water framework directive and the politics of exemptions," Water 8(2016): 1–15. DOI: https://doi.org/10.3390/w8090388; Phoebe Kondouri, Philippe Ker Rault, Vassilis Pergamalis, Vassilis Skianis, Ioannis Soulioutis, "Development of an integrated methodology for the sustainable environmental and socio-economic management of river ecosystems," *Science of The Total Environment* 540(2016): 90–100. DOI: https://doi.org/10.1016/j.scitotenv.2015.07.082

6 Water Law Act of 18 July 2001 (consolidated text LJ of 2017, item 1121).

7 Water Law Act of 20 July 2017 (consolidated text LJ of 2021, item 2233).

Commission has defined a common implementation strategy, especially the guidance on monitoring. This strategy aims to promote consistency in the implementation of monitoring system by providing supplementary guidance on the design and implementation of chemical and biota standards collection of samples, processing and expression of data, and use to undertake compliance assessments[8]. Thus, these waters are to be characterized in terms of their bioindicators, chemical elements and hydromorphological parameters. These indices should be compared to those from waters unchanged by human activity and next classified into different ecological status categories, with the objective for all waters to meet the 'good status' (Article 4). In this range, the provisions of WFD significantly expanded the environmental objectives, especially including requirements for discharge control and a comprehensive framework for monitoring and reporting[9].

According to provisions of the WFD the objectives of water management are based on the general ecological characteristics of these waters, consisting biological, chemical and hydromorphological features or their combination. Thus, Member States are required to raise complex and complete analysis of these parameters to determine the influence of anthropogenic pressures on the water environments and to classify waters with regard to 'status' categories. In case of lake waters, it is required that these waters achieve 'good ecological status'. This is a fundamental determinant for estimating the water quality system, which divided waters into five classes such as 'high', 'good', 'moderate', 'poor' and 'bad'. The final water

8 European Commission, Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No. 32 on Biota Monitoring (The Implementation of Eqsbiota) under the Water Framework Directive Luxembourg: Office for Official Publications of the European Communities, 2014; European Commission, Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No. 25, Guidance on Chemical Monitoring of Sediment and Biota under the Water Framework Directive (Luxembourg: Office for Official Publications of the European Communities, 2010).

9 See more Eleftheria Kampa, Wenke Hansen, *Heavily Modified Water Bodies. Synthesis of 34 Case Studies in Europe* (Berlin: Springer, 2004); Andrew Farmer, *Manual of European Environmental Policy* (London: Routledge, 2012); Theodoros Giakoumis, Nikolaus Voulvoulis, "Progress with monitoring and assessment in the WFD implementation in five European River Basins: significant differences but similar problems," *European Journal of Environmental Sciences 8*, no. 1 (2018a): 44–50. DOI: https://doi.org/10.14712/233619 64.2018.7.

quality evaluation depends on the worst level out of three separate estimations of biological, chemical and hydromorphological status. According to regulations in Annex V surface water monitoring in the case of lakes, apart hydro-morphological and chemical parameters requires the estimation of bioindicators to determine their ecological status. This ecological status estimated as the structure quality, functioning of water ecosystems and their state is compared to the natural or reference state. Finally, analysed water body is classified into one of the five performance groups: high, good, moderate, poor or bad status. For the determination of these water classes and the ecological status of waters very important is the monitoring system. In this range, Member States are obliged to procure the program for water status monitoring "to establish a coherent and comprehensive review of water status" in each River Basin District (Article 8 of WFD). Annex V of the WFD determines the locations and frequency of water samples with the emphasis on water bodies exposed to anthropogenic activity[10]. Three types of monitoring are specified in Annex 5 1.3 of the WFD:

(1) surveillance monitoring is prepared for the following purposes: to supply overall estimation of the surface water status at particular catchment of the river basin; complementing and validating the impact assessment on water ecosystems; to create the effective project of monitoring programs; and the estimation of long-term changes in natural conditions and their changes caused by anthropogenic pressure;
(2) operational monitoring is created mainly to establish the status water bodies recognized as waters with risk of failing to meet their environmental purposes, and estimation changes in the status of such bodies resulting from the measured programs;

[10] European Commission, Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance document No. 13, Overall approach to the classification of ecological status and ecological potential, Working Group 2A (Luxembourg: European Commission, 2005); EPA, Management Strategies for the Protection of High Status Water Bodies (2010-W-DS-3), EPA STRIVE Programme 2007–2013, 2012, accessed February 23, 2021, https://www.epa.ie/pubs/reports/research/water/ STRIVE_99_web.pdf; Andrew Farmer, *Manual of European Environmental Policy*, 15; Elżbieta Zębek, "Międzynarodowe i krajowe podstawy prawne i bioindykatory (glony) oceny stanu jakości wód powierzchniowych," 129; Elżbieta Zębek, Agnieszka Napiórkowska-Krzebietke, "Rozwój przepisów prawnych w zakresie bioindykacji środowiskowej a stan jakości wód jeziorowych," 382.

(3) investigative monitoring called as "complementary" is carried out in the following cases: inability to recognize the reason for excess in water parameters and bioindicators; surveillance monitoring shows inability to achieve the environmental purposes and operational monitoring has not settled the causes of this state of affairs; to estimate the magnitude and impact of accidental pollutions; to inform about determined program of measures to achieve the environmental purposes and special measures required to remedy the effects of accidental pollution[11].

This monitoring has to be compliant with the technical standards and the requirements for exchange, and collection of information established by the INSPIRE Directive (2007/2/EC)[12]. In addition, according to Article 8 of the WFD the sufficient quality and comparability of analytical results made by laboratories to monitor ecological and chemical status of waters compliant with Directive 2009/90/EC should be ensured[13]. To estimate the ecological status there are used indicators of ecological quality for a particular surface-water category. The monitoring elements need to be indicative of the pressures that are operating in the catchment. For example in the case of lakes, there are four groups of quality elements to be considered: (1) biological – phytoplankton, other aquatic flora, benthic invertebrates and fish; (2) general physicochemical elements – oxygen, nitrate and phosphate; (3) relevant pollutants (Annex VIII) – pesticides and some metals, and (4) hydromorphological elements – water flows and physical parameters[14].

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11 European Commission, Common implementation strategy for the Water Framework Directive (2000/60/EC), Monitoring under the Water Framework Directive produced by Working Group 2.7 – Monitoring, Guidance Document No. 7 (Luxembourg, 2003).

12 European Commission, Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council in accordance with article 18.3 of the Water Framework Directive 2222/60/EC on programmes for monitoring of water status, SEC (2009) 415 (Brussels, 2009a).

13 Directive 2009/90/EC of 31 July 2009 laying down, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, technical specifications for chemical analysis and monitoring of water status (OJ L 201, 1.8.2009, 36–38).

14 European Commission, Common implementation strategy for the Water Framework Directive (2000/60/EC), Monitoring under the Water Framework Directive Produced by Working Group 2.7 – Monitoring, Guidance Document No. 7 (Luxembourg, 2003); European Commission, Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance document No. 13, Overall approach to the classification of

2.2. Problems in implementing the provisions of the WFD in the EU

The WFD is a widely approved legal act and recognised as the most substantial part of European water protection legislation[15]. The effectiveness of the implementation of this directive by the EU Member States has been determined in numerous reports of the European Commission (EC) and the commentary literature. Thus, the Commission publicised the following implementation reports: the first report on the first stage of implementation in 2007; the 2 report on monitoring networks in 2009; the 3 report on the River Basin Management Plans in 2012; and the 4 report on the Programs of Measures and the Flood Directive in 2015.

The first report (COM(2007)128) of the EC in the range of implementation of the WFD was published in March 2007. This report involves the implementation of Article 5 of the WFD which requires the Member States to describe an environmental and economic analysis of water bodies by 2004. This report indicated that the number of monitored water bodies were 'at risk'. Moreover, there were many data gaps, but only three of the 27 Member States reported that the majority of water bodies were not at risk. There were several reasons for this, including agricultural and point source pollution. In this range, proper urban wastewater treatment was required in the new Member States. However, it found that these regulations have not been implemented by the EU15 to end of 2003. Although the new countries have made significant progress in these activities to their

ecological status and ecological potential, Working Group 2A (Luxembourg, 2005); John Lucey, *Water Quality in Ireland 2006 – Key Indicators of the Aquatic Environment* (Wexford: EPA, 2007); Elżbieta Zębek, "Międzynarodowe i krajowe podstawy prawne i bioindykatory (glony) oceny stanu jakości wód powierzchniowych," 131; Agnieszka Napiórkowska-Krzebietke, "Ocena jakości/stanu/potencjału ekologicznego jednolitych części wód powierzchniowych – kryteria i unormowania prawne w Polsce," in *Odpowiedzialność za środowisko w ujęciu normatywnym*, ed. Elżbieta Zębek, Michał Hejbudzki (Olsztyn: Wydawnictwo UWM, 2017), 143; Elżbieta Zębek, Agnieszka Napiórkowska-Krzebietke, "Rozwój przepisów prawnych w zakresie bioindykacji środowiskowej a stan jakości wód jeziorowych," 382.

15 Nikolaos Voulvoulis, Karl D. Arpon, Theodoros Giakoumi, "The EU Water Framework Directive: From great expectations to problems with implementation," *Science of the Total Environment* 575 (2017): 358–366. DOI: https://doi.org/10.1016/j.scitotenv.2016.09.228.

UE accession in 2004. Their common feature was a lack of requirements for environmental and economic assessment tools[16].

The second report of the EC (COM(2009)156) of 1 April 2009 concerned the programs for water status monitoring. It was showed that all Member States established the monitoring programs required by Article 8 and Annex V. There were two exceptions: Greece did not procure the report, and Malta did not implement monitoring programs of surface water. This report indicates a good organisation of monitoring effort in EU, with more than 107,000 stations reported for monitoring of surface and groundwater. However, the shortcomings in particular river basin districts or water categories were revealed as some countries that joined the EU in 2004 and 2007 did not apply the necessary assessment methods for bioindicators in many river basin districts[17]. Furthermore, in 2009, draft River Basin Management Plans were made accessible to public consultations in 17 Member States. In most drafts there were plans proving information on the current and foreseen status of water bodies by 2015. In addition, the likely achievement of good status by this year varied greatly from below 10 % of surface water bodies in Belgium-Flanders and the Czech Republic to above 80 % in Ireland, Bulgaria, France, and Estonia. Moreover, the Directive 2009/90/EC determining the technical specifications for chemical analysis and monitoring of water status was adopted[18].

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16 European Commission, Staff Working Document accompanying the Communication "Towards Sustainable Water Management in the European Union" – First stage in the implementation of the Water Framework Directive 2000/60/EC, SEC (2007) 362 (Brussels, 2007).

17 European Commission, Common implementation strategy for the Water Framework Directive (2000/60/EC), Guidance Document No. 19, Guidance on surface water chemical monitoring under the Water Framework Directive, Technical Report - 2009 – 025 (Luxembourg, 2009b).

18 Daniel Hering, Angel Borja, Jacob Carstensen, Laurance Carvalho, Mike Elliott, Christian K. Feld, Anna-Stiina Heiskanen, Richard K. Johnson, Jannicke Moe, Didier Pont, Anne Lyche Solheim, Wouter van de Bund, "The European Water Framework Directive at the age of 10: A critical review of the achievements with recommendations for the future," *Science of The Total Environment 9*, no. 1 (2010). DOI: https://doi. org/10.1016/j. scitotenv.12; European Commission, Communication From The Commission to the European Parliament and The Council - The Water Framework Directive and the Floods Directive: Actions towards the 'good status' of EU water and to reduce flood risks, COM(2015) 120 final (Brussels, 2015a); European Commission, Ecological flows in the implementation of the Water Framework Directive, Guidance Document No. 31

In 2012, the European Commission communicated the Blueprint to Safeguard Europe's Water Resources, which evaluated the existing policy. This report showed that only slightly above 50% of the surface waters would reach "good status" in 2015. Therefore, it was stated that additional actions were needed to preserve and improve EU waters. The European Environment Agency reported poor ecological status in about 50% of surface waters and indefinite chemical status in 40% of the waters in 2012. This situation was caused by insufficient budgets within the Member States to reach the purposes of the WFD by 2015[19].

The next problem in WFD implementation consisted of the most monitoring programs described by the EU countries have concentrated "on the monitoring of individual structural parameters, on the assumption that the good quality of such elements corresponds to the good functioning of ecosystems". Thus, these programs were based on symptoms rather than causes of water degradation. Consequently, in 21 of 27 Member States, there were no explicit relations between negative impact on water ecosystems and measure programs. In addition in 23 of 27 these countries, the analysis of shortcomings in these regulations implementation for the elaboration of suitable and cost-effective measures was not carried[20]. According to the last

Technical Report - 2015 – 086 (Luxembourg, 2015); Blandine Boeuf, Oliver Fritsch, Julia Martin-Ortega, "Undermining European environmental policy goals? The EU water framework directive and the politics of exemptions," 9.

19 European Commission, Report on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans, COM (2012) 670 final (Brussels, 2012a); European Commission, Ecological flows in the implementation of the Water Framework Directive, Guidance Document No. 31 Technical Report - 2015 – 086 (Luxembourg 2015b); Jan Verheeke, Dirk Uyttendaele, Michiel de Vries, Working on the Water Framework Directive – exploratory note in relation to the future article 19.2. review of the Directive, MINARAAD, 2017, accessed February 23, 2021, https://eeac.eu/wp-content/uploads/2018/01/171222-EEAC-exploratory-note-water-policy-def-1.pdf; Matjaž Glavan, Špela Železnikar, Gerard Velthof, Sandra Boekhold, Sindre Langaas, Marina Pintar, "How to enhance the role of science in European Union Policy making and implementation: The case of agricultural impacts on drinking water quality," *Water 11*, no. 3 (2019): 492. DOI: https://doi.org/10.3390/ w11030492.

20 European Commission, Common implementation strategy for the Water Framework Directive (2000/60/EC), Monitoring under the Water Framework Directive Produced by Working Group 2.7 – Monitoring, Guidance Document No. 7 (Luxembourg, 2003); European Commission Staff Working Document accompanying the Report from the Commission

analysed report of 2015, in less than 50% of surface waters in the EU good ecological status was found[21].

Problems in implementing these provisions of the WFD in some European countries may be caused by the fragmentation of water management bodies because responsibilities are highly fragmented between them. Examples of such countries are Georgia, Moldova and Ukraine, candidates for the EU, which, in accordance with the signed EU integration acts[22], have committed themselves to implementing the provisions of

to the European Parliament and the Council in accordance with article 18.3 of the Water Framework Directive 2222/60/EC on programmes for monitoring of water status, SEC (2009) 415 (Brussels, 2009a); European Commission, Attitudes of Europeans towards Water-related Issues – Summary, Flash Eurobarometer 344 (Brussels, 2012b); European Commission, Staff Working Document – European Overview accompanying the document Report on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans, SWD (2012) 379 final, 2012c; Nikolaos Voulvoulis, Karl D. Arpon, Theodoros Giakoumi, "The EU Water Framework Directive: From great expectations to problems with implementation," 362; EEAC, The EU Water Framework Directive results to date and outlook for the future, EEAC Working Group on Fresh Water Affairs, 2018, accessed February 23, 2021, https://eeac.eu/wp-content/uploads/2018/09/The-EU-Water-Framework-Directive-Results-to-date-and-outlook-for-the-future.pdf; Theodoros Giakoumis, Nikolaos Voulvoulis, "Water Framework Directive programmes of measures: Lessons from the 1 planning cycle of a catchment in England," *Science of The Total Environment* 668 (2019): 903–916. DOI: https://doi.org/10.1016/ j.scitotenv.2019.01.405.

21 European Commission, Communication From The Commission to the European Parliament and the Council - The Water Framework Directive and the Floods Directive: Actions towards the 'good status' of EU water and to reduce flood risks, COM(2015) 120 final (Brussels, 2015a); European Commission, Ecological flows in the implementation of the Water Framework Directive, Guidance Document No. 31 Technical Report - 2015 – 086 (Luxembourg, 2015b); European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results, COM(2017) 63 final (Brussels 2017); Theodoros Giakoumis, Nikolaos Voulvoulis, "The Transition of EU Water Policy Towards the Water Framework Directive's Integrated River Basin Management Paradigm," *Environmental Management 62*, no. 5 (2018b): 819–831. DOI: https://doi.org/10.1007/s00267–018–1080-z.

22 European Commission, Association agreement between the European Union, the European Atomic Energy Community and their Member States, Ukraine (OLJ L 161(3), p. 1–2132), 2014a; European Commission Association agreement between the European Union, the European Atomic Energy Community and their Member States, the Republic of

the WFD. Other authorities are responsible for management, monitoring, and water quality. There is no complete database or understanding of the links between existing multi-level legal institutions in these countries. The water quality standards in these countries have been regulated for a specific type of water use in water law[23]. In Ukraine, these standards have been set at more than 1000 parameters and are much higher than those specified in the WFD, but in practice water quality monitoring is limited to around 80 parameters, with only about a third of them being similar to those in the directive. The general problem is the lack of environmental monitoring tools[24]. Moreover, Georgian, Moldavian and Ukrainian water law do not classify water bodies according to the quality or quantity of water. The assessment of water quality is based on the assumption that one of the parameters exceeds the maximum allowable concentrations, water reservoir then cannot be used for specific purposes. Water quality standards are too restrictive and unattainable for most water users. Thus, the biggest problems with water monitoring in these countries are the lack of a clearly defined legal basis for water quality parameters, no quality objectives, no measurement and analysis methods applied and there is no provision for harmonization between different water agencies. In addition, another significant problem in the adaptation of EU legislation in these three countries are differences in the terminology used in the legislation, norms and standards, e.g. water quality, pollution, river basins and the overall concept of the protection of water resources in

Moldova (OLJ L 260, p. 1–740), 2014b; European Commission, Association agreement between the European Union, the European Atomic Energy Community and their Member States, Georgia (OLJ L 260, p. 1–740), 2014c.

23 Law of Georgia on Water (LJ of 1997, No. 936); Law of the Republic of Moldova on Water (LJ of 2011, No. 272; Water Code of Ukraine (LJ of 1995, No. 213–95).

24 Nina Hagemann, Bernd Klauer, Ruby M. Moynihan, Marco Leidel, Nicole Scheifhacken, "The role of institutional and legal constraints on river water quality monitoring in Ukraine," *Environmental Earth Sciences 72*, no. 12 (2014): 4745–4756. DOI: https://doi.org/10.1007/s12665–014–3307–5; Yuliya Vystavna, Dmytro Diadin, "Water scarcity and contamination in eastern Ukraine," *IAHS-AISH Proceedings and Reports* 366 (2015): 149–150. DOI: https://doi.org/10.5194/piahs-366–149.

terms of legislation. This is a significant obstacle to the integration of EU legislation and complicates practical alignment with this legislation[25].

An example of another country that has implemented the WFD provisions is the Netherlands, whose regional water authorities have facilitated the implementation of the river basin approach[26]. Most of the directive's water provisions have already been implemented. However, the longer the implementation process has progressed, the greater the uncertainties regarding the exact meaning of the obligations under the directive regarding river basin management plans. The water quality in the Netherlands is not good and the latest forecasts by the Dutch environmental assessment agency show that by 2027 95% to 60% of Dutch water will not meet the WFD standards[27]. Water quality and the main water management instruments are determined in the Water Act[28]. The main legal instruments are plans and programs, among which we can distinguish the national water policy plan of the central government, regional water policy plans from the voivodeship, land development plans of the Ministry of Infrastructure and Water. State water management and regional water management plans, authorities responsible for regional waters. In the Netherlands, surface water quality standards are set in accordance with Chapter 5 of the Environmental Management Act[29]. With regard to the ecological status, a division was made into natural waters and artificial or heavily modified waters, which is approximately 96–99% of waters. The definition of good ecological status and good ecological potential applies in the Netherlands as quality standards. However, a specification is required to give concrete content to these abstract definitions. Therefore, the government has clearly decided that it will not be binding

25 Yuliya Vystavna, Maryna Cherkashyna, Michael R. van der Valk, "Water laws of Georgia, Moldova and Ukraine: current problems and integration with EU legislation," *Water International 43*, no. 3 (2018): 424–435. DOI: https://doi.org./10.1080/02508060.2018.1447897.

26 Carel Dieperink, Tom Raadgever, Peter J. Driessen, Amoud A.H. Smit, Marleen W. van Rijswick, "Ecological ambitions and complications in the regional implementation of the water framework directive in the Netherlands," *Water Policy 14*, no. 1 (2012): 160–173.

27 Planbureau voor de Leefomgeving W. Ligtvoet et al., Waterkwaliteit en -veiligheid. Balans van de Leefomgeving 2014 – Deel 6, 2014.

28 Waterwet (Stb. 2009, 107, last amended by Stb. 2015, 399).

29 Wetmilieubeheer (Stb. 1979, 442, last amended by Stb. 2013, 20).

norms of good ecological status and good ecological potential. The parameters used to determine the ecological status of "natural" waters are set out in the Ministerial Monitoring Ordinance[30]. For artificial or heavily modified waters, it lays down guidelines for setting the standards that apply to the specific body of water. These standards are then embedded in the management plans for each specific water body, therefore there is no legally binding standard. In light of EU implementation requirements, this practice can hardly be considered with EU law. Moreover, the objectives of the directive must be achieved in all water bodies, whereas in the Netherlands this only applies to designated waters. Water monitoring is based on the ecological, chemical and hydrological status, as in other EU countries. However, the responsibility for implementing the surface water monitoring program rests with the authority that authorized the waste water discharge. This is problematic for two reasons. Firstly, the authorities only issue a permit on the basis of the chemical status, and the ecological status requirements are not met. Secondly, the monitoring program in accordance with EU guidelines allow the possibility to connect water bodies of the same type in order to monitor, provided that a sufficient number of monitoring points to assess the state of their water[31]. The Dutch guidelines do not explain how these conditions were established. Thus, a problematic issue in the Netherlands is how the quality standards of the ecological elements are implemented in the Dutch legal framework. They are not a valid in law document, but only in plans that are binding only for those authorities who have agreed to the plan. As a result, quality standards relating to the ecological status of waters cannot be enforced for a number of human activities that affect water quality, such as agriculture[32]. Nevertheless, the report of the European Parliament of 2020 shows that the WFD is fit for the intended purpose. However, its

30 Regeling monitoring Kaderrichtlijn Water (Stb. 2010, 5615, last amended Stb. 2015, 38398).

31 European Commission, Common implementation strategy for the Water Framework Directive (2000/60/EC), Monitoring under the Water Framework Directive Produced by Working Group 2.7 – Monitoring, Guidance Document No. 7 (Luxembourg, 2003).

32 Lorenzo Squintani, Ernst Plambeck, Marleen van Rijswick, "Strengths and Weaknesses of the Dutch Implementation of the Water Framework Directive," *Journal for European Environmental & Planning Law* 14 (2017): 269–293. DOI: https://doi.org/10.1163/18760104–01403002.

implementation needs to be improved and accelerated. While an Integrated Water Management Framework (IWM) has been created for many thousands of water bodies in the EU, which is helping to slow water status deterioration and reduce chemical pollution, less than half of the EU's water bodies are in good condition despite the 2015 deadline. Moreover, only one of the four indicators for freshwater, has improved in the last 10–15 years. The reasons for this are problems with the implementation of water legislation, mainly due to insufficient funding and insufficient coverage of environmental objectives in sectoral policies[33].

3. Changes in Polish legal regulations in the Field of Water Quality

3.1. WFD implementation in Polish legislation

Directive 2000/60/EC was implemented early into the Water Law Act of 2001 and then in the Water Law Act of 2017. In Poland, as in other EU countries, the transposition of the directive still presents many difficulties. The adoption of the Water Law Act 2001 was the first stage in the process of transposing the directive into Polish law. To properly implement the WFD rules in Poland, a timetable has been set for these activities: 2002–2003 designation of river basin districts, 2002–2003 identifying interested parties and proposing procedures for public participation, 2003 establishing the necessary GIS infrastructure, 2003 introducing laws and regulations as well as administrative provisions and provisions necessary for implementation of the WFD, 2003 determination of the administrative district authorities, 2002–2005 assessment of the current state and initial needs analysis, 2002–2006 setting environmental objectives, 2005–2009 needs analysis, 2006–2009 action programs, 2006–2009 river basin management plans, 2009–2012 implementation of the action program, 2013 update of the status for river basin districts, 2013–2014 review of the action program and river basin management plans and 2015 publication of the updated river basin management plan[34].

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33 Parlament Europejski, Wdrażanie unijnego prawodawstwa dotyczącego wody, Procedura: 2020/2613(RSP), Interpelacje z 7 grudnia 2020, accessed March 10, 2022, https://www.europarl.europa.eu/doceo/document/O-9–2020–000078_PL.html.

34 Rafał Miłaszewski, Tomasz Walczykiewicz, Draft report to the European Commission regarding economic analysis of water management for the Vistula and Oder river basins in accordance with the requirements of the Water Framework Directive 2000/60/EC together

The main problems that arose during the WFD implementation process were mainly due to the many shortcomings of the Water Law Act of 2001. For this reason, on 24 June 2010, the European Commission sent Poland allegations regarding incorrect transposition of the provisions of the directive. In 2011, the provisions of the Water Law were amended, which was supposed to remove the deficiencies. However, the EC required the demonstration of all essential measures taken by Polish authorities to implement the WFD and limit the negative impact on the state of the waters. Moreover, there were identified issues with complying with this process such as the lack of data, access to existing data, financing of works and timely implementation of the main points of the schedule[35].

The European Commission has assessed the second generation of river basin management plans notified by Poland following the WFD in terms of water status and the progress recorded since the first river basin management plans were developed. In the hierarchy range of pressure on the surface waters, the most important was unknown effect (36%), followed by nutrients (22%) and habitat transformation (8%). Therefore, there is no identification of the sources of pollution of water bodies, which does not allow for the elaboration of protective measures against their degradation and eutrophication. In addition, the number of operational and diagnostic monitoring sites to record ecological status decreased in comparison to the first river basin management plans. Insufficient monitoring of the ecological status of waters does not allow for their proper classification and hence there are gaps in statistical studies. The monitoring data is therefore inaccurate. However, there was a significant increase in the number and proportion of water bodies classified in ecological status (almost to 80%), while 70% of water bodies had an ecological status below good. Overall, the second river basin management plan improved the quantity and quality

with the concept of forward-looking activities (Warsaw: Departament Zasobów Wodnych Ministerstwa Środowiska, 2004); Maciej Maciejewski, Tomasz Walczykiewicz, „Dotychczasowe doświadczenia związane z wdrażaniem Ramowej Dyrektywy Wodnej," Infrastruktura i Ekologia Terenów Wiejskich 4, no. 1 (2006): 63–76.

35 PGW Wody Polskie, Water Directive – state of implementation into the Polish legal order, 2013, accessed February 23, 2021, http://www.rdw.org.pl/cele-i-harmonogram.html; Bartosz Rakoczy, *Opinion on a draft act amending the act - Water law and some other acts*, Sejm print No. 2106 (Warsaw: Office of the Senate, Office of Analysis and Documentation, 2014).

of directly available information as provided in the action programs. On this basis, priority actions for 2019 have been developed. There are include improving surface water monitoring by including all relevant quality elements in all water categories, implementing further measures to ensure good quantitative status of waters, ensuring that projects that can affect the state of water bodies, have been thoroughly assessed and justified in accordance with the requirements of the WFD[36].

Pursuant to the provisions of the WFD, water management planning is divided into river basin districts. In Poland, these plans are regulated in Article 13 of the Water Law and contain the following elements:

- a general description of the characteristics of the river basin district,
- a summary of the identification of significant anthropogenic pressures and the assessment of their impact on the status of surface and groundwater,
- list of protected areas,
- map of the monitoring network, along with the presentation of monitoring programs,
- setting environmental objectives for water bodies and protected areas,
- a summary of the results of the economic analysis related to the use of water,
- a summary of the activities included in the country's water and environmental program,
- a list of authorities competent for water management in the river basin district.

The Polish water law of 2017 is characterized by a very extensive network of 9 river basin districts (Vistula, Odra, Dniester, Danube, Jarft, Elbe, Niemen, Pregoła, Świeża) divided into water regions, which may complicate water monitoring (Article 13). As a consequence, it is not possible to examine the water quality of all water reservoirs in a given year and

[36] EEAC, The EU Water Framework Directive results to date and outlook for the future, EEAC Working Group on Fresh Water Affairs, 2018, accessed February 23, 2021, https://eeac.eu/wp-content/uploads/2018/09/The-EU-Water-Framework-Directive-Results-to-date-and-outlook-for-the-future.pdf; European Commission, Report from the Commission to the European Parliament and the council on the implementation of the Water Framework Directive (2000/60/EC) and the Floods Directive (2007/60/EC) Second River Basin Management Plans First Flood Risk Management Plans, COM(2019) 95 final (Brussels, 2019).

the assessment is carried out cyclically every few years. For example, as part of the river monitoring program for 2016–2021, 2,564 water sampling points have been planned, and 2,329 out of 4,586 surface water bodies (SWBs) will be monitored, which constitutes 51% of all SWBs. Moreover, out of 2,257 SWBs not covered by monitoring studies, 700 were characterized as not endangered due to the water condition. In the case of lake waters, 1044 SWBs have been designated. As part of the network of monitoring points and programs for the years 2016–2021, 567 lakes will be monitored with the use of 567 sampling points, which constitutes 54.31% of the SWBs of all lake waters.

The consequence of incomplete monitoring of waters is the lack of sufficient data, e.g. biological tests of waters to determine the typology of waters and reference conditions, hence they are considered preliminary, as well as the lack of sufficient data to fully assess the impact on individual water bodies. Moreover, there is a lack of a sufficient staffing to implement the WFD implementation tasks, along with organizational, financial and legal problems[37]. A practical example of implementing the provisions of the WFD are measures to improve the quality of water in the Barycz river basin. The most important problem in this regard is related to water management as a result of anthropogenic activities, i.e. the municipal sector, industry and agriculture, which make it difficult to achieve the environmental objectives. From among 11 integrated bodies of surface water, as many as 6 are endangered due to poor quality condition, which means that derogations from the originally established date for water bodies that require it are expected. Thus, the entire catchment area is at risk of not achieving the WFD goals. One of the reasons is the high implementation costs of all protective measures[38].

A comprehensive analysis of the WFD implementation status shows that it is unlikely to achieve good ecological status for all surface water bodies, but also for protected areas. One of the problems is the incorrect

37 Teresa Błaszczak, "Ramowa Dyrektywa Wodna: Strategia wdrażania," in *Integrated Coastal Zone Management at the Szczecin Lagoon: Exchange of experiences in the region,* ed. Bernhard Glaeser, Agnieszka Sekścińska, Nardine Löser, *Coastline Reports* 6 (2005): 87– 99.

38 Katarzyna Tokarczyk-Dorociak, Szymon Gębarowski, "Implementation of Water Framework Directive in Barycz river basin," *Infrastruktura i Ekologia Terenów Wiejskich* 10 (2011): 15–27.

assessment of the current status of waters by not taking into account the hydromorphological status, ichthyofauna and benthos, i.e. those factors which in most waters are most likely critical for the assessment of their current status. As a result, the needs of activities necessary to achieve the environmental objectives were not identified, and therefore these activities were not included in the National Water and Environmental Program or in other documents. In addition, no attempt has even been made to define environmental objectives for protected areas. An example is the Drawa river located in the Natura 2000 area of the Drawa Primeval Forest PLH320046 and, to a large extent, in the Drawa National Park. It is separated by a water dam of the Kamienna Power Plant with an inoperative fish ladder. In this case, steps should be taken to restore ecological continuity that were not included in the Water Management Plan[39].

Another problematic issue, as in the analyzed European countries, is the fragmentation of authorities managing water resources in Poland. After the reform of the water law, a new water management institution was established, the National Management Authority Polish Waters with an extensive structure. The organizational structure of Polish Waters consists of: National Water Management Board – Regional Water Management Boards (RWM) – Catchment Boards – Water Supervision with 11 regions for water management[40]. Apart from them, there are public administration bodies e.g. the minister of water economy, the minister of inland navigation, voivode, city president (Article 15). With such a multitude of authorities, their competences often overlap, which results in blurred responsibility for management, monitoring and water quality. Thus, efforts to improve water quality are incomplete and uncoordinated.

3.2. Polish monitoring system of lakes

The Water Law Act 2001 regulates water management following the principle of sustainable development, in particular, the shaping and protection

[39] Paweł Pawlaczyk, "The perspectives of achieving the objectives of Water Framework Directive in Poland," *Przegląd Przyrodniczy 23*, no. 3 (2012): 52–68.

[40] Elżbieta Zębek, "Water-law permission as an administrative and legal instrument for the management and protection of water resources," *Acta Scientiarum Polonorum Administratio Locorum 19*, no. 2 (2020): 119–130. DOI: https://doi.org/10.31648/aspal.4866.

of water resources, water use and management of water resources (Article 1). Water protection is specified in Section III of the Act, which indicates the environmental objectives and principles of water protection. The assessment of the status of surface waters includes the classification of ecological status, ecological potential and chemical status of these waters, as well as the determination of good ecological status, good ecological potential and good chemical status of surface waters (Article 38). Most of these provisions have been transferred to the Water Law Act of 2017 in Section III Water Protection in Articles 50–55. Moreover, environmental objectives, as in the previous act, consist in achieving and maintaining good surface water status, including good ecological status and good chemical status of surface waters, as well as preventing their deterioration, in particular concerning water ecosystems and other water-dependent ecosystems[41].

According to Article 349 Water Law Act of 2017, the State Environmental Protection Inspectorate is responsible for surface water monitoring, which is part of the State Environmental Monitoring. The monitoring network covers individual elements of the surface water system, including lakes. The monitoring network allows you to determine the status of waters and track changes in the environment. The aim of the research conducted as part of individual monitoring is to create the basis for taking actions to improve the status of waters and their protection against pollution, including protection against eutrophication caused by the impact of the domestic and municipal sector and agriculture as well as protection against industrial pollution. Monitoring and activities planned and implemented are following the six-year water management cycle resulting from the provisions of national law transposing the requirements of the WFD[42].

41 See more: Marcin Pchałek (ed.), *Gospodarowanie wodami. Kluczowe wyzwania w ramach nowego cyklu planistycznego* (Wolters Kluwer Polska, 2020); Elżbieta Zębek, "Legal protection of waters in the context of human rights," 18.

42 Lidia Kiedryńska, Monitoring i metody oceny jakości wód według Ramowej Dyrektywy Wodnej, Komentarz praktyczny, ABC LEX, 2016, accessed March 23, 2022, https://sip-1lex-1pl-10000f4nx0b6a.han.uwm.edu.pl/#/publication/469858101/kiedrynska-lidia-monitoring-i-metody-oceny-jakosci-wod-wedlug-ramowej-dyrektywy-wodnej?keyword=Kiedry%C5%84ska&cm=STOP.

Similar to other European countries, in Poland, there are four types of monitoring systems[43]: (1) diagnostic monitoring, (2) operational monitoring, (3) research monitoring, and (4) area-protected. Diagnostic and operational monitoring is aimed at providing information on the degree of compliance with the basic environmental objective of the WFD, which is the achievement of at least good status by waters. This monitoring is established to provide information on the status of water bodies, as well as to provide information on the responses of water bodies to specific types of pressure, including assessing long-term changes in water bodies occurring under natural conditions and various anthropopressure conditions. Diagnostic monitoring is cyclical with a minimum frequency every six years. However, operational monitoring covers the lake surface water bodies designated as threatened by failure to achieve good status to assess any changes in the status arising from the corrective action programs adopted by the water manager in Poland. This monitoring is carried out cyclically, at least every three years in the water management cycle. Research monitoring may be established to explain the reasons for the failure to meet the environmental objectives by a given homogeneous part of lake surface waters, where the results of diagnostic monitoring indicate that these objectives will not be achieved, and when operational monitoring has not been initiated. Moreover, the monitoring of protected areas is used to determine whether water bodies meet additional environmental objectives resulting from the nature of the protected area, especially the Nature 2000 sites[44].

Monitoring tests are conducted at measuring and control points. Diagnostic and operational monitoring is carried out at the measuring and control point representative of the assessed water body. Research as part of research monitoring and monitoring of protected areas is conducted at a location depending on the occurrence of the phenomenon/event/contamination being investigated and the location of the given protected area. The location of the points is based on water lists, updated characteristics of water bodies, as well as the emission lists referred to in Article 317 (1) point

43 Regulation of the Minister of Infrastructure of 13 July 2021 on the forms and methods of monitoring surface water bodies and groundwater bodies (LJ of 2021, item 1576).

44 Agnieszka Napiórkowska-Krzebietke, "Ocena jakości/stanu/potencjału ekologicznego jednolitych części wód powierzchniowych – kryteria i unormowania prawne w Polsce," 145.

8 of the Water Law Act, submitted by the National Water Management Authority to the Chief Inspectorate for Environmental Protection, taking into account the VIEP data on emissions to waters.

Research and assessment of surface water shall be done under State Environmental Monitoring. Since 2004, the assessment of water quality under the Water Law Act of 2001 has been in force along with a 5-grade classification of surface waters. According to this classification, the following water quality classes have been distinguished: I – very good quality, II – good quality, III – satisfactory quality, IV – unsatisfactory quality and V – poor quality with associated colour designation as blue, green, yellow, orange and red, respectively. This nomenclature of water quality classes also applies today. According to Annex 1, the bioindicator system was then expanded to include phytoplankton saprobicity, periphyton saprobicity, benthic macroinvertebrates, chlorophyll a, faecal coliforms and coliform bacteria. Currently, the Water Law Act of 2017 requires the monitoring system to be expanded. The assessment of the status of surface waters is being carried out in relation to water bodies, based on the results of the state environmental monitoring and presented by an assessment of the ecological status, assessment of the chemical state and assessment of the state. Ecological status/ecological potential is a definition of the quality of the structure and functioning of the surface water ecosystem, classified based on the results of research on biological elements and the physicochemical and hydromorphological indicators supporting them. The ecological status of surface water bodies is classified by giving the water body one of five quality classes, where first-class indicates very good ecological status, the second class - good ecological status, and the third, fourth and fifth classes - moderate, poor and bad ecological status, respectively. The classification of the assessed water body depends on the results of the classification of individual biological elements, with the principle that the ecological status/potential class corresponds to the class of the worst biological element. In addition to each class (I–V) and ecological status (high', 'good', 'moderate', 'poor' and 'bad'), coloured markings have been subordinated as blue, green, yellow, orange and red, respectively[45].

[45] Regulation of the Minister of Infrastructure of 13 July 2021 on the forms and methods of monitoring surface water bodies and groundwater bodies (LJ of 2021, item 1576);

The status of a water body is assessed by comparing the results of the classification of ecological status/potential and chemical status. A water body can be assessed as being in "good condition" if, at the same time its ecological status/potential is classified as being at least "good", the chemical status is classified as "good". In other cases, i.e. when the chemical status is classified as "below good" or the ecological status/potential is classified as "moderate", "poor" or "bed", the water body is assessed as being in poor condition. Due to the large number of water bodies in Poland, it is impossible to cover all of them with monitoring. For this reason, when presenting the ecological status/potential assessment, a distinction is made between results for monitored water bodies and for unmonitored water bodies, which are classified by extrapolation, based on the results obtained for the monitored water body or as a result of expert judgment. The results of the ecological status/potential classification, due to the relatively low confidence level, are presented by giving the water bodies thus assessed two classes: ecological status/potential "at least good" and "below good". The following standard bioindicators are used in the Polish monitoring system: Phytoplanktonic Index for Polish Lakes (PMPL), Multi-metric diatomaceous index (IOJ), Macrophyte Ecological Status Index (ESMI), Benthic macroinvertebrates and Lake Fish Index LFI +, LFI-EN[46].

Due to emerging problems with the implementation of the WFD to Polish legislation and in organizational and practical activities in Poland, guidelines were developed in this regard. On their basis, postulates were formulated, including well-structured water quality monitoring programs and established monitoring of pollutant discharges as well as programs of planned water protection activities are essential. To analyse these monitoring data, it is necessary to use modern, professional tools, namely mathematical models and information systems, especially spatial information systems integrated with the models. These actions should be based primarily on the correct transposition of the WFD and other directives to the new Water Law. The Environment Committee of the Senate of the Republic of Poland decided that the amendment to the current act of the Water Law

Agnieszka Napiórkowska-Krzebietke, "Ocena jakości/stanu/potencjału ekologicznego jednolitych części wód powierzchniowych – kryteria i unormowania prawne w Polsce," 146.

46 Ibid.

inadequate. Regardless of the legislative matters, there is no proper coordination of EU and national activities in the field of responsibilities related to water resources. Therefore, it is necessary to strengthen institutional water management. Water management plans should be carried out by all state units related to water, including departmental institutes that are subordinate to the Minister of the Environment, in cooperation with other relevant units and universities, in a coherent and properly coordinated manner[47].

5. Conclusions

The WFD is considered a very modern approach to water management and indicates new directions in water management, taking into account the basic principles of environmental law such as the principle of suitable development, the principle of subsidiarity and the 'polluter pays' principle, and also the principle of social participation. As legal provisions on water protection develop in European law, there is also a noticeable change in the assessment of their quality. This law includes not only standards aimed at regulating pollution and other harmful activities towards the environment, but also all standards whose purpose is to prevent, reduce or counteract threats to the environment, including aquatic ones. Thus, EU legislation deals with both water quality standards, pollution protection and water resource management principles.

But as the European Commission reports and literature indicate, some provisions have been observed to be too stringent and difficult for Member States to implement. The most important problems include:

- a failure to address requirements related to access to environmental justice
- lack of sufficient environmental and economic assessment tools
- gaps in individual river basin districts or individual water categories, e.g. there were still many river basin districts without assessment methods for biological quality elements, especially in the countries that joined the EU in 2004 and 2007

[47] Marek Gromiec, "Problems of water protection planing in the Water Framework Directive," *Water Supply and Water Quality* 2014, accessed March 10, 2022, https://water.put.poznan.pl/images/fullpapers/2014/OCHRONA_JAKOSC_WOD/249_WODA2014_WODA_2014.pdf .

- insufficient budget within the Member States, to reach the goals of the WFD by 2015, especially for the some important "basic measures", e.g. water sewage treatment or a solution for the nitrate emission from agriculture
- monitoring programs that focused "on the testing of individual structural parameters, on the assumption that the good quality of such elements corresponds to the good functioning of ecosystems" and, thus, these programs concentrate on symptoms, rather than on the causes of water degradation.

The consequence of these shortcomings was the fact that nearly half of EU surface waters did not reach good ecological status in 2015. Thus WFD has not delivered its main objectives of non-deterioration of water status and the achievement of good status for all EU waters. This suggests too high expectations of the WFD regulations for the Member States with regard to achieving this ecological status of waters. Proper coordination of monitoring will not only contribute to achieving environmental objectives but also reduce the administrative and financial burden of monitoring.

Similar problems with the implementation of the WFD have also been observed in Poland. The identified problems that could have an impact on the proper continuation of this process are the lack of data, access to existing data, financing of works and timely implementation of the main points of the schedule. In this field, Poland has received the recommendations of the European Commission, the most important of which are: investments required to comply with the Urban Waste Water Treatment Directive and effective implementation and enforcement of the measures in the new nitrate action programs. However, in Poland, during the implementation of the WFD regulations and other executive acts, the surface water monitoring system has been significantly expanded and modernised. In addition to the five-grade classification of water quality, water assessment was introduced, especially lakes, based on the ecological status of waters, introducing standardised biological indicators for phytoplanktonic, benthic diatoms, macrophytes, macroinvertebrates, and fishes. Thus, all links in the food chain of the lakes, which participate in the process of self-purification of waters, and are very sensitive to changes occurring during the inflow of anthropogenic pollution, are taken into account. However, there should be criticism here about the insufficient number of measurement

points in water quality monitoring, the lack of application of all indicators in the assessment of the ecological status of water, the lack of precise identification of pollution sources, and the lack of definition of environmental objectives for water reservoirs located in protected areas, e.g. Natura 2000, All this causes gaps in monitoring and the inability to plan and implement protective measures to achieve environmental goals. Because accurate and harmonised assessment of water quality allows the development of strategies for the protection of lake water quality. Nevertheless, further implementation and improvement of the WFD implementation process allowed for more effective assessment of water quality and, as a consequence, to take action as soon as possible to improve water quality and achieve at least good ecological status, which is the most important goal of the directive.

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Artificial intelligence systems and the right to good administration

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Abstract: The use of AI in public administration is becoming a reality, although it is still a long way from large-scale undertakings. The right to good administration, well-established in EU legal order, is equally real, however, it must be borne in mind that this right has so far been defined only in relation to traditional administration. Therefore, the purpose of the paper is to examine whether the use of AI in public administration would allow individuals to fully exercise their right to good administration. To achieve this purpose, it is reconstructed, on the basis of EU law provisions in force and the case-law of the CJEU, the meaning and scope of the right to good administration, and analysed, taking into account a definition of AI systems and planned legislative changes, whether and to what extent the reconstructed understanding of this right enables the use of AI systems in public administration. In the course of research the hypothesis that the right to good administration does not preclude the use of AI systems in public administration is verified. As the conducted analysis shows, the right to good administration as interpreted in traditional administration enables the use of AI systems in public administration, provided that the appropriate quality of these systems and the level of knowledge and skills of the parties and authorities are ensured.

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1. Introduction

The 2018 European Initiative on Artificial Intelligence (also known as the European Strategy on AI) aimed to boost the EU's technological and industrial capacity and AI uptake across the economy, both by the private and public sectors[1]. With regard to the latter sector, the European Commission assumed that AI can significantly improve public services and contribute to the objectives set out in the 2017 Tallinn Declaration on eGovernment[2], for example, when it comes to analysing large amounts of data and helping check how single market rules are applied[3]. In the 2018 Coordinated Plan on AI, the European Commission stated that AI tools are crucial to the future work of public administrations. At the same time the Commission indicated that when AI is implemented, for example, for security and law enforcement, particular legal and ethical challenges arise, considering that public administrations are bound to act as prescribed by law, that they need to motivate their decisions and that their acts are subject to judicial review by administrative courts[4]. Awareness of these challenges did not prevent the Commission from setting an ambitious goal. The Coordinated Plan was to bring together a set of actions at EU, national and regional levels in view of making public administrations in Europe frontrunners in the use

1 Cf. Joanna Mazur, "Unia Europejska wobec rozwoju sztucznej inteligencji: proponowane strategie regulacyjne a budowanie jednolitego rynku cyfrowego," *Europejski Przegląd Sądowy*, no. 9 (2020): 14.

2 Text of the Declaration is available at https://www.newsd.admin.ch/newsd/message/attachments/49838.pdf.

3 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Artificial Intelligence for Europe, Brussels, 25.4.2018, COM(2018) 237 final (hereinafter COM(2018) 237), p. 3.

4 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Coordinated Plan on Artificial Intelligence, Brussels, 7.12.2018, COM(2018) 795 final (hereinafter COM(2018) 795 final), p. 7. Cf. Jan Etscheid, "Artificial Intelligence in Public Administration," 18th International Conference on Electronic Government (EGOV), Sep 2019, San Benedetto del Tronto, Italy, accessed February 24, 2022, https://hal.inria.fr/hal-02445801/document; Adrien Bibal, Michael Lognoul, Alexandre de Streel and Benoît Frénay, "Legal requirements on explainability in machine learning," *Artificial Intelligence and Law*, no. 29 (2021): 153, https://doi.org/10.1007/s10506-020-09270-4.

of AI[5]. In the 2020 White Paper on AI, the European Commission stated that it is essential that public administrations rapidly begin to deploy products and services that rely on AI in their activities[6].

In this context, mention should be made of the Recovery and Resilience Facility (RRF) that entered into force on 19 February 2021 and finance reforms and investments in Member States from the start of the pandemic in February 2020 until 31 December 2026. This financial instrument provides an unprecedented opportunity to accelerate the uptake of AI in public administration across Europe through its Flagship "Modernise" which aims at boosting investments and reforms in digitalisation of public administration[7]. However, concrete actions related to the application of AI in public administrations were undertaken earlier. For instance, the European Commission's AI-powered eTranslation portal[8] was introduced to public administration in Member States in November 2018. Two years later, 6600 civil servants across the Member States were utilising the eTranslation web portal. Some Member States have also not been idle. For example, Estonia's AI strategy has exceeded expectations and Estonia has seen wide adoption and use of AI – with over 50 AI use-cases deployed by the public sector[9].

The use of AI in public administration is thus becoming a reality, although it is still a long way from large-scale undertakings[10]. The right to good administration, well-established in the EU legal order, is equally real,

5 Annex to the COM(2018) 795, p. 2-3.

6 White Paper on Artificial Intelligence – A European approach to excellence and trust, Brussels, 19.2.2020, COM(2020) 65 final, p. 8.

7 Annexes to Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Fostering a European approach to Artificial Intelligence (hereinafter Annexes to COM(2021) 205), p. 48.

8 ISA^2 - Interoperability solutions for public administrations, businesses and citizens. For details, see https://ec.europa.eu/digital-building-blocks/wikis/display/CEFDIGITAL/eTranslation.

9 Annexes to COM(2021) 205, p. 61.

10 Vasiliki Koniakou, "Governing Artificial Intelligence and Algorithmic Decision Making: Human Rights and Beyond," in *Responsible AI and Analytics for an Ethical and Inclusive Digitized Society: 20th IFIP WG 6.11 Conference on e-Business, e-Services and e-Society, I3E 2021, Galway, Ireland, September 1-3, 2021, Proceedings*, ed. Denis Dennehy, Anastasia Griva, Nancy Pouloudi, Yogesh K. Dwivedi, Ilias Pappas, Matti Mäntymäki (Cham: Springer, 2021), 173.

however, it must be borne in mind that this right has so far been defined only in relation to traditional administration. Therefore, the purpose of this paper is to examine whether the use of AI in public administration would allow individuals to fully exercise their right to good administration. To achieve this purpose, it will be reconstructed, on the basis of EU law provisions in force and the case-law of the Court of Justice of the EU (CJEU), the meaning and scope of the right to good administration, and analysed, taking into account a definition of AI systems and planned legislative changes, whether and to what extent the reconstructed understanding of this right enables the use of AI systems in public administration. In the course of the research undertaken for this paper, the hypothesis that the right to good administration does not preclude the use of AI systems in public administration is verified. The analysis is primarily legal-dogmatic, but, to the extent necessary, also takes into account the socio-legal and legal-theoretical perspective.

2. EU definition of AI systems

There is still no definition of AI in EU law. According to the EU "soft" definition, included in the European Strategy on AI, AI systems mean "systems that display intelligent behaviour by analysing their environment and taking actions - with some degree of autonomy - to achieve specific goals"[11]. As further explained in this document, "AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications)"[12]. Of course, there are more "soft" definitions, but it should be noted that non-EU definitions are omitted here. The European Commission is trying, with the participation of many entities, such as groups of experts, to develop an autonomous definition for the purposes of the EU legal order. As indicated in the literature on

11 COM(2018) 237, p. 1.
12 COM(2018) 237, p. 1.

the subject, the efforts made so far in this field have resulted in a dominant definition in terms of the public governance of AI use[13].

The Glossary at the end of the Ethics Guidelines for Trustworthy AI, written by the High-Level Expert Group on AI (AI HLEG) and made public on 8 April 2019, provided a definition of AI systems for the purpose of this document. According to this definition, AI systems are software (and possibly also hardware) systems designed by humans (humans design AI systems directly, but they may also use AI techniques to optimise their design) that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. Such systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions[14].

This definition is further elaborated on in a dedicated document prepared by the AI HLEG that accompanies the Ethics Guidelines. Interestingly, the AI HLEG started from the definition proposed by the European Commission in the European Strategy on AI. Then, they expanded this definition to clarify certain aspects of AI as a scientific discipline and as a technology[15]. According to this more advanced definition, the term

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13 Anneke Zuiderwijk, Yu-Che Chen, and Fadi Salem, "Implications of the use of artificial intelligence in public governance: A systematic literature review and a research agenda," *Government Information Quarterly* 38, issue 3 (July 2021): 1-19, https://doi.org/10.1016/j.giq.2021.101577. Cf. Tomasz Zalewski, "Definicja sztucznej inteligencji," in *Prawo sztucznej inteligencji*, ed. Luigi Lai and Marek Świerczyński (Warsaw: C.H. Beck, 2020), 6-8; Mark Leiser, "Bias, journalistic endeavours, and the risks of artificial intelligence," in *Artificial Intelligence and the Media. Reconsidering Rights and Responsibilities*, ed. Taina Pihlajarinne and Anette Alén-Savikko (Cheltenham: Elgar, 2022), 10-11; Stanislav Abaimov and Maurizion Martellini, *Machine Learning for Cyber Agents. Attack and Defence* (Cham: Springer, 2022), 18.

14 Ethics Guidelines for Trustworthy AI, High-Level Expert Group on Artificial Intelligence (hereinafter Ethics Guidelines), p. 36 (text of the Guidelines is available at https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai).

15 A Definition of Al: Main Capabilities and Disciplines. Definition developed for the purpose of the AI HLEG's deliverables, High-Level Expert Group on Artificial Intelligence, p. 1 (text of this document is available at https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai).

"AI system" should be understood as meaning any AI-based component, software and/or hardware wherein usually AI systems are embedded as components of larger systems, rather than stand-alone systems. An AI system is first and foremost rational. It achieves rationality by: perceiving the environment in which the system is immersed through some sensors, thus collecting and interpreting data, reasoning on what is perceived or processing the information derived from this data, deciding what the best action is, and then acting accordingly, through some actuators, thus possibly modifying the environment. In this context, the term "decision" should be considered broadly, as any act of selecting the action to take, and does not necessarily mean that AI systems are completely autonomous. A decision can also be the selection of a recommendation to be provided to a human being, who will be the final decision maker. The AI HLEG clearly pointed out that rational AI systems do not always choose the best action for their goal, thus achieving only bounded rationality, due to limitations in resources such as time or computational power. However, rational AI systems are a basic version of AI systems. They modify the environment but they do not adapt their behaviour over time to better achieve their goal. Learning rational systems are rational systems that, after taking an action, evaluate the new state of the environment (through perception) to determine how successful its action was, and then adapt its reasoning rules and decision-making methods[16].

For the purpose of the proposed Regulation laying down harmonised rules on AI (in the 2021 version)[17], AI system means software that is developed with one or more of the techniques and approaches listed in Annex I to this Regulation and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with[18]. In accordance with the aforementioned Annex the relevant AI techniques and approaches are: 1. machine learning approaches, including supervised, unsupervised and

16 A Definition of AI, p. 1-3.

17 Proposal for a Regulation of the European Parliament and the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, Brussels, 21.4.2021, COM(2021) 206 final.

18 Article 3, point 1 of the proposed Regulation.

reinforcement learning, using a wide variety of methods including deep learning; 2. logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; 3. statistical approaches, Bayesian estimation, search and optimisation methods[19]. Although Annex I explains a lot, contrary to recital 6 of the Regulation, the proposed legal definition cannot be considered as precise.

If all three elements, i.e. Article 3, point 1 of the Regulation, recital 6 of the Regulation and Annex I to the Regulation, are combined, the resulting definition is similar to the one proposed by the AI HLEG. However, from the point of view of the need for clarity of the legal definition, such a procedure does not seem to be a recommended solution. It should also be emphasised that experts' explanations similar to an academic lecture have a different function than a legal act. The definition contained in the draft Regulation under discussion has been considered too broad by many commentators. As they have indicated, Article 3, point 1 in conjunction with Annex I covers almost every computer program. Such a broad approach may lead to legal uncertainty for developers, operators, and users of AI systems, especially when it comes to high-risk AI systems. Many associate the term "artificial intelligence" primarily with machine learning, and not with simple automation processes in which pre-programmed rules are executed according to logic-based reasoning. The mandatory requirements envisaged for high-risk AI systems are based on the observation that a number of fundamental rights are adversely affected, in particular, by the special characteristics of machine learning, such as opacity, complexity, dependency on data, autonomous behaviour. Since these characteristics are either not or only partly present in simple (logic based) algorithms, the broad definition of AI systems can lead to an overregulation. However, a wide definition may be justified in light of the prohibited AI practices delineated in Article 5 to offset the threats posed by different kinds of software to the fundamental rights of individuals because there is little difference

[19] Annexes to the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, Brussels, 21.4.2021, COM(2021) 206 final, Annexes 1 to 9, p. 1.

to the rights of affected citizens whether the banned practices (subliminal manipulation, exploitation of vulnerabilities, social scoring, or remote biometric identification) are enabled by machine learning or logic-based reasoning[20]. In conclusion, from the perspective of defenders of fundamental rights, the proposed legal definition of AI systems is not a major problem.

3. Public administration as a high- risk area in the context of AI systems

In the revised Coordinated Plan on AI, the Commission indicated that the use of AI creates risks that need to be addressed. Certain characteristics of AI, such as the opacity of many algorithms that makes investigating causal relationships difficult[21], pose specific and potentially high risks to fundamental rights. For example, it is often not possible to determine why an AI system has arrived at a specific result. As a consequence, it may become difficult to assess and prove whether someone has been unfairly disadvantaged by the use of AI systems, for example in an application for a public benefit scheme[22]. Also, poor training and design of AI systems can result in significant errors that may undermine fundamental rights. The use of AI systems may leave affected people with significant difficulties to correct erroneous decisions. Therefore, AI-enabled robots and intelligent

[20] Martin Ebers, Veronica R. S. Hoch, Frank Rosenkranz, Hannah Ruschemeier, and Björn Steinrötter, "The European Commission's Proposal for an Artificial Intelligence Act—A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)," *Multidisciplinary Scientific Journal*, 4 (2021): 590, https://doi.org/ 10.3390/j4040043. Cf. "ZVEI Comments on the EU Commission's Proposal for a Regulation laying down harmonised Rules on Artificial Intelligence ("AI Act")," ZVEI - Zentralverband Elektrotechnik- und Elektronikindustrie e.V. Abteilung Innovationspolitik, accessed February 24, 2022, https://www.zvei.org/fileadmin/user_upload/Presse_und_Medien/Publikationen/2021/September/EU-KI-Gesetz/ZVEI-Comments-on-AI-Proposal_2021-08.pdf; "DIGITALEUROPE's initial findings on the proposed AI Act," DIGITALEUROPE, accessed February 24, 2022, https://www.digitaleurope.org/resources/digitaleuropes-initial-findings-on-the-proposed-ai-act.

[21] For details, see Andreas Tsamados, Nikita Aggarwal, Josh Cowls, Jessica Morley, Huw Roberts, Mariarosaria Taddeo, Luciano Floridi, "The ethics of algorithms: key problems and solutions," *AI & Society*, no. 37 (2022): 218– 220, https://doi.org/10.1007/s00146-021-01154-8; Carlos Zednik, Hannes Boelsen, "Scientific Exploration and Explainable Artificial Intelligence," *Minds and Machines*, no. 32 (2022): 222-223, https://doi.org/10.1007/s11023-021-09583-6.

[22] Cf. Joshua Ellul, "Should we regulate Artificial Intelligence or some uses of software?" *Discover Artificial Intelligence*, no. 2, (2022): 5, https://doi.org/10.1007/s44163-022-00021-9.

systems must be engineered and designed to meet the same high standards of protection of fundamental rights provided for by EU law as for traditional technologies. However, existing EU legislation is unable to provide this level of protection[23]. The Commission's proposal for a regulatory framework on AI was intended to be "a key juncture in the journey towards protecting (...) fundamental rights and hence ensuring trust in the development and uptake of AI"[24]. Work on it, however, is delayed due to disagreement on many issues that are the subject of it. As the European Commission itself pointed out, the stakes are high for the EU – spearheading the development of new ambitious global norms[25].

The Commission's proposal contains a set of harmonised rules applicable to the design, development and use of certain high-risk AI systems. The purpose of these rules is to enhance transparency and minimise risks to fundamental rights before AI systems can be used in the EU. In line with a risk-based regulatory approach, the proposed legal framework is designed to intervene only where this is strictly needed[26]. In this context, the 'high-risk' AI use means that the risks posed by the AI systems are particularly high. Whether an AI system is classified as high-risk depends on its intended purpose of the system and on the severity of the possible harm and the probability of its occurrence. As can be seen from recital 28 of the proposed Regulation, the extent of the adverse impact caused by AI systems on the rights protected by the Charter of Fundamental Rights is of particular relevance when classifying an AI system as high-risk. According to Article 6(2) of the proposed Regulation, AI systems referred to in Annex III shall be considered high-risk. As Annex III states, high-risk AI systems are the AI systems listed in one of the areas, including: 1. access to and enjoyment of public services and benefits; 2. migration, asylum and border control management. In both of these areas there are "classic" administrative proceedings and accordingly the annex indicates "AI systems

23 COM(2021) 205, p. 3-4.

24 COM(2021) 205, p. 4.

25 COM(2021) 205, p. 4.

26 Cf. Fabio Bassan, *Digital Platforms and Global Law* (Cheltenham: Elgar, 2021), 61; Kees Stuurman, Eric Lachaud, "Regulating AI. A label to complete the proposed Act on Artificial Intelligence," *Computer Law & Security Review*, no. 44 (2022): 16, https://doi.org/10.1016/j.clsr.2022.105657.

intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for public assistance benefits and services, as well as to grant, reduce, revoke, or reclaim such benefits and services"[27]. In the second area, the Commission listed four AI systems, including "AI systems intended to assist competent public authorities in the examination of applications for asylum, visa and residence permits and associated complaints with regard to the eligibility of natural persons applying for a status"[28].

When analysing the content of Annex III, a question should be asked why it only refers to "public services and benefits", by which - it seems - the authors of this act understand the rights of the addressee of the decision, not the obligations. Meanwhile, as Mateusz Pszczyński points out, AI systems can also be used in administrative proceedings aimed at imposing an obligation or an additional charge. An example is the decision setting real estate tax for natural persons. Every year between January and March, thousands of such tax decisions are issued by the executive bodies in all Polish municipalities. They use computer programs which, on the basis of the taxpayers' records, including data on the subjects of taxation, rates and tax base, determine the amount of real estate tax. When printed, the decisions are signed by the office holder of the body or a person authorised by him/her. The correctness is verified at the initial stage when the updated rates are checked. There is no time nor technical possibility for each decision to be checked before it is signed by an authorised entity. The same applies if an additional charge is imposed as a result of a parking fee not being paid. Therefore, in Poland already today a computer program basically replaces human beings and makes a decision on their behalf, while the signature is a legal fiction, which, due to the formalism of tax or other proceedings, must be observed[29]. It is similar in other countries, such as Denmark and Finland[30]. Nowadays, it is easy to imagine the use of AI sys-

27 Item 5(b) of Annex III.

28 Item 7(d) of Annex III.

29 Mateusz Pszczyński, "Administrative Decisions in the Era of Artificial Intelligence," *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza*, no. 11 (2020): 258– 259, https://doi.org/10.14746/ppuam.2020.11.13.

30 Markku Suksi, "Administrative due process when using automated decision-making in public administration: some notes from a Finnush perspective," *Artificial Intelligenceand*

tems to issue decisions on imposing the obligation to provide personal or material benefits for defence in the event of mobilisation and during war or for natural disaster prevention and recovery, if only because of the haste necessary in such situations. Even if not all potential obligations imposed by an "AI official" fall within the scope of application of EU law, certainly some of them, such as e.g. obligations relating to value added tax. In any case, as noted by Błażej Kuźniacki, tax law has a very large potential to use AI compared to other branches of law, due to the high complexity and technical nature of tax standards and their detachment (to a large extent) from everyday human life[31]. Obviously, AI systems intended to be used to assess the eligibility of individuals for public assistance benefits and services and to grant, reduce, revoke or reclaim such benefits and services may pose a high risk to fundamental rights, however, inferring *a minore ad maius* (from the less to the greater), AI systems intended to be used to establish or assert natural persons' obligations can pose an even higher risk. It is therefore a misunderstanding to leave this group of administrative matters out of sight, and the short and closed catalogue of Annex III should be considered a mistake already from the perspective of technological development in 2021.

4. Right to good administration at the EU level

The right to good administration is guaranteed in Article 41 of the Charter of Fundamental Rights of the EU[32]. According to Article 41(1) of the Charter, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. As provided by Article 41(2) of Charter, this right includes: 1. the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; 2. the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

Law, no. 29 (2021): 90, 93.

31 Błażej Kuźniacki, "Przeciwdziałanie unikaniu opodatkowania z wykorzystaniem algorytmów i sztucznej inteligencji na przykładzie nadużyć umów o UPO w świetle PPT," *Przegląd Podatkowy*, no. 5 (2019): 30.

32 EU (2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000.

3. the obligation of the administration to give reasons for its decisions. The word 'includes' in that latter provision shows that the right to good administration is not confined to the three abovementioned guarantees[33]. Article 41(2) of the Charter lists a set of rights to be observed by the Union's administration, including the rights of defence, which include the right to be heard and the right to have access to the file[34]. It should be emphasised that the requirements pertaining to the right to good administration, which reflects the general principle of EU law, and in particular the right of every person to have his or her case handled impartially within a reasonable time, are applicable in procedures where Member States apply EU law[35].

The right to good administration (also the general principle of good administration) requires administrative authorities, when carrying out their inspection duties, to conduct a diligent and impartial examination of all the relevant matters so that they can be sure that, when they adopt a decision, they have at their disposal the most complete and reliable information possible for that purpose. Consequently, where a party makes errors in her/his application, and neither the party nor the authority concerned subsequently identifies those errors, that authority may not be held responsible for doing so, unless the errors are easily noticeable, in which case the authority should be able to detect them under his obligation of verification under the principle of good administration[36]. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution

33 CJEU Judgement of 29 April 2015, Claire Staelen v European Ombudsman, T-217/11, ECLI:EU:T:2015:238, paragraph 82.

34 CJEU Judgment of 13 December 2018, Ryanair DAC and Airport Marketing Services Ltd v European Commission, Case T-165/15, ECLI:EU:T:2018:953, paragraph 62.

35 CJEU Judgment of 24 Februar 2022, SC Cridar Cons, Case C-582/20, ECLI:EU:C:2022:114, paragraph 45.

36 CJEU Judgment of 21 October 2021, CHEP Equipment Pooling NV v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-396/20, ECLI:EU:C:2021:867, paragraph 48 and 49.

concerned[37]. Subjective impartiality is presumed in the absence of evidence to the contrary[38]. Whether the time taken for a procedure is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity, and also, where relevant, to information or justification which the Commission may provide concerning the measures of investigation carried out during the administrative procedure[39].

The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely[40]. The right of access to a personal file means that the institution in question must give to the person concerned the opportunity to examine all the documents in the investigation file that might be relevant for his defence. These include, in particular, both incriminating and exculpatory evidence, save for internal documents of the institution in question and other confidential information[41]. The statement of the reasons for the decision is particularly important in so far as it allows persons concerned to decide in full knowledge of the circumstances whether it is worthwhile to bring an action against the decision and the court with jurisdiction to review it, and it is therefore a requirement for ensuring that the judicial review guaranteed by Article 47 of the Charter is effective. The statement of reasons must be adapted to the nature of the legal act at issue and to the context in which it was adopted. In that regard, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard

37 CJEU Judgement of 18 March 2021, Pometon SpA v. European Commission, Case C-440/19 P, ECLI:EU:C:2021:214, paragraph 58.

38 CJEU Judgment of 27 November 2018, Mouvement pour une Europe des nations et des libertés v European Parliament, Case T-829/16, ECLI:EU:T:2018:840, paragraph 49.

39 CJEU Judgment of 12 July 2019, Toshiba Samsung Storage Technology Corp. and Toshiba Samsung Storage Technology Korea Corp. v European Commission, Case T-8/16, ECLI:EU:T:2019:522, paragraph 469.

40 CJEU Judgment of 4 June 2020, European External Action Service (EEAS) v. Stéphane De Loecker, Case C-187/19 P, ECLI:EU:C:2020:444, paragraph 68

41 CJEU Judgment of 11 July 2019, BP v European Union Agency for Fundamental Rights (FRA), Case T-888/16, ECLI:EU:T:2019:493, paragraph 171.

not only to its wording but also to its context and to all the legal rules governing the matter in question and, in particular, in the light of the interest which the addressees of the act may have in obtaining explanations. Consequently, the reasons given for an act adversely affecting a person are sufficient if that act was adopted in a context which was known to that person and which enables her/him to understand the scope of the act concerning her/him[42].

5. Exercising the right to good administration in AI-based proceedings

As indicated in the literature on the subject, it is uncontroversial that a clear definition of AI is necessary to create an effective legal framework[43]. Such a definition is definitely missing in the Commission's proposal. The (too) broad definition of AI systems means that an "AI official" already frequently deals with administrative cases, and she/he will do so more often, both in terms of the number of cases (mass cases) and the categories of cases (cases belonging to various areas of public administration activity). Therefore, it is urgent and increasingly important to answer the question whether the use of AI in public administration allows individuals to fully exercise their right to good administration. From the point of view of the need to protect this right, we can put together traditional administrative procedures, administrative procedures using Bayesian estimation and administrative procedures using deep machine learning. However, the scale of potential threats or real detriment to the exercise of the right to good administration will be significantly different. The European Commission has admitted that the use of AI can affect the right to good administration[44]. "Influence" is a broad concept and not necessarily a negative one. The implementation of

42 CJEU Judgment of 15 July 2021, European Commission v Landesbank Baden-Württemberg and Single Resolution Board, Joined Cases C-584/20 P and C-621/20 P, ECLI:EU:C:2021:601, paragraph 103 and 104.

43 Raffaele Pugliese, Stefano Regondi and Riccardo Marini, "Machine learning-based approach: Global trends, research directions, and regulatory standpoints", *Data Science and Management*, no. 4 (2021): 27, https://doi.org/10.1016/j.dsm.2021.12.002.

44 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Protecting Fundamental Rights in the Digital Age - 2021 Annual Report on the Application of the EU Charter of Fundamental Rights, Brussels, 10.12.2021, COM(2021) 819 final (hereinafter COM(2021) 819), p. 16.

AI systems in administrative procedures can have both threats (or damages) and benefits to the right to good administration. In the Charter of Fundamental Rights in the context of Artificial Intelligence and Digital Change[45], the representatives of the 26 Member States[46] meeting in the Council recognised the potential of digital technologies, including AI applications, to improve the protection of the right to good administration. Unfortunately, they did not explain what they meant.

It is believed that AI systems are able to help decision-makers to reach better decisions, to enhance officials' analytic abilities and to intensify creativity adequate to modern challenges[47]. However, this is one perspective, focusing rather on good (comfortable) work in administration, albeit with a high-quality decision for the addressee as its result. On the other hand, the addressee of the decision may face problems of a rudimentary nature. By way of example, the Haut Conseil du Travail, an advisory body to the French Ministry for Social Affairs, has estimated that 1 in 5 people in France encounter difficulties trying to complete administrative procedures online, and has warned that digitalisation can jeopardise the principle of equal access to public services if alternative means of access are not maintained[48]. It is therefore legitimate to ask whether the right to access the case file, which is an element of the right to good administration, if the case is handled by an "AI official", will not be illusory for an average participant in the proceedings. The group of authors is right when they write that with a lack of appropriate monitoring, it is challenging for a variety of stakeholders to identify the risk of harmful repercussions of AI systems after

45 Note from Presidency on 12 October 2020 to Delegations. Presidency conclusions - the Charter of Fundamental Rights in the context of Artificial Intelligence and Digital Change, item 2 (text of the Charter is available at https://www.consilium.europa.eu/media/46496/st11481-en20.pdf).

46 One Member State (Poland) objected to the use of the term "gender equality".

47 Mohammad I. Merhi, "A Process Model of Artificial Intelligence Implementation Leading to Proper Decision Making," in *Responsible AI and Analytics for an Ethical and Inclusive Digitized Society: 20th IFIP WG 6.11 Conference on e-Business, e-Services and e-Society, I3E 2021, Galway, Ireland, September 1-3, 2021, Proceedings*, ed. Denis Dennehy, Anastasia Griva, Nancy Pouloudi, Yogesh K. Dwivedi, Ilias Pappas, Matti Mäntymäki (Cham: Springer, 2021), 40-41.

48 COM(2021) 819.

deployment[49]. In this context, it should also be noted that the exercise of the right to good administration is not possible without digital sovereignty, which, as recalled by the Berlin Declaration, is of key importance for ensuring the ability of citizens and public administrations to make decisions and act in a self-determined manner in the digital world[50].

The analysis of the normative content of the EU's right to good administration suggests one simple conclusion - AI systems should facilitate the consideration of the case within a reasonable time. Whether the requirements of impartiality (in particular, subjective impartiality) and fairness are met, will directly depend on the quality of the AI system - the quantity and reliability of data entered into it and the appropriate training of the AI algorithms. In turn, the exercise of the right to be heard (to present one's views, but also to provide evidence in her/his favour) and the right to access the files (to read them, but also to demand changes or supplements to their content in one's favour) will be conditioned by the knowledge and skills of the proceedings' party. Therefore, sufficient information and effective training will be a key factor in this regard. The implementation of the obligation to give reasons for the decision will be the result of the quality of the AI system and the knowledge and skills of the official, assuming that all stages will not be carried out by an "AI official". Since, as is clear from the case-law, only the key elements of the right to good administration are mentioned, not all of them, the possibility of exercising the right to good administration should always be analysed in the light of the circumstances of the case. Meeting the detailed requirements related to the interpretation of the CJEU, such as diligence and verification of documents

[49] Boris Düdder, Florian Möslein, Norman Stürtz, Magnus Westerlung and Roberto V. Zicari, "Ethical maintenance of artificial intelligence systems," in *Artificial Intelligence for Sustainable Value Creation*, ed. Margherita Pagani and Renaud Champion (Cheltenham: Elgar, 2021), 151.

[50] Berlin Declaration on Digital Society and Value-Based Digital Government at the ministerial meeting during the German Presidency of the Council of the European Union on 8 December 2020, p. 6 (text of the Berlin Declaration is available at https://ec.europa.eu/isa2/sites/default/files/cdr_20201207_eu2020_berlin_declaration_on_digital_society_and_value-based_digital_government_.pdf). Cf. Andrea Simoncini and Erik Longo, "Fundamental Rights and the Rule of Law in the Algorithmic Society," in *Constitutional Challenges in the Algorithmic Society*, ed. Hans-W. Micklitz, Oreste Pollicino, Amnon Reichman, Andrea Simoncini, Giovanni Sartor and Giovanni De Gregorio (Cambridge: Cambridge University Press, 2022), 31-33.

for the presence of noticeable errors, should be facilitated by the use of AI. On the other hand, the usefulness of the justification of the decision for the purposes of appealing and conducting judicial review may be increased by a good quality AI system, but will also depend on the knowledge and skills of the (real) official who uses it. In this context, close attention should be paid to the CJEU's liberal approach to justifying the decision. In the light of its guidelines, a rationale for the decision prepared with the participation of the "AI official" or by the "AI official" will not be defective or insufficient in principle. The reconstructed understanding of the right to good administration enables the use of AI systems in public administration, provided that the appropriate quality of these systems and the level of knowledge and skills of the parties and authorities are ensured.

European Declaration on Digital Rights and Principles for the Digital Decade, solemnly proclaimed by the European Parliament, the Council and the European Commission on 26 January 2022, addresses the issue of interactions with algorithms and AI systems only in the context of freedom of choice, which is not entirely in line with the specificity of how public administrations handle matters. As regards the form and manner of resolving the case, the parties to the administrative procedure do not enjoy freedom of choice. According to the Declaration, everyone should be empowered to benefit from the advantages of AI by making their own, informed choices in the digital environment, while being protected against risks and harm to one's fundamental rights[51]. Taken literally, this should apply to all stages of the administrative procedure, and therefore not only to the submission of the application, but also to the decision. This should also mean maintaining the traditional form of dealing with cases as an alternative to cases handled by an "AI official". It is important, however, that in this Declaration, the EU institutions have committed to: 1. ensuring transparency about the use of algorithms and artificial intelligence, and that people are empowered and informed when interacting with them; 2. ensuring that algorithmic systems are based on suitable datasets to avoid unlawful discrimination and enable human supervision of outcomes affecting people; 3. ensuring that technologies, such as algorithms and artificial intelligence are not used to

[51] European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26.01.2022, COM(2022) 28 final (hereinafter COM(2022) 28), p. 4

pre-determine people's choices, for example regarding health, education, employment, and their private life; 4. providing for safeguards to ensure that artificial intelligence and digital systems are safe and used in full respect of people's fundamental rights[52]. It should be assumed that the fulfilment of three of these commitments (the first, the second and the fourth), which are relevant to administrative proceedings, would be a necessary and sufficient condition for the effective exercise of the right to good administration at the EU level.

6. Conclusion

As the above analysis has shown, the right to good administration as interpreted in traditional administration does not exclude the use of AI systems in public administration, e.g. when issuing tax decisions, decisions in the field of social security or social assistance, or even decisions regarding construction processes or environmental protection, but it requires the fulfilment of a number of conditions. Therefore, all three EU institutions that have adopted the European Declaration on Digital Rights and the Principles of the Digital Decade, and in particular the EU legislator, i.e. the European Parliament and the Council, should ensure that AI Regulation is in line with the commitments made. In the revised Coordinated Plan on AI, the European Commission announced that it will continue its efforts to ensure that AI developed and put on the market in the EU is human-centric, sustainable, secure, inclusive, accessible and trustworthy. The Commission is right when it writes that a regulatory framework to ensure trust in AI systems is essential to achieve these goals[53]. However, it is not just the regulatory framework for AI that is at stake. It is also necessary to supplement and clarify the rights of the parties and the obligations of the authorities in administrative proceedings, so that all subjects in these proceedings have the necessary information and skills.

52 COM(2022) 28, p. 4.
53 COM(2021) 205, p. 8-9.

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Disinformation regarding COVID-19 in light of the priorities of the European Commission and the legal regulations binding and currently drafted in Poland[1]

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human rights, freedom of expression, COVID-19, epidemic Sars-CoV-2, infodemic, disinformation

Abstract: Disinformation regarding the COVID-19 pandemic is a global phenomenon. It constitutes a threat to the values protected under the law, health in particular. The primary issue tackled in "Disinformation regarding COVID-19 in the light of priorities of the European Commission and the legal regulations binding and currently drafted in Poland" paper is an attempt at answering the following question: Is eliminating COVID-19 disinformation from public space possible in light of the priorities of the European Commission and the legal regulations already effective and currently being drafted in Poland? The analyses conducted under the paper lead to the conclusions that the provisions currently regulating freedom of expression theoretically constitute a basis for eliminating disinformation from public space but are, in practice, not very effective. This leads to the need for searching for other, more effective legal instruments in this field, both on the level of European Union law making and domestic legislation. Although we may speak of a consensus concerning assessment of the very phenomenon of disinformation the legislative and practical actions taken, both on the domestic level and the European Union level, enable us to indicate substantial and frequently disturbing differences

[1] Legal status as of: 25th of January 2022.

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regarding shifting the aspects emphasized by legislation. As compared to the proposed solutions drafted by the European Commission and the drafts of domestic acts, the vastly different approach to the idea of controlling disinformation is clearly visible. Therefore, it must be stated that such circumstances will lead to development of varied legal effects of the drafted regulations that will decide, among other issues, the practical effectiveness or lack thereof in the case of the drafted solutions. In the course of the analysis of the issue constituting the subject of this paper we should concurrently bear in mind that freedom of expression is one of the principles in a democratic state governed by the rule of law.

1. Introduction

For close to two years the world has been attempting to overcome the COVID-19 pandemic which in a global scale has claimed the lives of over 5 million people[2]. Proliferation of the SARS-CoV-2 virus has been from the very beginning accompanied by the virus of disinformation. As a result of development of electronic means of social communication this phenomenon, although long known in various forms[3], constitutes an imminent risk to not only the quality of social communication but also to specific values protected under the law. It is global in nature and as of yet a solution to it has not been discovered[4]. The phenomenon of disinformation refers

[2] The COVID-19 death toll as of 17.09.2021 was 4,675,036 and 5,604,957 as of 25.01.2022.

[3] Cf. Russell L. Weaver, "Fake News (& Deep Fakes) and Democratic Discourse," *Journal of Technology Law & Policy* 24, no. 1 (2019): 39–40; Udo Fink, and Ines Gillich, "Fake News As A Challenge For Journalistic Standards In Modern Democracy," *University of Louisville Law Review* 58, no. 2 (2020): 265–266.

[4] Cf. David García-Marín, "Infodemia global. Desórdenes informativos, narrativas fake y fact-checking en la crisis de la Covid-19," *El Profesional de la Información* 29, no. 4 (2020): 2; Jesús-Ángel Pérez-Dasilva, Koldobika Meso-Ayerdi, and Terese Mendiguren-Galdospín, "Fake news y coronavirus: detección de los principales actores y tendencias a través del análisis de las conversaciones en Twitter," *El Profesional de la Información* 29, no. 3 (2020): 1–22. Authors draw attention to the fact that by preying on emotions of fear and uncertainty false information spread faster than the coronavirus itself and lead to social unrest. It is prudent to remember that lack of social trust constitutes a significant problem - it is a factor which leads to deterioration of all social groups, development of social tensions

to the COVID-19 epidemic in a particular manner. On the legal grounds disinformation regarding the COVID-19 epidemic should be placed within the space of freedom of expression to which everyone is entitled. Counteracting and controlling distribution of false information, a phenomenon detrimental to society, presents specific challenges in the context of the role and significance of freedom of expression in a democratic state. Disinformation itself is being concurrently perceived as a serious threat to democracy[5]. In all of its context this phenomenon is recognized as one of the most prominent challenges that the European Union faces, as evidenced by, for example, the priorities of the European Commission.

The primary issue to be tackled in this paper has been formulated in the form a question: Is eliminating disinformation regarding COVID-19 from public space possible in the light of the priorities of the European Commission and the legal regulations already effective and currently drafted in Poland? When tackling this issue we should consider several specific problems. Firstly, it is prudent to determine the nature of disinformation related to the COVID-19 epidemic; what is the priority of this issue according to the European Commission?; Can COVID-19 disinformation be effectively counteracted by the currently binding and drafted Polish legal provisions? The issues presented in such a manner correspond with the structure of this paper. The first part of this paper (2) discusses the nature of disinformation regarding COVID-19, that constitutes a particular

and is conducive to developing resistance to rational argumentation regarding all subjects. Authors of the invoked works emphasize that dissemination of the falsehoods regarding COVID-19 results in development of a factual threat and related after effects - it is dangerous because it influences health and may lead to further infections and deaths.

5 Chris Tenove, "Protecting Democracy from Disinformation: Normative Threats and Policy Responses," *The International Journal of Press/Politics* 25, no. 3 (2020): 517–537; Edda Humprecht, Frank Esser and Peter Van Aelst, "Resilience to Online Disinformation: A Framework for Cross-National Comparative Research," *The International Journal of Press/Politics* 25, no. 3 (2020): 493–516; W. Lance Bennett and Steven Livingston, "The Coordinated Attack on Authoritative Institutions. Defending Democracy in the Disinformation Age," in *The Disinformation Age. Politics, Technology, and Disruptive Communication in the United States*, ed. W. Lance Bennett, Steven Livingston (Cambridge University Press, 2021), 261–283; Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda. Manipulation, Disinformation and Radicalization in American Politics* (New York: Oxford University Press, 2018), 341–349.

form of disinformation; the second part of the article (3) presents the European approach to this phenomenon expressed in terms of the priorities of the European Commission; the third part of the paper (4) confronts COVID-19 disinformation phenomenon with the binding and currently drafted Polish legislation in the context of the potential effectiveness of the legislation in the field of eliminating this phenomenon from the public space and the fourth part (5) embodies conclusions *de lege lata* and *de lege ferenda*. In the circumstances of a still ongoing pandemic unprecedented in terms of scale, this paper does not claim the right to formulate definitive conclusions on the subject but instead constitutes an attempt to present the opinion of the author and an open invitation to discussion.

2. The nature of the COVID-19 disinformation phenomenon

From the formal point of view disinformation regarding COVID-19 is a particular form of disinformation in its general meaning. According to the „EU Code of Practice on Disinformation", disinformation is „verifiably false or misleading information which, cumulatively, is created, presented and disseminated for economic gain or to intentionally deceive the public and may cause public harm, intended as threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security"[6]. Furthermore, the document adds that „the notion of disinformation does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising". On these grounds we may assume that COVID-19 disinformation is distinguished by deliberate dissemination of false information concerning all aspects of the SARS-CoV-2 and COVID-19 disease the virus causes, including challenging and negating the existence of the disease. Such information misleads a recipient and may constitute an imminent and factual threat to the values protected under the law. The phenomenon of disinformation is directly related to the phenomenon of infodemic. "Infodemic is a blend of *information* and *epidemic* that typically refers to a rapid

[6] EU Code of Practice on Disinformation, accessed December 30, 2021, https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation .

and far-reaching spread of both accurate and inaccurate information about something, such as a disease. As facts, rumours, and fears mix and disperse, it becomes difficult to learn essential information about an issue. Term "infodemic" was coined in 2003, and has seen renewed usage in the time of COVID-19"[7]. The category of *fake news*, the false (as in falsified, intentionally fabricated in order to appear credible) information served as press information distributed over media[8], is intrinsically related to the issue of disinformation. The term *fake news* was initially related solely to press messages. As a result of common and widely spread use of this term, a semantic shift has occurred in the meaning and currently the term *fake news* is used in reference to all false news appearing in the public space, not necessarily prepared and posted by professional journalists and press.

The issue of disinformation in reference to COVID-19 has been for the first time recorded by the World Health Organization[9] which along with nine other organizations operating within the framework of the United Nations Organization[10] (hereinafter: the UNO)) drew attention to the most

7 It should be noted that this term is considered to have been coined by David Rothkopf who used it for the first time in 2003 in an article devoted to spread of SARS virus published in *Washington Post* on 11.05.2003. – "Words We're Watching: 'Infodemic'," accessed November 19, 2021, https://www.merriam-webster.com/words-at-play/words-were-watching-infodemic-meaning.

8 It is prudent to bear in mind that there is no singular, commonly accepted definition of this term. Cf.: Fink, and Gillich, "Fake News," 267: "Despite various proposals by scholars to define "fake news" and to distinguish it from other forms of distorted or misleading information, there is still no consensus on the definition of this concept. According to some scholars, "fake news" describes deliberately false factual statements, i.e. lies, distributed through news channels. Others conceive a broader meaning to cover speech that is presented in such a way as to make its recipients likely to draw certain false conclusions (distorted news or "fake news" in a broader sense)"

9 During the Munich Security Conference held in the beginning of 2020 the Managing Director of World Health Organization stated during meeting of the foreign policy and security experts that "(...) we're not just fighting an epidemic; we're fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous (...) We call on all governments, companies and news organizations to work with us to sound the appropriate level of alarm, without fanning the flames of hysteria" "Munich Security Conference," accessed November 19, 2021, https://www.who.int/director-general/speeches/detail/munich-security-conference

10 "Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation. Joint statement by WHO, UN,

important aspects of disinformation: disinformation constitutes a factual threat - it may be harmful to physical and psychological well-being of humans; it intensifies social stigmatization, it polarizes the public discourse related to COVID-19; it provokes and intensifies hate speech; it increases the risk of conflicts, violence and violation of human rights; ultimately, it endangers development of democracy, human rights and social cohesion in the long-term perspective[11]. In relation to the above, the UNO called for developing and implementing plans for counteracting infodemic through promoting timely distribution of accurate and credible information based on scientific knowledge among all social groups, particularly among high-risk groups. The call also concerned preventing proliferation of disinformation and controlling disinformation with concurrent observation of the freedom of speech. The Member States have also been called for cooperating with all social groups during development of domestic plans of action and for supporting the said groups in developing solutions and resistance to disinformation[12]. The statement and the call to action included therein are not binding in a legal sense. However, the fact that it has been proclaimed and adopted is evidence for the magnitude of the issue - the authors of the document directly speak that the price for dissemination of false information is being paid in human life; furthermore the authors advocate for the absolute need for the greatest possible degree of cooperation between public and non-public institutions in the field of counteracting disinformation.

3. COVID-19 disinformation in the context of the priorities of the European Commission

The issue of disinformation related to COVID-19 is treated very seriously by the European Union (the EU). The need for providing credible and accurate information regarding the pandemic has been indicated among the ten most important actions the EU is taking in its fight against COVID-19 and

UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC," accessed November 19, 2021, https://www.who.int/news/item/23–09–2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation .

11 "Managing the COVID-19 infodemic."

12 "Managing the COVID-19 infodemic."

the European Parliament called for "establishing a European source of information with the goal of providing all citizens with access to accurate and credible information in their native language and asked social media platforms for joining in the fight with disinformation and hate speech"[13]. The body responsible for coordination of joint response to the pandemic is the European Commission. Counteracting and controlling disinformation on the subject of COVID-19 is one of the areas in which the Commission operates in relation to the pandemic. According to the conception developed by the European Commission the departure point for the anti-disinformation strategy as well as one of its priorities is the necessity of protecting freedom of expression as well as other guaranteed rights and freedoms which should be treated as an axiom. Due to this fact the primary goal of the actions taken is not criminalizing disinformation as such or prohibiting it *expressis verbis* but the work for the benefit of increasing transparency of the Internet environment and responsibilities of the entities operating therein through substantially improving transparency of content moderation practices, bolstering position of citizens in this area and supporting an open democratic debate. This goal is to be realized through mobilizing all agents operating in this area: public bodies, businesses, media, academic circles and civil society, to cooperate.

The European Commission has been tackling the issue of disinformation for several years and its stance on the COVID-19-related disinformation is the derivative of the stance of the Commission on disinformation in general. The fight against disinformation was indicated in priority no. 6 adopted by the European Commission for the years 2019–2024 and titled "A new push for European democracy"[14]. In this priority the following declaration was made among other declarations: „in order to protect our democracy from external interference, a joint approach is necessary to tackle issues such as disinformation and online hate messages"[15]. "European Democracy Action Plan" has been adopted within the framework

13 "10 things the EU is doing to fight the coronavirus," accessed November 19, 2021, https://www.europarl.europa.eu/news/pl/headlines/society/20200327STO76004/10-dzialan-ue-w-walce-z-koronawirusem .

14 "A new push for European democracy," accessed November 19, 2021, https://ec.europa.eu/info/strategy/priorities-2019–2024/new-push-european-democracy_en.

15 "A new push for European democracy."

of the priority in which counteracting and controlling disinformation has been indicated as one of the four actions for the benefit of bolstering standing of citizens and establishing more resistant democracies across the entire EU[16]. It has been emphasized that "democracies around the world are facing a proliferation of false information, which may have the potential to destabilize their democratic institutions, and undermine the trust of citizens. To address misinformation, disinformation and foreign interference different policy responses are required"[17]. The Commission was obliged to improve methods for counteracting foreign interference in the information space of the EU and to effect adoption of such changes in "Code of Practice on Disinformation" which will ensure that the Code will project responsibility of the Internet platforms on the basis of the principle of co-regulation consistently with the drafted Digital Services Act and that the Code will enable defining solid foundations for monitoring of implementation of the adopted premises[18]. Improving and strengthening of media education, understood as developing the capacity for utilizing media, improving awareness and providing support to the civil society in this regard, which is not greatly valued in Poland, plays a pivotal role in the information space. Implementation of the adopted premises and criteria is to be assessed in 2023.

There is no doubt that counteracting disinformation effectively requires as wide approach to the problem as possible, which in practice means that the Commission has to act in two different ways. On the one hand the Commission postulates the necessity of reinforcing self-regulating actions, on the other the Commission demands legislative solutions and thus it has prepared a set of acts related to digital services (Digital Services Act and Digital Markets Act) in which particular attention is being drawn to self-regulating actions. Both types of actions directly indicate the necessity of counteracting and controlling disinformation.

The most important component of the initiatives taken in the field of self-regulation is "Code of Practice on Disinformation" adopted in 2018.

16 "European Democracy Action Plan," accessed November 19, 2021, https://ec.europa.eu/info/strategy/priorities-2019–2024/new-push-european-democracy/european-democracy-action-plan_en

17 "European Democracy Action Plan."

18 Cf. "European Democracy Action Plan."

Its signatories consist of the largest Internet platforms operating within the EU as well as the primary industry associations representing the European advertising sector. The Code has become an instrument which ensures greater transparency and responsibility of Internet platforms; it proposed a framework for monitoring and improving policy of platforms in relation to counteracting disinformation. However, in the face of new challenges, in particular the challenges related to disinformation on the subject of COVID-19, provisions of the act proved to be insufficient. Due to this fact the Commission has prepared new guidelines on the issue of reinforcing and improving "Code of Practice on Disinformation". As it has been decided in the Digital Services Act the improved Code will evolve towards the form of a co-regulating instrument. The key elements which according to the Commission are essential for transforming the code into a stronger counter-disinformation instrument as well as a tool for establishing safer and more transparent Internet environment were indicated within the framework of the guidelines. Among other components the guidelines include: the need for expanding the scope of application of the Code (object expansion) to address disinformation in not only its narrow understanding as false or misleading content that is distributed with the goal of misleading or acquiring economical or political gain and that may result in public harm but also in the understanding of disinformation as false or misleading content made available without harmful intentions when there is a risk of serious public harm provided that the freedom of speech is guaranteed; the need for extending participation in the role of signatories to the Code to smaller websites (subjective expansion), the need for signatories of the Code to establish a permanent mechanism for adapting the Code to the current requirements; the need for exercising control over posted advertisements; the need for unifying the understanding of prohibited behaviour; the need for reinforcing standing of the users, primarily through effective media education but also through increasing visibility of the credible information the public is interested in by way of issuing warnings addressed to the users who come into contact with false or misleading content achieved through propagation and improving effectiveness of the functions used to flag harmful and false information and by making credibility indicators available thus enabling users to make an informed and conscious choice regarding navigating the Internet; ultimately,

the need for cooperation between the signatories of the Code and the scientific circles researching the phenomenon of disinformation. It is worth emphasizing that the importance and practical power of the Code stems from its self-regulating nature - signatories voluntarily oblige to adhere to its provisions, jointly cooperate to develop solutions and provisions which they then follow. The importance of such solutions does not deteriorate when the area they regulate becomes encompassed by legislative solutions. Quite the contrary, these two types of regulations reinforce each other mutually, particularly when an instrument of self-regulation evolves towards co-regulation[19].

The Proposal for a Regulation of the European Parliament and Of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/E[20] (hereinafter: DSA) submitted by the Commission include compatible regulations developed as a consequence of the manner in which the Commission currently perceives the issue of disinformation. The issue itself appears *expressis verbis* in the recitals preceding the normative text. Disinformation is to be countered and controlled through further development of supervision and regulations concerning advertisement systems utilized by major Internet platforms (recital 63). Disinformation has also been indicated as the area requiring being taken into consideration during development of codes of conduct (recital 68). It has been emphasized in particular that the provisions regarding proceedings within the framework of the ordinance (DSA) may serve as a basis for the already taken self-regulating actions on the level of the European Union and reinforcing the already adopted "Code of Practice on Disinformation" (recital 69). Finally, developing the so called "crisis protocols" is supposed to aid in counteracting disinformation. This instrument

[19] European Commission, "Communication From The Commission to the European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions. European Commission Guidance on Strengthening the Code of Practice on Disinformation", COM(2021) 262 final, accessed December, 03, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0262&from=pl .

[20] European Commission, "Proposal for a Regulation of The European Parliament and of The Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC", accessed December, 11, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0825 .

may be utilized in the event of extraordinary circumstances influencing public security or health. In the case of absence of the crisis protocols their development may be initiated by the Commission in order to coordinate rapid, joint and cross-border response in the Internet environment. The extraordinary circumstances may consist of all unforeseen events, including serious cross-border threats to public health such as pandemics, in the case of which the Internet platforms may be used for the purpose of rapid proliferation of disinformation (recital 71). It has been emphasized that the Internet platforms are to be encouraged to develop and apply specific crisis protocols. The protocols themselves should be activated only for a limited period of time and the measures adopted within their framework should be limited to the measures absolutely indispensable for countering extraordinary circumstances. The regulation stipulates specific provisions referring to two specific institutions pivotal for combating disinformation. According to these provisions the European Commission and the European Board for Digital Services[21] will not only facilitate developing codes of conduct on the European Union level but may also invite appropriate entities to develop such codes in the event of emergence of a systemic risk, also through defining obligations in the field of implementing particular measures limiting such risks as well as defining the framework for regular reporting regarding all implemented measures and their results (Art. 35 of DSA). These postulates also concern Internet advertising (Art. 36 of DSA). In accordance with Art. 37 of DSA the European Board for Digital Services may order the Commission to initiate development of crisis protocols for the purpose of counteracting a crisis strictly limited to extraordinary circumstances influencing public security or health. Among a number of requirements, a crisis protocol should meet the requirement that has been indicated regarding the protocol specifically defining the types of protection measures

[21] European Board for Digital Services is established as an independent advisory group of Digital Services Coordinators on the supervision of providers of intermediary services. The Board shall be composed of the Digital Services Coordinators, who shall be represented by high-level officials. Where provided for by national law, other competent authorities entrusted with specific operational responsibilities for the application and enforcement of this Regulation alongside the Digital Services Coordinator shall participate in the Board. Other national authorities may be invited to the meetings, where the issues discussed are of relevance for them under (article 47).

enabling preventing all adverse impact on exercising basic rights indicated in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and information. Thus, all actions taken with the goal of counteracting disinformation should also secure and protect exercising the basic rights, including the right to freedom of expression.

4. Disinformation on the subject of COVID-19 and the legal regulations effective and currently drafted in Poland

Being aware of the nature, content and the magnitude of proliferation of disinformation concerning COVID-19 we should pose a question: Does the law effective in Poland govern the instruments which may be used for restricting this phenomenon? Are the binding legal provisions capable of effectively governing the cases of dissemination of falsehoods regarding COVID-19 and therefore preventing their adverse impact while concurrently maintaining freedom of speech, which is one of the principles of a democratic state governed by the rule of law?

The analysis of the currently binding provisions applicable to the current health situation in Poland[22] resulting from proliferation of SARS-CoV-2 virus and COVID-19 disease the virus causes and referring directly to the proclaimed state of the epidemic leads to the conclusion that these provisions do not refer to disinformation regarding COVID-19 and freedom of speech - such provisions are not included in the Act on the prevention and control of infections and infectious diseases in humans of 5 December 2008[23] and the Act of 2 of March 2020 on special measures for preventing, counteracting and controlling COVID-19, other infectious diseases and crisis caused by said diseases[24].

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22 State as of 25th of January 2022 - the state of the epidemic has been instituted and remains in effect in the area of the Republic of Poland.

23 Act on the prevention and control of infections and infectious diseases in humans of 05 December 2008, Journal of Laws 2021, item 2069, uniform text.

24 Journal of Laws 2021, item 2095; The solutions introduced in the act were criticized repeatedly by prof. E. Łętowska, incl. criticism in the interview for Gazeta Wyborcza: „Prof. Ewa Łętowska:The act regarding coronavirus violates the Constitution. It should be rescinded," *Gazeta Wyborcza*, March 4, 2020, accessed November 18, 2021, https://wyborcza.pl/7,75398,25755535,prof-ewa-letowska-ustawa-o-koronawirusie-narusza-konstytucje.html.

Due to these circumstances the phenomenon of proliferation of false information regarding COVID-19 should be analyzed on the basis of the binding law as an issue referring to content and scope of freedom of expression to which everyone is entitled on the basis of general provisions governing these issues. The framework for the regulations regarding the scope and legal boundaries of freedom of expression effective in Poland is defined by international acts and the Constitution of the Republic of Poland and the specifics of these regulations are defined in ordinary legal acts and ordinances. The issue of freedom of expression in the international legal sources of the United Nations' legal order is governed by the International Covenant on Civil and Political Rights (ICCPR)[25] drawn up on 19th of December 1966 in New York and ratified by Poland in 1977 whereas in the legal order of the Council of Europe the issue of freedom of speech is governed by the Convention for the Protection of Human Rights and Fundamental Freedoms[26] drawn up on 4th of November 1950 in Rome and effective in Poland since 19th of January 1993. Analyzing the provisions regarding freedom of expression in the context of the European Union we cannot omit the Charter of Fundamental Rights of the European Union[27]. Each of the listed acts not only defines the content of freedom of expression but also allows for restricting freedom of expression in extraordinary circumstances and defines under what circumstances limiting freedom of expression is acceptable[28]. Obviously, the provisions of the Constitution of the Republic of Poland serve as a starting point for the derivative statutory legal sources concerning freedom of expression[29]. The constitutional model adopted in the provisions of the fundamental law constitutes a foundation

[25] International Covenant on Civil and Political Rights of 19 December 1966, Journal of Laws 1977, No. 38, item 167, art. 19.

[26] Convention for the Protection of Human Rights and Fundamental Freedoms 04 November 1950, Journal of Laws 1993, No. 61, item 284, art. 10.

[27] EU(2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000, art. 11.

[28] Author of the paper does not quote and discuss these regulations due to the fact that these regulations are well known to the reader and the volume of the paper is limited.

[29] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

for the specific solutions and provisions adopted in ordinary legal acts[30] and lower-order legal regulations.

The analysis of the provisions regarding freedom of expression in all the acts invoked hereinabove leads to the conclusion that the model of freedom of expression adopted therein establishes strikingly similar standards. Acknowledging this particular freedom as one of the pillars of a democratic state governed by the rule of law does not automatically impart the qualities of an absolute freedom to the freedom of expression. Each of the invoked legal acts allows for restricting freedom of expression under specific circumstances defined by law and the conditions for restricting freedom of expression correspond with the adopted standards. The requirements for restricting freedom of expression are as follows: firstly, restricting freedom of expression has to be provided for in the provisions of law; secondly, restricting freedom of expression has to be indispensable for protecting specific values; thirdly, the said values have to be directly indicated in the invoked legal acts. These values refer to public interest and therefore public interest is a general determinant of the boundaries of freedoms and rights of an individual; it is a typical general clause which requires constant redefinition consistent with the shifting social context[31].

Therefore, can proliferation of false information regarding COVID-19 be legally restricted? Can it be treated as violation of boundaries of freedom of speech? It appears so - disinformation regarding COVID-19, particularly during the pandemic, may be considered as the action meeting criteria justifying elimination of such misleading expressions from the public space. It appears that the value that requires elimination of disinformation related to a dangerous pandemic from the public space is health indicated *expressis verbis* as the value justifying restriction of rights and freedoms in all legal acts governing freedom of expression, including Art. 31, Section 3

[30] The most important are: the Act of January 26, 1984 – Press Law, i.e. Journal of Laws 2018, item 1914; the Act of December 29, 1992 - Broadcasting Act, i.e. Journal of Laws 2020, item 805; the Act of September 6, 2001 - Act on Access to Public Information, i.e. Journal of Laws 2020, item 2176.

[31] Cf. Leszek Garlicki and Krzysztof Wojtyczek, "Art. 31," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. II*, 2nd edition, ed. Marek Zubik, (Warszawa: Wydawnictwo Sejmowe, 2016), accessed December 29, 2021 https://sip.lex.pl/#/commentary/587744241/541681?tocHit=1&cm=RELATIONS.

of the Constitution of the Republic of Poland[32]. Furthermore, Art. 68 of the Constitution is devoted to the issue of health as a value. In accordance with the content of this article each person has a right to protect one's health and public authorities are responsible for combating and controlling epidemic diseases[33]. Although there is an ongoing debate regarding the nature of this norm we may most certainly claim that public authorities are obliged to take actions aimed at controlling and combating epidemics. The first actions coming to our minds when thinking of such activities are the actions taken within the sanitary and medical fields; however, the postulate addressed to public authorities and formulated in such manner does not exclude taking other actions including actions in the field of freedom of expression including the care for ensuring that the information regarding epidemics accessible in the public space is credible and true and that the information not meeting these criteria is removed. It must be recalled that according to the Constitutional Tribunal "the possibility envisaged in Art. 31, Section 3 of the Constitution restricting the right to freedom of expression due to reasons of health protection may refer to both protecting health of the entire society as well as protecting health of individual groups or individual persons"[34]. Obviously, in any particular case the issue of judging importance of these values – freedom of speech on the one hand and the values violated by misleading information on the other – would be resolved by an independent court and an independent judge. Each attempt at eliminating a case of disinformation on the basis of the invoked regulations

[32] It is worth to remember that the understanding of the premises and criteria indicated in art. 31, section 3 can overlap in a various ways - e.g. protecting health is a component of public order protection; particularly drastic cases of threat to public order may become a threat to national security, including health etc. However, indicating only a single premise/criterion is required for restricting rights and freedoms of an individual person - cf. Garlicki and Wojtyczek, "Art. 31".

[33] Cf. art. 68 sections 1 & 4 of the Constitution of the Republic of Poland/ Polish Constitutional Tribunal, Judgement of 09 July 2009, Ref. No. SK 48/05. Health is also subject of legal protection under numerous legal acts of state rank - in civil law as a personal good of a human, listed in the exemplary catalogue of goods as the primary personal good (the right to protect health), in criminal law as subject of protection threatening or violating which bears criminal liability (offences against life and health and offences against common security) and in a number of acts of administrative law.

[34] Polish Constitutional Tribunal, Judgement of 09 July 2009, Ref. No. SK 48/05.

would require filing a suit or a complaint with an appropriate court and receiving an appropriate ruling. Such proceedings would each time require an enormous commitment of resources and time and the ruling would apply solely to a particular case. In the case of disinformation in general and the COVID-19-related disinformation in particular, when the scale of the issue is enormous and global in nature, this model of operation should be considered as entirely ineffective or with a severely limited effectiveness[35]. Thus, a question comes to mind: is it possible to effectively control and counteract disinformation regarding COVID-19 by using a differently drafted legal measure?

It appears that such beliefs are held by the entities which suggested introducing particular changes into legal provisions. We must not naively believe that legal provisions will eradicate the virus of COVID-19-related disinformation but without such provisions combating disinformation is entirely impossible. Defining the legal status of disinformation regarding COVID-19 unambiguously would make actions aimed at eliminating such information much easier. However, several remarks regarding the legislative actions postulate must be made. First and foremost, such actions must be constantly accompanied by the awareness of the fact that freedom of expression is one of the principles in a democratic state governed by the rule of law. Thus, all legislative actions which interfere with the freedom of expression principle should be applied only to the extent allowed by law and necessary for protecting the values indicated by the legislator - in this case, health. This remark is even more justified due to the fact that the analogous regulations enforced in certain countries are being perceived as using the pandemic as a justification for unauthorized and unlawful restriction of freedom of expression and media[36]. It has been observed that among these regulations there are regulations which could make supervising public administration and transparency of its actions more difficult for unjustified

35 Cf. Michał Krawczyk and Kamil Mikulski, *COVID-19: Disinformation in the Polish Cyberspace* (Kraków: The Kosciuszko Institute, 2020), 4–34.

36 Scott Griffen, "Seizing the moment," *British Journalism Review* 31, no. 2 (2020): 37; Evelyn Mary Aswad, "In A World Of *Fake News*. What's A Social Media Platform To Do?," *Utah Law Review*, no. 4 (2020): 1009–1028.

reasons[37]. Introducing the custodial sentence (imprisonment) sanction for dissemination of false information regarding pandemic is being perceived as an excessive, disproportional and dangerous restriction[38]. Thus, developing effective legal regulations preventing proliferation of false information regarding a pandemic is not an easy task[39] and certain representatives of the doctrine directly serve the ground for a thesis that "there are no effective legal solutions in the field of distribution of false information"[40]. However, it appears that any possible difficulties should not be a decisive factor for not taking legislative action regarding this issue.

In this context it is prudent to take note of two legislative proposals submitted in Poland.

The first is a draft of the act submitted by Members of Parliament on 21st of October 2020, that advocates for changing the Act of 5 December 2008 on preventing and control of infections and infectious diseases in humans, which according to the submitting MPs is aimed at combating disinformation related to COVID-19[41]. It concerns "introduction of sanctions (a fine or restriction of freedom) for publicly challenging the threat to public health presented by SARS-CoV-2 virus or challenging existence of the virus by introduction of penalizing provisions"[42]. It constitutes

37 Cf. A protest of Spanish journalists - "Cientos de periodistas rechazan el control de las preguntas en las ruedas de prensa en La Moncloa," *ABC ESPAÑA*, April 06, 2020, accessed January 02, 2021. https://www.abc.es/espana/abci-medio-centenar-periodistas-rechazan-control-preguntas-ruedas-prensa-moncloa-202003312101_noticia.html In Poland similar effect is the result of the "one press agency, one question" rule used during press conferences held by the government. It is an example of unauthorized and unlawful restriction of the right to information.

38 Cf. Roxana Radu, "Fighting the 'Infodemic': Legal Responses to COVID-19 Disinformation," *Social Media + Society* 6, no. 3 (2020): 1–4.

39 Jason Pielemeier, "Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?," *Utah Law Review*, no. 4 (2020): 917– 940.

40 Weaver, "Fake News", 51.

41 Justification for draft of the Act on altering the act on prevention and control of infections and infectious diseases in humans, accessed December 30, 2021, 9–020–297–2020.pdf (sejm.gov.pl).

42 Sejm paper EW-020–297/20. Paper no. 746. In the self-submitted correction to the draft the applicants resigned from the restriction of liberty penalty, accessed December 30, 2021, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=746

a criminal law provision[43] within the framework of administrative and legal regulations.

The analysis of the content of this draft leads to several conclusions. This regulation should remain in effect solely for the duration of the state of the epidemic, therefore only for the period when the state of the epidemic is formally instituted and maintained. The regulation would not be applied without limitations regarding duration and area – an aspect of the regulation which should be assessed positively. It would not be utilized to fight disinformation in the general understanding or in the case when a state of the epidemic would not be instituted in a given area even if the epidemic would, in fact, break out in the said area. It appears that the requirement for the distributed information remaining in conflict with the current state of medical knowledge ("contradicting the current state of medical knowledge") included in the drafted change would, in actuality, make applicability of the provision more difficult because qualifying each case would require determining "the state of current medical knowledge" and indicating the existing conflict. If in a defined factual state an appropriate body formally institutes a state of the epidemic, negating the threat or challenging existence of the threat should constitute an adequate premise for implementation of this provision. Finally, the hallmarks defining the causative act proposed in the draft do not cover all possible instances of dissemination of false information regarding COVID-19, which could result in tragic consequences[44]. The proposed regulation neither includes provisions enabling direct elimination of COVID-19-related disinformation from the public space. Thus, in the proposed wording the regulation would realize the goal presented by the authors of the draft only partially.

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43 "Art. 1 of the Act on altering the act on prevention and control of infections and infectious diseases in humans," accessed December 30, 2021, 9–020–297–2020.pdf (sejm.gov.pl).

44 Examples include false information regarding composition, structure and the manner in which COVID-19 vaccines act and their after effects - such information do not meet the criteria of the causative act stipulated in the draft of the act - although such false information remain in conflict with the contemporary medical knowledge they do not need to automatically negate the threat (an epidemic) to public health, challenge existence of the epidemic, discourage from or incite to not implement or not follow the procedures ensuring protection, and yet still such information remain dangerous *fake news*.

The draft of the Act on Freedom of Speech in the Internet Social Networking Services drawn up by the Ministry of Justice[45] should be the second legislative proposal that should draw attention. In Art. 1 of the Act the authors of the draft proposal indicate the goals of the act is to establish conditions for supporting freedom of expression, ensuring the right to access to credible information, improving degree of protection of human rights and freedoms in the social networking services with at least one million registered users available in the area of the Republic of Poland as well as ensuring that the Internet networking services adhere to regulations regarding freedom of expressing opinions and views, gathering information, distributing information, expressing religious beliefs, beliefs concerning general outlook and philosophy as well as the freedom of communication. For the purpose of the drafted act, disinformation has been defined as "false or misleading information created, presented and distributed for the purpose of gain or interfering with public interest"[46]; while disinformation has been recognized as unlawful content[47]. The Freedom of Speech Council is to be appointed on the basis of the drafted act, a new body of public administration "ensuring that the Internet social networking services adhere to provisions regarding freedom of expressing beliefs and opinions, collecting and distributing information, expressing religious beliefs and beliefs regarding general outlook and philosophy as well as freedom of communication" (Art. 4). The analysis of this draft leads to the conclusion that the act is highly repressive in its nature. The draft rises numerous and well justified concerns among experts. Primarily, the draft of the act proposes imposing a number of responsibilities and obligations on service providers, that appear to be impossible to meet in practice and a failure to meet them is

45 Draft of the Act on Freedom of Speech in the Internet Social Networking Services, D293, 28.09.2021 version, currently under review, accessed December 17, 2021, https://legislacja.rcl.gov.pl/projekt/12351757/katalog/12819479#12819479.

46 Art. 3, point 6 of the draft of the Act on Freedom of Speech in the Internet Social Networking Services.

47 Art. 3, point 8 of the draft of the Act on Freedom of Speech in the Internet Social Networking Services: "Whenever the act speaks of unlawful contents the said contents are to be understood as the contents violating personal goods, disinformation, contents of criminal character, as well as the contents which violate good morals, in particular the contents which propagate and laud violence, suffering or humiliation".

penalized with substantial penalties[48]. The obliged entities are concurrently deprived of a number of procedural guarantees that are considered as standard for a state governed by the rule of law, both at the administrative and court proceedings stages[49]. The analysis of the draft leads to a further conclusion that the willingness to protect freedom of speech, which should be perceived and assessed positively, indicated in the content of the act and the draft authors' declarations, will in practice be used primarily to protect actions of the users who come into conflict with regulations on the Internet platforms. Being aware that the regulations prohibit publishing the content that violates the law raises a question: Whose freedom of speech understood in what manner is this act supposed to protect? It is hard not to notice that the act attempts to govern only a fraction of the Internet reality in a selective manner subordinate to indirectly stated goals of the act and completely disregards the fact that the previously discussed regulations concerning, among other issues, disinformation spread by means of the Internet are currently being developed at the level of the European Union. It is prudent to take note that the majority of the entities reviewing the draft, including the Chairman of the Office of Competition and Consumer Protection, President of the Personal Data Protection Office, President of the National Broadcasting Council and Polish Ombudsman, submitted a number of substantive and critical remarks. Furthermore, it is hard not to notice that the solutions adopted within the framework of the draft in numerous sections constitute a legislative practice inconsistent with standards of a state governed by the rule of law. In this context it is difficult to assess this draft positively.

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48 Within 48 hours a service provider is obliged to process the complaint submitted by a user regarding propagation of unlawful contents, restricting access to contents or restricting access user's profile and after lapse of this period a user may refer the matter to the Freedom of Speech Council; not fulfilling the obligation to review and process the complaint within the deadline may result in imposing a pecuniary fine in the amount ranging from PLN5,000 to PLN50,000,000.

49 The exemptions projected in the draft in regards to the scope of proper application of the provisions of the act of 14th of June 1960. Code of Administrative Procedure of 14 June 1960, Journal of Laws 2021, item 735, as amended, deprives the parties to the proceedings of various rights incl. the right to active participation in the case or the objective truth principle.

When speaking about the proposals regarding legislative actions aimed at restricting proliferation of false information on the pandemic it is prudent to recall that introduction of the John Doe lawsuit ("the unknown defendant lawsuit", which is literally called "blind lawsuit" in Poland) into the Polish legal order with the goal of combating *fake news* has been postulated within the doctrine for several years. Introduction of this legal instrument has been proposed within the framework of the Civil Code amendment draft submitted by the Ministry of Justice. This instrument could be also used for counteracting disinformation related to COVID-19[50], though it has not been directly proposed as a tool for combating proliferation of false information regarding COVID-19.

5. Conclusions

The analysis performed within this paper leads to the conclusions which enable us to make an attempt at providing the answer to the questions presented above, that may be regarded as the conclusion *de lege lata* and *de lege ferenda*.

Development of electronic means of social communication has led to the state in which disinformation constitutes an imminent threat not only to the quality of social communication but also to specific values protected by law. The above remark particularly concerns disinformation regarding COVID-19 in the case of which the endangered value protected by law is health. However, we must bear in mind that disinformation also constitutes a threat to other basic democratic values and the very democracy itself and therefore there is a general consensus at both the European level and within the Polish discourse regarding understanding of disinformation. The essence of the COVID-19-related disinformation is the intentional distribution of false information regarding all aspects of SARS-CoV-2 virus and COVID-19 disease the virus causes, including challenging existence of the virus itself and the disease it causes. This issue stops being a purely

[50] Cf. Anna Krzyżanowska, "Fake news – jak z nim walczyć i czy da się wygrać," *Rzeczpospolita,* April 29, 2020, accessed December 30, 2021, https://www.rp.pl/Dobra-osobiste/304299824-Fake-news--jak-z-nim-walczyc-i-czy-da-sie-wygrac.html ; the subject of this proposition has been discussed by: prof. E. Łętowska, prof. A. Rzepliński and prof. A. Bodnar and others; Cf. Tomasz Pietryga, "Ślepym pozwem w fake newsa," *Rzeczpospolita,* April 29, 2020, accessed December 30, 2021. https://www.rp.pl/article/20200429/PCD/304299826.

theoretical problem when we recall the number of infections and the death toll caused by SARS-CoV-2 virus and when we realize that the pandemic continues.

Although we may speak of the consensus regarding assessment of the very phenomenon of disinformation, the legislative and practical actions taken at the level of the European Union and at the domestic level enable us to indicate major differences and frequently disturbing shift of emphasis.

Within the framework of the conclusions *de lege lata* and *de lege ferenda*, it must be noted that combating disinformation in general and the COVID-19-related disinformation in particular constitutes a significant component of the actions taken by the European Commission on behalf of the European Union as evidenced by the adopted priorities. At the level of the European Union the need for developing such legal instruments, that will enable the combat disinformation effectively if properly developed and improved within a set time-frame, is clearly observable. The existing solutions have proven to be ineffective. All actions taken in this field are subordinate to the imperative priority of protecting freedom of expression as well as other guaranteed rights and freedoms and the solutions proposed at the level of the European Union appear to actually implement this postulate. Therefore the basic mechanism of the adopted solutions is, instead of criminalizing disinformation, to develop solutions within the framework of self- and co-regulation in cooperation with service providers: increasing transparency of the Internet, increasing responsibility of the entities operating in the Internet as these entities have been for many years getting prepared for accepting this responsibility as well as bolstering status of citizens through various means, including media (digital) education, and supporting an open democratic debate. Attention must be drawn to the fact that at the level of the European Union's regulations, disinformation is not automatically treated as illegal content. The financial penalties for not observing the provisions of the regulations enforced under the DSA are also provided for but are treated as a measure of last resort and the procedure for imposing them is precisely governed.

The analysis of the legal provisions currently effective and binding in Poland leads to the conclusion that although elimination of disinformation related to COVID-19 would be theoretically possible on the basis of

the existing regulations governing restriction of freedom of expression, in practice the operational model would be highly ineffective or effective to a severely limited degree. Thus, public opinion has been presented with a proposal of legislative solutions that are supposed to be more effective. Similarly, to the proposals of the European Union, the domestic drafts of acts tackling the issue of the COVID-19-related disinformation emphasize the role of freedom of expression and declare the willingness to protect it. However, the detailed analysis of the proposed domestic solutions *de lege ferenda* may rise justified concerns. First and foremost, unlike the European Union legislators, the domestic law proposal authors automatically consider disinformation as illegal and unlawful content and the primary and, essentially, basic instruments to fight disinformation include penalties with the major difference between the drafts prepared by Members of Parliament and the Ministry, being the fact that in the case of the former the entities putting disinformation into circulation are to be penalized whereas in the case of the latter penalties are to be imposed on service providers. The solutions proposed under the domestic Polish legislation do not tackle or address the problem of disinformation holistically. Therefore, it appears that even if the proposed solutions were adopted, they would not result in effective elimination of disinformation, including disinformation regarding COVID-19.

As compared to the solutions drafted by the European Commission and the domestic drafts of acts, the different approach to the idea of controlling and counteracting disinformation is clearly visible. The European Commission encourages agents operating in the information space to develop self-regulation solutions and in the legislative space - co-regulation solutions resulting from joint effort to develop and further improve effective solutions. The domestic acts' proponents, particularly the authors of the proposal prepared by the Ministry of Justice, impose a number of enormous and impossible to realize responsibilities and obligations on service providers and then transfer the full responsibility for realizing and meeting these obligations to service providers and further secure and enforce meeting these obligations by means of enormous financial penalties arbitrarily imposed by the administrative body appointed for this purpose and concurrently deprive service providers of a number of process guarantees in this respect.

These two kinds of policies are more enlightening than the pure, literal wording of the proposed solutions. The solutions proposed by the European Union are based on joint and conscious development of the solutions protecting against disinformation and concurrently upholding the right to freedom of expression, that are to be later adopted. The domestic solutions are based on unilaterally imposing highly repressive regulations that neither address the actual possibility of implementing the said regulations nor ruthlessly deprive the entities, these regulations apply to, of the basic guarantee that their rights will be protected. Unfortunately, it is to be expected that these two completely different paradigms of counteracting disinformation regarding COVID-19 are irreconcilable and that the latter one fails to reconcile with democratic standards.

Therefore, the attempt to answer the question whether eliminating COVID-19 disinformation from the public space is possible in the light of the priorities of the European Commission and the legal regulations already effective and currently drafted in Poland must be concluded that the European Union paradigm offers a chance of achieving this goal due to being prepared jointly in cooperation with the entities to which these regulations apply to. Furthermore, we have to emphasize that there is no doubt that correctly constructed legal provisions constitute a necessary instrument that allows for eradicating the COVID-19 disinformation from the public space but such provisions can be developed only as a result of respecting democratic standards of legislation, cooperation and mutual respect among all participants of the process - factors that have been, as it would seem, forgotten by the authors of the domestic proposals.

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The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law

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Abstract: The crisis that Europe faced in 2015 has never been resolved and countries have adopted different strategies to deal with the influx of migrants. Some of them raise serious legal doubts for good reason. One of the new national solutions currently in the process of passing is the new migration plan announced by the United Kingdom in the Nationality and Borders Bill last year. The aim of the reform is to improve the British asylum system and to fight effectively illegal immigration and people smuggling.The aim of the article is to present the most important assumptions of the British reform in the field of granting refugee status. The analysis would allow to assess the compliance of the designed solutions with international obligations, the fulfilment of which should form the basis of the asylum policy of each State being a party to the 1951 Convention relating to the Status of Refugees. The main aim of the article, however, is to draw attention to the fact that the international protection of refugees should be equated with community interests and referring to the individual interest of the State is an erroneous and dangerous assumption.

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1. Introduction

In March 2021, the UK government announced the adoption of the New Plan for Immigration, which was officially announced two months later[1]. Its assumptions are to be implemented through the adoption of the Nationality and Borders Act, the Bill of which was published on 6 July 2021[2].

As explained on the UK government website, the Bill is "the cornerstone of the government's New Plan for Immigration", which aims to provide "the most comprehensive reform in decades to fix the broken asylum system". There are also three aims of the Act, which are: 1) to make the system fairer and more effective, to better protect and support those in genuine need of asylum, 2) to deter illegal entry into the UK by breaking the business model of criminal trafficking networks and saving lives, 3) to remove from the UK those with no right to be here[3]. One of the reasons for the reform is that in 2019 the number of asylum applications increased by 21% compared to the previous year, i.e. to almost 36,000, which was the highest rate since the European migration crisis in 2015/2016. It was also referred to the cost of the asylum system, which exceeds a billion pounds a year, and the fact that the number of people who cannot be removed due to legal restrictions had been steadily declining for several years. It was stated that "as a result, there are now over 10,000 Foreign National Offenders circulating on the streets, posing a risk to the public". At the same time, it was declared to continue accepting refugees and helping them to integrate with British society[4].

The British Nationality and Borders Bill was criticised by international organizations. The UN Refugee Agency website clearly stated the planned reform in the UK would punish the majority of refugees seeking asylum

1 New Plan for Immigration. Policy Statement, March 2021, accessed January 10, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708–001_Sovereign_Borders_Web_Accessible.pdf.

2 The text of the Nationality and Borders Bill (HL Bill 82) as of 9 December 2021, accessed January 10, 2022, available at: https://publications.parliament.uk/pa/bills/lbill/58–02/082/5802082_en_1.html. Detailed information on the stages of its passing is available at: https://bills.parliament.uk/bills/3023.

3 Policy Paper - Nationality and Borders Bill: Factsheet, 6 July 2021, accessed January 10, 2022, https://www.gov.uk/government/publications/the-nationality-and-borders-bill-factsheet/nationality-and-borders-bill -factsheet.

4 Ibidem.

in that country, creating a model that would undermine the established rules and practices for international refugee protection. According to the United Nations High Commissioner for Refugees, the law undermines the 1951 Convention relating to the Status of Refugees (Refugee Convention), to which the United Kingdom is a party, and does not promote the British government's goal of protecting people at risk of persecution[5]. Amnesty International also expressed a critical opinion. It indicated, *inter alia*, that the Bill would not break the business model of people smugglers through provision that increases criminal sentences, but it would only increase the reliance of people, already vulnerable to exploitation by trafficking gangs. On the other hand, the organization recognized the real goal of the reform to discourage potential asylum seekers in the United Kingdom[6]. In turn, Human Rights Watch stated that the measures proposed in the Bill undermine international refugee and human rights obligations[7].

The aim of the article is to review the most important assumptions of the British asylum system reform in the context of international protection of refugees and to present the concept of community interests with which, according to the Author, international protection of refugees should be equated.

2. Basic assumptions of the reform of the British asylum system and their evaluation

The Nationality and Borders Bill consists of 7 Parts, which include provisions concerning, *inter alia*, nationality, asylum, immigration control, age assessments, modern slavery.

As regards the title issue, the first thing that draws attention is the differential treatment of refugees adopted in Clause 11. The Bill divides refugees

5 The Nationality and Borders Bill, accessed January 10, 2022, https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html. The United Kingdom signed the Convention on the day of its opening for signature and was one of the first countries to ratify it. For the text of the Convention, see Convention relating to the Status of Refugees, Geneva, 28 July 1951, Journal of Laws 1991, No. 119, item 515.

6 Eight ways the Nationality and Borders Bill falls short, accessed January 10, 2022, https://www.amnesty.org.uk/nationality-borders-bill-truth-behind-claims.

7 United Kingdom. Events of 2021, accessed January 10, 2022, https://www.hrw.org/world-report/2022/country-chapters/united-kingdom.

into two groups. The first one includes those who "have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention)", and "have presented themselves without delay to the authorities". In addition, if the refugee has entered or is staying in the UK illegally, it is required that they "can show good cause for their unlawful entry or presence". Refugees who do not meet these conditions are to be included in the second group (Clause 11(1)-11(3)). Such a distinction is to allow for a different treatment of refugees and their family members, for example in respect of the length of the period of limited leave to enter or remain, the requirements that the person must meet in order to be given indefinite leave to remain, or a prohibition on access to public funds (Clause 11(5)-11(6)). The Bill Explanatory Notes indicate that Group 2 refugees would be granted temporary protection status with no possibility of settlement for at least ten years[8]. It should also be noted that the Bill only indicates examples of differential treatment. The enumeration is not exhaustive; thus, it leaves a lot of freedom in the selection of measures resulting in a different treatment of refugees from the first group and the second group.

As Clause 11 indicates, the main criterion differentiating the refugee status is the fact of arriving directly from the country or territory where the refugee's life or freedom was threatened. The Bill more broadly refers to the condition of immediate arrival from a country where life or freedom was threatened, and in Clause 36(1) it is stated that "A refugees is not to be taken to have come to the United Kingdom directly from a country where they life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugees Convention in that country". This means that people who for some reason stayed in another country before coming to the UK should be refused recognition as a refugee. The regulation broadens *de facto* the interpretation of Article 31(1) of the Refugee Convention. In a legal opinion entitled "UNHCR Observations on the Nationality and

[8] Nationality and Borders Bill Explanatory Notes as introduced in the House of Commons on 6 July 2021 (Bill 141), 6, para. 19, accessed January 10, 2022, https://publications.parliament.uk/pa/bills/cbill/58–02/0141/en/210141en.pdf (access: 10 Dec. 2021).

Borders Bill", prepared by the United Nations High Commissioner for Refugees in October 2021[9], it was noted that such an interpretation of "coming directly" would be inconsistent with the Refugee Convention unless it continued to be interpreted in line with current UK jurisprudence. According to it, the term "directly" is defined broadly and purposively, which protects from being punished those refugees who have crossed through, stopped over or stayed in other countries on their way to the country of intended sanctuary[10].

The provisions of Clause 35(1) are quite unclear and may raise doubts not only due to possible reasons for stopping in another country, which are not specified in the Bill, but also due to the resulting condition of seeking effectively protection in the UK. The question arises whether a refugee must apply for protection in the first safe country. The Refugee Convention does not refer to the first safe country principle and does not oblige a refugee to seek protection in the nearest country or the first country to which they flee[11]. The doctrine indicates that the use of the safe country concept violates the rights of refugees by restricting their freedom to choose the State in which they will seek protection. Moreover, it infringes the individual character of an asylum claim by relying on a general assessment of the situation in the country of origin or a third country, without considering individual circumstances[12]. The concept was also critically assessed by the United Nations High Commissioner for Refugees in a document prepared in 1991 entitled "Background Note on the Safe Country Concept and Refugee Status"[13]. The UNHCR pointed out that the use of the concept "would *a priori* preclude a whole group of asylum seekers from refugee status" which, in the opinion of the High Commissioner, "would

9 UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021–2022, October 2021, accessed January 10, 2022, http://www.migration.org.za/wp-content/uploads/2017/08/First-Safe-Country-Principle-in-Law-and-Practice.-Issue-Brief-7.pdf.

10 Ibidem, 9, para. 25.

11 Roni Amit, "The First Safe Country Principle in Law and Practices," *Migration Issue Brief 7* (June 2011): 4.

12 Potyrała Anna,"Ochrona uchodźców w ustawodawstwie państw członkowskich Unii Europejskiej z Europy środkowej i wschodniej," *Studia Polityczne* 2 (2012): 232.

13 Background Note on the Safe Country Concept and Refugee Status, EC/SCP/68, 26 July 1991, accessed January 10, 2022, https://www.unhcr.org/excom/scip/3ae68ccec/background-note-safe-country-concept- refugee-status.html.

be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the status of refugees". In particular, it would be a reservation to Article IA (2) of the Convention, which would be in violation of the prohibition against making reservations to this article under Article 42. It would also introduce *de facto* new geographic restrictions to the Convention, which would be contrary to the intent of the 1967 Protocol to the Convention. The UNHCR also accused the concept of non-compliance with Article 3 of the 1951 Convention which requires States to apply its provisions without discrimination as to country of origin. In the High Commissioner's opinion, "strict application of the concept could lead to individuals being returned to a situation of danger to life, in violation of the Article 33 prohibition against refoulement"[14]. Simultaneously, in the same document, the High Commissioner did not exclude the legitimacy of an international reconciliation of formal mechanisms for determining responsibility which incorporates the "safe country" notion with the provision of clearly defined and harmonized criteria against which to measure whether countries should be considered safe. However, such mechanisms can only be effective if certain conditions regarding standards of application (to whom the mechanisms apply and with respect to which countries), standards of treatment (how the mechanisms shall be applied and when) will be included in an agreement between the interested parties. It is also important to agree on the operational modalities that would relate to treatment of asylum seekers, arrangements for return and readmission, as well as monitoring the implementation of commitments[15]. It is worth noting that the doctrine does not negate the use of the safe country concept in international agreements either, as long as their content corresponds to the standards of refugee protection[16]. However, even in such a situation, the allegation of limiting the refugee's right to choose the country in which they want to apply for protection seems justified if the claim is assessed solely on the basis of general premises. Therefore, the actions of States in

14 Ibidem, para. 17.

15 Ibidem.

16 See Amit, "The First Safe Country," 4–5; James C. Hathaway, "Refugees and Asylum," in *In Foundations of International Migration Law*, ed. Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (Cambridge: Cambridge University Press, 2012), 183.

this area must meet high standards of verification of submitted claims and of assessment of the circumstances, so that the basic principles of international refugee protection are maintained. It seems that States' reaching for the safe country concept may justify the burden of providing protection in the event of a mass influx of refugees and the need to guarantee this protection at an appropriate level. However, the success of the concept in its practical dimension requires agreement and solidarity between States. An individual assessment of the claim is important in order to consider circumstances such as the right to family life under the principle of family reunification. This would contribute to the assimilation of the refugees and facilitate their naturalization.

According to Schedule 3 – "Removal of asylum seeker to safe country"[17] the concept of "safe countries" used in the Nationality and Borders Bill allows the refoulement of a refugee or obliging them to leave the territory of the UK and go to a country where "a person's life and liberty are not threatened by reason of the person's race, religion, nationality, membership of a particular social group or political opinion", from which "a person will not be removed elsewhere other than in accordance with the Refugees Convention" and to which "a person can be removed without their Convention rights under Article 3 (...) being contravened" and from which "a person will not be sent to another State in contravention of the person's Convention rights". It is also noted that it is a place where "the person is not a national or citizen of the State" (Section 77(2B)). In the legal opinion of the UNHCR, the applied concept of "safe countries" was criticised. It was noted that there was no requirement that the territory be a State or a party to the Refugee Convention, or that it offered the possibility of applying for refugee status or otherwise recognised the rights guaranteed to refugees in the Refugee Convention. It was also found that there was no consideration of the reasonableness of the transfer in any individual case, and the law provided an opportunity for a person to show that in their particular circumstances they would be at risk of violations of their rights

[17] Schedule 3 - Removal of asylum seekers to safe country, Amendments to section 77 of the Nationality, Immigration and Asylum Act 2002, The Nationality and Borders Bill (HL Bill 82), 88–91, accessed January 10, 2022, https://publications.parliament.uk/pa/bills/lbill/58–02/082/5802082_en_1.html.

under the European Convention on Human Rights, but provided no such opportunity with regard to the risk of persecution or onward refoulement or expulsion prohibited under the Refugee Convention[18].

Doubts are also raised by the content of the provisions that use the concept of a "safe third State". According to Clause 15, Section 80B(4), it is a country in which "the claimant's life and liberty are not threatened (...) by reason of their race, religion, nationality, membership of a particular social group or political opinion", from which "a person will not be sent to another State - (i) otherwise than in accordance with the Refugee Convention, or (ii) in contravention of the their rights under Article 3 of the Human Rights Convention" and "a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention, in that State". As the United Nations High Commissioner for Refugees notes, first of all, the regulation creates a low standard for when a State would be considered 'safe' for a particular claimant. It also allows to assume that a country could still be considered safe even if the applicant had been at risk of being subjected to human rights violations there that either fall short of threats to life and liberty, or to which they were not exposed for reasons of a Refugee Convention ground. The quite general wording of point (ii) of the regulation, which uses the term "a person may", was also criticised. It was found that it was not clear from the terms of the Bill that this possibility needs to be available to the particular applicant. From the wording of the Bill it appears it may arguably be sufficient that in general there is the possibility of applying for refugee status in that State[19].

Under the law, a connection of an asylum seeker in the UK with a safe third State would render a claim in this matter inadmissible. To clarify the assumptions of the regulations, Clause 15, Section 80C explains that the term "connection" to a safe third State means the fulfilment of one of five conditions under which the claimant: 1) has been recognized as a refugee in the safe third State, and remains able to access protection in accordance with the Refugee Convention in that State, 2) has otherwise been granted protection in a safe third State as a result of which the claimant would not be sent from the safe third State to another State: otherwise

18 UNHCR Observations on the Nationality, 12, para. 37.

19 Ibidem, 10, para. 31.

than in accordance with Refugee Connection, or in contravention of their rights under Article 3 of the European Convention on Human Rights, and remains able to access that protection in that State, 3) has made a relevant claim to the safe third State and the claim: has not yet been determined, or has been refused, 4) was previously presented in, and eligible to make a relevant claim to, the safe third State, it would have been reasonable to expect them to make such a claim, and they failed to do so. The last condition is that in the claimant's particular circumstances, it would have been reasonable to expect them to have made a relevant claim to the safe third State. The concept of a safe third State in the above form was therefore not based on a guarantee of obtaining the refugee status, but only on protection against expulsion in contravention of the Refugee Convention and Article 3 of the European Convention of Human Rights, or on meeting the condition of making or having a reasonable opportunity to make a "relevant claim" to the safe third State for such protection[20].

Other doubts are raised by the provisions of Clause 39. The Explanatory Notes to the Bill indicate that "this clause creates a new criminal offence of arriving in the UK without a valid entry clearance (with Electronic Travel Authorisation to be added once substantive clauses on this provision are introduced) where required, in addition to entering without leave"[21]. The lack of reference in the regulation to the situation of people seeking refugee protection may in practice penalise their arrival in the UK without the required visa. On the other hand, obtaining a visa is not a condition, the fulfilment of which is to enable a claim for protection under the 1951 Convention. It may rather constitute evidence of an unfavourable policy of States which are looking for various solutions limiting or preventing obtaining the refugee status. Moreover, as the UNHCR observes, British law does not provide for the possibility of applying for entry clearance to apply for an asylum, and thus "no one from a country whose citizens normally need a visa would be able to come to the UK to seek asylum without potentially committing a criminal offence"[22].

20 Ibidem, 10, para. 32.

21 Nationality and Borders Bill Explanatory Notes, 45, para. 382.

22 UNHCR Observations on the Nationality, 12–13, para 37.

Unfortunately, all of the presented regulations of the Nationality and Borders Bill raise reasonable doubts and it is difficult to resist the impression that they fit into a broader practice of States, which results in adopting various solutions in national law, sometimes questionable in terms of their compliance with the norms of public international law. At the same time, States make use of the quite controversial, though willingly practiced, construction of a "safe country"[23]. In addition, the provisions contained in the Bill leave the British administration a considerable margin for actions that are highly questionable as to their compliance with the universal standards of human rights protection. According to Article 14 of the Universal Declaration of Human Rights "everyone has the right to seek and to enjoy asylum from persecution in other country"[24]. The significance of this regulation is not diminished by the fact that the UNDH is not legally binding[25]. Whatever position we take in the discussion of representatives of the science in this matter, it should be remembered that the Declaration is a political and moral model for States, and it is based on the recognition of inherent human dignity. In addition, the 1951 Convention obliges States not to return back refugees to a place of harm under the *non-refoulement* principle (Article 33). Even when adopting a broad framework for interpreting the provisions of the Refugee Convention, one must not forget about the guarantees created for refugees by the agreement itself,

[23] More about the safe country concept, *inter alia* in: Cathryn Costello, "Safe Country? Says Who?," *International Journal of Refugee Law* 28, (2016): 601–622; Susan Kneebone, "The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept," in *Moving On: Forced Migration and Human Rights*, ed. Jane McAdam (Oxford: Hart Publishing, 2008), 129–154; Anna Magdalena Kosińska, "Ewolucja koncepcji bezpiecznego kraju pochodzenia w dobie kryzysu migracyjnego" in *W obliczu kryzysu. Przyszłość polityki azylowej i migracyjnej Unii Europejskiej*, ed. Anna Magdalena Kosińska (Lublin: Wydawnictwo KUL, 2017), 141–164; Silvia Morgade-Gil, "The"Interna' Dimension of the Safe Country Concept: the Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts," *European Journal of Migration and Law* 20, no. 1 (2020): 82–113.

[24] Universal Declaration of Human Rights adopted on 10 December 1948, G.A. Res. 217A (III), U. N. Doc. A/810 at 71 (1948).

[25] For more, see Maria "Sullivan and Dallal Stevens, "Access to Refugee Protection. Key Concepts and Contemporary Challenges" in *State, the Law and Access Refugee Protection: Fortresses and Fairness*, ed. Maria Sullivan and Dallal Stevens (Oxford and Portland, Oregon: Hart Publishing, 2017), 8.

and which are expressed in the essence of their protection. Additionally, it is closely related and is part of the system of international protection of human rights. Therefore, the individual approach of States must fit within the framework defined in this way. Meanwhile, the British immigration Bill contains façade regulations, the practical effect of which will be to make it difficult for refugees to seek asylum, and even to punish them.

3. International protection of refugees and the concept of the community interests in international law

The issue of refugees is closely related to the need to guarantee international peace and security. Consideration of it as a threat to these values made the States of Central and Eastern Europe to engage in the interwar period in efforts to solve the problem of forced migration[26]. Today, migrations constitute a serious challenge for States in the face of successive migration crises. It is for these reasons that it is necessary to undertake international cooperation to work out new solutions under public international law. The individual approach of States is not only inadequate to the scope and scale of the issue, which is, after all, global in nature. This fact also justifies the claim that it is only at the international level that it is possible to deal with the key issues related to contemporary refugees. The foundation of such a position should be the assumption that the international protection of refugees is in the common interest of States.

The common interest of the entire international community is one of the reasons for following the norms of public international law[27]. However, the perception of the common interest by States is often different, and positions in this matter can be consolidated the most effectively by tragic events affecting most States, or circumstances threatening their security in a multidimensional aspect. Such situations may weaken the natural tendency of States to mark their position in the international community in the name of defending their own interests and sovereignty. The problem undoubtedly lies in the wrong ideological and conceptual approach to international

[26] Potyrała, "Ochrona uchodźców," 212.

[27] Remigiusz Bierzanek and Janusz Symonides, *Prawo międzynarodowe publiczne* (Warszawa: Wydawnictwo Prawnicze PWN, 1999), 22.

values and obligations, which should counterbalance the interests of individual States in the event of their conflict with community interests.

In the doctrine of international law, the term "community interest" is understood as "the interest in the protection of which all States are potentially involved, as opposed to individual and group interests aimed at protecting the status of a specific State or a designated group of States, respectively"[28]. It is noted that the practical functioning of the concept requires the transformation of international relations and the law regulating them. At the heart of this process is the fact that States have become aware of the existence of certain common goods or values, such as peace, humanity, or the environment, and of the need to protect such goods or values in their mutual relations[29]. Its complement would create an "ideal state" from the point of view of community interests, which would outweigh the individual interests of the State. In practice, however, the conflict between the two concepts is not always easy to resolve. It is stressed that the simple presumption that "community interests shall prevail over individual interests" is not sufficient and that gaining a balance between the protection of community and that of individual interests is a necessity[30]. However, it seems that community interests should prevail over individual interests wherever international peace and security are threatened. Their maintenance is guaranteed, *inter alia*, by the protection of human rights, which include the rights of refugees.

The literature indicates that an early example of the recognition of the global sphere of community interests beyond State interests whose protection and promotion is a collective duty is the Universal Declaration of Human Rights. It is also emphasised that the task of public international

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28 Roman Kwiecień, *Interesy indywidualne państw a interesy wspólnotowe w prawie społeczności międzynarodowej. O znaczeniu liberalizmu i komunitaryzmu dla teorii prawa międzynarodowego* (Lublin: Wydawnictwo Marii Curie-Skłodowskiej 2015), 65. For more see Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt, ed., *The Common Interest in International Law,* (Antwerp: Intersentia, 2014); Bruno Simma, "From Bilateralism to Community Interests in International Law," *Recueil des Cours de l'Académie de Droit International* 250 (1994): 217–384.

29 Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law," *The European Journal of International Law* 21, no. 2 (2010): 395.

30 For more see Villalpando, "The Legal Dimension," 415.

law is to create a framework ensuring a sustainable future for all, and the efforts made for this purpose are reflected in different representative areas of law. A characteristic feature of this process is a shift of emphasis from the original specific consent of the contracting parties to the protection of individuals or to collective interests, for example in human rights law and refugee law[31].

The implementation by States of the provisions of the Refugee Convention differs from the original assumptions that guided its adoption. They were reflected in the preamble to the Convention, in which, *inter alia*, we read that "human beings enjoy fundamental rights and freedoms without discrimination" (paragraph 2). It further states that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation" (paragraph 5). Recognizing the social and humanitarian nature of the problem of refugees, "the wish that all States (...) will do everything within their power to prevent this problem from becoming a cause of tension between States" (paragraph 6) is also expressed. In the preamble formulated in such a way, we find not only a reference to human rights. It is also about the necessity for States to cooperate and to take by them all measures to ensure that forced migrations do not cause conflicts between them. Practice shows that States have a problem coping with this task. They do not connect the obligation of international protection of refugees with the protection of community interests, considering rather that they are contrary to their individual interests.

In view of the increased influx of migrants from sensitive places in the world and forecasts that the problem will increase, for example, due to climate changes[32], it is necessary to take appropriate steps to find common solutions. Perceiving the issue in an individual way is quite dangerous and

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31 Eyal Benvenisti and Georg Nolte, "Community Interests Across International Law: Introduction," *Global Trust Working Paper* 7 (2017): 2.

32 According to the estimates by N. Myers, presented in 2005 at the 13th Economic Forum in Prague, by 2050 about 200 million people may leave their place of residence. In his opinion, the reason will be "disruptions of monsoon systems and other rainfall regimes, by droughts of unprecedented severity and duration, and by sea-level rise and coastal flooding". Oli Brown, "Migration and Climate Change," *IOM Migration Research Series* 31 (2008): 11.

becomes the cause of actions that contradict the assumptions of the concept of international protection of refugees and violate treaty obligations. An example of this are the solutions adopted in the Nationality and Borders Bill presented in the article. Such an approach may lead to situations generating tensions between States or threatening international peace and security in the world. As an example, it is enough to mention the conflict between England and France in the face of the increased influx of migrants to the UK in 2021, or the migration crisis on the Polish-Belarusian border that has been ongoing since mid-2021. Ultimately, however, it is the refugees who bear the greatest costs of the non-cooperation of States and their search for indirect solutions aimed at minimizing the effects of their obligation to international refugee protection.

4. Conclusions

The doctrine of public international law emphasises that collective interest should be invoked with caution and in a justified manner, as the primacy of community interests over other interests, including the interests of States in the legitimation of international law, cannot be taken for granted[33]. It is also indicated that the survival of humanity may be difficult without the protection of community interests[34]. This statement should be treated multidimensionally and in connection with various planes of the international community functioning, especially those that require joint action of States[35]. In the case of refugee protection, the practice of States, which has been going on for more than half a century, has not brought about any specific solutions that should have been adopted in the face of the evolving and growing refugee problem. The lack of constructive cooperation is one of the main causes of neglect in this matter. It seems that any argument based on the individual interest of the State, including invoking its sovereignty, would be difficult to defend. The community interest overpasses the concept of State sovereignty, and not only because of rational arguments that require defending

33 Samantha Besson, "Community Interests in International Law. Whose Interests Are They and How Should We Best Identify Them?" in *Community Interests Across International Law*, ed. Eyal Benvenisti, Georg Nolte, Keren Yalin-Mor (Oxford: Oxford University Press, 2018), 37.

34 Yoshifumi Tanaka, "Protection of Community Interests in International Law: The Case of Sea Law," *Max Planck Yearbook of United Nations Law* 15 (2011): 375.

35 Benvenisti, Nolte, "Community," 3.

the fundamental values common to the entire international community, such as those resulting from human rights. This superiority should also be sought in what the community interest defends in a broader sense. Tensions between States can have far-reaching consequences, including those whose essence is to maintain international peace and security. The implementation of this goal is undoubtedly also in the interests of the individual States. Therefore, the perception of the refugee issue and the effects of postponing its multilateral solution should be fundamentally changed. It is hard to disagree with J.C. Hathaway, who postulates conclusion of an agreement regulating "both a fair sharing of (financial) burdens and (human) responsibility"[36]. In his opinion, the right solution would be to create a globally managed refugee protection system and adopt regulations in which "refugees are simply the object, not the subject of the agreement". In a completely human and ethical dimension, it should be said after J.C. Hathaway that "It is high time for a reform that puts refugees (...) first, and which recognizes that keeping a multilateral commitment to refugee rights alive requires not caution, but rather courage"[37]. However, counting more on common sense than the courage of States, it seems that the impetus for taking an appropriate initiative could be the perception of international protection of refugees as a matter closely related to acting for community interests in which States should perceive protection of individual interests.

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[36] James C. Hathaway, "The Global Cop-Out on Refugees," *International Journal of Refugee* 30, no. 3 (2018): 601.

[37] Ibidem, 603 and 604.

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The intersection of transnational and international criminal law – example of trafficking in persons

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Abstract: The paper addresses the possible intersection of transnational and international criminal law, using the example of the crime of trafficking in persons. In recent years trafficking in persons has gathered a great deal of attention from scholars, practitioners and politicians, nevertheless theoretical aspects concerning that notion and its relation with other concepts present in international law – such as slavery, practices similar to slavery, enslavements etc. – have still been neglected. As this notion appears at the intersection of different areas of law, including transnational and international criminal law, its closer analysis can contribute to determination of theoretical boundaries of both areas of international law.

1. Introduction

International response to organized crime has formed a part of a new area of law - transnational criminal law. The term 'transnationality' itself, although applied many years ago by Phillip Jessup[1], has found its way into treaty usage only in the year 2000, namely in the Transnational Organized Crime Convention (hereinafter: UNTOC). From this moment we can observe emergence of transnational criminal law - a branch of international law that

[1] All law which regulates actions or events that transcend national frontiers. Both public and private international law are included; Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 3.

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deals with "indirect suppression, through domestic laws and measures, of criminal activities which have actual or potential cross-boundary effects"[2].

The term "transnational criminal law" derives from the concept of transnational crime, which has been applied by the United Nations since its fifth Congresses on the Prevention of Crime and the Treatment of Offenders that took place in 1975[3]. It was designed to identify crimes that transcended national borders, infringed laws of more than one state or caused effects in other states. Nevertheless, for many years the concept remained undefined. This has changed with the adoption of UNTOC, which stipulates in its Article 3 that "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State"[4]. Most important feature of the UNTOC and other suppression conventions is the obligation to criminalize certain acts in the domestic legal systems of state-parties. These instruments do not impose obligations on individuals. That is why, unlike in the area of international criminal law, a person who commits a crime in an object, not a subject of the given convention[5]. However, under certain conditions, it is possible for a crime to belong to both these areas of law. As proven by the analysis of its internationally agreed definition, trafficking in persons is an example of such crime.

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2 Neil Boister, "Transnational Criminal Law?" *European Journal of International Law* 14, no. 5 (2003): 955.

3 Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012), 3.

4 United Nations, Convention against Transnational Organized Crime, Palermo/ New York, 15 November 2000, 2237 UNTS 319 (Hereinafter: UN TOC)

5 As Crawford and Olleson put it: "pirates do not acquire international legal personality by being hanged at the yardarm", see: James Crawford, Simon Olleson, "The Nature and Forms of International Responsibility," in *International Law*, ed. Malcolm Evans (Oxford: Oxford University Press, 2003), 447.

1.1. How transnational are transnational crimes?

As pointed out by R. Clark, transnational crimes are transnational because they transcend borders, not because they are subject to a treaty establishing an obligation to criminalize them[6]. Interestingly, like many other transnational crimes, trafficking in persons has been defined without incorporating the transnational element[7]. The definition of trafficking in persons is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter: Palermo Protocol)[8]. In the course of analysis of the Palermo Protocol it is crucial not to omit its parent convention - unless provided otherwise, provisions of the UNTOC apply *mutatis mutandis* to all of its three protocols and therefore its general rules constitute a part of the anti-trafficking framework[9]. According to the Article 3 of the UNTOC, the Convention applies to the prevention, investigation and prosecution of certain offences that are "transnational in nature and involve an organized criminal group". This provision has led to uncertainty regarding the scope of application of this instrument and even has caused strong criticism[10]. Nonetheless, in order to get the whole picture, it is necessary to invoke Article 34 of the UNTOC, according to which the offences established in accordance with the Convention and its Protocols "shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group." Therefore the Trafficking Protocol serves as a tool to harmonize criminal laws of state-parties, requiring criminalization of trafficking in their domestic legal systems,

6 Roger Clark, "Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus," *Criminal Law Forum* 22, no. 4 (2011): 522.

7 Migrant smuggling is a rare example of a crime that can only be committed transnationally - without border crossing there is no smuggling.

8 United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing UN Convention against Transnational Organized Crime, UNTS vol. 2237, p. 319.

9 Trafficking Protocol, Art. 1(2).

10 James Hathaway, "The Human Rights Quagmire of Human Trafficking," *Virginia Journal of International Law* 49, no. 1 (2008): 9–10.

regardless of their transnational nature. In fact, an obligation to criminalize trafficking is a central and mandatory obligation of all states that have ratified that instrument[11].

1.2. Suppression of trafficking in persons

The definition of trafficking in persons found in the Palermo Protocol consists of three elements and was designed to embrace all persons engaging in trafficking process and simultaneously - to recognize that trafficking occurs in various forms: most importantly, that it is not limited to the exploitation of prostitution of others, as it was perceived for almost a century[12]. The three constituent elements are: the act (what is done - recruitment, transportation, transfer, harbouring or receipt of persons), the means (how it is done - by threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim), the purpose (why it is done - for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs). The definition of trafficking in children consists of only two elements, as it is not required for any of the special means to be employed by the trafficker in cases of where victims are underaged[13].

Before the year 2000 there was no internationally agreed definition of trafficking in persons. The term 'trafficking' had been used by different actors to describe activities ranging from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence, etc. for certain exploitative

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

12 Before adoption of Palermo Protocol there were series of *suppression* conventions concerning trafficking, however their scope was much more limited (both *ratione materiae* and in terms of obligations imposed on the state parties): International Convention for the Suppression of the "White Slave Traffic", LNTS, vol. 9, p. 415; International Convention for the suppression of the Traffic in Women and Children, LNTS vol. 9, p. 415; International Convention for the Suppression of the Traffic in Women of the Full Age, LNTS vol. 150, p. 431;; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success/New York, UNTS vol. 98, p. 101.

13 Trafficking Protocol, Art. 3(c) and (d).

purposes[14]. But since the adoption of the Palermo Protocol, trafficking definition has been widely recognized by states, many of whom have incorporated the concept of the crime of trafficking in persons into their legal systems for the first time only after adoption of this treaty[15]. It was also incorporated in other international instruments, such as the Council of Europe Convention on action against trafficking in human beings[16], the Convention Against Trafficking in Persons adopted by Association of Southeast Asian Nations (hereinafter: ASEAN) and - with minor changes - in the European Union Directive 36/2011[17]. Only *South Asian Association for Regional Cooperation (hereinafter: SAARC) adopted a different approach and has limited this crime to instances of* „moving, selling or buying of women and children for prostitution", which resembles more of a historical understanding of this concept, as reflected in the treaties adopted in the first part of the 20 century[18].

Same definition can also be found in Malabo Protocol – Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights, being another peculiar example of intersections of international and transnational criminal law. Adopted in June 2014, the Protocol extends the jurisdiction of the yet to be established African Court of Justice and Human Rights both to international and transnational crimes[19].

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

15 According to the Global report on trafficking in persons, which analysed legislation of 155 states, 45% of the them have introduced the definition for the first time and many others have adopted changes in their, as their laws criminalized only certain aspects of the definition of trafficking. United Nations Office on Drugs and Crime, Global report on trafficking in persons (2009) p. 24.

16 Council of Europe, Convention on Action against Trafficking in Human Beings and its Explanatory Report, Warsaw, ETS no. 197.

17 Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (O.J.E.C. L101/1, 5 April, 2011).

18 SAARC, Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, Art. 1(3).

19 „1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder: 1) Genocide 2) Crimes

2. Trafficking in persons as an international crime

In the course of the analysis of trafficking in persons definition it becomes clear that some of the acts classified as trafficking could in the same time constitute international crimes – crimes against humanity or war crimes. As it is stated in article 7.1(c) of the Rome Statute of the International Criminal Court (hereinafter: ICC): 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children[20]. The Elements of Crimes add that exercising "any or all powers attaching to the right of ownership over one or more persons" includes, but is not limited to, "purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty." Nevertheless, some of the drafters were afraid, that this phrase is focused too much on the commercial character of the act and therefore footnote 11 has been added: "It is understood that such deprivations of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children"[21].

Although there are doubts concerning the meaning of the notion of "trafficking in persons" as contained in the Rome Statute and in the Elements of Crime, it is reasonable to assume that the definition found in the Palermo Protocol would apply. This supposition goes in line with findings of scholars who contend that the ICC should, and eventually

Against Humanity 3) War Crimes 4) The Crime of Unconstitutional Change of Government; 5) Piracy 6) Terrorism 7) Mercenarism 8) Corruption 9) Money Laundering 10) Trafficking in Persons 11) Trafficking in Drugs 12) Trafficking in Hazardous Wastes 13) Illicit Exploitation of Natural Resources 14) The Crime of Aggression (...)" African Union, Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights, 27 June 2014, STC/Legal/Min/7(I) Rev.1, Art. 28A.

20 The Rome Statute of the International Criminal Court, UNTS vol. 2187 p. 90 (hereinafter: the Rome Statute).

21 International Criminal Court, Elements of Crimes (as amended), U.N. Doc. PCNICC/2000/1/Add.2, Art. 7(c).

will embrace the definition found in the Palermo Protocol[22]. As pointed out by Aston and Paranjape: "Lack of a precise and accurate definition of trafficking is one of the biggest impediments in the prosecution of trafficking cases by the ICC. The definition of trafficking given by the Palermo Protocol is very precise and the ICC needs to adopt it so that the aim of establishing the Rome Statute to include and expand all forms of exploitation and slavery as a consequent of trafficking could be taken up and prosecuted in an effective manner"[23].Such an example of incorporation of the notion created within the framework of transnational criminal law into international criminal law would not be unusual. Trafficking in persons definition has already been applied in other fields of international law, most importantly by the European Court of Human Rights - for the first time in the *Rantsev v. Cyprus and Russia* judgment, where the Court has decided that this practice, as such, falls within the scope of Article 4 of the ECHR prohibiting slavery, servitude and forced or compulsory labour[24].

Also Statutes of the two *ad hoc* tribunals: the International Criminal Tribunal for Rwanda (hereinafter: ICTR) and the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) enumerate 'enslavement' as a crime against humanity - these instruments do not mention trafficking in persons tough, as their creation has preceded adoption of the internationally agreed definition of this crime. The ICTY – both Trial and Appeal Chamber – has engaged in the analysis of the term "enslavement" in its judgment in *Kunarac, Vukovic and Kovac* case (or so called:

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22 Allain, Jean, "The Definition of "Slavery" in General International Law," *Howard Law Journal* 52, (2009): 239-275; Joshua Aston and Vinay N. Paranjape, "Human Trafficking and its Prosecution: Challenges of the ICC," Social Science Research Network accessed April 1, 2022, https://ssrn.com/abstract=2203711; Jane Kim, "Prosecuting human trafficking as a crime against humanity under the Rome Statute," *Columbia Law School Gender and Sexuality Online* 2, (2011):1–32.

23 Aston and Paranjape, "*Human Trafficking*," 10.

24 EChR Judgement of 10 October, Case Rantsev v. Cyprus and Russia, application no. 25965/04, hudoc.int., par. 282, see also: Vladislava Stoyanova, "Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the Rantsev case," *Netherlands Quarterly of Human Rights* 30, no. 2 (2012):163–194.

Foča case)[25]. As it was established in the course of the proceedings, the defendants have kept imprisoned and repeatedly raped a group of Muslim women and girls in the town of Foča. These events could be classified as trafficking in persons, as all of three elements of the definition set forth in the Palermo Protocol were present: victims were harboured and transferred, by means of threat and use of force for the purpose of sexual exploitation. The judges have engaged in very detailed analysis of the notion of enslavement in customary international law, in which they used indicators based on the notions constituting elements of the trafficking definition[26]. However some scholars claimed that the ICTY in the Foča judgment has actually blurred the conceptual borders of these two notions[27]. It seems apparent that the relationship of the definition of "trafficking in persons" and "enslavement" is very complex and this topic clearly requires further attention.

Nevertheless, crimes against humanity have been defined differently in the Rome Statute - when it comes to crimes against humanity and the ICC, trafficking could also be classified as sexual slavery within the meaning of Article 7.1(g). The understanding of this act is similar as enslavement, with the additional requirement that "the perpetrator caused such person or persons to engage in one or more acts of a sexual nature." Important remarks regarding sexual slavery have been made by the ICC in the Katanga judgment[28]. "To prove the exertion of powers which may be associated with the right of ownership or which may ensue therefrom, the Chamber will undertake a case-by case analysis, taking account of various factors. Such factors may include detention or captivity and their respective duration;

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25 ICTY Judgment of 22 February 2001, Case Prosecutor v. Kunarac, Vukovic and Kovac, IT-96-23-T and IT-96-23/1-T; ICTY Judgment of 12 June 2002, Case Prosecutor v. Kunarac, Vukovic and Kovac, IT-96-23/1-A.

26 Nicole Siller, "The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals," *European journal of comparative law and governance* 3, no. 2 (2015): 236–261; Anna Głogowska-Balcerzak, *Standardy zwalczania handlu ludźmi w prawie międzynarodowym* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2019), 219–223.

27 Harmen Van der Wilt,"Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts," *Chinese Journal of International Law* 13, (2014): 305.

28 ICC Judgment of 20 March 2014, Case Prosecutor v. Germain Katanga, application no. ICC-01/04–01/07, paras. 978 and 985.

restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account." Similar practices were analysed by the Special Court for Sierra Leone in the context of forcing women and girls to become so called „jungle wives" or „rebel wives" - a euphemism for a sex slave[29].

Obviously in order to prosecute a trafficking case at the ICC as a crime against humanity contextual and mental elements of this crime need to be fulfilled - acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[30]. The term "widespread" is understood as referring to a large-scale nature of the act involving multiplicity of victims, whereas 'systematic' conduct requires "the organized nature of the acts of violence"[31]. Some authors however tend to construe these terms extensively. As T. Obokata claims, the widespread nature of trafficking is connected to the fact that at least 800,000 people are trafficked every year and virtually every state in the world is affected by this crime. Nevertheless this kind of interpretation is definitely too far-reaching – the ICC analyses specific situations in which attacks take place, not general statistics concerning certain types of crimes committed worldwide[32]. Furthermore, the attack must be conducted "pursuant to or in furtherance of a State or organizational policy"[33]. The latter requirement depends on the definition and interpretation of terms "policy" and "organization", which – as such – is beyond of the scope of this

29 SCSL Judgment of 18 May 2012, Case Prosecutor v. Taylor, application no. SCSL-03-01-T, par. 393–394.

30 On detailed analysis of all requirements see: Kim, "Prosecuting human trafficking,"20.

31 ICTY Judgment of 11 November 1999, Case Prosecutor v. Tadic, application no. IT-94-1-T, par. 648.

32 Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System," *The International and Comparative Law Quarterly* 54, no. 2 (2005): 445–457.

33 The Rome Statute, Art. 7.2(a).

presentation[34]. It suffices to observe, that this requirement is rather demanding. What is more - most authors, including M.Ch. Bassiouni, claimed that crimes against humanity cannot be committed by non-state actors[35]. Some scholars however accept such a possibility and claim that the term "organizational policy" refers not only to States, but also to the policies of organizations. "Criminal organizations either in association with or independently of national policies, and particularly those of a certain size which are active in international organized crime may fall within the scope of Article 7 – when their activity may be characterized as widespread or systematic"[36]. On top of everything, the gravity threshold found in the art 17(d) of the Rome Statute can render potential trafficking cases inadmissible.

In conclusion - theoretically the possibility of prosecution of some of trafficking in persons cases before the ICC remains open and it has been discussed by scholars[37]. Focusing solely on the jurisdiction *ratione materiae* it seems possible to qualify crimes committed over the last few years by Deash against civilians in Syria and Iraq as both trafficking in persons and enslavement or sexual slavery within the meaning of Rome Statute[38].

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34 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016), 157; Carsten Stahn, *The law and practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 705–731; Mathias Holvoet, "The state or organisational policy requirement within the definition of crimes against humanity in the Rome statute: an appraisal of the emerging jurisprudence and the implementation practice by ICC states parties." *International Crimes Database* 2 (2013). This issue has also been analyzed in the ICC case law, see for example: ICC Judgment of 20 March 2014, Case Prosecutor v. Germain Katanga, application no. ICC-01/04–01/07, par. 1106.

35 Mahmoud Cherif Bassiouni, "Crimes against Humanity: The Case for a Specialized Convention," *Washington University Global Studies Law Review* 9, no. 4 (2010): 575–594.

36 Kristina Touzenis, "Trafficking in Human Beings Human rights and transnational criminal law, developments in law and practices," *UNESCO migration studies* (2010): 64; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), 431; Clare F. Moran, "Beyond The State: The Future Of International Criminal Law", International Crimes Database," accessed April 1, 2022, http://www.internationalcrimesdatabase.org/.

37 Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System," *The International and Comparative Law Quarterly* 54, no. 2 (2005): 133;; Touzenis, *"Trafficking in human beings"*, 63–65.

38 Obviously, when it comes to crimes of Daesh, we must leave aside other jurisdictional aspects, as neither Syria nor Iraq is a party to the Rome Statute and the referral by UN Security Council is not possible due to political reasons.

If we look at the *modus operandi* of Daesh members it seems clear that their acts could fall within the scope of the trafficking definition - victims were recruited, transported and harboured by means of threat, abduction or deception, for the purpose of sexual exploitation or other forms of exploitation stipulated in the Article 3 of the Palermo Protocol. The same acts could also qualify as crimes against humanity, which has been suggested, among others, by the former ICC Prosecutor herself[39].

3. Implications

What are the implications of this short analysis? As some scholars point out, "trafficking remains classified as a transnational crime, but its elevation to an international crime appears to be on the horizon"[40]. This kind of statements seem too far-reaching – it is possible that a crime classified as trafficking in persons will also meet the criteria of crimes against humanity of enslavement or sexual slavery or war crime of sexual slavery and will be adjudicated by the ICC. But should that influence perception of trafficking in general, and list it among "the most serious crimes of concern to the international community as a whole"[41]? I would rather claim that it would simply mean that some – and only some – instances of crimes against humanity/war crimes and trafficking in persons can overlap.

Possibility of overlapping of some transnational and international crimes poses a question about jurisdiction and state obligations resulting from suppression conventions. The obligation of state-parties to the Palermo Protocol to extradite or prosecute traffickers is incorporated in Article 16 par. 10 of the UNTOC and was based on so called 'Hague formula', deriving from Hague Convention for the Suppression of Unlawful Seizure

[39] "Since the summer of 2014, my Office has been receiving and reviewing disturbing allegations of widespread atrocities committed in Syria and Iraq by the so-called Islamic State of Iraq and al-Sham/Greater Syria ("ISIS" aka "ISIL", "Daesh" or "IS"). Crimes of unspeakable cruelty have been reported, such as mass executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, enlistment and forced recruitment of children and the persecution of ethnic and religious minorities, not to mention the wanton destruction of cultural property." Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 of April 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08–04–2015–1>

[40] Siller, "*The Prosecution,*"259.

[41] The Rome Statute, Art. 5.

of Aircraft[42]. The potential overlapping of transnational and international crimes is visible in the works of the International Law Commission (hereinafter: ILC) concerning obligation *aut dedere aut judicare* in which, in addition to prosecution and extradition, the Commission has envisaged a third option - surrendering the suspect to a competent international criminal tribunal[43]. With the establishment of international criminal tribunals, there is the possibility that a State bound by an obligation to extradite or prosecute a suspect could recourse to a third alternative and surrender that person to a competent international criminal tribunal (*ad hoc* tribunal or the ICC). This alternative has already been included in treaty law - it has been prescribed by Article 11 par. 1 of the Convention for the Protection of All Persons from Enforced Disappearance, which reads: "1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution"[44].

It is not clear however, whether this third alternative needs to be specifically mentioned in a treaty, or is it enough, that there is an international court, whose jurisdiction extends over a specific crime. In 1952 the International Committee of the Red Cross has envisaged that the third option would satisfy *aut dedere aut judiciare* obligation arising from Article 49 of the first Geneva Convention[45]. More recently, Judge Xue in her dissenting opinion in the Belgium v. Senegal judgment (case concerning Questions relating to the Obligation to Prosecute or Extradite) argued that had Senegal surrendered Mr. Habré to an international tribunal created by the African

42 International Law Commission, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 10.

43 International Law Commission, Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*"), Geneva, 7 June 2006, A/CN.4/571, paras. 52–53.

44 United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, UNTS, vol. 2716, p. 3.

45 International Committee of the Red Cross, The I Geneva Conventions of 12 August 1949, Commentary, p. 366.

Union, they would not have been in breach of their obligation to prosecute him under article 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As she has pointed out, "even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal's surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention nor the State practice in this regard prohibit such an option"[46].

In its final report regarding the topic, the ILC stated that the obligation to extradite or prosecute may be satisfied by surrendering a suspect to a competent international criminal tribunal[47]. Such an interpretation has been also supported by Council of Europe experts[48]. Taking into account increasing significance of international criminal tribunals, the ILC has suggested that provisions of new treaties concerning the obligation to extradite or prosecute ought to incorporate the third alternative, as should domestic legislation of state-parties thereto[49]. As indicated in an Amnesty International study, some states, including Argentina, Brasil, Croatia, France, Georgia, Portugal, Switzerland, Uruguay, already have legislation that includes this third alternative[50]. These developments however could have possible influence on the application of the principle of complementarity, which stipulates that the case is not admissible before the ICC if it is being investigated or prosecuted by a State having jurisdiction over it, unless that State is unwilling or unable to genuinely carry out the investigation

46 Dissenting Opinion of Judge Xue, ICJ Judgment of 20 July 2012, Case Questions relating to the Obligation to Prosecute or Extradite (Belgium v.Senegal), I.C.J. Reports 2012, par. 42.

47 ILC, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 34

48 "In the era of international criminal tribunals, the principle may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court." Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings, Strasbourg, 2006.

49 ILC, The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission Adopted at its sixty-sixth session, 2014, par. 29.

50 Amnesty International, International la w commission: the obligation to extradite or prosecute (*aut dedere aut judicare*), IOR 40/001/2009, p. 17.

or prosecution[51]. Within the framework of transnational criminal law the question of concurrent jurisdiction among states remains an up-to-date issue - especially with regard to priority among different bases for jurisdiction. As pointed out by R. Clark, there are no such rules in the multilateral suppression conventions and the issue is left to decide on an *ad hoc* basis[52]. Would it be the same with concurrent jurisdiction of a third state and of the ICC, or should extradition to that state have priority as a result of the complementarity principle? This issue requires closer attention as complementarity is the key principle that governs exercise of the Court's jurisdiction, requiring state-parties to carry the main burden of investigating and prosecuting cases and is considered necessary for the ICC to operate more effectively.

4. Conclusions

The tendencies described in this article should be seen as evidence of possible overlapping of some crimes, rather than of erosion of the division between international criminal law and transnational criminal law. Nevertheless it must be noted that there is a trend towards expansive interpretation of existing crimes, and it is particularly visible in case of trafficking in persons. Whereas it still seems unlikely for the ICC to adjudicate trafficking cases, the potential of overlapping with acts such as enslavement or sexual slavery as crimes against humanity or war crimes could have positive effect in the context of the concept of positive complementarity. To some extent, the ICC has already encouraged the development of domestic prosecutions of transnational crimes. In Uganda, the government has decided to establish a special judicial division mandated to prosecute both international and transnational crimes. The International Crimes Division, a special division of High Court of Uganda was established in 2011, it has jurisdiction over, *inter alia*, crimes against humanity, war crimes, terrorism as well as human trafficking and piracy. Developments of this kind could contribute to closing the impunity gap, which is desirable both in the field of international and transnational criminal law.

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51 The Rome Statute, Art. 17.1(a).

52 Roger Clark, "Jurisdiction over transnational crime," in *Routledge handbook on transnational criminal law*, ed. Neil Boister, Rober R. Currie (Abingdon: Routledge, 2015), 91–106.

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