Collective human rights
in the first half of the 21st century
SUPLEMENT

Alcide De Gasperi University
of Euroregional Economy in Józefów

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Edited by Magdalena Sitek & Peter Terem & Marta Wójcicka

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Catalonia – from autonomy towards independent state

Abstract
The article aims at showing the Catalonian people way to autonomy and their aspirations of forming an independent state. The self-determination of the Catalonian people has to deal with setting the correct balance for both the sense of nationality and the principle of territorial integrity. Spain as a country is in charge of providing security at the international level as well as the protection and internal unity of the state. The autonomy of Catalonia is a great issue for the government in Madrid, the broaden independence seems to be impossible to achieve. The Spanish government has blocked any changes in the Spain Constitution which could be used nowadays or in the future for aiming at obtaining the whole sovereignty by, for instance, Catalonia. Catalonia possesses its own nation which is determined to have its own state. These nation members are connected with each others in a special emotional way. They are aware of their own uniqueness and a Catalonian language as the main means of conveying their own identity or culture. One tries to marginalize these steps towards self-determination by such a national or region al groups as well as by national minorities, social groups or communities.

The institutional – legal, historical, and extrapolation research methods, according to the classification provided by Professor Waldemar Żebrowski, was used during this article preparation, as well as the institutional – legal method used for analyzing the acts concerning the Catalonian case, legalization and the coherence with the international law; the historical – for presenting the origin of the Catalonian nation and the extrapolation method – for showing the geopolitical trends in treating the issue of Catalonia.

Keywords:
Catalonia, identity, nation, regionalism, self-determination, sovereignty, Spain

1. Sovereignty in the past and at present

The notion of sovereignty has changed during centuries not only because of the historical context (See: K. Grzybowski, Historia doktryn politycznych i prawnych, Warszawa 1968), but also due to this term different understanding in the field of economic, law and political science (Kranz, 2005, p. 15). Ludwik Ehrlich says: „sovereignty means self-determination – legal independence from any external factors and whole ruling, understood as the skill of any internal state connection normalizing" (Ehrlich, 1947, p.104). He pointed at the relation between relations inside any state as well as in the more and international global scale – external factors influencing inferior politics. Nowadays Europe is not an independent element, it is linked not only with particular states but, what is more important, with international organizations (Sowiński, 2004, p. 25).

Internal sovereignty is a relation between a citizen and a state based on the nation right to self-determination – taking into consideration the democratic system, in which a nation not only monitors the manner of governing but also gives it the right to govern. Nation sovereignty is a relation between organs of government and a nation, as well as the power coming from it (Kranz, 2006, p.38). External sovereignty is connected with a state status in the international field, its relations with other states and the subjects of the international law; it is also about the relations between a particular state and the international law. In this case the state sovereignty means that a state is independent from the other actors and the international law is used in order to protect the state sovereignty, regardless of this state's resources. States should be treated equally taking into consideration their sovereignty (Kranz, 2006, p. 38).

Sometimes states decide to give up their rights to deal with actions in the framework of international structures, but one should notice the difference between the scope of power and its strength (Fukuyama, 2005, p. 22).

The scope of power is meant as all state's competencies, the overall aims set which should be achieved and these goals implementation due to functions which it possesses (Fukuyama, 2005, p.22).

Europe is an example of advanced integration in the framework of it we can observe both the limitation of some state's competences and it gives unlimited possibilities to guarantee this state's interests and benefits (Kranz, 2006, p. 28).

The integration processes occurring in the framework of the European Union, which are the part of globalization force as to define a state sovereignty „in an open way taking into consideration growing interrelationship" (Wasilkowski, 1996, p. 18). Europe of 21st century is an open set, which has been still filled in new ideas,

opinions and cultures. The 19th –century social turbulences caused by the feeling of lack of confidence and troubles in dealing with new challenges those are brought on by the neighbouring surroundings. Today the European continent is fed up with the economical crisis. It also tries to manage with suppressed but strong nationalistic trends which aim at self-determination of its own identity and nation.

Humankind goes through not only economic but also identity crisis which influences on different nation groups' aspirations to self-determination and independence. Catalonia is a good example of such nationalism. Catalonian nation self-determination is charged with the burden of setting the border between this which can be understood as nationality and the principle of state territory. Spain as a state has to take care of the state security in the international field as well as the internal security and state unity. Autonomy possessed by Catalonia is a huge problem for Madrid government. The Catalonian self-government broadening cannot be achieved. The Spanish authorities have blocked any constitution changes which could give the possibility of increasing the Catalonian autonomy nowadays and in the future.

2. From regionalism towards autonomy

The Catalonian history towards self-determination started in the 19th century, when the wave of the European romanticism arose. It brought the idea of uniqueness and identity. A lot of nationalistic movements with separation tendencies were developed in Catalonia and the State of Basques (Skibiński, 2000, pp. 26-31).

J. Vazquez de Mella (1980) protected regionalism, which was opposite to centralisation of Burbon Dynasty, liberalism and "unlimited" freedom (See: O. Lira, Nostalgia de Vazquez de Mella, Fundamentos de la Tradicion Politica Hispanica, Santiago de Chile, 1942). According to his opinion, regionalism is rooted in the spirit of the Spanish nation – this is a kind of formalism revitalisation in all regions and this is an attempt to overcome uniformising centralism. What all regions should look for instead of autonomy is regionalism. According to Vazqueza de Melli, there are two types of regions. First of them, is an independent unit possessing its own and exclusive character. The second one is relatively independent but is connected with other regions by the spirit of unity. Vazquez de Mella says „we are regional nationalists who disintegrate and divide the state unity" (Vazquez de Mella, 1931-1947, pp. 321-322). He depicts a state as a union of regions which make up national reality and he rejects a state meant as the power over nations (Canals Vidal, 2006, p. 89). He highlighted that a state is a political unity which aims at several nations' integrity. In the case when a nation were not form any common being but were consisted of

many national particularisms, political instability would occur. Regions, in such a situation of internal state instability, would apply for being in dependant in the basis of the nation principle. From his point of view, a state should be common, include the whole regions' resources, we should not ignore these [regions] types and characters, and therefore we should not ignore the common history of all Spanish regions" (Vazquez de Mella, 1931-1947, pp.27-43). For traditionalists Spain is a regions federation, ruled by a monarch and the common history cannot be erased by one generation of rebels (Vazquez de Mella, 1931-1947, p. 314). However, a new sight on regions has leaded towards autonomy establishment.

3. Autonomy for Catalonia

The crucial year was 1932, it was the time when Catalonia gained the status of autonomy and was recognised by the then Spanish government as a legal set of authorities so- called. *Generalitat* (See: M. Myśliwiec, 2006, pp. 61-67). The Catalonians joy did not last long because of General Franco action against every independent aspiration. The isolation of Spain at this time did not give many opportunities for Catalonians to self-determine. A sense of Catalonian cultural, economical and language identity in the framework of a new democratic Spain leaded to achieving a broaden autonomy from the central authorities. In the year of 1978, on the strength of a new constitution, Catalonia, Galicia and the Basque Country gained the right for autonomy, actually they were recognised as "historical nations" (Álvarez Conde, 1984, p. 59). It led to establishing a system of regional autonomies. This process can be dived into three main stages. The first one took part since the appointment of Adolfo Suáreza's government in 1976 to the constitution recognition in 1978. It was the time when Suárez came to an agreement with the Catalonian leader – Josep Tarradellas on the restoring of the Catalonian government and Josep Tattadellas became President of the Generalitat of Catalonia. In 1977, the idea of establishing so called 'pre-autonomy' was came up with; it seemed to be a solution for the problem of Catalonia (Łabno-Jabłońska, 1996, p. 24). The burden of new autonomies ruling was intended to rest on the shoulders of regional political classes, which were supposed to be manipulated by central systems. The second stage was between the year of 1978 and 1981, this period is famous for the attempt of a coup d'état. In 1979, there was a discussion over the Catalonian as well as Basque status, which were finally passed. This situation led to the competition among other regions, which did not agree on privileged position of Basques and Catalonians. In February 1980, a referendum in Andalusia was held. People decided to reject partial autonomy of

this region. The numbers of protests and ETA terrorist attacks caused unrest in the army, which led to the attempt of a coup d'état, mentioned above. The phase number three began in 1981 and it has been still in progress. The coup d'état brought about many law changes, not only connected with regions but the whole Spain. Society started to understand and created new law without the burden of General Franco's regime (Pérez-Díaz, 1996, p. 220).

4. Catalonia – new stage

In January 1986 Spain was enrolled to European Community. Politicians of CiU (*Convergència i Unió*) knew what benefits could be obtained from the integration with European structures. This gave them opportunity of getting independent from the government in Madrid. The concept of Regions Europe, developing for a long time, (See: Convergència i Unió, Catalunya, veu i vot a Europa, Barcelona 1987, p. 5) became the *CiU* slogan during the election to the European parliament. During his visit in Stockholm, on 5th November 1987, President *Generalitat* Jordi Pujol introduced his idea of transforming Catalonia into strong and flourishing motor of European economy (Pujol, 1987, p.5).

It is worthy to consider whether the CiU coalition described as a nationalistic group try to gain the independence for Catalonia or whether it focuses on complete separation from Spain, what can be dangerous for this state security and unity. The event of the recent years have clearly shown that the Catalonian nation aspirations of being independent from Madrid are very strong and the bigger and bigger wave of social dissatisfaction causes further aversion on both sides. For ones, Catalonia aspirations towards an own state establishment are treated as a kind of nationalism, the others use the term of separatism. The actions undertaken by the Catalonian government in order to fulfil the dream of full self-determination are backed by the sense of identity. Sometimes the term of double identity which should be used to define Catalonians occurs in the literature review (See: Wyniki badań przeprowadzonych przez Institut de Politiques iSocials, 1989 Sondatge d`opinio. Catalunya, Barcelona 1993, pp. 70-85). It could not be further from the truth. Actually, we should treat Catalonians as a well-organised nation group. Despite Catalonians, there are seventeen autonomous groups, willing to self-determine. The most populous ones, apart from Catalonians, are Basques and Galicians. The destabilization of political system in Spain caused by more and more powerful nationalistic movements' influence led to, as Hermann Tersch says, surfacing of the Basque and the Catalonian nationalists" goals. Their aims are being totally

independent form the government in Madrid and establishing the direct relations with Brussels. Catalonia by the end of 2005 demanded the full financial sovereignty and limitation of the incomes allotted to the Spanish budget. It had to influence on political aspirations of national group which gained more and more power in the parliament during the consecutive elections.

The elections held in Catalonia aims at internal autonomy policy changes as well as being noticed by the government in Madrid. The election to the parliament between 2006 and 2012 made the position of CiU higher (See: Eleccions al Parlament de Catalunya). Social unrests caused by the crisis, have revealed more and more clearly the Catalonian willing to break away from the motherland as the years passing. Since the year of 2013, this way has started to be more distinct because of the passing so-called sovereignty declaration by the Catalonian Parliament (See: Resolució 5/X Del Parlament de Catalunya, per la qual s'aprova la, Declaració de sobirania i del dret a decidir del poble de Catalunya). The following referendum showed that the number of the Catalonian separation supporters has been still rising. In 2013 their proportion stood for 54. 7% (See: Baròmetre d'Opinió Política, 1a onada 2013, Centre d'Estudis d'Opinió, 2013).

Catalonian enthusiasm was not damped by the words of the Spanish Prime Minister – Marian Rajou. He frightened that if Catalonia decided to take further steps it would lead to 'its separation outside Spain and outside the European Union, so in nowhere (See: W Europie nie ma miejsca dla niepodległej Katalonii). On the 23rd January 2013, Catalonia accepted the declaration of sovereignty and the Catalonian nation right to self-determination (Declaració de sobirania i del dret a decidir del poble de Catalunya), which in its preamble defines "aspirations towards the sef-government in Catalonia is based on the Catalonian historical right, their secular institutions and the Catalonian legal tradition (See: Katalonia zatwierdza deklarację suwerenności). Accepted by the Catalonian parliament the declaration of sovereignty gives the green light for democratic system implementation, which should lead to independence gaining in the basis of sovereignty, clarity, legality , dialogue, social cohesion, Europeism. It is not surprising that despite of the opposition of the Madrid authorities, which the attempt of the referendum conducting treated as unlawful with the constitution and contemporary law. In 2014 in Catalonia there was the opinion poll which aimed at showing that Catalonian people really wanted to be separated and independent form Spain. 2,344,828 people took part in this plebiscite, 80.76% of them say yes and only 4.54% was against such changes (See: Participation i resultants Del 9N).

Catalonia owns its own nation, which wants to possess its own state. The members of this nation in a particular, emotional way are connected in the sense of their own identity and they have national awareness and the Catalonian language is one of the main their own identity and culture means of confining.

5. Catalonian so who?

Therefore what can we define as the Catalonian identity so openly manifested by the Catalonian people?

The picture of a single man, who due to his behaviour, beliefs, feelings and attitudes should be coherent with the national identity of Catalonian nation. An n individual expresses oneself by belonging to a specific nation and possessing the historical awareness. For highlighting the uniqueness of one own nation, one uses the national language and shows how important the knowledge of cultural heritage is. Catalonians define themselves as Catalonian nit Spanish; they do not treat themselves as national minorities living on the territory of Spain. They are proud of themselves, of their origin and they have plans to be achieved in the future. The main goal is to be independent from Spain and forming a sovereign state based on the freedom of nation and individual in the Framework of a free state. Autonomy even if is defined broodingly always is connected with some limitations which are imposed and formed the image of relations between rulers and the ruled. The feeling of injustice and enslavement is treated as a constraint by the ruled. Unhappiness among them can be misused in order to creating separation structures which will be aimed at the complete separation the existing.

So, what does the Catalonian identity so open expresses by Catalonians mean? The image of just one of Catalonian citizens is coherent with the whole nation identity – Catalonian identity, in the field of behaviour, beliefs, feelings and approaches. A human being manifest oneself by being a part of a specific nations and sharing the same historic awareness. The uniqueness of one's nation can be highlighted by speaking the certain language and having knowledge of the cultural heritage. Catalonia people name themselves as Catalonians no Spanish, they do not feel as a national minority just living on the territory of Spain. They are proud of their background, origin and they have the future plans. Their main objective is to be independent form Spain and establishing the sovereign state based on the freedom of nation and individuals in the framework of sovereign state. The autonomy even this in the broad sense is about limits, which one has to obey and which paint the image of mutual dependence between the governed and the governing. The

feeling of injustice and subjectivity are treated by the governed as commitment. Unhappiness raised among subjects can be used to form separation structures or even independent state.

Feeling of being a European, for the majority of young people, is only a slogan, which can be heard from time to time, but actually is connected with loosing the sense of safety. Europe is a significant centre, but one can also say that it has less and less to say and it plays less important role in the field of multicultural and polycentric world (Bauman, 2007, p. 38). The economical crisis caused the wave of unhappiness therefore the issue of defining oneself as a human being and one's on identity seem to be essential. Adjustment to the global system forces us to define ourselves and our roles in this system (Sulivan, 2002, p. 89).

Catalonia must face the music with the economical crisis , despite that it is still the richest and the most indebted autonomy and „being an independent state does not mean to share the political ideas of the Catalonian bourgeoisie or defend them – it means to have awareness, which is a part of our state and interclass independence process (Bizoux, 2006).

6. Summary

Multinational identity determined by politics comes into being n the framework of the European Union. One tries to marginalize such aspirations aiming at self-determination by describing them as regional groups, national minorities, social groups or such communities.

At this point it is worthy to consider, whether these multinational, multicultural values will be able to integrate. Is this new European identity enough to survive in the framework of the European Union? Unfortunately, these questions have been still waiting for the answers.

Europe, which unites with an effort in the framework of the European Union, with anxiety looks at the independence aspirations of Catalonians.

It is not ready for accepting a new state within its borders. Therefore, can we agree with Four's words, who says „Europe of big states […] is not and has never been the natural Europe[…] The Real Europe, natural, consists of many small states, few nation communities, districts and free towns, which are connected over the divisions and dissimilarities by common civilisation created for two millennia" (Świderek, 1999).

Regardless what term is used to describe the Catalonian aspiration towards gaining sovereignty: nationalism, separatism, regional egoism one cannot deprive

them of the right for self-determination and taking responsibility of their own future. This motto should be crucial, *different* does not mean *worse*, *a few* does not mean without the right for voting.

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The right to food as an element of the cultural life of man. Deliberations based on the EU policy

Abstract
Subject of research: In many countries of the modern world food is considered common good. It has provided the basics of its own philosophy. It has become a ritual, a part of medicine and national welfare. It is also a subject to detailed legal and non-legal regulations. In this area many divergences appear. Any controversies are arbitrated by law. In the cultural aspect,food is a platform connecting an individual with the rest of the community. The access to food that satisfies special dietary requirements resulting from his cultural background, is the fundamental right of man. .
Purpose of research: The research touches upon the issue of the interrelation between legal and non-legal regulations referring to food in selected legal cultures.
Methods: The text is based upon theoretical refection in an axionormative order. The middle stage of the research process isthe exegesis of normative acts and the analysis of jurisdictions of courts.

Keywords*:*
the right to food, European Union policy, legal cultures

1. Introduction

The history of humankind is inseparably associated with production and consumption of food. Many different factors such as wars, crises, conquests and rebellions have influenced either abundance or insufficiency of nourishment. The trade with agricultural products has been an essential part of human activity. It has been accompanied by legislative actions. Food has become the subject of numerous regulations. One of the oldest acts concerning, inter alia, trade with agricultural products, is the Code of Hammurabi, established in the 18th century BC (S. Kowalczyk,2014). Having resulted from various forms and results of work, cultural differences influ-

ence wealth, variety and diversity of food consumed by people (R. Tokarczyk, 2009, p. 47). As R. Pravettoni points, each culture has its own code of conduct, which sometimes favours some food and bans other, impermissible (2009, p. 2). It is determined by many factors such as: geographical location, economic situation, historical background, the need for certain nutrients and religious norms.

In many countries of the modern world food has gained the status of the common good. It has its own philosophy. It has become a ritual, a part of medicine[1], and an element of a national culture. In Europe this is most apparent in Italy. The majority of products registered under the Union system of the protection of regional and traditional products having designations of origin in accordance with the Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and the Council Regulation (EC) No 509/2006of 20 March 2006on agricultural products and foodstuffs as traditional specialities guaranteed, is of Italian origin (Law Journal 2009, no. 99, p. 830).

The principle of mutual recognition[2] laid down by the European Court of Justice (judgement in Cassis de Dijon case of 20 February 1979, case 120/78) has given the EU citizens the opportunity of gaining extensive reciprocal knowledge about their food traditions. Consequently, not only economic, but also cultural integration can be observed.

The idea of food sovereignty (S. Kowalczyk, 2009, p.13 and next; J. Kraciuk, 2014, pp. 119-127) is becoming increasingly important. The term was coined on the forum of international agricultural organisations La Via Campesia during the FAO (Food and Agriculture Organization of the United Nations) world food summit in 1996. It helps local communities build their food independence and reflects the objections that farmers and local civil society organisations raise against transnational food corporations. It aims to protect local markets and supports GMO-free production. Consequently, it significantly affects the protection of social and cultural roles of food.

[1] The recognition of healing values of many products is characteristic for almost all cultures. Recently people of the western culture have shown increasing awareness of the importance of proper nutrition. As P. Pitchford states, this awareness is influenced by the tradition of Far East, where a balanced diet has been an integral part of practices that are supposed to heal and result in spiritual enlightenment. See, by the author : *Odżywanie dla zdrowia. Tradycje Wschodnie i nowoczesna wiedza o żywieniu*, Łódź 2012, p. 7.

[2] The principle guarantees the free movement of goods. The product lawfully marketed in the state of its origin must be released for free circulation and must be guaranteed the access to domestic markets of all Member States.

The next issue is the phenomenon of ethnic cuisines (Chinese, Indian, Tibetan, Turkish),which appear in abundance, especially in huge European agglomerations. The phenomenon is associated with the process of migration and a slow cultural interchange (R. Pravettoni,2009, p. 2). Cultivating home-grown food traditions has a strong impact on preserving national identity. It is incorporated into other phenomena, such as pollution, overconsumption, malnutrition and food waste. The variety of products available on the market and a high income makes a part of society consume certain products excessively. This, according to experts, results in so called metabolic diseases of modern civilisation (J. Małysz, 2009, p. 127).

Nowadays European directives concerning food law are normalised by the Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (Law Journal L1,1.2.2002). However, every year the rules are supplemented by new national and union regulations. Should any controversies of a cultural background arise, they are adjudicated by legal practice.

The subject of this article is associated with several disciplines of science. It is mainly embedded in the sphere of legal culture and human rights. The article refers to binding religious rules and court judgements.

2. The concept of "food" and "functional food" in community law

Introducing legal definitions in European regulations was the impact of the process of harmonisation of law. The need of unification resulted from divergent legal terminology of Member States. As Germanò remarks, they have so far used different languages, traditions and cultural behaviour codes and are now connected by the same or similar law (E. Rook Basile, 2006, p. 248).

Under the EU regulation "food" (or "foodstuff") means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. "Foodstuff"" includes drinks, chewing gum, and all substances, including water, deliberately added to food while making or processing it. The abovementioned definition includes water that meets the standards imposed by the art. 6 of the Council Directive 98/83/EC(of 3 November 1998 on the quality of water intended for human consumption) and without prejudging the requirements of directives 80/778/EEC and 98/83EC.

"Food" shall not include:

(a) feed;

(b) live animals unless they are prepared for placing on the market for human consumption;

(c) plants prior to harvesting;

(d) medicinal products within the meaning of Council Directives 65/65/EEC (Law Journal L 22 of 9.02.1965. Directive superseded by Directive 2001/83, Law Journal. L 311/67 of 28.11.2001) and 92/73/EEC (Law Journal L 297 of 13.10.1992. Directive superseded by Directive 2001/83);

(e) cosmetics within the meaning of Council Directive 76/768/EEC (Law Journal L 262 of 27.9.1976. Directive superseded by Directive 2000/41/EC, Law Journal L 145 of 20.6.2000);

(f) tobacco and tobacco products within the meaning of Council Directive 89/622/EEC (Law Journal L 359 of 8.12.1989. Directive superseded by Directive 2001/37, Law Journal L 194/26 of 19.7.2001);

(g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971;

(h) residues and contaminants.

The similar definition is provided by *Codex Alimentarius* under which "food means any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drink, chewing gum and any substance which has been used in the manufacture, preparation or treatment of "food" but does not include cosmetics or tobacco or substances used only as drugs" (Code of Ethics for International Trade in food including concessional and food aid transactions CAC/RCP 20-1979). The regulations of the Code referring to natural food, using antibiotics , additives, pesticides, herbal and natural medicines are considered the most controversial.

Using a substance for human consumption as well as for industrial purposes compels high standards of safety and quality it must meet , at least unless its other ,non-consumptive application is proven (A. Szymecka-Wesołowska, 2013, p. 55).

New nutritional purposes have enforced increasing awareness of the connection between health and the quality of life. A new terminology has been introduced to define healthy food. In the EU document FUFOSE, the universal definition of *Foods for Specified Health Use* - FOSHU -has been created (Project reference: FAIR950572, Funded under: FP4-FAIR). It is the food which positive influence (beyond their natural nutrimental potential) on one or several functions of the body has been proven, and there's a proper scientific record of such an evidence. The food improves one's

health and/or deters diseases. Additionally, it should be similar to traditional food and its amounts normally expected in a diet show its feasibility. Therefore it excludes tablets, powders or sachets. Such food may be classified within the Novel Foods Regulation (Regulation EC No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients). The food serving higher functions is the opposite of the highly processed food and it reflects the idea of healing with aliment that has existed in nearly all cultures in the world for ages.

3. The regulations concerning food in selected legal cultures

The norms applied to nutrition vary depending on geographical location of a region and its community, customs, economic political and religious factors. Some of these requirements are very restrictive and non-compliance is a subject to legal or non-legal sanctions. Others are the matter of individual choice. However, it cannot be questioned that food is the cultural platform on which an individual and the rest of community coexist. The right for food access with the respect of food requirements resulting from one's cultural background constitutes the fundamental human right.

Some cultures accept or reject the consumption of certain kinds of meat. Legal acts sometimes determine the way of preparing food and dictate lent observance or approve using certain food ingredients. Restrictions and obligations resulting from religious norms often prejudge whether certain plants and animals are suitable for human consumption.

The legal culture of Judaism is very representative for such extensive regulations. When analysing their merits, they predominantly function to sanctify life. As Smith points out, in the Talmud eating or drinking without the act of blessing beforehand can be compared to robbing God of his possessions (H. Smith, 1995, p. 196). Jewish law legitimizes food, among other values, provided it has been blessed. Koshering is the basic of Jewish life. It is also the subject to various regulations. As MesiylatYešariym states: " Man is a materialistic and mean creature, devoted to ordinary existence in this world. In this respect, the products which consumption is not permitted , are much worse than others , because they are absorbed by human body and become the part of his essence. Every man with a proper judgement shall perceive prohibited food as poison or as a nourishment into which poison has been added" (chap. 11, quoted after: Z. Greenwald, 2005, p. 416-417). Should any doubts about classifying a product as kosher appear, a rabbi has the authority to decide.

The most common symbols of kosher food include the letter "K"- sometimes there is a circle, a star or the other graphic symbol surrounding the letter, or the

letter "U"- alone or circled. Another symbol of Kosher certification is issued by the organisation the Orthodox Union and is more popular in Europe. All certificates (*hashgacha*) are assigned by specialised Jewish organisations, which *Kashrus Coordinators* audit the products.[3] In the European Union all detailed guidelines concerning labelling food are stated by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance (Law Journal L 304/18 of 22.11).

As Greenwald contends, in the past all generations prepared meals using the ingredients with which they were familiar. Most often dishes were made at home, therefore people knew what ingredients were involved (Z. Greenwald, 2005, p. 417). At present, it is not easy to keep food pure kosher. In result of food industry development food has been "enriched" with many harmful additives. The issue of careful inspection of kosher food has been essential to avoid any serious halachic neglect.

The law of Judaism includes some restrictive norms concerning the consumption of many kinds of meat and others. As Tokarczyk underlines, the law considers human beings free creatures, who due to their reasoning have the opportunity to choose between good and evil (2008, p. 147). The restrictions affect, inter alia, stewed meat, pork, insects, larvae and bread made with fermented rye. The trees from which fruit comes should be more than 3 years old. The Torah entirely bans on the consumption of blood (Leviticus 7:26-27; 17:10-14). It states that blood is life and life must not be taken together with flesh. Blood must be poured out on the ground like water (Deuteronomy 12:21-25).

Judaic normative culture very precisely designates the procedure of animal slaughter (*shechita*). The ruling of the Constitutional Tribunal in that matter, which positioned animal rights above religious freedom evoked controversies. The Constitutional Tribunal stated that: Art. 34 par. 1 of the Animal Protection Act of 21 August 1997 (Law Journal 1997, no 111, p. 742) in regard to is its ban on animal slaughter in a butchery in the ways required by religious rituals, is incompatible with Art. 53, par.

[3] In Poland the certificate of kosher food is issued by the office of the Chief Rabbi of Poland. Details available: http://warszawa.jewish.org.pl/pl/certyfikaty-koszernosci

1,2 and 5 of the Constitution of the Republic of Poland of 2 April 1997 (Law Journal 199, no. 78, p. 483) in conjunction to Art. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Law Journal 1993, no 61, p. 284); Art. 35, par. 1 and 4 of the aforementioned Act in regard to imposing criminal liability in case of animal slaughter in a butchery in the ways required by religious rituals is incompatible with art. 53 par. 1,2 and 5 of the Constitution in conjunction to freedom of conscience and religion guaranteed by the art. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ref. no K52/13).

The union of Jewish Religious Communities in Poland (the claimant in the case) underlined that kosher meat is an indispensable article for Jews to observe special, resulting from their faith rules concerning food they use. The pronouncement of the Grand Chamber of the European Court of Human Rights in Strasburg of 27 June 2000 in the case of Cha'are Shalom VeTsedek v. France stated that ritual slaughter is legitimated by the art. 9 of the Convention (Case of *Cha'are Shalom VeTsedek v. France*, Application no. 27417/95).

The Constitutional Tribunal shared the opinion that the adoption of specific methods of animal slaughter in accordance with religious rituals to obtain permissible food is a form of manifestation of the freedom of religion and therefore it is guaranteed by the Article 9 (ECHR). The Tribunal invoked the pronouncement of the Austrian Constitutional Tribunal of 17 December 1998 (B 3028/97, VfSlg 15.394; M.A. Nowicki, 2013, p. 753). It was also emphasised that ritual animal slaughter is permitted in the majority of Member States of the European Union[4].

The matter under the ruling of the Tribunal has been the subject of a new regulation within the European law since 1 January 2013 when the Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing entered into force (Law Journal L 303/l of 18.11.2009). The section 18 of the document states that derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. (Law Journal L 340 of 31.12.1993). The Community provisions applicable to religious slaughter have been transposed differently depending on national contexts. Therefore, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this

[4] IAt the time of the pronouncement the ban on ritual slaughter was binding only in Sweden, Poland and Denmark and in Lithuania, where the regulation was adopted on 1 January 2015. See: the pronouncement of CT of 10 December 2014, p. 6.4

Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union. (Law Journal EU 2012, C 326).

As S. Patyra remarks, the regulation of the EU Council comprises provisions commonly binding hence their transposition to the legislative systems of member states is not necessary (2013, p.10). Łętowska claims that the regulation does not affect religious customs or the theme of religion. She point that only one (aforementioned) act states that derogation from stunning animals prior to slaughter is permissible only in case of religious slaughter, to strictly observe religious rituals. Therefore, the author criticises using the method of ritual slaughter to obtain meat for "normal", regular trade.(P. Rochowicz, 2015). She also averts to the final provision of the regulation which states that Member States maintaining any national rules aimed at ensuring more extensive protection of animals at the time of killing[5], shall inform the Commission before 1 January 2013. The Minister of Agriculture and Rural Development submitted the letter dated 27.12.2013 to the Commission, notifying that: "In Poland, since 1 January 2013 animal slaughter without stunning will be prohibited". The pronouncement of the Constitutional Tribunal is controversial for both scientists and defenders of animal rights.

In the law of Islam food is classified similarly to kosher food. The products are considered to be "pure" *(tahir*) and designated as *halal*. The rules originate from the Koran. Pork[6] and alcohol are banned. There is an obligation to observe lent during Ramadan (M.U. Tworuscha,2009, p. 93-95). The infringement of the regulations is punished with legal sanctions in many Muslim countries.

The legal culture of Buddhism does not explicitly regulate meat consumption. The analysis of the ban on meat consumption existing in different schools of Buddhism proves that in spite of the strict ban on killing, the ban on meat consumption is not dogmatic. XVII Karmapa expressed his view on the consumption of meat: "But if we don't eat meat, even if we don't live longer, I think we will live happier

[5] Art. 26 par. 1 "This Regulation shall not prevent Member States from maintaining any national rules aimed at ensuring more extensive protection of animals at the time of killing in force at the time of entry into force of this Regulation"

[6] Koranic teachings: " Say, I find not in that which is revealed to me aught forbidden for an eater to eat thereof, except that it be what dies of itself, or blood poured forth, or flesh of swine -- for that surely is unclean or what is a transgression, other than (the name of) Allah having been invoked on it. But whoever is driven to necessity, not desiring nor exceeding the limit, then surely thy Lord is Forgiving, Merciful." (sura 6, 146).

lives. If we enjoy the flesh and blood of other beings, then at the time we have to go, we might feel as if this life didn't turn out so well. We will have carelessly consumed the flesh and blood of other beings. That might happen, right? If we don't eat meat, life might not be longer, but there is a possibility we might be more satisfied"(2007). Karmapa, having escaped to India, became a vegetarian himself, and since then, has encouraged his numerous followers to reduce or refrain from meat consumption. Many Buddhist monasteries offer purely vegetarian meals.

The example of the infringement of the Art. 9 of ECHR because of the denial to provide a detainee with meatless meals was the case *Jakóbski v. Poland* (Application no. 18429/06. Judgment. Strasbourg. 7 December 2010). The applicant complained that the authorities of the detention centre refused to provide him with vegetarian food thus failing to respect dietary requirements of his religious beliefs (Mahajana Buddhism) and consequently infringed his right to manifest his faith. His refusal to ingest meals was treated as the attempt of a hunger strike which might have resulted in a disciplinary punishment. In 2006 the officer of a detention center in Szczecin argued that "A detainee has the right to the freedom of religion and the right to the change of faith, if he wishes. However, the aforementioned rights do not automatically impose the obligation to submit special menus that fulfil the specific requirements of a faith the detainee follows upon the authorities of the prison . The issue of special dietary requirements resulting from religious or cultural background should not be employed by detainees to manipulate the authorities of a detention center to gain a personal benefit (p. 17). The only kind of diet offered with respect to religious requirements was pork-free diet.

The Tribunal states that that observance of dietary requirements can be considered as a way of practical manifestation of religious beliefs within the scope the Art. 9 (Case of *Cha'are Shalom VeTsedek v. France*, Application no. 27417/95). The Tribunal marked, not having arbitrated whether all such decisions are made in order to fulfil religious obligations, that the decision of a detainee in question, of following a vegetarian diet might have been be inspired and motivated by his faith. The refusal to provide him with a vegetarian diet interfered with provisions enshrined by the Art. 9 of the Convention. The Tribunal was not convinced by the argument of the government party that providing the detainee with a vegetarian menu would result in a disruption of the process of management, or in a lower quality of meals served to other detainees.

The European Tribunal of Human Rights obliged the Government of Poland to prevent similar infringements in future. Under the provisions of art. 109 of the Ex-

ecutive Criminal Code the authorities of a detention centre are obliged to take effort to provide a detainee with an adequate diet in both cultural and religious terms (Law Journal 1997, no. 90, p. 557). In the document of 4 June 2013 addressed to the General Director of Detention Service (ref. no. 1717/3013/DP/AS) the Helsinki Committees for Human Rights underlines the need to secure the right of detainees to fulfil their dietary requirements that result from their religious background. The Foundation estimated that the failure to adapt meals to religious requirements infringe personal rights of detainees. Such practices are inconsistent with the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules[7]. The regulation of 8 May 2015 drafted by the Minister of Justice[8] takes into account the developments in the subject, and introduces the option of a diet respecting religious and cultural requirements of a detainee – referred to as a "religious or cultural norm".

4. Summary

Cultural background determines the way in which nutritious requirements of a man are satisfied. Food represents the factor which definitely enables different cultures to integrate, which is clearly visible in the age of globalisation. There are certain discrepancies between common traditions and normative acts. Such phenomena are conspicuous in result of migration processes. The process of preserving traditional diets is challenged by the global food and water crisis, which impedes their supply and distribution. To meet the challenges, the document referred to as the Charter of Milan was signed during the *International* Agricultural Forum "From Expo Milano 2015 and Beyond: Agriculture to Feed the Planet", on 3-4 June. The commitments taken under the Charter reflect the right to food, treated as the fundamental human right. One of the entries of the document states that food has a strong social and cultural value, and should never be used as an instrument of political or economic pressure. The other urges the governments to commit to drafting and adopting legislation to regulate social, cultural economic and environmental problems.

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[7] Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. P. 22.1" Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work."

[8] Draft Regulation of the Minister of Justice of 8 05 2015 on nourishment of inmates of detention centers and pre-trial detentions. The text available : *www.bip.sw.gov.pl/.../projektyakty/image2015-07-30-134210.pdf.*

The course of future actions has already been set in the Human Development Report 2011: "To safeguard the future of the planet and the right of future generations everywhere to live healthy and fulfilling lives. This is the great development challenge of the 21st century. Understanding the links between environmental sustainability and equity is critical if we are to expand human freedoms for current and future generations." The quotation starts the Preamble of the Chart of Milan.

The policy of the European Union seems to combat all social plagues much more extensively than other federations. In recent years the gradual merger of economic and cultural integration and social integration has been observed. However, finding a remedy for modern nutritious dilemmas depends on the philosophy of politics. As Brodecki aptly realises, the dialogue between lawyers and experts on culture and economy will occur when the they build the platform for intellectual interchange (2010, p. 63). The construction of such a bridge will not be possible until they act unanimously.

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The problem of personal data protection of parties to a civil suit against standards of the right to privacy

Abstract
The main research objective of this paper is to analyse the problem of protection of privacy of parties and participants in the proceedings, as well as third parties, in civil procedural law. Considerations will be narrowed down to the issue of protection of personal data, understood broadly as any information allowing to identify a participant in the proceedings, as well as relating to sensitive areas of his life, especially family and intimate life. This problem takes on a new dimension in view of the ongoing computerization of these proceedings, which promotes dissemination of information. Thus, the issue of protection of personal data goes beyond the scope of judicial meetings and access to court records, and extends to the area of the protection of computer data, their processing and sharing, e.g. on information portals.

The study will apply three basic research methods – the dogmatic method, relating to the analysis and interpretation of provisions of the procedural statute; and the analytic method, including analysis of Polish literature, which is necessary due to the need to use in this matter the experience in the field of implementation of IT tools and means of distance communication.

Keywords:
right to privacy, civil suit, protection of personal data

1. Introduction

There is no doubt that the right to privacy includes the protection of personal data, so all the information (beyond the information specifying the identity of the person) that may directly or by linking them with other information lead to the identification of a particular person. Pursuant to the provisions of the Act of 29 August 1997

on personal data protection (Journals of Laws, No. 133, item 883, with changes, hereinafter referred to as the Act) personal data shall mean any information relating to an identified or identifiable natural person. An identifiable person is a person whose identity can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to their physical, physiological, mental, economic, cultural or social characteristics. As indicated in Art. 6 para. 3 of the Act, the information is not considered a threat for person's identity if establishing it requires excessive cost, time or actions. Thus protecting the right to privacy and data protection are closely related. As pointed out by M. Safjan, we are dealing with creation of a kind of apparent informational autonomy because the entity, being under strong pressure of requirements of modern civilization, has less and less impact on the scope of information shared about themselves [...]. Weight of the protection of the individual and its privacy moves increasingly towards public institutions and funds. Therefore, the protection will have to be carried out not by private law, but by the definition of the boundaries of the protected area in the public law itself. As a result, the area of the autonomy of an individual narrows, in some fields, completely (Safjan, 2002, p. 5).

This also applies to the sphere of civil procedural law, the use of which inevitably forces the processing of personal data, including, in justified cases, sensitive data, which will be discussed below. It is essential to establish right proportions of this interference in relation to the real needs of justice. Consequently, infringement of informational autonomy is as deep as it is required at finding the truth in civil proceedings, and thus it is natural that in cases considering family or incapacitation matters the scope of intervention will be further-reaching than e.g. business cases, in which the court will mostly use publicly available data, contained among others in the records or the relevant register.

As indicated by the Constitutional Court, the so-called information autonomy of the individual means the right to decide on disclosure of the information by the person whom it considers, and the right to exercise control over such information available to the other parties. The right to legal protection of private life is guaranteed in Art. 47 of the Constitution (Journal of Laws, No. 78, item 483, with changes), and some detailed privileges that create the content of this law – in other constitutional provisions. The informational autonomy of the entity is most of all guaranteed in Art. 51 of the Constitution. In accordance with Art. 51 para. 1 of the Constitution, no one can be obliged to disclose information concerning their person, except on the basis of an act. Public authorities shall not acquire, collect

and share information on citizens other than necessary in a democratic state ruled by law (Art. 51 para. 2 of the Constitution). Art. 51 para. 1 of the Constitution affirms the right of individuals to decide on the disclosure of information about them. Duty to disclose information about them is a restriction of informational autonomy. Such a restriction may be imposed only by law, the imposition of such a duty must be within the limits of state intervention in the sphere of constitutional rights and freedoms of a person and citizen, defined by Art. 31 para. 3 of the Constitution (Judgment of the Constitutional Court of 19 February 2002, OTK-A 2002, No. 1, item 3).

In terms of proceedings in civil matters an essential meaning when it comes to the limitation of the autonomy of information has the provisions of Art. 3 of the Code of Civil Procedure (Resolution of 17 November 1964 – the Code of Civil Procedure, Journal of Laws of 2014, item 101, as amended, hereinafter referred to as CCP), according to which the parties and the participants of the proceedings are obliged to carry out procedural actions in accordance with good practice and give an explanation of the circumstances of the case truthfully and without concealing anything, and present evidence. This does not mean, however, that the consequences of this provision are absolute – in this regard this should be related primarily to the mandatory or optional examples of disclosure in the proceedings, which, however, are beyond the scope of this study.

On the other hand, one cannot ignore the problem of anonymization as a process interfering with the autonomy of information of the party (participant) within a particular civil case, which will be the subject of further considerations. Efficient solution for anonymization, pseudoanonymization or other activities related to generalization or deletion of personal data, prevents, or due to the content of Art. 6, para. 3 of the Act crucially hampers, the possibility to distinct a particular individual within a set of data, to create links between the two records in the data set (or between two separate data sets) and to conclude any information from those data set. Consequently, in most cases, the removal of elements allowing direct identification is not sufficient to ensure that the identification process is no longer possible. Often it is necessary to take additional measures to prevent the identification, which also depend on the context and purpose of the processing for which the anonymized data are intended. Even rudimentary information placed in a specific context can lead to the identification of the party (participant) of the proceedings, which would become a contravention of the whole idea of anonymization.

2. The problem of protecting the right to privacy versus protection of personal data

The main problem relating to the protection of the right to privacy is the question of its defining, and above all establishing the boundary between the sphere to which one has the exclusive right and an area which in justified cases can be interfered with by the public authority, including the court conducting the civil case.

According to the Constitutional Court in case of the right to privacy we deal with the right to live our own lives, directed according to our own will, with limited only to necessary minimum of any external interference. This is related inter alia to personal life and thus also health and is sometimes called the right to be left in peace. The Constitution, while speaking about the right to protect privacy, family, honour and good name and to decide about our personal life, establishes a prohibition on state interference in the private life of the individual but also imposes positive obligations on the state (Judgment of the Constitutional Court of 11 October 2011, K 16/10, Journal of Laws, No., no 240, item 1436). As M. Pryciak rightly emphasizes, the essence of privacy mingles with other rights and freedoms, which hinders the determination of the precise line between them. The doctrine of law has failed to create a single, coherent and widely accepted and applied definition of privacy, and going further – the right to privacy. However, it is an essential law, within which there are attempts to substantiate the areas of protection (Pryciak, p. 227-228).

In both definitions of privacy and the right to it, you can see the complex structure of privacy, which is an aggregate of many elements that should be protected by law (e.g. a way to spend leisure time, health, sexual preferences), covering different spheres of human activity that can be described as intimate, private or family life. The complexity of the privacy is also indicated by B. Banaszak, who stressed that these are qualities, inner personal (individual) experiences of a human and their evaluations, reflections on external events and sensory impressions, and also the state of health (Banaszak, 2012, p. 295).

The thoughts of A. Kopff seem particularly useful in order to circumscribe the relationship between the individual human and judicial authorities. The author states that personal good in the form of private life is everything, that due to the justified isolation of the individual from the general is used to develop physical or mental personality and preserve achieved social position. A. Kopff divides the private area into two basic areas: the intimate personal life and the private personal life. The first sphere of those includes personal experiences of a person, about

which a person only informs the loved ones. The author points out that this information relates to the internal, intimate sphere of experiences of the individual and asserts that no circumstances may constitute justification for interference in this sphere. On the other hand, the area of private life includes the circumstances and events of personal and family life, which are shared with family members, as well as friends and colleagues (Kopff, 1982, p. 32-35). Outside the scope of these two spheres is an area of universal accessibility that goes beyond the protection of the law, because it does not create a scope in which you can talk about any manifestations of privacy. Thus, within the framework of legal protection of private life there is no information that has "a public character", but even this kind of information may be included within the scope of protection of Art. 8 of the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284, hereinafter referred to as the Convention), even if they are systematically collected and stored by public authorities (Judgment of the European Court of Human Rights of 6 June 2006, 62332/00, LEX No. 182368).

Continuing my considerations relating to aggregate structure of the right to privacy, there should be noted those aspects that are important in terms of protection of personal data. In this regard, a special attention should be paid to the position of A. Mednis, according to whom privacy is divided into four different spheres: 1) the informational privacy, which includes all the information about persons, which allow their identification; 2) the mystery of the inner world of the individual, under which there should be mentioned feelings, experiences, mental states of the person; 3) personal space and inviolability of a person, covering the area which the person is psychologically (emotionally) related with, and 4) the sphere of autonomy of behaviour in which people want to follow their will and establish relationships with other people (Mednis, 2006, p. 93). In this regard it can be concluded that the scope of judicial involvement will depend primarily on the type of civil case in which it occurs. Certainly, in any case the judicial body has the power to acquire identification data, and so in civil proceedings we cannot talk about the existence of informational privacy. This does not mean, however, that personal data which is not necessary to conduct a civil case (this applies to both parties, or participants and witnesses) is not a subject to legal protection, the essence of which is to prevent its disclosure without undue needs. This applies to a particular civil case, as well as judicial decisions as sources of information about the law.

3. Anonymization as an instrument for the protection of personal data

With regard to the sphere that goes beyond the conduct of particular proceeding, the publication of judgments of courts of general jurisdiction, the Supreme Court and other judicial authorities are crucial for protecting the privacy of the parties and the participants in terms of personal data, primarily on web portals (mainly on the Portal of Judgments). This form provides common and unrestricted access to content and justifications of decisions in terms of gathering the information, e.g. on the case-law in a particular category of cases.

As emphasized by the administrators of the portal, in the Portal of Judgments the content of courts decisions and the reasons for the judgment are published without any additional petition. Judgments are available for free and there is no need for prior user registration. The range of published judgments was determined by a panel of judges and assumes no sharing of the content covered by the exceptions and irrelevant from the point of view of legal values and information or judgments repeated. In order to facilitate finding the proper content, the Portal of Judgments contains a simple and advanced searching device. Thanks to it, there is the ability to track the path of judgments of a single department of the court or the presiding judge. Any judgment published on the Internet is also related with the information not located in its content. Namely, the legal basis and the key words. The first applies, of course, to the regulations under which the judgment has been made, and the other to the subject of the judgment (http://www.ms.gov.pl/pl/sady-w-internecie/portal-informacyjny, 20 June 2015).

However, this does not mean that the remaining judgments should be published in full, without introducing appropriate restrictions on the disclosure of all content. Due to indicated need to protect sensitive data and the circumstances interfering also in the privacy or intimacy, it is crucial to anonymize the judgments. As underlined in the information materials of the judicial authorities: anonymization is processing content in such a way as to prevent the identification of individuals (and more specifically, to make this identification impossible without excessive cost, time or actions). On the other hand, the documents should be anonymized in a way which will allow it to retain its readability and not to lose any content of a general nature (http://legnica.so.gov.pl/bindata/documents/DOC6d9e2d8aca46468c0ab7a3b7590b880b.pdf, 20 June 2015). Consequently, it can be concluded that anonymization is a solution which has a task to maintain a balance between maximizing the principle of transparency of proceedings and the protection of personal data in a scope which would not diminish the efficiency of realization of the right to information about law. In practice, anonymization is performed by one of four steps:

a) converting of the whole phrase into a single initial in case of anonymization of towns and geographical names as well as first names and surnames which occur in the text;
b) converting of the whole phrase into a single initial, followed by an ellipsis "(...)" in regard to the names of equipment, vehicles and trade names of various substances or other products, if they consist of more than one word;
c) converting the whole phrase into a pair of initials for the names of individuals;
d) converting the single words or sentences into an ellipsis in other cases.

As indicated in the rules of anonymization: subjected to anonymization are not contents of judgments (phrases) that do not contain dangerous data and information, which can allow identification of a legal entity. In particular, these are the contents of the judgment relating to the legal nature of the decisions, i.e. belong to the category of legal language, e.g. the content of the law, or juridical language, e.g. juridical argumentation, comment on the legal norm, the interpretation of the law or doctrine of the law (Ibidem). Legal terminology covers both the legal and juridical language and all notions arising from judicial office instruction. In practical use of this terminology one can also encounter wordings (phrases) for electronic legal information retrieval systems. The process of anonymization is excluded from other elements, like the names of public authorities, particularly the public administration (including the names of offices) and the justice system as well as the marking of time.

In the area of personal data protection the anonymization of the so-called sensitive data is essential. These data are included in the group of particularly protected personal data. Art. 27 para. 1 of the Act presents a closed list of sensitive data. It is forbidden to process a personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, party or trade union membership, as well as data on the state of health, genetic code, addictions or sex life and data relating to convictions, decisions on penalty and fines as well as other decisions issued in courts or administrative proceedings. It is true, however, that there are indications the occurrence of which repeals the prohibition of processing of sensitive data, and among them, as indicated in Art. 27 para. 2 section 5 of the Act, case where the processing relates to data which are necessary to pursue a legal claim, however, those factors must be assessed very strictly for the benefit of the individuals those data concern.

The issue is difficult for the final resolution mainly due to the strong individual character of particular cases, nevertheless, it seems that the principle of openness is essential, and it should be limited only in some circumstances for the protection of personal data. The reversal of this interdependence would distort the essence

of justice, which quality is to a large extent shaped by social control based on the principle of transparency.

In practice the potential value of anonymization is considered, in particular as a strategy to reap the benefits of the "open data" by individuals and the general public, while limiting the risk to the individuals. Case studies and publications of researches have shown, however, how difficult it is to create truly anonymous data set while retaining as much basic information as it is necessary to carry out the task (Opinion no 5/2014 on anonymization techniques of 10 April 2014, http://www.giodo.gov.pl/plik/id_p/6338/j/pl/, p. 3, 20 June 2015). As emphasized in the doctrine (on the example of the administrative courts): the aim of anonymization of the judgments is to reconcile, on the one hand, the requirements of full transparency of activities of public authorities – which is stated in Art. 61 of the Constitution and the Act of 6 September 2001 on access to public information (Journal of Laws, No.112, item 1198, with changes) – on the other hand, the need to protect personal data and other information, where access is restricted by law. The process of excluding from the judgment the data that can lead to easy identification by parties outside the proceedings (whether individuals or legal entities), or leading to the disclosure of secrets protected by law, does not necessarily apply to every case, and also – it does not have to have a uniform character. It should always be preceded by an analysis of whether, in a given case, there is information that is a subject to legal protection (Information on administrative courts of 2008, p. 381-382, http://www.nsa.gov.pl/sprawozdania-roczne.php, 20 April 2015).

Hence the fundamental problem of automation of anonymization, or more precisely – determination whether, at any stage of the process the human factor, that evaluates the importance of rulings, also in relation to the protection of personal data, should be completely excluded. It is even more difficult when it's taken under consideration that the basic premise is that the result of anonymization techniques applied to personal data should be, given current technology, both sustainable and possible to remove, i.e. preventing the processing of personal data (Opinion no 5/2014 on anonymization techniques of 10 April 2014, http://www.giodo.gov.pl/plik/id_p/6338/j/pl/, p. 3, 20 June 2015). It seems that today it is impossible to ultimately prejudge how far the automation of these activities should go, because it is not possible to clearly identify the limits of the possibilities of IT tools, which are subject to continuous development. It is even more justified when we take under consideration that practice shows that people also make mistakes, which is the subject of complaints – on the one hand from the parties that as a result of too cost-

effective anonymization, have been identified by the users of portals, on the other hand – people who believe that in specific cases anonymization range is too wide or lack of publication of the judgment are unfounded and are demanding access to their content under the provisions on public information.

4. Summary

With regard to the processing of personal data, as well as in relation to other aspects of privacy protection, civil courts – like other state authorities – must use the rule of proportionality, expressed by the adequacy of the level of invasion in a sphere of personal data (in some cases, sensitive data) to the real needs connected to the determination of the factual basis of the decision of a civil court.

As pointed out by the Constitutional Court, the essence of excessive interference is the recognition that the legislature cannot establish limits exceeding a certain level of nuisance, particularly violating the proportion between the reduction of powers of individuals and the rank of public interest, which should be protected. In this perspective, the prohibition of excessive interference has a protective function in relation to the rights of individuals. This ban therefore becomes one of the consequences of citizens' trust in the state (Decision of the Constitutional Court of 16 May 1995, K 12/93, OTK 1995, No. 1, item 14). As indicated in the literature, the need to respect the principle of proportionality means that the restriction of rights is necessary – it is not possible to implement the limitations in a different way, and at the same time, make the limitation comfortable for the citizens; useful – effective to achieve the target; and proportionate in the strict sense – prohibition of excessive interference by the legislature, while the degree of nuisance for the individual remained in proportion to the value of the aim to which the implementation of the restriction is to serve (Czarnecki, p. 12).

Hence the need to balance by a civil court, and in a broader perspective – by operators of the legal information systems, the appropriate relationship between the protection of personal data concerning the parties of the proceedings and such values as fair proceedings in a particular case or the realization of the right to information by providing knowledge about the contents of decisions through commonly available means of communication, in particular information portals. One of the main instruments in this regard is anonymization – provided that it is carried out properly, which means that on the one hand will prevent or highly complicate identification of the parties (participants) of the proceedings, on the other – will ensure an appropriate level of access to information on the law.

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Selected elements of the reform of personal data protection in the European Union

Abstract
In the face of rising threats to the privacy of individuals with regard to the processing of personal data, in 2012 the European Commission proposed an introduction of a new, holistic approach to personal data protection in the EU. Directive 95/46 will be replaced in this area as of 2018 by the Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The purpose of these deliberations is first of all to present new threats to the privacy of individuals with regard to the processing of personal data. Another goal is to analyze and assess selected principles of the reform of data protection law in the EU, aimed, among others, to strengthen the rights of individuals with regard to the processing of data and to simplify procedures for international data transfers. In this respect the proposed changes to the issue of consent to the processing of data by individuals will be presented as well as new mechanisms for the protection of personal data in the context of data transfers outside the EU. The adequacy of these legislative plans will be assessed in general and from the angle of special conditions in the field of sport.

The paper will use a legal-dogmatic method, involving the analysis and inference from legal acts as well as an analytical-synthetic method in respect to representative literature of the field of study.

Keywords:
consent to data processing, data protection, reform of data protection law, international transfer of data, personal data protection in sport

1. Justification of the necessity of a reform of the EU rules on personal data protection

In the face of new technological challenges related to the processing of personal data, as well as new categories of data such as geolocation data, or profiles of the Internet users as consumers, in doctrine and practice it is assumed that the existing rules on data protection have lost to a great extent their function of a warranty (Krzysztofek, 2012, 29). It should be noted that the current technology allows individuals as well as legal entities to share any information easily, including information belonging to the category of personal data, and to share information publicly on a global scale. It should be noted that the concept of personal data is very broad. The Polish definition of personal data, based on the assumptions of Directive 95/46 is extremely broad, because in the light of Article 6 of the Act on the Protection of Personal Data of 29 August 1997 any information relating to an identified or identifiable natural person is regarded as personal data. Such a broad legal definition of personal data causes that the status of personal data could potentially be granted to any information relating to an individual. The doctrine also states that personal data may take various forms. Alongside traditional data there could be photos, videos, recorded voices, so-called biometric data, etc. regardless of the manner and extent of their acquisition and sharing (Barta and Litwiński, 2015, 77).

From the perspective of an employed individual, specific risks for the protection of personal data could result, among others, from cloud computing, since it is connected with the loss of control by an individual over sensitive information in a situation in which entities store these data with programs hosted on hardware that belongs to third parties (Krzysztofek, 2012, 30). Another problem is so called profiling, i.e. matching a strategy adopted by someone processing data to individuals by monitoring their behavior on the Internet (Wiewiórowski, 2013, 25). It should be noted that also public authorities make use of the increasing amount of personal data, e.g. about the place of residence, for purposes such as prevention of terrorism and crime.

In the face of presented risks and developments, the European Commission proposed the introduction of a new, holistic approach to personal data protection in the EU. Directive 95/46 will be replaced in this field by the Regulation of the European Parliament and the Council, i.e. a union act directly and entirely valid in all EU countries. The objectives of the draft, large-scaled and perceived as revolutionary reform of data protection law include, among others, strengthening the rights of individuals with regard to the processing of data (Boni, 2013, 3) and the global dimension of data protection, i.e. the simplification of the provisions related to

international data transfers (Gajda, 2013, 83). Our attention will be focused on these selected aspects of data protection law in further deliberations.

2. The issue of consent to the processing of personal data

It is understood that the issue of consent should be the basis for the EU's approach to the protection of personal data, as it is for individuals the best way to control data processing operations, and the information for the data subjects should be presented in an easily understandable and accessible format, eg. in a form of standard icons (Góral, 2013, 7).

The current directive on the protection of personal data does not require explicit consent to all types of data, such a requirement was formulated only in relation to sensitive data. European legislature has only adopted here in Article 7 a, a vague criterion of "unambiguous" consent given, however, it is common practice to process the data based on implied consent. In this situation, it is assumed that the data subject consents to the processing of data, e.g. by accessing a specific website and accepting the privacy policy presented there. Experience has shown, however, that this assumption is not based on the actual level of the users' awareness. Another problem, which is associated with the autonomy of information of the data subject, is the position of the subject processing the data "on the market". If there is no alternative solution that would involve releasing smaller amounts of data, freedom of decision to consent becomes illusory (Szymielewicz and Walkowiak, 2014, 31). This state of affairs causes that it has become a challenge for the new European data protection law to create higher standards based on the assumption that only the need to consent explicitly gives the data subject a chance to make an informed decision as to how to use his or her privacy.

Consent to the processing of personal data is one of the conditions of admissibility of data processing. This particular condition is intended to guarantee the autonomy of information of the data subject when the possibility to process the data depends on the decision of the data subject. It should be remembered that this is a particular situation – occurring when the need to process the data does not result from a contract or legal regulations (Szymielewicz and Walkowiak, 2014, 30). It is therefore not desirable to demand and obtain consent from the data subject, when such data is allowed to be processed by law. (Barta, Fajgielski and Markiewicz, 2011, 448). Other conditions that legalize the processing of the data specified in Article 6 paragraph 1 b-j of the draft Regulation include situations in which the data processing is necessary for the performance of a contract to which the data

subject is party (b) processing is necessary for compliance with a legal obligation to which the controller is subject (c); processing is necessary in order to protect the vital interests of the data subject (d); processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (e). It should be taken into consideration that the consent to the processing of data is equivalent to other premises of legality of data processing.

"The data subject's consent", in the light of Article 4 paragraph 8 of the proposed Regulation, means "any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action signifies agreement to personal data relating to them being processed." In Article 25 of the preamble to the Regulation it has been established that: "Consent should be given explicitly by any appropriate method enabling a freely given specific and informed indication of the data subject's wishes, either by a statement or by a clear affirmative action by the data subject, ensuring that individuals are aware that they give their consent to the processing of personal data (…). Silence or inactivity should therefore not constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. If the data subject's consent is to be given following an electronic request, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided."

It should be noted that in this case we are dealing with a complete withdrawal from the requirement of written consent to the processing of data. Article 7 paragraph 2 of the draft Regulation explains the conditions that must be met so that consent shall provide a legal basis for the lawful processing of the data. "If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter." This requirement may relate, among others, to consent to the processing of sensitive data, e.g. medical data.

It should also be emphasized that the burden of proof for the data subject's consent to the processing of their personal data for specified purposes shall be borne by the controller (Article 7, paragraph 1). The data subject has the right to withdraw his or her consent at any time, however, the withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. In accordance with point 33 of the preamble to the Regulation "in order to ensure free consent, it should be clarified that consent does not provide a valid legal ground where the individual has no genuine and free choice and is subsequently not able to refuse or withdraw consent without detriment."

An important novelty laid down in the draft Regulation of 25 January 2012 is a condition of lawfulness of consent referred to in Article 7 paragraph 4. Pursuant to these provisions the consent does not constitute legal grounds for processing in case of significant imbalance between the data subject and the controller. In point 34 of the preamble it has been explained that this is particularly the case when there is a relationship of dependency between the data subject and the controller. This kind of relationship exists, inter alia, when personal data of employees are processed by the employer in the employment context or when personal data of athletes are processed in connection with the fight against doping in sport, this issue will be discussed below. The doctrine stresses that it remains unclear how to assess significant nature of this imbalance and who could be responsible for such an assessment (Conference Report 2015, 8).

In the system of protection of personal data special protection is required for sensitive data. Under the provisions of the Act on the protection of personal data such data can include information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, party or trade union membership, as well as data concerning health, genetic code, addictions or sexual life. The group of data mentioned here is subject to more intensive protection, which is expressed, among others, by the fact that Article 49 paragraph 2 of the Regulation provides for more severe criminal penalties for unlawful processing of such data. Another category of sensitive data is composed of the information relating to convictions, decisions on penalty and fines, as well as information on the judgments delivered in judicial or administrative proceedings. It should be noted that the list of sensitive data in Directive 95/46 constitutes a narrower catalogue, because information on the genetic code and addictions is not included. The Polish legislator requires, in Article 27 paragraph 2 point 1 of the Act, written consent for the processing of such data and allows processing of such data only in limited cases. Consent to the processing of sensitive data expressed in a form other than in writing is ineffective (Barta and Litwiński 2015, 310). Also in the draft of the EU Regulation in point 41 of the preamble it has been noted that, in order to avoid discrimination, such data should not be processed unless the data subject gives his or her explicit consent. The general prohibition of the processing of data considered sensitive has been provided for in Article 9 of the proposed Regulation.

In the draft EU Regulation, such data include information revealing race or ethnic origin, political opinions, religion or beliefs, trade union membership and data concerning health or sex life, criminal convictions or related security measures.

However, exceptions from this ban due to special needs shall be clearly indicated, in particular when processing of the data takes place within lawful activities of certain associations or foundations whose aim is to enable the implementation of fundamental freedoms. According to the EU legislator, exemptions from the prohibition on processing sensitive categories of data shall be allowed, if it is carried out under the law and subject to appropriate safeguards to protect personal data and other fundamental rights, if it is in the public interest (point 42 of the preamble). It should be emphasized that the draft of the EU Regulation introduces a new category of sensitive data, namely, biometric data. In accordance with Article 4 paragraph 1 Section 11 of the draft Regulation as adopted by the European Parliament on March 12th 2014 "biometric data" means any data relating to the physical, physiological or behavioral characteristics of an individual which allow their unique identification, such as facial images or dactyloscopic data. Bearing in mind that the development of biometry restricts human rights, because the right to privacy and freedom of movement is exposed, on the other hand – biometric data is very useful in practice for the administration, the judiciary and the police, processing of such data will require a special regime applicable to sensitive data, i.e. it shall be permitted only in strictly specified cases in accordance with the Regulation. Processing "genetic data", defined by the proposed Regulation as all data, of whatever type, concerning the characteristics of an individual which are inherited or acquired during early prenatal development, will also be subject to a similar regime at the EU level.

The draft Regulation introduces specific rules regarding the processing of personal data of children below the age of 13 (see Article 8). The processing of personal data of a child shall be considered lawful if and to the extent that consent is given or authorized by the child's parent or custodian. The controller is required to take reasonable efforts to obtain verifiable consent (Adamska, 2013, 109). In the version of the Regulation adopted by the European Parliament on March 12th 2014 it has been indicated that if the intended subjects of personal data are children, a language suited to their age shall be used.

3. Transfer of personal data to third countries or international organizations

Another important point of the reform of data protection law in the EU is the issue of transfer of personal data to a third country or an international organization. The growing importance of this issue is associated with globalization and economic development in general, including the development of new technologies, and above

all, a phenomenon called global outsourcing, where more and more subjects transmit their data or entrust it to other entities, often operating in other countries (Byrski and Konarski, 2013, 91). The doctrine stresses that this phenomenon is sometimes one of the bases of corporate activities (Łęcka 2010, 71).

It should be emphasized that at the EU level, specific rules concerning the transfer of data to third countries, i.e. countries not belonging to the European Economic Area (all the EU countries plus Iceland, Norway and Liechtenstein) have already been introduced by Directive 95/46 / EC. In accordance with Article 25 of the Directive, Member States are obliged to ensure that the transfer of personal data to a third country may take place only if this country ensures an appropriate level of protection. The European Commission has gained a right under Article 25 paragraph 6 of the Directive, to carry out the assessment regarding the existence in a specific third country an appropriate level of protection (called adequacy findings). And so, for example, both Swiss and Canadian legislation have been deemed to be at an appropriate level of protection, however, such a status has not been granted to American legislation (Łęcka 2010, 78). It has been acknowledged that even in cases when the legislation of the country concerned does not ensure an adequate standard of protection of personal data, transfer of such data is possible after undertaking appropriate security measures in the form of contracts. The main role has been played here by standard contractual clauses developed by the European Commission (Fischer 2013, 84). The instruments, which under the Directive had a character of soft law were so called binding corporate rules, establishing standards for transfer of data to third countries within one entity. These standards have been developed within the framework of the so-called Article 29 Working Party, acting as an advisory body to the European Commission and bringing together data protection officers from across the EU.

Practical application of the provisions of the Directive has demonstrated that the procedures for transferring data to third countries and international organizations have been inconsistent, uncomplimentary and imprecise, which raised doubts as to interpretation and constituted a threat to the rights of data subjects. For example, until December 31st 2014 on the basis of the Polish Act of 29 August 1997 on Protection of Personal Data even when a prior approval by a data protection authority of so-called binding corporate rules was required, there was an obligation to obtain the consent of the Inspector General for Personal Data Protection, for transfer of data to a third country, which was widely criticized in the doctrine (Byrski and Konarski, 2013, 101; Łęcka 2010, 85).

The draft Regulation clarifies and simplifies the rules for cross-border transfer of data. In Article 41 it has been sustained that the Commission may take a decision which will be valid throughout the Union, that some third countries or territory or a processing sector within that third country or an international organization, ensure an adequate level of data protection, thereby guaranteeing legal certainty and uniformity across the Union. In such cases, transfer of personal data to these countries may take place without the need to obtain any further authorization.

In Article 42 of the draft Regulation it has been adopted, that in the absence of a decision assessing an adequate level of protection, a controller or processor should take measures to compensate for the lack of protection in a third country by offering appropriate safeguards for the data subject. Such appropriate safeguards may consist of taking advantage of binding corporate rules, standard data protection clauses adopted by the Commission, standard data protection clauses adopted by the supervisory authority, contractual clauses approved by the supervisory authority or other appropriate and proportionate measures justified in the light of all the circumstances surrounding a single operation of transfer of data or a set of such transfers provided that it has been authorized by the supervisory authority.

The novelty is, in particular, normalization at a level of regulation of data transfer operations based on binding corporate rules and establishing a procedure to approve such rules. It has been assumed that the supervisory authority approves binding corporate rules in accordance with so-called consistency mechanism laid down in Article 58 of the Regulation, provided that they are legally binding and enforceable by all members of the group of enterprises of the controller or processor and include their employees. The aim of the consistency mechanism is to ensure uniformity of application of the regulation in relation to processing operations which may concern data subjects in several Member States. Through this mechanism independent supervisory authorities in the Member States will apply the framework for regulation in a consistent and uniform manner. This mechanism will operate through the European Data Protection Board, consisting of the heads of national supervisory authorities and the European Data Protection Supervisor (EDPS), which will replace the current Article 29 Working Party.

In the absence of a decision assessing an adequate level of protection under Article 41 or the relevant safeguards under Article 42, the operation or set of operations of transfer of personal data to a third country or international organization may take place only under the conditions enumerated in Article 44 a-h of the draft Regulation. It must be assumed that presented above simplifying the rules for international data

transfers will facilitate business activities and will have a positive impact on the competitiveness of the EU companies in the international arena.

The Polish legislator responded to the legislative action at the EU level by bringing into force on 1 January 2015 changes to Article 48 of the Act of 29 August 1997 on the protection of personal data concerning exemption from the obligation to obtain the consent of the Inspector General for transfer of personal data to a third country which does not ensure in its territory an adequate level of protection of personal data when the transfer takes place on the basis of standard contractual clauses or binding corporate rules (Becker 2015, 44). New legislation introduced in the Polish legal system the institution of binding corporate rules and specified a procedure for their approval by the Inspector General. The implemented regulations are aimed at preparing the controllers of data for regulations announced in the draft Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

4. The issue of personal data protection in sport

An example of an area of socio-economic life which undoubtedly will benefit from the reform of the European data protection law is sport. The specificity of protection of personal data in sport is based on the fact that we meet with a far-reaching interference of national and international sports governing bodies in the sphere of informational autonomy of players. Informational autonomy, which is a part of protection of private life, means the right to decide on disclosure of personal information to others, and the right to exercise control over such information if this information is available to other subjects (Judgment of the Constitutional Court of June 17th 2008).

This means that despite the actual right to decide on disclosure of personal data an athlete is powerless against a superior position of a sport federation. Lack of consent to the collection and processing of personal data is in fact tantamount to exclusion from the possibility of participating in sporting competitions (Kędzior, 2014, 137; Korff, 2009, 94). This situation means that the idea of granting free and explicit consent, as defined in the draft Regulation, will not be a sufficient condition for legalizing the processing of personal data of players, among others in a system of fighting doping in sport. It is easy to notice that failure to give such consent would lead to incurring irreparable damage by a player, i.e. exclusion from sport competitions. These objections have already been addressed in the International

Standard on Protection of Privacy and Personal Information – ISPPI – in the version of January 1, 2015 (point 6.0), which implies that personal data of the contestants will be processed in cases where the law expressly provides for the processing or with the consent of the participants. Because of an illusory nature of consent by a participant to the processing of personal data it should be noted that the premise legalizing the processing of personal data should be a different condition than the consent provided for by law. Referring to the draft EU Regulation it should be pointed out that such a condition may constitute, among others, situations in which processing is necessary for compliance with a legal obligation to which the controller is a subject (c); processing is necessary in order to protect the vital interests of the data subject (d); processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (e) (Article 6, paragraph 1 point b-j of the draft Regulation).

Significant for the sport sphere will be the inclusion to the catalogue of sensitive data genetic and biometric data, which is used, among others, to determine profiles of professional players for the purpose of determining a so-called biological passport. Ultimately, it is supposed to lead to the creation of a database containing the results of blood and urine tests of a player. On this basis it will be possible to compare original results of the athlete's blood tests with the results obtained during doping controls. The processing of such data in accordance with the requirements of the draft Regulation and ISPPI will require clear and unambiguous consent.

It should also be noted that due to the international nature of sport important in this area may be changes in the cross-border transfers of personal data of players. It can be assumed that binding corporate rules in the processing of data in the context of the fight against doping in sport lie with ISPPI, a compromise developed between the World Anti-Doping Organisation and Article 29 Working Party on behalf of the EU. It should be proposed to develop, in the future, at the European level of all sports federations, common rules (binding corporate rules), protection of data in order to process the data in the context other than the fight against doping (e.g. for the purpose of informing about the results of a competition). It is one of possible ways to unify data protection law in the system of autonomous sports law.

5. Conclusions

In so far binding legal status that has been regulated at the EU level in a form of directive in the scope of protection of personal data diverse legal systems existed, which created barriers for entrepreneurs and public authorities arising from the

fragmentation, legal uncertainty and inconsistent enforcement of law. Above all, there have been difficulties for individuals related to their control of personal data concerning them. So far, existing practices in the field of consent to processing of data have not guaranteed informational autonomy of the data subject since the requirement to obtain explicit consent to the processing of data was insufficient to make an informed and voluntary decision.

In the proposed Regulation it has been assumed that in order to be lawful the consent should be expressed in a free, conscious and clear way. The consent does not need to be in a form of a specific statement, conduct expressly indicating acceptance by a person using his or her data will suffice (Conference Report 2015, 8). In this context the definition of consent in the proposed Regulation does not differ substantially from the current concept of consent, however foreseeable conditions of lawfulness of consent are some novelty. It has been determined, for example, that the burden of proof of consent rests on the data controller. In addition, it has been assumed that consent shall not be deemed to be freely expressed if there would be a significant imbalance between the parties. This premise may in the future be important not only in labor relations, but also, in an area such as sport. Therefore it can be expected that subjects such as sports associations will seek in the future another condition legalizing processing the data than consent.

It should be assumed that changes in the proposed EU Regulation – which are due to come into force in 2018 – will strengthen the position of an individual – hence an athlete – in the system of protection of personal data, among others due to the fact that the requirements for consent to the processing of personal data has been greatly enhanced in the new Regulation. Moreover, the measures adopted will be binding uniformly across the EU. The expression of tendencies towards modernization of the European data protection law is, among others, the fact that, responding to contemporary challenges, biometric data has been included in the category of personal data.

Another aspect of modernization of data protection law, which should be viewed positively, is the fact that the rules for cross-border transfers have been clarified and simplified. As it has been presented above, all identified measures will have factual and legal consequences not only in case of typical business ventures but also in areas such as commercialized and professionalized sport.

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Ethical issues of discrimination based on sexual orientation

Abstract
This paper focuses on controversial issue of discrimination based on sexual orientation in democratic societies and societies in various transition states towards the democratic model. Study aims to describe the key ethical dilemmas linked to the development of the international law. It briefly comments on selected aspects of the relationship between morals, human rights and democracy. Persisting deeply-embedded homophobic attitudes, combined with a lack of adequate legal protection in many parts of the world result in deaths and torture. This article identifies some of the core ethical, political and legal principles that facilitate progress in the international legal systems.

Keywords:
discrimination, human rights, morals, ethics, democracy

1. Introduction[1]

This paper discuss very sensitive issue of discrimination on the grounds of sexual orientation in a period of great legal and political controversy about what human rights do we have, or should we have, and why. The normative theory of human rights is embedded in a more general political and moral philosophy which may in turn depend upon various religious, metaphysical or anti-metaphysical theories about human nature and the objectivity of morality[2]. Philosophical attitudes of contemporary political

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[2] More about sexual morality see in: Marková, 2012, 2015 (a,b).

actors are therefore often contradictory and sharply critical of one another. Differences arise not just in between different parts of the world but moral intuitions derived from various philosophical attitudes can be very divisive issue even within societies where the political actors have relatively common cultural background and similar traditions. Growing uncertainty about the whole concept of human rights reflects disturbing uncertainty about the universal nature of particular moral reasoning behind them.

2. Birth of the non-discrimination ideal and political struggle

The very idea of human rights has a debatable history with lots of possibilities to see it from a different point of view and consequently come to the different but still, perhaps, respectable conclusions. We will mention briefly some key points that we find helpful in understanding of where we are and where we have come from in the case of discrimination on the ground of sexual orientation.

Although, some sort of reasoning (usually conditional) for respect towards other human beings, and some form of equality limited to certain aspect of life, can be traced to the considerable past in most cultures, the very core political idea of human rights, as we know it, is not as old as it may seems and had been actually put into practice just very recently. Practical idea of using human rights theory as ideologically unifying moment of the social movement seems to have major roots in the beginning of the modern revolutionary struggle against aristocratic privilege and despotism. Even the thinkers, who actually led the major political struggle and successfully forced their aristocracy, clergy, dignitaries and other social "betters" to recognize their equal rights, have usually denied the same rights to members of other excluded social groups, like woman, people of a different race, religion, etc. When revolutions, for example, in Britain and the United States effectively extended some human rights, they only went so far, as to guarantee the progress to propertied white males of certain Christian sects. It seems to be a historic fact that: "Prior to the second half of the seventeenth century, the idea that all human beings, simply because they are human, have rights that they may exercise against the state and society, received no substantial political endorsement anywhere in the world. Although limited applications of the idea were associated with political revolutions in Britain, the United States, and France in the late seventeenth and eighteenth centuries, an extensive practice of universal human rights is largely a twentieth-century creation and late a late twentieth-century creation at that" (Donnely, J. 2013, p. 75). The political requirement of non-discriminatory treatment by state actors is therefore clearly a product of relatively recent social development. Much of it happened after the Second World War (Alder, J. 2004). Even

the Universal Declaration of Human Rights, no doubt an important milestone and useful political instrument, in spite of its second article giving crystal clear guarantee of equal and thus all human rights for every person, in fact bluntly ignored colonialism, which certainly involved brutal racial discrimination and systematic denial of the human rights to many Asians, Latin Americans and almost all black Africans for quite some time (Donnely, J. 2013, p. 75). Since then, we have been forced, largely under pressure from various social movements, inspired by new thought on social justice, to change our conceptions of the criteria for full and equal membership in our society. Race, colour, sex, religion, wealth, social class are now almost universally declared illegitimate bases for discrimination in most of the contemporary societies with clear and relatively non-controversial moral reasoning supporting this social standard. At least the mainstream society is usually clear about this issue. Although we may still in our private lives prefer people of certain race, colour etc., and marry preferably someone with similar cultural background or social class, we usually don't want to see the state itself to take these features into consideration when dealing with its citizens and political views questioning basic principle of equality are widely seen as extreme and hardly worth arguing against here.

It is quite clear, that woman and nonwhites were until well into twentieth century widely seen as irreparably deficient in their rational faculties and particularly in their moral capacities. Lesbian, gay, bisexual and transgender persons are facing exactly the same prejudice today. They have been for centuries subjected to homophobia and other forms of intolerance and discrimination, very often within the family circles, and still are subject to criminalization in many countries. "In approximately eighty countries sexual relations among adult members of the same sex are legally prohibited. In Iran, Mauritania, Saudi Arabia, Sudan, and Yemen (plus certain states in Nigeria) penalties up to death may be imposed" (Donnely, J. 2013, p. 278). Marginalisation, social exclusion and violence on grounds of gender identity or sexual orientation are common in many parts of Europe. However, discriminatory treatment, usually defended by religious, cultural and traditional arguments, seems to lose the ground to more liberal and empirical counterarguments.

3. Legal bases for the protection against discrimination on the grounds of sexual orientation

Even without wrestling with tremendously difficult question of what the law really "is", effectively ignoring ages long disputes in legal philosophy, and without even mentioning the words "legal positivism" or "natural law", question of the bases for protection against

discrimination on the grounds of sexual orientation is still very complex. We will, therefore, focus just on selected written law, existing on contractual basis of some sort.

Now, different legal systems clearly produce various levels of protection. Each may relay on a different set of laws, international treaties, their alternative interpretation and judicial decisions. Some recognize sexual orientation as an illegitimate bases for discrimination, others clearly (or less clearly), do not. The UN Universal Declaration of Human Rights, a resolution of UN General Assembly (1948), for example, proclaims inherent dignity and equal and inalienable rights of all members of the human family based on equality, but at the same time de-facto exclude gay man, lesbians, and other sexual or gender minorities from the full protection. Its Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" but fails to mention sexual minorities directly. "Such explicit listings reflects extended and difficult, often violent political struggles – essential to strong and ambiguous protection. The list of protected groups provides a record of the successful struggles by excluded and despised groups to force full (or at least formally equal) inclusion in political society" (Donnely, J. 2013, p. 275). The failure to mention LGBTI people among the protected groups has practical impact on life of many people around the world. They can still be recognized under "other status" formula, but they are often not and thus even the basic protection is not there. Joint statement, one of the latest attempts to remedy the deficiencies, made on 18 December 2008 by 66 states at the United Nations General Assembly, condemned human rights violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests and "deprivation of economic, social and cultural rights", including "the right to health". This statement is very far from requiring equal treatment and even at this very basic level of protection against killings, torture, arbitrary arrests, etc., is supported just by the tiny minority of the member states. UN has had actually 192 member states in 2008, before the acceptance of South Sudan in 2011. But the recent judicial decisions of European courts reflect the grooving social support for the full enjoyment of all human rights regardless of gender and sexual orientation at least in Europe and America. While in many countries around the world gay and lesbian people still have to struggle for mere decriminalization of the same sex relationship among consenting adults, contemporary pluralistic societies, based on liberal political principles, either now publicly debate the ethical aspects of legalizing same sex marriage or have already adopted laws that offer some legal

recognition to the same sex couples. (Twenty-four out of the forty-seven Council of Europe member States have already enacted legislation permitting same-sex couples to have their relationship officially recognized as either a legal marriage or some form of civil union.) Same sex marriage or civil union is probably the most prominent contemporary LGBTI political issue, related to the discrimination on the bases of sexual orientation, debated in Europe. Progressive development within the Council of Europe member States is truly outstanding and the scope of European Union legislation has grown significantly as well. "Only a decade ago, a student of EC (European Communities) discrimination law would have known of only two grounds of discrimination: nationality (subsumed within the general analysis of single market legislation) and sex discrimination. There has been a dramatic increase in the scope of EC discrimination law since then, in particular after the incorporation of Article 13 EC by the Amsterdam treaty. EC law now regulates discrimination on grounds of sex, gender, race, ethnic origin, religion or belief, sexual orientation, age and disability" (Chalmers et al, 2007, p. 873). This dramatic progress is, however, an issue of intense moral controversy for many Europeans with strong religious or political beliefs (Catholics, Muslims, some conservatives, extreme right, etc). Problem of the legal protection against discrimination based on sexual orientation highlights important connections of legal philosophy with other departments of philosophy, especially normative ethics and political philosophy. Legal philosophy is therefore sometimes regarded as an empty one. As a consequence to this, legal philosophy has to take up one or another disputed philosophical position on problems that are not distinctly legal, disputed position, universal nature of which is deeply questionable. This makes the claim of the true universality of the human rights nothing but the political statement and clear example of wishful thinking.

4. Bedrock principles of human rights theory

So what are the universal human rights after all? Well: "There is no agreement as to how we identify human rights. A contemporary view is that human rights is a label for a range of basic moral values claimed to be universal and derived from feelings of respect and sympathy for others, but often involving irreconcilable value differences" (Alder, J. 2004, p. 442). In spite of these seemingly irreconcilable value differences, the idea of universal human rights is very important and well worth of further development. It is the only substantive moral ideal that has come close to almost universal international recognition. Although, paradoxically, we do not agree on its philosophical foundations nor the practical content: "The enjoyment of these rights is seen as central to human

dignity and freedom, as individuals are seen as incapable of living a decent life without these guaranties" (Chalmers et al, 2007, p. 233). Some people claim that, they are based upon the idea that human beings have a special "dignity", others that they are somehow revealed by God, others that they are simply "self evident". However, in the absence of a religious belief, it is difficult to see where for example "special dignity" comes from. David Hume, for example, claims that human rights are driven by our natural sympathy for others and that we create conventions underpinning particular ways of life which we desire to preserve. Others following Immanuel Kant, derive them from apparently self-evident rational truths (Alder, J. 2004, p. 442). But the possibility of seeing something a priori, without any prior empirical evidence, requires at least the belief that our consciousness has some pre-empiric or beyond empiric dimension (Tugendhat, E. 2004, p. 14). And that is by no means certain, nor it is truly "self evident". Ronald Dworkin (Justice for Hedgehogs, 2013), for example, argues that certain principles are non-negotiable conditions of democratic society, and therefore some kind of test on government legitimacy. "No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion.

Second, it must respect fully the responsibility and right of each person to decide for himself, how to make something valuable of his life" (Dworkin, R. 2013, p.2). Again, a very impressive theory, but by no means universally accepted one. Furthermore, the very relationship of human rights theory and democracy itself is disputed, because even liberals (at least some of them), actually question whether the simple will of the majority can in fact change anything at all, regarding the existing, once legally recognized, or just imagined, human rights. And, even if we accept some principles as non-negotiable conditions of a democratic society, and agree to protect them against all odds, there are still some people left (like those joining so called: "Islamic state"), to whom other principles, very often religious, are more sympathetic than the democratic ones.

5. Democracy, liberalism and human rights theory

It seems quite clear that liberal political philosophy and its principles underpin much of the contemporary claims of human rights. It is equally clear, that we have no universal answer to "what is the human right" and we would like to have one. Disputes are therefore inevitable and who should have the last word in them is the question of prime importance. Society has, de facto, several options in its choice of the final decision maker. The ultimate decision maker, in case of basic human rights, could theoretically be either democratically elected law maker, referendum, dictator,

some sort of special body, or constitutional court. "It is often claimed that the courts are most likely to produce the "best" outcome, being independent, open and guided by intense rational analysis as a forum of public debate. However, arguments about what is the best outcome merely repeat the disagreement. Unless we agree as to what accounts as a best outcome, we could not agree what mechanism is likely to produce it. There is no universal agreement on this, but giving the last word in disputes over human rights to a court seems particularly attractive to those who wish to impose philosophical-ethical master principles on others but less so to those who rely on pragmatic accommodation between competing interests (Alder, J. 2004, p. 443).

Another tricky question is, whether the democratic society should somehow protect its own accepted human rights standard against being overridden by the democratic lawmaker, and if so, than why? Well, perhaps, because the "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind", the Universal Declaration of Human Rights states in preamble. But are all the human rights that we now have to recognize under the international law, truly essential for existence of the democracy? Is further development of the basic principles, like equality, truly essential for democracy? Well, we think it is, but connection between human rights, and democratic system requires further analysis. If the democracy is understood as the majority rule, than the question, whether the majority will choose liberal attitude is left open. If they choose it, we call the state "liberal democracy". But there is a possibility to hold an opinion, that there is no real alternative to liberal democracy and that democracy is so dependent on liberal ideas that non-liberal democracy is in fact not democracy at all (Jurová, J. 2011, p. 110). Human rights based on liberal thought seem to be a corner stone of democracy. They have in fact, much in common with reproductive system, system of sex organs within an organism, which work together for the purpose of sexual reproduction. Democracy can under extreme circumstances, give birth to regime that cut off, or cripple, human rights legislation and its core principles, but democracy is than not likely to reproduce afterwards and dies. Protection of these rights and principles therefore seems to ensure the reproduction of democratic system, and courts are just guiding and developing these principles, when protecting unpopular minorities. So, unsurprisingly: "The favourite liberal argument in favour of a court (as a final decision maker in disputes over human rights) is that democracy is more than just the will of the majority, that it must be supported by certain basic rights of equality and freedom protected by independent courts against volatility, corruption or foolishness of the majority" (Alder, J. 2004, p. 442). Handing over power to

rule on disputes over human rights to a court therefore seems not principally anti-democratic. It is, as Alder (2004) puts it, a prudent pre-commitment of majority anxious to guard against its own weaknesses, for example a panic overreaction to a supposed threat such as immigration, gay people, terrorism, etc. This can be a particularly important protection mechanism when sexualized moral panic outbreaks. Sexualized moral panics are known from history as "the fear of the masturbation epidemic" that haunted the 18th and 19th centuries, moral crusades against abortion and unwed teenage mothers, anti-pornography campaigns, efforts to criminalize prostitution through attacks on the trafficking of woman, panics surrounding homosexuality, and HIV in the 20th century", and contemporary 21st century fear of the "gender ideology" that spreads in central European Christian communities[3]. What marks each of these cultural happenings as "panics" is the level to which the societal and personal expressions are out of proportion with the threat posed by so-called "folk devils" (e.g. masturbating children, unwed mothers) and evil-doers (e.g. homosexuals) groups (Herdt, G. 2009, p. 12). Therefore: "Just as Ulysses ordered the crew to bind him to the mast and ignore his subsequent pleas to unbind him so that he would not give way to Sirens, or a smoker may ask a trusted friend to hide the cigarettes, by removing fundamental rights from its control, the majority lessens the risk that it will misuse its power" (Alder, J. 2004, p. 443). This approach to human rights, however, does not make everyone happy. It actually makes some people, who want to force other human beings to live in accordance with their particular, often religion based, ideal of a good life, very angry and desperate. Liberal principles of equality and individual freedom are far from universally accepted. Claims of their universality face the obvious problem that the core principles may not be recognized to the same extent, nor interpreted in the same way, in all cultures, and concept of human dignity may be too vague to be applied in practice. Within the religious communities, especially Christian fate based, grooving talk about "the judicial tyranny", in relation to the anti-discrimination laws, is producing absurd conspiracy theories of all sorts and fear of unspeakable evil called "gender". Muslim communities around the world, often unintentionally, produce young people willing to sacrifice their life and life of others, woman and children, to stop the global impact of liberal principles. A desperate fight, that we call "Islamic terrorism" is at least partially motivated by hatred towards "western world" ruled by these political principles, incorporated to the human rights concept.

[3] More about sexual moral panics in general see in: Herdt, 2009.

6. Conclusions

In spite of the difficulties mentioned above there is no other substantive, functioning, comparable moral ideal in contemporary world that has come even close to such international recognition as the idea of universal human rights. There are multiple reasons to it, secular nature of the arguments independent of particular religious teachings, historical experience of certain countries, (Second World War, etc.), development of philosophical thought on justice in certain cultures and political opportunity to spread these moral concepts provided by the economic superiority of some societies in particular times, etc.

Legal bases for the protection against discrimination on the grounds of sexual orientation, is a very complex issue. Different legal systems naturally produce different "universal" outcome.

Each of them relay on different set of laws, international treaties, their alternative interpretation and judicial decisions. This study was not meant to be comparative, but it is quite clear anyway, that gay man, lesbians, and other members of sexual and gender minorities are excluded from the full protection of the United Nations human rights norms. Declaration fails to mention them among protected groups. Its final list of protected groups, provides a record of the successful struggles by excluded and despised groups to force full (or at least formally equal) inclusion in political society, but LGBTI people has not yet won their battle on this stage.

European Convention on Human Rights (1953), under the auspices of the Council of Europe, also fails to name the gay man, lesbians, and other members of sexual and gender minorities among protected groups, but the subsequent recommendations of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals, 924 (1981) and 1474 (2000), 1547 (2007), 1728 (2010), are very progressive, courageous and helpful. Related case law of the European Court of Human Rights consider sexual orientation a prohibited ground for discrimination and its judicature has contributed significantly to the advancement of the law, setting an important precedents.

Only the Charter of Fundamental Rights of the European Union, actually in Article 21, clearly prohibits any discrimination based on sexual orientation. The logic of the full and equal humanity in this document, which was signed on 7 December 2000 and entered into force on 1 December 2009, finally overcame claims of moral inferiority, bringing (at least formal) equal membership in society through explicitly guaranteed protections against discrimination.

Brief analysis of the relationship between human rights, liberalism and democracy suggests that current concept of human rights is based on liberal principles and democracy itself may not be able to continue and reproduce when the core principles of equality and individual freedom are significantly compromised. This seems to be an effective justification for handing over certain powers to the independent courts, in order to protect basic principles against volatility, corruption or foolishness of the majority.

Global trends suggests that neither cultural, traditional nor religious values, nor the rules of a "dominant culture", can be invoked today, in any civilized country, to justify hate speech or any other form of discrimination on grounds of gender identity or sexual orientation. Nevertheless, many gay and lesbian people still have to struggle for decriminalization of the same sex relationship. Some are tortured and killed. According to legal theorists like Dworkin, if government fails to show equal concern for the fate of every single person over whom it claims dominion, and fully respect the responsibility and right of each person to decide for himself, how to make something valuable of his life, it has lost its legitimacy.

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Special Criminal Court for Central African Republic

Abstract
Since 1960 CAR was a place of conflict and human rights abuses. The creation of the Special Criminal Court in the Central African Republic responds to the desire of the whole population to end impunity for the most serious crimes committed in the CAR since January 1, 2003. This article starts with basic information about the latest conflict in CAR. Then it presents brief walkthrough form the moment the idea of hybrid court was started in CAR till its latest developments. It shows the points of focus based on previous experiences with hybrid courts, things which require special attention in order for this idea to result in delivering justice to the people of Central African Republic.

Keywords:
human rights, Central African Republic, hybrid courts, Africa

1. Introduction

The Central African Republic (CAR) is a country of approximately 4.6 million people in the middle of African continent. Since its independence from France in 1960 it goes from one crisis to another, marked by military coups, despotic rule, and national and regional rebel activities. The most recent crisis is the removal of President François Bozizé by the northern based Séléka rebel group on 24 March 2013. Deadly conflicts in the capital Bangui, resulted in displacement of at least 900.000 people. The Séléka group consisted of fighters including significant number of foreign mercenaries from Chad and Sudan and they targeted the majority Christian population. Séléka's actions led to the creation of anti-balaka ("anti-machete" in the local Sango language) militias between August-September 2013. Séléka's actions have straighten the anti-balaka resulting a vengeance upon civilians from CAR's Muslim minority.[1]

[1] Crisis in the Central African Republic, Alexis Arieff, Tomas F. Husted, https://www.fas.org/sgp/crs/row/R43377.pdf

The brutal violence originating on religious identity in Bangui and Bossangoa on 5 and 6 of December 2013, resulted in more than 1,000 people killed between fighting groups of the anti-balaka and Séléka. United Nations (UN) suggested that between 3,000 and 6,000 people have been killed in CAR since December 2013, but the International Commission of Inquiry has called this a "radical underestimate."[2]

Refugees in countries surrounding CAR increased from 200,000 in December 2013 to more than 462,000 as of August 2015. Overall the death toll as well as displacement figures are not complete, they are missing information about people still hiding in the bush. Due to all the actions 2.7 million people (over 60% percent of the population of the country) are in need of humanitarian assistance. In April 2015 United Nations stated that CAR is "the world's largest forgotten humanitarian crisis of our time."[3]

The UN estimated also that since December 2013 around 80 percent of Muslim population has been forcibly displaced or killed in CAR. International Commission of Inquiry also suggested the Muslim population of Bangui has been reduced to 1 percent. Tens of thousands of Muslim civilians left the capital and western provinces looking for shelter in surrounding countries. Those who stayed in the country have been forced into enclaves by the anti-balaka. Many remain systematically encircled, cut off from food and medical supplies, and face an ongoing threat of attack.[4]

Violence which shook the country in 2013–2014 especially in the religious dimension was just one episode in a long running political and security crisis. Weak state or even almost absent at times in some parts of the country as well as governance characterised by exclusion and monopolisation of economic resources by a small elite resulted in weak legitimacy. The inability of the CAR as a country and the national army lacked ability to exercise their sovereign functions and impose a minimum of security allowed the creation of armed groups using violence as a mode of governance. Spill-over of security crises in neighbouring Chad, Sudan, the Democratic Republic of the Congo, and Uganda contributed to destabilising CAR.[5]

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[2] Picking up the pieces? The 'protection gap' in CAR, Veronique Barbelet, http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9471.pdf

[3] United Nations High Commissioner for Refugees, "UN: Central African Republic at risk of becoming the world's largest forgotten humanitarian crisis," http://www.unhcr.org/553e49ec6.htm

[4] Report of the UN Secretary-General on the protection of civilians in armed conflict, United Nations Security Council, http://www.derechos.org/nizkor/iraq/doc/protecivil1.html

[5] Crisis in the Central African Republic, Alexis Arieff, Tomas F. Husted, https://www.fas.org/sgp/crs/row/R43377.pdf

With the conclusion of the Bangui Forum on 11 May 2015 – a national forum bringing together close to 600 state and non-state delegates to address the CAR's political, economic and security problems resulted on decision to go on a path towards rebuilding peace. The Republican Pact for Peace, National Reconciliation and Reconstruction adopted a list of future measures including a truth commission, local peace and reconciliation committees, an investigative commission. The agreement also reaffirms support for the creation of a Special Criminal Court for the CAR. In April 2015 the National Transition Council did adopted a law establishing hybrid entity composed of national and international officials within the domestic judiciary. It can investigate gross violations of human rights and international humanitarian law committed on CAR territory since 1 January 2003. The law states that the court will have a five year, renewable mandate until it get automatically dissolved after all cases will be judged. Interim President Catherine Samba-Panza promulgated this law on 3 June 2015.[6]

Although the International Criminal Court (ICC) Prosecutor Fatou Bensouda declared in September 2014 opening an investigation into crimes allegedly committed in the CAR since 2012, the creation of a Special Criminal Court is seen as a useful complement to the ICC's actions. Hybrid courts hold promises of greater local ownership of justice processes as well as closer proximity to victims and this positively impacts on society. Hybrid courts contribute to building domestic judicial capacity and drive local civil society to support for the Special Criminal Court. The court should give justice for mass human rights abuses in the CAR. Still important challenges exist, the key aspects concerning the design and workings of the Special Criminal Court need to be clarified.[7]

2. Special Criminal Court

East Timor, Sierra Leone, Cambodia, Kosovo, or Lebanon those are other hybrid courts that can tell us what to expect. They are naturally a more legitimate and effective justice option than international or domestic ones. Still what we see in those countries is failing to deliver on their justice promises due to lack of resources and political commitment. Those issues cause delays in the establishment

[6] The uncertain promise of hybrid justice in the Central African Republic, Valérie Arnould, http://www.egmontinstitute.be/wp-content/uploads/2015/09/APB14.pdf

[7] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx

of courts. This can result in weak legitimacy and public support for these courts. Therefore proper funding and human resources are needed for implementation of the Special Criminal Court, so it can start investigations before the entire court is set up. This will allow the court to proceed with indictments and prosecutions relatively rapidly once it is established. Hybrid courts need substantial and long-term financial commitment as well as secure premises, experienced staff and also resources for victim and witness protection. Based on Special Court for Sierra Leone we know that budget around 300 million dollars allowed for it to operate for 11 years, during which it issued 13 indictments and conducted 11 trials. Extraordinary Chambers in the Courts of Cambodia (ECCC) needed 204.5 million dollars to run from 2006 till 2014 with prosecution of five accused in that time. Therefore it needs to be understood that justice by a hybrid court can't be achieved in a few years and on a minimal budget, Special Criminal Court for CAR needs proper funding.[8]

The law establishing the Special Criminal Court for CAR states that its funding will come entirely from donations. UN Peacebuilding Fund gave 10 million dollars for funding this court. In May 2015 European Commission decided to designate 72 million Euros (almost 80 million dollars) this should show other possible donors that it's a good idea to support reconstruction and peace efforts in the CAR. For sure contributions from UN mission, MINUSCA (United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic), or ad hoc donations could help at the beginning, need for a specific donor-funding structure for the Special Criminal Court will be crucial to ensure sustainable funding.[9]

Another parallel issue is right selection of court staff as well national as international to ensure appropriate expertise, effective leadership and proper administrative structure. Based on the creation law we know that internationals will work alongside national staff though a majority of staff, including judges, will be nationals. This is an opportunity for the Special Criminal Court to properly use domestic capacity and greater local ownership not to have mostly international presence in the court. Assurance for national staff, in particular senior level needs to be given so there will be no political interference so they won't undermine the independence and

[8] Hybrid Courts, http://www.internationalcrimesdatabase.org/Courts/Hybrid

[9] CAR gains $78.6M in new funding, but is it enough?, https://www.devex.com/news/car-gains-78-6m-in-new-funding-but-is-it-enough-86243

legitimacy of a court. A balance between promoting local ownership and judicial independence is most likely the biggest challenge for this kind of courts.[10]

For Special Criminal Court to operate effectively it needs certain political commitment from national and international players. For now support for the court appears strong amongst Central African political actors, they did back the proposal for a Special Criminal Court at the Bangui Forum. Still presidential and legislative elections are set for October and November 2015 and this can result in huge change in current political approach. Current President Catherine Samba-Panza, a strong supporter of this solution, as well as members of the transition government are not allowed to take active part in the incoming elections. Also support for Special Criminal Court seen on Bangui Forum is not equal to political help in the implementation phase. Since court will not be setup before elections pressure from civil society and interested donors as well as MINUSCA will be essential to secure Special Criminal Court support under the post-election government. The law allows MINUSCA to be involved in the future of the court not only from logistical and financial point of view but also with political support. It can have a say in properly prioritising the pursuit of justice and also to ensure appropriate ownership of the Court. Issues like execution of arrest warrants, security provisions for the Court and its staff, and the provision of witness protection can also be talked over with United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic.[11]

Next challenge is dealing with the insecurity which continues to affect large parts of the country, se security situation remains fragile, non-state armed groups continue to operate and abuse local populations in other parts of the country. For the moment there is a limited prospect for strengthened security using national army, since it lacks equipment, professionalism, and motivation. Also the Séléka alliance of northern rebel groups and the nebulous anti-Balaka militias will make restoring security more difficult, since not all feel bound by the disarmament agreements concluded at the Bangui Forum. If investigators and judges can become vulnerable to threats and intimidation it will discourage people from working for the court. Security risks are high it can be is illustrated by a recent incident in which supporters

[10] Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform Ethel Higonnet, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1005&context=student_papers

[11] United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic, http://www.un.org/en/peacekeeping/missions/minusca/

of the former ruling party, Kwa na Kwa, and alleged anti-Balaka members forcefully entered court premises in Bangui to extract the party's secretary-general, Bertin Bea, who was on trial for inciting hatred and troubling public order.[12]

CAR transitional government made a second referral to the Court in May 2014, requesting it to investigate crimes since 1 August 2012. Therefore judicial mechanism is already in place to investigate atrocities committed in the country. A law framework regarding relationship between different jurisdictional levels is set. Article 37 states that the ICC has priority jurisdiction over the Special Criminal Court when the ICC Prosecutor "is seized of a case entering concurrently in the jurisdiction of the ICC and the Special Criminal Court". The law also states that after full creation of Special Criminal Court, it will have primacy over other domestic courts for crimes falling under its jurisdiction. This is a hierarchical structure of jurisdiction and it creates a system of "reverse complementarity" between the ICC and the Special Criminal Court. Still there is no mentioning about Special Criminal Court being restricted to mid-level or lower ranking perpetrators. In fact, Article 37 states that the ICC and SCC have 'concurrent jurisdiction' rather than 'complementary jurisdiction'. There is nothing preventing Special Criminal Court from focusing its investigations and prosecutions on those 'most responsible'. Still ICC Prosecutor's new strategic plan outlines an intention to focus on limited but higher quality investigations, so most likely ICC will allow Special Criminal Court to take the initiative. Still if Memorandum of Understanding between the ICC and Special Criminal Court is planned it's important to present more details into the nature of their relationship [13]

Also important is the question of scope for Special Criminal Court's planned investigations. For prosecutors in order to function effectively it will be to have a clear and transparent strategy on case selection. What kind of incidents will be investigated and which individuals will be targeted for prosecutions, also it will be good to have some kind of priority established as well. In an ideal world Special Criminal Court would most likely want to put into trial all perpetrators, but limited resources can prevent it from doing so. Therefore a strategy for case selection is important and not only for the court but also to have perceptions about what the Court can or cannot practically achieve. The case selection decided by the Special

[12] The uncertain promise of hybrid justice in the Central African Republic, Valérie Arnould, http://www.egmontinstitute.be/wp-content/uploads/2015/09/APB14.pdf

[13] The ICC Prosecutor's New Draft Strategic Plan, Alex Whiting, https://www.justsecurity.org/24808/icc-prosecutors-draft-strategic-plan/

Criminal Court will affect perceptions of its legitimacy, since it can be seen as fair and reflecting local experiences of the conflict or, in contrast, as overly selective and politicised.[14]

Theoretically the court can investigate senior, mid- or lower-level perpetrators no matter if they are members of state or non-state armed groups, still the idea is that Special Criminal Court will focus on non-state armed groups. Never the less court might be inclined to focus on more senior level perpetrators. However, identifying these might be hard, despite preliminary investigative work done by the UN's International Commission of Inquiry due to the fragmented nature of the rebel and militia groups. Targeting nominative leaders of the various factions of the rebel groups may not reflect chain of command reality. Also a politically motivated temptation to only go after some renowned rebel leaders or even former presidents François Bozizé and Michel Djotodia, can result in serving political purposes first and pushing justice to a second place. Therefore Special Criminal Court should find a balance between going after symbolically important cases and those who were really responsible for the devastating attacks which resulted in mass atrocities. [15]

Since there is still ongoing insecurity, operational ability and expediency, the Special Criminal Court may at first go for focusing on events in Bangui, which can result in incomplete justice to victims and reproducing a partial historical reading of the country's conflicts. Also since the Court will be operation form Bangui it can have limited visibility and reach to victims in remote areas. Therefore a form of decentralised Special Criminal Court should be considered. The law already provides such a possibility in its Article 2. This can cause logistical challenges and financial constraints for sure, but at the same time can be crucial in ensuring that the Special Criminal Court delivers fair and balanced justice.[16]

It should also be pointed that the Court has a mandate not only for 2012–2014 conflict, but also crimes committed during earlier conflicts and Bozizé's coup d'état in 2003. That considerably expands the possible workload of the court and

[14] The uncertain promise of hybrid justice in the Central African Republic, Valérie Arnould, http://www.egmontinstitute.be/wp-content/uploads/2015/09/APB14.pdf

[15] The International Commission of Inquiry on the Central African Republic - Final report (S/2014/928), http://reliefweb.int/report/central-african-republic/international-commission-inquiry-central-african-republic-final

[16] Situation in the Central African Republic II Article 53(1) Report - https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Art%2053%201%20Report%20CAR%20II%2024Sep14.pdf

highlights the need for a clear policy on case selection. This also raises questions because of a 2008 amnesty law which could partially protect some combatants and rebel leaders from prosecution if there were also active in the events covered by that law. Still war crimes, crimes against humanity, and genocide are expressly excluded from the amnesty. The status of the 13 October 2008 amnesty law and its relation to the Special Court should therefore be clarified as soon as possible.[17]

3. Conclusion

Since 1960 they year CAR started to be a country independent from France conflict and human rights abuses were one of it's constants. Therefore the idea to create hybrid justice mechanism through the Special Criminal Court in the CAR received enthusiastic response from the world. It provides an alternative to end impunity. Still it has challenges ahead that need to be dealt with to have successful pursuit of justice in the CAR. First of all it's proper funding. Special Criminal Court also needs independence to result in a justice with sufficient degree of legitimacy. It also requires enough capacity to deployment of an advance team of experts to move forward with initial investigations. There are also security measures to be put in place to ensure the court can carry out its activities with impartiality. A constructive cooperation between Special Criminal Court and ICC needs to be created as well. Also the pursuit of justice in the CAR needs to be locally embedded. There should also be public communication about the court in order to manage expectations about what it can or not achieve. Still the world has high hopes for this solution and it's actions to be performed in the future.

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Religious intangible heritage. The protection of religious traditions in Spain and in the Autonomous Community of Valencia

Abstract
The efforts that have been done by Spanish legislation, both a State level as, specifically, in the region of Valencia to preserve and to protect the religious intangible heritage that exists in Valencia. In the first part it is studied the legislation. The second one refers more deeply to the legal norms about the individual manifestations of popula religious tradictions declared by the Autonomous Community of Valencia. So, the work starts with the foundation of the legal question in the Spanish Constitution of 1978 which guarantees the "cultures, traditions, languages and institutions" and shows the obligation by the Spanish State to protect and preserve the "historical, cultural and artistic heritage of the peoples of Spain"; the Spanish Law about this subject; the Statute of Autonomy of the Valencian Communit; valencian general rules on Cultural Heritage, and finally, the particular ones where is declared as a cultural intangible heritage each one of the facts with a religous nature. These regional laws are studied depending on its importance. first, the ones concerning valencian religious tradition who have reached the recognition by UNESCO as Intangible cultural heritage, and then many others religious traditions with only a regional recognition.

Keywords:
intangible heritage, religion, culture, festivals, folklore, legislation, protection

1. Some remarks on Law, culture and religion

A great number of Valencian folk traditions with a religious nature has been recognized by the Law as intangible heritage. With the aim to preserve and to protect these traditions belonging to Valencian (and Spanish) culture, it had been done several efforts in the Spanish legislation, and also, specially, in the legislation of the Autonomous Community of Valencia, but this paper is only focused on Valencian

intangible heritage with a religious nature. However, as we will see later, there is a considerable amount of those religious traditions that have been protected and that can be a good paradigma for the legislation on this subject by the Legislator in other countries.

In order of that, it's necessary begin this research introducing the general legislation, both Spanish as Valencian one, concerning this topic. General legislation is the basis for the undertanding of the specific laws; later they will be referred more specifically the specific Valencian rules where individual manifestations of folk religious intangible traditions have been declared. Culture and religión are important subjects for the society and the individuals in each country. Public Powers cannot forget these issues as a great social factors which are born or have been created by the individuals and by the society, and also because they cooperate in the social growth of the society itself. So, legislation in this field is indoubtedly necessary.

However, at least in most of Spanish legislation about this subject, it happens the inclusión of religion inside culture as a global subject. In some cases, this could be the result of an inconscious fact, but in some other cases the origin of that is in the laicist ideology. It`s clear that some aspects of religious traditions, as inmaterial heritage, can be considered a part of the culture in a wide sense. But this has the risk to damage the religious freedom: it's allowed to ask if, in the case in which the religious traditions are declared as intangible heritage, it means that they become also "intangible" for the religious confession or for the religious community where that heritage has been born and has been developed? It means that a Church or a religious confession won't be able to change his own religious tradition for a religious motivation?

In that case, the declaration as intangible heritage will be a good issue for the culture and, also, for the society, but really it won't be necessarily a good thing for the religion or for the religious society whre the tradition is performed. The problems related to protection of the cultural heritage and religious freedom has been researched in Spain since the eighties by Aldanondo Salaverria (1987). So, that is out of the field of research of this paper, which only aim is is to show the positive aspects of the legislation on this subject.

2. General Spanish rules on culture

Spanish Constitution, that it was approved in the year 1978, guarantees, among other items, the "cultures, traditions, languages and institutions" and it establish that Spanish State must protect and preserve the "historical, cultural and artistic heritage of the peoples of Spain".

The legal development of this constitutional statement is contained in the Law on Spanish Historical Heritage (Ley de Patrimonio Histórico Español) approved on 25th June 1985. Among other stetements, there is defined what are those goods so-called "of cultural interest": bienes de interés cultural (Martínez Abaco, 2011).

By the other hand, this general Law, which have his jurisdiction in the whole Spanish territory, also defines the concept of "heritage"; and it is done in a very large sense; so, the heritage can be composed by intangible godos, moreover than tangible ones. Finally, the Spanish Law establishes the administrative procedure that is needed to declare each one of the goods related to the cultural religious intangible tradition as belonging to the historical heritage (Querol, 2009).

Logically, the concept of "good of cultural interest", as it is said in the Spanish general Law, it is also located in other laws with an autonomic or regional application. So, the autonomous communities, such as Valencian one, who have assumed the responsibility in the subject "culture" and they are in charge on that issue in their respective territories, didn't hesitated to rule the cultural heritage, as Crespo Hellín (1993) emphatizes.

Also, it must be mentioned the Convention for the Safeguarding of Intangible Cultural Heritage, approved in 17th October 2003, due to Spain has agreed and joined that Convention. So, the Article 2.2.c) of this Convention considers that intangible cultural heritage is manifested, among others by "social practices, rituals and festive events", and cultural heritage is defined (Article 2.1) as "the practices, representations, expressions, knowledge and techniques, together with the instruments, objects, artefacts and cultural spaces associated therewith them, that communities, groups and, in some cases, individuals recognize as an integral part of their cultural heritage".

This article of the Convention do not uses the words "religion" or "religious" (as it is usual in most of rules on this issue); so, it says that intangible cultural heritage "is transmitted from generation to generation; It is constantly recreated by communities and groups in response to their circumstances, their interaction with nature and their history; with a sense of identity and continuity, thus helping to promote respect for cultural diversity and human creativity".

It is very important that "communities and groups" are the subjects allowed to make the transmission from generation to generation of the intangible heritage. That fact not only suggests, but clearly it estates, that all intangible cultural heritage, including the religious ones, must be a traditional issue. It is due to the fact that, without the transmission from one generation to another generation, it can't be an

authentic tradition. In addition, as a consequence of it, intangigle heritage must be still alive nowadays, due to it must be constantly recreated by the groups transmissors, although many of its current manifestations would be threatened by a sad lack of appreciation, understanding or interest by the younger generations (De Cabo, 2009).

On the other hand, and despite of it has been said before, intangible religious heritage is implicitly included when Article 2.2.c) of the Convention refers to "social practices, rituals and festive events" because most of that rituals and feasts have a religious nature.

Rules about religious intengigle heritage at all legal levels, in my opinion, are a good exemple of a factual depiction of the inculturation of the folk religious feelings in the legislation. Those rules are usually enacted to protect a reality or an activity that appears in all cases as a cultural one. That is the reason that explains that such regulation is done without explicitly mentioning the undeniable religious nature of that activity or reality; on the contrary, in most cases they only make mention to the cultural, historical and ethnographic implications of this activity. In this case, the above implications conceal (though not always get hide) their origin, development and survival in our days through the practice of religious devotions or conducting undubtedly religious activities. Furthermore, that devotions and religious practices are usually performed not only by individuals, but by some people which have achieved a high level of organization; and this fact is a great help in order to intangible religious heritage could be transmitted from generation to generation.

Finally, as it is known, in Spain, intangible heritage is related to Catholic Church, or to the Christianism in a wide sense, as Campos y Fernández de Sevilla (2013) remarks. Obviously, in Valencian Autonomous Community it happens the same.

3. Valencian general rules on culture

By the other hand, it`s evident that Valencian rules about culture and cultural heritage must have a constitutional basis. So, Article 148 of Spanish Constitution establishes that the autonomous communities may assume competences relating to "fostering the culture". Thus, as a consequence of that constitutional statement, the Statute of Autonomy of the Valencian Community (Estatut d'Autonomia de la Comunitat Valenciana), approved by the Organic Law 17/2006, of 10th April, where it is amended the former -and first- Valencian Statute of year 1982, is able to regulate that subject. So, its preamble provides that the regional government "must protect the values of Valencian people, its historical heritage, its culture, its traditions and customary activities"; and the Article 49 of the Statute mentions the

subjects with a Valencian exclusive jurisdiction, where are included "culture" (in the Article 49.1.4) and "historical and artistic heritage" (in the Article 49.1.5).

In addition, other articles statutary regulate some institutions related with culture, as the Article 40, where it is regulated the "Consell Valencià de Cultura" (Valencian Culture Council), a very expertised entity on culture and heritage; as well as the Article 12, where it is established that the Valencian regional government has the duty to defend and promote the right of access to culture and the cultural diversity of Valencian Community for all its citizens.

And finally, it is very interesting, and also really surprising, the Article 57 of the Valencian Statute, that gives to the Royal Monastery of Saint Mary of the Valldigna (Reial Monasteri de Santa Maria de la Valldigna) the character of "spiritual, historical and cultural temple of the región" and it allows that this Monastery could have an specific Law, such as Law 10/2008, 3rd of July. Really, it's an odd declaration in a non confessional Public Administration (Bonet Navarro, 2008).

Out of these statutary rules, and developing the regional competences, the cultural heritage subject has been ruled many years ago. Since the first Valencian Law on Cultural Heritage (Llei de Patrimoni Històric Valencià), born on 11th June 1988, as the later reforms as Law of 9th February 2007, among others, they are the legal response to the needs of Valencian society about to seek the protection and boosting of its cultural heritage, due to Valencian Autonomous Community has numerous cultural tradition, most of them with a religious nature, as a consequence of the big dynamism of the Valencian society. So, one of the most important principles of the Valencian rules on this subject is to reinforce the protection of intangible heritage (López Beltrán de Heredia, 1999).

In order of that, Valencian Law says that intangible cultural heritage is a part of Ethnological Heritage where it is included a lot of ítems, such as "creations, knowledge, skills, and the most representative and valuable practices of life forms inside the Valencian traditional culture"; as well as "the expressions of the traditions of the Valencian people in their musical, artistic, gastronomic and leisure or entertainment demonstrations, especially those that have been the subject of oral transmission".

Finally, in this issue it must be added a new Law that emphatizes the importance of Valencian intangible heritage, among others. It is the Ley (Act) 6/2015, of April 2nd, about Recognition, Protection and Promotion of the Hallmarks of the Valencian people (Llei de Reconeixement i protecció de les senyes d'identitat del Poble Valencià), where, the Article 6, says that they are recognized as hallmarks of the

Valencian people, among others the monasteries of Saint Mary of Puig (Monasteri de Santa Maria del Puig), and Saint Mary of the Valldigna (Santa Maria de la Valldigna), in its fourth ítem, and "Valencian goods declared as a World Heritage Site, and Valencian Cultural Heritage", in its seventh item. So, here are implicitly included all the Valencian traditions declared as intangible heritage.

There are other regional rules in this field, such as the agreement between Valencian government and the Catholic Church on cultural heritage and many rules that declare different traditions as "bien de interés cultural" (in Sapnish) or "bé d'interés cultural" (in Valencian): good with a cultural interest, with an intangible nature, where many of them have a religious content.

Any such rules, that later they will be explained more accurately, not only contain the so-called "declaración de interés cultural" (statement of cultural interest), but a deep description of the contents of each intangible religious and traditional Feast or activity that it is declared in each of them rules, its roots and historical circumstances, its proceedings or enforcement rituals, its actors, its times and places, its material recourses such as clothes, supplies, songs, and everything that is connected with popular cultural tradition with a religious nature.

Thus, these rules, in my opinion, have a very great importance, because they serve to protect the religious intangible traditions, to fix the way that they came to our days, and to prevent its loss or modification in the future. In order to achieve that purposes, in some cases, these Laws create administrative institutions.

4. Valencian religious traditions with the recognition as World Intangible Cultural Heritage

4. 1. Some remarks about World Intangible Cultural Heritage

In 1972, UNESCO (United Nations Educational, Scientific and Cultural Organization) signed the Convention on the Protection of World Heritage, which did not take into account the intangible heritage but only natural and cultural ones.

However, the concern within UNESCO on this field has been growing; after the appearance in 1997 of Masterpieces of the Oral and Intangible Heritage of the Humanity, which offset the lack of the 1972 mentioned program. As it has been said, the process of recognition of the importance of intangible cultural heritage resulted in the adoption, provided by UNESCO, of the Convention for the Safeguarding of the Intangible Cultural Heritage, in 17 October 2003, where is absolutely relevant the definition of intangible cultural heritage in Article 2.

The intangible cultural heritage, as defined above, is manifested particularly in the following areas:

a) Oral traditions and expressions, including language as a vehicle of intangible cultural heritage; b) performing arts;

c) Social practices, rituals and festive events;

d) Knowledge and practices concerning nature and the universe; e) traditional craftsmanship.

Based on the above definition, it is clear that cultural heritage to real or personal property, namely monuments or objects, but must include the traditions or living expressions inherited from ancestors and that can be transmitted is not limited to the descendants (Hernández Ayala, 2011).

In addition, the fragile intangible cultural heritage is an important factor in order to maintain the cultural diversity in the globalized World, and it contributes to the dialogue and the respect between the cultures and the different lifestyles. Its importance is not only for the cultural manifestation itself that it is in each good declared as cultural heritage, but also by the knowledge that it is transmitted by generation to generation and that it has a high social and economic value. As a result of that fact, the safeguarding of the assets declared as intangible cultural heritage, is, on the one hand, that the recognition is maintained as such assets to the community in which it arose, and on the other hand, that the transfer must occur continuously from one generation to another.

But it should be noted that what has been said not mean that the safeguard of intangible heritage remains "fixed" necessarily to its original or primitive way, with no possibility of evolution, but safeguarding occurs also in the transfer of knowledge or techniques. Thus, the protection means strengthening the conditions for continuous evolution and interpretation of the intangible cultural heritage and its transmission to the successive generations. Therefore, the measures for safeguarding of the intangible heritage should be different from those ones applicable to the protection of cultural heritage as it is possible that the during the process of necessary transmission of intangible heritage some elements could be changed or disappeared.

So, it would be possible that a religious confession could introduce modifications in"its" religious tradition, althoug it would be declared as an intangible heritage.

4.2. Valencian World Cultural Intangible Heritage

Most of the feasts and events that have been declared as Valencian intangible heritage are an undoubtedly popular or folk piety manifestationa, or they have a clear religious nature. Here they are included the two most important Valencian cultural intangible

heritage which have so much relevance and knowledge that they have reached to be recognized by UNESCO as World Intangible Cultural Heritage.

The first of them is the "Misteri d'Elx" (The Mistery, or The Mistery of the city of Elx), that it is ruled by the Valencian "Ley" (in Spanish) or "Llei" (in Valencian) –Act–13/2005, of 22nd December. In 2001, before the promulgation of Valencian Law, the Mistery had been recognized bu UNESCO as Masterpiece of World Oral and Intangible Heritage, and after, in 2008, as World Intangible Heritage.

The Mistery is a medieval religious drama performed during two days: "La Vespra" (The Eve) and "La Festa" (The Feast), on 14th and 15th of August, where is depicted the death, assumption and coronation of the Virgin Mary. It has several choral dramatic elements, with sings that they are sung in Valencian Language. It is performed by many people.

This long and accurate Valencian Law has, among a lot of other statementes, a significant Chapter V where they are articulated some measures for the preservation of The Mistery and its promotion under the legislation on cultural heritage, patronage, intellectual property and trademarks. It is inspired by UNESCOS's guidelines and the World Intellectual Property Organization (WIPO) on the protection of traditional popular manifestations and intangible cultural heritage (Castaño García, 2006; Furnell, 2009).

Second Valencian religious intangible heritage one recognizeb by UNESCO since 2011, is the "Festa de la Mare de Déu de la Salut d'Algemesi" (Virgin of Salut -that means Health- Feast in Algemesi village); ruled by "Decreto" (in Spanish) or "Decret" (in Valencian) –Decree– 117/2010, of 27th August.

According to the traditional memory, the image of the Virgin of "la Salut" was found in XIIIth century, around 1247; however, the first new about the celebration of the Feast is in the year 1610. The Feast is held annually, and it is divided in four events that took place sin the last days of August to the 8th of September :

First one, is named the "Novena de la Mare de Déu" (The Virgin's Nine Days of Prayer" (that it is held from 29th August to 6th September); second one is the "Volta" (Ring), that it is performed two days before the Feast of the Virgin, when a group of "dolçainers" (a typical Valencian flute players) walks by the itinerary of the procession announcing the arrival of the Fest. Third one is the "Vespra del Dia de la Verge" (the Virgin's Day Eve) they are performed some other acts that I can't explain now. And finally, the fourth one is the "Dia de la Verge" (Virgin's Day), on the 8th of September, when it take place two processions: the one by the morning is named "La processioneta" (The Little Procession), and by the afternoon, the second and most important one is named "la Volta General" (The High Procession).

In this Feast they are perfomed several folk dances which have a long tradition and ancestrial origins, as well as human towers, and they are sang traditional melodies such as "La Muixeranga" (Domingo i Borràs & Jarque, 1999).

Finally, it is a third Valencian World Intangible Cultural Heritage, which it is cronologically, the second one, due that it was recognized by UNESCO since 2009. It is the "Tribunal de les Aigues de la Vega de Valencia" (Water Court of Valencian), that it is only indirectly related with religion, due to its jurisdictional sessions always take place in front of one of the doors of Valencia's Cathedral: the Apostles one. In early times its jurisdiction was acted inside the muslim mosque, but after the Christian conquest, the Court went of the new Christian temple due to the muslim affiliation of most part of the people that would be judged and that didn't were allowed to be into the Church (Sala Giner, 2013; Bonet Navarro, 2014). The recognition as intangible heritage by Valencian rules was done by Decree 73/2006, of 26th May.

5. Other Valencian religious traditions recognized as intangible heritage

As it has been said, there are many others religious traditions recognized as an intangible heritage but with an only regional framework. Most of the traditions that, by the moment, have been declared as intangible heritages have a religious content. In a chronologic order, they are:

5.1 "El Betlem de Tirisiti d'Alcoi" (The Tirisiti's Nativity in the city of Alcoi)

The so-called Tirisiti's Nativity, due to the name of one of its characters, was ruled by Decret (Decree) 192/2002, of 26th November. This Decree describes this intangible heritage as "a puppet show that gathers in its argument, religious elements and various elements that reflect local customs, traditions, and unique facts of Alcoy" and that the Decree describes all that things in a great detail: the characters, the dialogues, the songs, the atrezzo and the meaning and the originis of each of those elements (Grau & Lloréns, 2005).

5. 2. "El Camí dels Pelegrins de Les Useres (The Pilgrim`s Way at the village of Les Useres)

The Pilgrim`s Way was ruled by Decree 40/2007, of 13th April, which declares the religious way as a Natural Monument, and it is defined as "a secular customary event preserved thanks to the popular fervor" consisting of "a unique penitential procession

involved residents of this town" and that it is described very accurately as well as its elements. In addition, Article 3 refers to the protection and preservation of "cultural heritage of the way, both tangible and intangible" (Gómez Labrado, 1995).

5. 3. "La Tamborada d'Alzira" (Drum Play in the city of Alzira) and "La Rompida de la Hora de Alcora" (The Broken Time in the village of Alcora)

The third Valencian rule include two related religious traditions, which are two Feast with common elements. The "Tamborada" in Alzira and the "Rompida de la Hora· in Alcora are both related with Holy Week. So, the name "Rompida de la Hora" could be translated as the Broken Time due to that "time" is referred to the hour of the Death of Jesus Christ. Both religious intangible heritages are ruled by the same Decree: 1/2012, of 13rd January, due to the fact that both traditions have its origins in the celebrations of Holy Week.

The "Tamborada" of Alzira is performed by drum bands owned by fraternities of the Holy Week of Alzira village. These drum band date back at least to year 1539, when musical accompaniments and chorus played the so-colled "motets" songs, and played a typical Valencian drum called "tabal". Easter and Holy Week is structured in eighteen Alzira's brotherhoods or penitential fraternities, counting each one with its owm drum band.

The "Rompida de la Hora de Alcora" is an attractive Feast due to the strong sound of the so many drums which carry a great mysticism and make a magic attraction even to the most skeptical people. Hundreds of visitors flock to the townof Alcora to witness the religious Feast respecting the pain with a respectful and terrifying silence, broken only by the sound of the drums.

5.4. "La Solemnitat del Corpus Christi en la ciutat de Valencia" (The Corpus Cristi celebration in the city of Valencia)

The Corpus Christi celebration in the Valencia City) is ruled by Decree 92/2010, 28th May. The Corpus Christi celebration has been, for centuries, the main Catholic Feast in Valencia City. It dates back from to 1372, when the Feast of Corpus was performed by the request of the bishop of Valencia, Cardinal Jaime of Aragon. Since that year, this annual celebration was developing all of their characters, dances, cars and parade riding, and it became a meeting place for all spiritual, and religious heritage, including identity aspects of the city and its inhabitants during several centuries. It has been even repeated and adapted for the entry of kings and emperors, and other extraordinary occasions (Moraleda i Monzonís, 2000; Beneyto Berenguer, 2013).

5.5. "La Cavalcada dels Reis Mags d'Alcoi" (The Riding Parade of the Three Kings in the city of Alcoi)

The Three Kings Parade -or Riding- in Alcoy City is ruled by Decree 199/2011, of 23rd December. The origins of this Parade dates back to year 1866. It is an special and unique parade not only because of its age or to be the first one in all Spain, but by its configuration and contents which allow that it stays true to its meaning and it perfomes with a greatest likelihood the arrival of the Three Kings and the Adoration of the Child Jesus, performed on the night of each 5th of January, the eve of the Epiphany. It is kown as the first Three Kings Riding in all Spain (Espí Valdés, 1974).

5.6. "La Santantonada de Forcall" (Saint Anthony's Feast at the village of Forcall)

The Saint Anthony's Feast in Forcall is ruled by Decree 10/2012, 5th January. It is a form of ancient popular and folk religious celebration that it was later mixed with some ethnological aspects in a long historic process. It is a celebration where tangible and intangible is strongly combined, and where it interspers several and different elements such as folk theater, fires, symbolic figures of the traditional infernal bestiary, carnival components, pyrotechnics, shared food, presence of a tree called "Maio", festive sociability, music, dancing and traditional games and magic rituals of fertility, leading to a very rich and fascinating composition.

All of these elements turns around a popular theatrical performance of the Saint Anthony's life, that it is linked to the burning of a cabin or wooden Little house, where a lot of unique characters appear. All these drama representations have a considerable antiquity, because in the Middle Ages they were widespread all around Europe.

5.7. "El Ritual del Pà Beneït de La Torre de les Maçanes" (Blessed Bread Ritual at the town of La Torre de les Maçanes)

The Blessed Bread Ritual in Torremanzanas is ruled by Decree 153/2014, of 26th September. Since immemorial times thie ritual of Blessed Bread takes place every 9th of May in honor of Saint Gregory. Probably, it is a christianised primitive ritual of offering bread by young girls. It is a mixed reminiscent of ancient pagan agrarian rites as well as fertility rites, such as ancient Greek or Roman peoples made to Artemis or Ceres godesses. Nowertheless, nowadays it is undoubtedly a Catholic religious Feast. The rituals with blessed bread in the Valencian Community have been studied by Pardo Pardo (1989).

5.8. "La representació dels Milacres de Sant Vicent Ferrer" (The Miracles of Saint Vincent Ferrer performance)

The Miracles of Saint Vincent Ferrer perfomances is ruled by Valencian Decree 43/2015, of 10th April. It is mostly performed in Valencia City, but not only. The mentioned Decree defines this religious intangible heritage as a jewel of Spanish and Valencian theater. It is performed by children on the so-called "altars de Sant Vicent" (Saint Vincent altars) which are staged in some streets and they are decorated with religious atrezzo. The performances of the milacres of this Valencian Saint, and Valencia City's patron have born inside the neighborhood people and they have been perfected over time as an artistic, cultural, and devotional manifestation, and also with a satirical and festive expression, reaching a high level of aesthetic quality (Corbín Ferrer, L. (2005).

5.9. "El toque manual de campanas" (Hand bell ringings) in for churches of the Valencian Community

Valencian Decree 111/1013, of 1st August, declares as intangible heritage the hand bells ringings of these four valencian churches: the Santa Iglesia Catedral Basílica Metropolitana de Santa María de Valencia; the "Iglesia parroquial de la Asunción de Nuestra Señora" in the village of Albaida; the "Campanar de la Vila" in the city of Castelló de la Plana, and the "Santa Iglesia Catedral Basílica de Santa María de la Asunción" in the city of Segorbe.

As the Law says, the protection of these four sets of hand bell ringings as a inmaterial heritage "means not only the general protection of this activity, knowledge and skills, but also the facilities, bells and touches in its current state, without interfering with its regular use as touches for a daily activity, for holidays or mour events, or even for special concerts".

For Valencian legislator, the hand bell ringing "constitute an immaterial and intangible heritage, because historical bells and ancient documents are used in their execution and are held in a place that already turns out to be monumental heritage", also, "the conduct of the activity is consolidated as an art form and sample of Valencia traditions, knowledge and techniques". The bell ringing "is considered part of the cultural soundscape of Valencia since the times of James the First, and the voice of the community" and also "endowed an identity to the town and reported the collective activities".

A more general research about the bell's sounds as intangible heritage was done by Alonso Ponga & Sánchez del Barrio (1987).

5.10. "La Mojiganga de Titaguas" (The Mojiganga dance at the village or Titaguas

Finallly, the Mojiganga Dance in the village of Titaguas is ruled only by a "Orden" (in Sapanish) or "Ordre" (in Valencian) – Order– 3/2012, of 23rd January.
It is a manifestation from the former "mojigangas" or burlesque dances, which have evolved precisely to a symbolic setting. That dances reproduce, in a very special festive context ten images or pictures, formed in part by human towers. The images, dances and towers are performed in the town streets with no changes since the eighteenth century. All pictures and perfomances making up the dance are closely related to each other, and some of them, as the altars of the first half have a clear (even Marian) religious motive, meanwhile the second part refers to traditional crafts. So, these human towers have different meanings, both religious and secular.

Here is a legal question; why this dance is recognized as intangible heritage only in a local level, being very similar to other traditions (such as the mentioned Feast of the Verge de la Salut? Only political strategies can explain this fact, due to the religios tradition and the intangible heritage as its results are, basically, the same.

Probably the different recognition of this tradition could be related with the regional government's strategy for reach the recognition as World Intangible Hoeritage for the Feast performed in Algemesí, increasing the legal level of the regulations, by a Law instead of a Decree, and increasing the space of that recognition.

6. Concluding considerations

It's is clear that that the rules about intangible heritage are a very good way to the promotion, protection and even fixation of the traditional religious intangible heritage wherever it would be performed. Despite of the possibility of damage the religious freedom in some cases, and the introduction of political considerations (it is necessary remember hier the case of "The mojiganga dance"), the Valencian experience in this subject can be a good paradigma for the protection of intangible heritage in other places.

By the other hand it is also clear the deep relation between religion and intangible heritage, and that in the case of Valencia, the religious traditions so declared are, all of them, performed by or inside the Catholic Church.

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Human rights as a quintessence of values and responsibility

Abstract
This paper shows that every human right, at its base, has basic human need and there is the moral conviction that this need should be satisfied. Sharing this belief by the State is expressed in the recognition of a particular law. The established law, both national and international, should therefore be consistent with human rights.

The concept of responsibility is chronologically first in the internal law then the State's principles of responsibility were developed in the international law and the accountability of public authority in internal law and then the principle of responsibility of international organizations.

It may be noted that the development of the theory of legal liability tends towards breaking the paradigm of negative responsibility. It requires the necessary methodological distinction between the "historic" responsibility, oriented at settlement of certain actions and establishing its consequences for the responsible entity, and the prospective responsibility which essence boils down to indicate the duties required from a responsible entity "for the future".

Keywords:
responsibility, human rights, supranationality, international law, child protection, human dignity

1. An openness of society to human rights

The world community recognizes or denies the legitimacy of behaviour of its members due to the basic standards accepted on the basis of their commonly shared values. This idea is present throughout history and theory of international law, ranging from H. Grotius with his concept of the law of nations, as the law quod omnium Gentium cars multarum voluntate vim obligandi accipit, Ch. Wolff's idea of civitas maxima,

I. Kant's idea of "eternal peace", H. Triepel's concept, Gemeinwille, contemporary concepts of the common law of mankind or theories of "common interest (good)"[1].

Human rights, as it was defined by the General Secretary of the United Nations – Boutros Ghali, „are the essence of values through which together we confirm that we are one human community."[2]

Every human right, at its base, has basic human need and there is the moral conviction that this need should be satisfied. Sharing this belief by the State is expressed in the recognition of a particular law. The law should therefore be consistent with human rights.

Donnelly writes „Human rights are the best – I would say, the only effective – political instrument which human ingenuity invented to protect the dignity of the individual against the common threats of modern society".[3] He emphasizes that in a changing society, they are the best instrument for the protection of human dignity, realizing development goals, striving for social justice and ensuring stability: Western patterns, modernization, development and backwardness (...) separate, in most places, the individual from small, giving support traditional communities. (...) Moreover, in most places, the State infiltrate these communities causing, in many situations, radical change and disintegration. (...) The society that used to protect human dignity and ensure a place in the world, now as a modern State, a modern economy, a modern city has become oppressive and alien force invades the dignity of a person and his or her family. (...) In this case, human rights seem to be a „natural" response to changing conditions, a logical and necessary consequence of the evolution of measures aimed at implementing human dignity. An entity needs individual rights[4].

The declarations from Human Rights Conference in Bangkok and Vienna are an example of the difference between particular and the universalistic understanding of human rights.

During the Conference, the compromise was adopted which expresses itself in agreement: „although human rights are universal in nature, the role of national and

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[1] Ph. Allotta, The Health of Nations. Society and Law Beyond the Statte, Cambidge 2002, p. 289, H. Lauterpacht, International Law and Humen Right, London 1950, B. Simmy, From Bilateralism to Community Interest in International Law, RdC, vol. 1994/VI, p. 262 and following.

[2] Prawa Człowieka – wspólny język ludzkości. Przemówienie na II Światowej Konferencji Praw Człowieka, /in/ Deklaracja Wiedeńska i Program Działania Światowej Konferencji Praw Człowieka, Wiedeń, czerwiec 1993, Poznań 1998

[3] J. Donelly, Universal Human Rights in Theory and Practice, Ithaca – London, 1989, p. 59 – 60

[4] Op.cit, p.65

regional specifics, as well as various cultural and religious conditions need to be kept in mind „ (...) „The role of national and regional specifics, as well as various historical, cultural and religious circumstances should be kept in mind. However, the duty of States, regardless of the political and economic system and culture, is to promote and protect all human rights and fundamental freedoms. [5]"

The "hard" and "soft" Universalist's beliefs are clashed. E. Brems analysing the current situation regarding universality of human rights is proposed to consider the criticism of non-Western representatives for an appeal against „the exclusion of certain areas of the world from the influence of international human rights law" assuming that the critics „want to extend the universality of these rights by taking into account the needs, concerns and values of people belonging to all communities of the world at all levels of international protection of human rights". Brems accepts the criticism as an appeal for „a broader universality of rights, which in its present form is not satisfactory". He proposes „to reconcile international human rights with the diversity of human societies" by „spreading the idea of opening societies on human rights" and „wider opening of international human rights law on a variety of social contexts"[6].

The common, both for the "hard" and "soft" universalists, is that they do not tolerate: genocide, torture, tyranny, honour killings, genital mutilation or any other form of oppression on public or private, even if it is justified by the political, religious or cultural reasons. The „soft" universalists focus on the universality of values and standards, allowing the diversity of cultural practices and other situations provided that they do not contribute to violations of rights.

I believe in the evolution of societies and standards, not throughout pushing anybody on a particular evolutionary path but by shaping the consciousness and showing the road on which the other nations went. Ch. Taylor stresses that to achieve supracultural consensus on the human rights' issue, we must look at the history of violations of these rights in our own European backyard. Contrary to popular opinion, the global convergence will not happen by widespread loss of tradition or its abandonment only by creative re-immersion different groups into their own spiritual heritage, by following different paths to one goal"[7].

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[5] E.Brems, Human Rights: Universality and Diversity, The Hague, p. 58, 67 – 68

[6] E.Brems, Op. Cit., p. 510 – 511

[7] Ch. Taylor, Conditions of an Unforced Consensus on Human Rights /in/ J. R. Bauer, D.A. Bell (ed.) The East Asian Challenge for Human Rights, Cambridge – New York, 1999, p. 124 – 144

Human rights should play an important role in the formulation of general standards of conduct in human relationships. The human dignity which every man has in equal measure, is the ultimate source of all human rights.

The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10th December 1948 proclaims: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". The Declaration also says (article 2) that everyone is entitled to use all the rights and freedoms set forth in it, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Universal Declaration gave to the principle of equality of all people truly universal character. It proceeds from the assumption that "…recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble). At the same time it states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It is recognized that these rights are derived from the inherent dignity of the person, that the ideal of free human beings enjoying the civil and political freedoms, freed from fear and misery, "can be achieved only if conditions are created whereby everyone may enjoy his or her civil and political rights and the economic, social and cultural rights."

So far, three types / generation of human rights were distinguished. The first includes civil and political human rights, the second – the economic, social and cultural right. Both these generations include the human rights of the nation. The third generation includes the human rights, recognition of which took place in the 60s and 70s of the twentieth century. These are the rights of human solidarity, fruit of the realization by the United Nations, that there are needs and common threats of all humanity.

We may present the individual rights payable to any individual, we can discuss the specific use of individual human rights of people exposed especially to the lack of respect, violating the legal protection of the human embryo or foetus, attempts to answer the question whether the regulations creating such standard protect the right to life even before birth, and if so, to what extent. We can also discuss the human rights of children, the elderly, the disabled, belonging to a national, ethnic, linguistic

or religious minority, belonging to the indigenous peoples, workers – migrants and members of their families, as well as refugees.

Children can be with their parents or another adult, but also they can stay alone. A child seeking refugee status or already recognized as a refugee should enjoy protection and humanitarian assistance in the enjoyment of all the rights conferred to child by The United Nations Convention on the Rights of the Child. It goes first and foremost to protect the child's health, access to education and to benefit from social protection.

The collective rights and the human solidarity rights may also be a subject of discussion. But it should be considered that selective approach to human rights is inadmissible.

So far, the four regional aid and protection of human rights schemes – European, American, African and Arabic have been created. The system in Asia and Oceania is at the other cultural and philosophical grounds. Today, we observe in the international practice and its related discourse attempts to relativize the values of peace and seeing the primary and final international relations and other values. The international law, in this sense, undoubtedly marks the axiological ferment.

Both, the United Nations and regional systems of promotion and protection of human rights are about the same individual human rights.

At the Second World Conference on Human Rights (Vienna 14 – April 26, 1993), in the final document, it was stated that: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".[8]

The main responsibility for the realization of human rights lies on the state. There is also the responsibility of the international and supranational community. It has, however, a secondary and mainly controlling nature. The responsibility of every individual for the realization and the implementation of human rights in human relations has a significant importance.

[8] Deklaracja Wiedeńska i Program Działania Światowej Konferencji Praw Człowieka, Wiedeń 1993, Poznań 1998, IN PAN, p. 43

Personal dignity is the central value of the Universal Declaration of Human Rights and international acts, including the Convention on the Rights of the Child ratified by Poland. Each person is a value irreducible to any other good and it is a person endowed with autonomy.

It should be mentioned that the UDHR did not recognize the dignity as the foundation of human rights. The dignity and rights were treated as equivalent basis of „freedom, justice and peace in the world". Only in 1966, in the International Covenants on Human Rights, it was stated that „these rights are derived from the inherent dignity of the human person".

I should be recalled that J. Maritain introduced the concept of equal dignity of every human person to human rights. „The human person has rights by virtue of the very fact of being a person, entity, master of himself and his actions, and for this reason is not merely a means to a goal, but an objective which as such should be treated. The dignity of the human person? These words do not mean anything until we accept that under natural law, the human person has a right to be respected, he or she is a legal entity and have the rights. It all belongs to a man due to the reason of being human."[9]

According to R. Dworkin, the dignity justifies the possession and exercising of one's rights. „To say that someone, in relation to government, has a fundamental right in the strong sense, such as the right to freedom of expression, it has some importance only if this law is necessary to protect his dignity or his status as someone equally entitled to the care and respect as others, or some other personal value with similar consequences. Otherwise there would be no meaning to such saying."[10]

It seems that the dignity is the value that fits into the concept of the child's good – to shift the emphasis from direct asserting of child's rights to their needs and responsibility of adults would serve better to the good of child. O. O'Neill[11] in his publication provides theoretical and political arguments for focusing not only on those children's rights but primarily on the duties of adults.

M. Guggenheim states that: "If the defender of the children's rights were able to reformulate the claims on their behalf from the rights language into talking about what for them is right and just, maybe we would got back the time that adults could

[9] J. Maritain, The Rights of Man and Natural Law, New York 1951, p. 65

[10] R. Dworkin, Biorąc prawa poważnie, translated by T. Kowalski, Warszawa, 1998, p. 359

[11] O'Neill, Children's Rights and Children's Lives /in/ Ph. Alston (ed.) Children, Rights and the Law, Oxford, 1992, p. 24 – 42

devote to better understanding of their responsibilities towards children. Though unintentionally, our emphasis on the rights of the child reduces the pressure on adults to behave towards them justly „[12].

It must be assumed that the strongest argument for better treatment of children would be, in almost any situation, paying attention to their needs and securing their best interests. The adults must be prepared for this task – where the timeless archetype of responsibility is the relationship between the parent and the child. New problematizations of the responsibility concept pay more attention to the characteristics, attitudes and the duties of responsible person.

The responsibility applies to thoughts, words, actions and omissions, and it is something more than just a sense of duty.

The responsibility is synonymous with reliability, efficiency, reliability, truthfulness, ethics, morality, loyalty, trustworthy, conscientiousness, integrity and incorruptibility[13]. The responsibility is connected to a sense of duty and moral-legal consciousness: there are psychological phenomena which according to their component parts (intellectual and emotional elements) have a lot in common (common generic characteristics) and at the same time show significant and specific differences on which the attention is drawn by L. Petrażycki[14].

I. Kant said that man is „responsible for recognizing, on the basis of his or her actions, the dignity (...) in every human selfhood. This obligation requires the respect due to every human being". The corresponding law results from this obligation. „Everyone has the right to require from fellow human beings the respect for his or her person"[15].

2. Legal and philosophical nature of human rights

Especially after World War II, in the theory and philosophy of international law, we find the size of the intakes of "the global rights of mankind." The questioning of State monopoly on the creation, application and enforcement of international law and reformist approach expressed in emphasis of law obligations towards human are the common and constitutive features

It is worth mentioning about the concept of "global public order" developed

[12] M. Guggenheim, What's Wrong with Children's Rights, Cambridge, MA – London, 2005

[13] A. Dąbrówka, E. Geller, R. Turczyn, Słownik synonimów, Warszawa 1995

[14] L. Petrażycki, O pobudkach postępowania i o istocie moralności, Warszawa 2002, p. 23 and following

[15] I.Kant, Metafizyka moralności, translated by E. Nowak, Warszawa 2005, p. 347

by the New Haven School (policy – oriented jurisprudence)[16]. This concept sees international law as the decision-making process by different actors operating within the international community in order to protect their own interests through effective control of the process. As it is noted by R. April and who indicates the literature „At the same time he emphasis on, deliberately omit in this place, the ontology and methodology of policy-orientated jurisprudence, the universality of this order and the centrality of human dignity"[17].

Due to developed European integration, the „supranationality" (supranationalte) entered into legal language on a permanent basis concept[18].

For a certain time it was even part of the legal language. It was enshrined in art. 9 of the Treaty creating the European Coal and Steel Community of 18th April 1951. Its introduction was intended to highlight the specific status of one of the organs of the Community – the High Council. Under the regulation of the Merger Treaty of 8th April 1965, this word was removed from the text of the Treaty[19]. Currently, „supranationality" is often used in legal and political discourse concerning the status of the European Union. This notion is unfortunately burdened with ambiguity.

It should be indication made on the work of T. Franck who his concept of the legitimacy of international law begins by asking question about the reasons for observance of international law. The hypothetical answer indicates that the standards and institutions of this law have a high degree of legitimacy itself[20]. The obedience to international law, it is emphasized by Franck, is a recognition

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16 M.S.McDougal, Studies in World Public Order, New Haven 1960.

17 M.S.McDougal, H.D.Lasswell, The Identification and Appraisal of Diverse Systems of Public Order /in/ M.S. McDougal, Studies..., op.cit, p.3 and the following, M.Reisman, Designing and Managing the Future of the State, EJIL, vol. 8 (1997), p. 409 and following., idem. Sovereignty and Hman Right in Contemporary International Law, /in/ G.H.Fox, B.R.Roth, Democratic Governance and International Law, Cambridge Universty Press, Combridge 2000, p. 239 and following.

18 H. Krabbe, L'idee moderne de l'Etat, RdC, vol..13 (1926/III), p. 509, 572–579

19 J.Barcz Organizacja ponadnarodowa "Sprawy Międzynarodowe" 1991, no 7–8, p. 89, J.Kranz, Tło prawne dyskusji nad reformą ustrojową Unii Europejskiej, Kraków – Warszawa 2007, p. 71–75, J.Kunz Supra – national organs, AJIL, vol. 46 (1952), p. 697, J.Menkes, A. Wasilkowski, Organizacje międzynarodowe. Wprowadzenie do systemu, Warszawa 2004, p. 93–97, F. Rosenstiel, Le Principe de'supranationalite. Essai sur rapports de la politique et du droit, Pedone, Paris 1962, p. 40–60, J.H.W. Verzijl, Supranational, /in/ idem. Intenational law in historical prspective, vol. 1, Sijthoff, Leyden 1968, p. 283–292, Ch. De Visscher, Theories et realites en droit international public, 3 ed, Pedone, Paris 1960, p. 287 – 289

20 Th.M. Franck, The Power of Legitimacy amony Nations Oxford, New York 1980, p. 25

the existence of the international community as the legal community. The task of the international community is to legitimize or refusal to legitimize the actions of its members and institutions in accordance with applicable standards and legal principles[21]. The legitimacy of the law results from the law itself, which means that as legitimized can be recognized this law which has „internal ability to generate its observance.

The legitimacy of international law weakens, according to Franck, not so much failures to its standards, but above all, the tolerance of law failure. No response to the violation of legal prohibitions leads to the erosion of the legitimacy of the law, which is reflected in its disregard and permission to its unilateral interpretation by the state.

The law does not operate in an axiological vacuum and therefore legal reasons require a supplement and strengthen its deontic arguments. It is not just a question of ethical obligations posed to the international law, but also it is about identifying those values at the basis of international law which determine the ejection of specific legal arguments.

The dissimilarity of international law and national law, which is usually regarded as a model of law, resulted in specific, not to say bizarre, the contemporary philosophers of law's attitude to international law. It expresses itself in paying attention by the philosophical and legal literature on the juridical problems of the international law. In this case, the approach of international law philosophy emphasizing only duty and moralizing perspective significantly impoverish its content.

These remarks allow us to propose a definition of the philosophy of international law and the familiarizing with its main research problems. The philosophy of international law is a conceptual attempt to explore the factors and conditions constituting the international legal order and thus learning about its nature and an indication on the ideas and values forming this law. The ideas, on which the international law is based on, constitute its dogmatic identity and, as such, allow us to explore the law. The values indicate „obligation" aspect of its application.

R. Kwiecień indicates that „... the understanding of the role and function of science, including the science of law, reducing them to the role of empirical data analysis tools significantly impoverished understanding of social processes. This also applies to understanding of the legal processes taking place within the international community. (...) Undoubtedly, the international law needs a systemic and systematic philosophy, because only such philosophy allows us to make the integral and in-depth

[21] Op.cit, p. 39

analysis of the changing international legal order. Only such philosophy allows us to take an attempt to explain the ontological and epistemological meanings hidden in legal texts and to raise the awareness of their importance for legal practice."[22] Interesting comments about the role of doctrine in the contemporary international law are made by A. Carty[23].

3. International liability of a state

The philosophers of law formulated their theories, starting first and foremost with the principles of domestic law and their findings are useful for presenting the theoretical aspects of the liability in international law. It should be noted that this legal liability in domestic and international law is applicable to the responsible entities[24]. The concept of responsibility is chronologically first in the domestic law, then the principle of State responsibility in international law and the accountability of public authority in domestic law and then the principle of responsibility of international organizations were developed[25].

Attention should be drawn to the fact that the issue of State responsibility was dealt by the United Nation International Law Commission, which in nearly 50 years of work ended its operations in 2001 adopting the proposal regulates the state responsibility for violations of international law. The project is undoubtedly a compromise between the abrasive approaches, views, positions and expectations of the international community. „The project of the International Law Commission's Articles on Responsibility of States for internationally illegal acts" was adopted by the United Nations General Assembly, which on 12th December 2001 accepted (without a vote) Resolution 56/63 "acknowledge" Articles and recommending them to "governments regard, without resolving the question of their future adoption or other appropriate action"[26].

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[22] R. Kwiecień, Teoria i filozofia prawa międzynarodowego. Problemy wybrane. Warszawa 2011, p. 20–29

[23] A. Carty, Philosophy of International Law. Edontargh 2007, p. VII–VIII

[24] M. Balcerzak, Odpowiedzialność państwa – strony Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności. Studium prawno międzynarodowe, Toruń 2013, p. 33

[25] E.Bagińska, Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej, Warszawa 2006, p. 1–7

[26] Rezolucja Zgromadzenia Ogólnego ONZ, no 56/83, point 3 and Report of the International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries, Cambridge 2002 and J. Crawford, J. Peel, S. Olleson, The ILC's Articles on Responsibility of State for International Wrongful Acts, Completion of the Second Reading, EJIL no 12(2001), p. 963

It seems that in this case we are dealing with soft law. The resolution has been divided into four parts. The introductory part (internationally illegal act of State) concerns the definition of violations of international law by the actions of the state, next: the Content of the international responsibility of Member and The use of the international responsibility of the state, determine the content of the international responsibility of the State and the rules of its investigation. While the fourth (general provisions) formulates the general principles concerning the relation of this codification to other rules of international law and issues not covered by the Articles.

Several articles set out in Resolution should be pointed out: article 5 provides that the State is responsible for the actions of individuals or other entities authorized to perform the functions of a public nature.

In accordance with article 8, a State is responsible for the actions of individuals, groups of individuals and other entities operating in accordance with the guidelines and instructions of state bodies, under the direction or control of the state. It reaffirmed the principle that the State is responsible for the acts which are accepted as its own, while a State is not responsible for the actions of its bodies left at the disposal of another country. In articles 16 to 19 there are provisions relating to the international tort of State in the context of liability for torts committed by another State.

Resolution in article 12 specifies that the responsibility of the state is independent of the source of violation of the commitment. It is crucial, because it confirms the uniform character and of the international liability, eliminating the need to define the various types of international commitments, especially outcome and action commitments. In this document, such issues as: self-contained regimes (regimes closed) or the relationship between the general regime of international responsibility and the law of treaties are taken into consideration. With regard to the first of these issues, the article 55 confirms unequivocally that in areas where responsibility is regulated by specific standards, these norms should be still applied. Regarding the second issue, the article 73 of the Vienna Convention on the Law of Treaties clearly emphasizes that the Convention does not, in any way, prejudge the consequences for international agreements, among others, consequences coming from the law of international responsibility[27].

[27] W. Czapliński, Kodyfikacja prawa o odpowiedzialności międzynarodowej państw, "Studia prawnicze", Warszawa 2003, issue 4(154), p. 37, see W. Czaplińska, Odpowiedzialność państwa za naruszenie praw człowieka, /in/ C. Mik (ed..) Prawa człowieka w XXI wieku – wyzwania dla ochrony prawnej, Toruń 2005, p. 94

Resolution of the provisions of the Convention of human rights including children's rights is the responsibility of the State party but requires the involvement of all sectors of society, including children themselves. The Committee on the Rights of the Child recognizes that the responsibility for respecting and ensuring the rights of the child in practice is beyond the State and services controlled by the State, and includes children, parents and the wider family, other adults, and – services and organizations acting outside the state sector.

The Committee agrees, for example, with the Genera comment no 14 (2000) of the Committee on Economic, Social and Cultural Rights, regarding the right to the highest achieved standard of health, which in paragraph 42 states that: "While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities."

The State must work closely with the non-governmental organizations in the widest sense, while respecting their autonomy: this applies to, for example, NGOs working in the field of human rights, child rights, children's organizations and youth-led organization, youth groups, parents and family groups, religious groups, academic institutions and professional associations.

There is no doubt that the responsibility is ambiguous concept and going beyond the legal discourse. However, it is also the concept of fundamental, (even constitutive) importance to the normative systems[28].

4. The constitutive human feature

It is understood that the responsibility (responsabilitas derived from the Latin respondere) is an expression of the sense of hierarchy of values, unshakable inner balance, respect for self and others. On the opposite side there are: manifestations of selfishness, selfish attitudes, cowardice, lack of ideological orientation and nonchalance. Functioning in the dominant approach to liability in the system of normative, which is about describing with this term a situation (state) in which the entity suffers the consequences of his or her act or omission contrary to the norm.

[28] P. Cane, Responsibility In Law and Morality, Oxford – Portland Oregon 2002, p. 1

At the same time, this approach creates a paradigm of "negative liability, focused on guilt and on drawing effects of "bad" behaviour.

It is noted that the development of the theory of liability is moving towards breaking the mentioned paradigm of negative responsibility. This is clearly showed in P. Cane's thought, which requires the necessary methodological distinction between the "historic" responsibility aimed at settlement of certain action and establishing its consequences for the responsible person and the prospective responsibility which boils down to indicate the duties required from the responsible entity pro futuro[29]. P. Cane, in built by himself construction of the prospective liability, clearly moves away from dimension of liability based on fault for failing to meet the commitment.

In the twentieth century, the new paradigms, the currents of thought, the theories of dialogue or the philosophy of responsibility, acting as „the new way of thinking" began to be formed[30].

The dialogue has become an important issue of the contemporary culture – we learn the art of mutually being, functioning in the relationship human being – human being. The sense of dialogue is the mutual discovery of truth, a greater share and benevolent acceptance of another, and careful listening not just to words but to meaning. It allows us to avoid the illusion that we are absolutely alike or different.

A. de Saint – Exupery says that the ontological attempt to describe the human being without the concept of liability is now no longer possible „to be a man means

[29] P. Cane, op.cit., p. 30 and 35

[30] M. Buber, Ja i Ty. Wybór pism filozoficznych, translated by J. Doktór, Warszawa 1992, M. Buber, Problem człowieka, translated by R. Reszke, Warszawa 1993, M. Buber, Droga człowieka według nauczania chasydów, translated by G. Zlatkes, Warszawa 1994, T.Gadacz, Wolność a odpowiedzialność Rosenzweiga i Levinasa krytyka heglowskiej wolności ducha, Kraków 1990, Filozofia odpowiedzialności XX w.. Tekst źródłowy, ed. and translated by J.Filek, Kraków 2004, H. Janas, Zasada odpowiedzialności. Etyka dla cywilizacji technologicznej, translated by. M.Klimowa, Kraków 1996, E. Husserl, Kryzys europejskiego człowieczeństwa a filozofia, translated by. J.Sidorak, Warszawa 1993, R. Ingarden, Wykłady z etyki, Warszawa 1989, R. Ingarden, Książeczka o człowieku, Kraków 1972, S.A.Kierkegaard, Albo – albo, vol. II, translated by K.Toeplitz, Warszawa 1976, E. Levinas, Czas i to, co inne, translated by J. Migasiński, Warszawa 1994, E.Levinas, Trudna wolność, translated by A. Kuryś, Gdańsk 1991, E. Levinas, Całość i nieskończoność. Esej o zewnętrzności, translated by M.Kowalska, Warszawa 1998, Mosty zamiast murów. O komunikowaniu się między ludzkim, ed. T. Stewart, Warszawa 2000, G. Picht, Pojęcie odpowiedzialności, translated by K. Micjalski „Znak" 1979 no 1-2, G. Picht, Geschichte und Gegenwart, Stuttgart 1993, K. Święcicka, Husserl, Warszawa 1993, N. Hartmann, Ethik, ed. IV, Berlin 1962

just to be responsible"[31]. On the other hand, E. Levinas points out that „the more I reply, the more I am responsible".[32]

We must agree with J. Filek, who in the introduction to the discussion about the philosophy of liability in the twentieth century indicates that „the notion of responsibility as a basic concept of the new paradigm of thought has the same importance as the philosophical concept of truth and freedom[33]. For this reason, it must be also important for the field of protection of human rights for which these concepts are foreground. From this point of view, the liability ethics is more than a legal responsibility of human subjected to a legal obligation. Responsibility as ethical principle – it is the proceedings respecting the inherent human dignity being which means the natural indivisible and inalienable supreme value[34], which is the source of human rights. R. Ingarden in „Lectures on ethics" pointed out the responsibility as one of the conditions for actions implementing moral values[35].

In addition, he stressed that the broader understanding of responsibility is possible as the full of advantages of value of a non-moral character. J. Filek notes, starting with the notion of legal and moral responsibility, that we have no chance to reach its notion that would correspond more to the source phenomenon of responsibility. In other words, „it is not legal responsibility and moral responsibility allowing, on the way of used synthesis, some responsibility, simply, no-adjectival responsibility, but rather the opposite, the legal and moral responsibility are possible only on the basis of phenomena of this source responsibility as a responsibility" (...) „But, it cannot already be a word-date negative responsibility, which in retrospect, sees some done evil, attribute this evil to the man and pulls him to account. It is about showing the power of positive responsibility which looks to the future and shows to the man rely on him good. The emerging sense of responsibility has no longer the nature guilt, but it grants the power of a sense of his or her own opinion and his or her own dignity and importance" (...) „remember this: the paradigm of responsibility, the

[31] A. de Saint – Exupery, Ziemia, planeta ludzi, translated by W i Z. Bieńkowscy, Warszawa 1964, p. 117

[32] E. Levinas, Inaczej niż być lub ponad istotą, translated by P. Mrówczyński, Warszawa 2000, p. 158

[33] J. Filek, Filozofia odpowiedzialności XX wieku, Kraków 2003, p. 9 – 13

[34] T. Gałkowski, Etyczne i teologiczne implikacje dla teorii prawa i praktyki prawniczej /in/ Prawoznawsktwo a praktyka stosowania prawa, Z. Tabor, I. Bogucka. (ed.) Katowice 2002, p. 281 – 282, B. Klimczak, Etyka gospodarcza, Wrocław 2003, p. 58 – 62

[35] J. Nowak, L. Sosnowski, Słownik pojęć filozoficznych Romana Ingardena, Kraków 2001, p. 172

paradigm of another person, not only it does not tolerate the paradigm of a third person, which is the paradigm of truth, nor the first-person paradigm or paradigm of freedom, but allows us to better understand them, freeing them from threatening their one-sidedness"[36].

The responsibility is understood by R. Ingarden as constitutive human feature. The ontological understanding of responsibility can therefore be characterized as a category describing the human being and because of which the actions are classified as ethically responsible or irresponsible. One can speak of the primary responsibility that focuses on self-responsibility (which does not preclude taking into account the notion of community as an institution in front of which you are responsible). This responsibility is established because of the values qualifying the activities as the responsible or irresponsible action. R. Ingarden expressed it: "if there were no positive and negative values and relationships that occur between living and determined compounds, there would be no real responsibility, as well as fulfilling of any requirements set by them. This assertion opens first view of the ontic foundation of responsibility"[37].

J. Filek refers to the presented here ontologization of responsibility. He replaces the Cartesian „I am, so I think" with "I am so I am responsible"[38]. A human being is considered in the context of accountability that characterizes its significance.

The responsibility is thus understood as constitutive human feature. The reference to the responsibility which is used by H. Jonas becomes significant. The liability could be summarized in three concepts: „totality, continuity and future" referenced to the existence and prosperity of human beings (...) „the liability is thus primarily the responsibility of the people for the people and it is the archetype of any responsibility. This relationship of the entity in the respect of liability assumes that although this ratio itself and in each individual case is one-sided, it is essentially reversible and includes possible mutuality „.

J. Filek notes that „human being is in relation of responsibility not only as a perpetrator of a particular act, but as a human being, decisive here is not the nature of his particular act or omission, but the very location of the man in the being"[39].

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[36] Ibidem

[37] R. Ingarden, O odpowiedzialności i jej podstawach ontycznych /in/ Książeczka o człowieku, Kraków 2001, p. 99 – 100

[38] J. Filek, Ontologia odpowiedzialności. Analityczne i historyczne wprowadzenie w problematykę, Kraków 1996, p. 7

[39] J. Filek, Filozofia odpowiedzialności XX wieku, Kraków 2003, p. 18

The philosophy of responsibility manifests itself wherever more or less consciously, the dialogic structure as the basic structure is exploited. It is operated not only by dialogic people.

5. Conclusion

Human rights require an increase of abilities of persons to be responsible for other people, skilful perception of others in the relations between human beings. The State authorities in the sense of servitude responsibility for the whole society should respect and fulfil human rights, seeing and treating people for who they are responsible protecting their fundamental needs and rights.

The community of values creates the condition and the basis for the existence of the political community, nation, and supranational community however the function of the law is procedural and institutional protection of these values. The material and procedural character of law shapes this social order. Without public awareness, by the nations, of human rights, the universality, the value on which human rights are based, the standards juris cogentis cannot be developed and cannot function. It is necessary to build the communication between different nations and countries in order to develop, in a dialogue based on soft universalism, the position on the implementation of human rights.

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Protection of personal data in medical documentation

Abstract
Medical documentation is one of the essential evidence in disputes regarding medical damage, in court proceeding as well as in case of extrajudicial methods of dispute resolution the party of which is a patient, such as arbitration or proceeding before regional commissions for the adjudication on medical events. Due to the fact that the documentation includes among others sensitive personal data, it is necessary to ensure adequate protection of the data against an unauthorised access by third parties.

The author analyzes the current regulations in the matter of protection of personal data contained in medical records, with particular emphasis on the scope of the data to be made available to litigants other than the patient and the medicinal entity or third parties who do not take part in the proceedings.

Keywords:
personal data, medical documentation, protection of personal data

1. Introduction

Medical documentation is one of the essential evidence in disputes regarding medical damage, in court proceeding as well as in case of extrajudicial methods of dispute resolution the party of which is a patient, such as arbitration or proceeding before regional commissions for the adjudication on medical events. Due to the fact that the documentation includes among others sensitive personal data, it is necessary to ensure adequate protection of the data against an unauthorised access by third parties.

It is necessary to thoroughly analyse current regulations regarding the standards of guarantees of protection of data processed in medical documentation. These data

are often of sensitive nature and an unauthorized access of third parties may sometimes have negative consequences for the patient, such as a specific social ostracism or in extreme cases, work-place related consequences (it refers especially to persons suffering from chronic diseases that are usually associated with particular social background, for instance AIDS or sexually transmitted diseases). It is undeniable that the lawmaker should prioritise ensuring the highest standards of protection of data processed in medical documentation, and their disclosure in a court proceeding or in an extrajudicial proceeding should be done in compliance with strict security rules.

The aim of this paper is to analyse present regulations regarding personal data protection with view to their proper safeguarding against the access by unauthorized entities and the possible consequences of such processing.

2. The character of personal data processed in medical records

The main legal act used to determine, what medical documentation should entail, is the Act on Patient's Rights (Act of November 6th, 2008 on Patient's Rights and the Spokesman for Patient's Rights (consolidated text – Journal of Law of 2012, Item 159, as amended), further as P.R.A.). Although it does not include the legal definition of medical documentation, in art. 25 it lists its minimal content. In accordance with art. 25 P.R.A. it is at least:

1) indication of the patient that allows his identification:
   a) name (names) and surname;
   b) date of birth;
   c) sex;
   d) address of the place of residence;
   e) PESEL [personal identification number], if it was assigned, in case of a newborn – PESEL number of the mother, and in case of persons that have not had the PESEL number assigned – type and number of the document confirming their identity;
   f) in case the patient is underage, completely incapacitated or unable to consciously grant a consent – name (names) and surname of the legal representative and the address of his place of residence;
2) specification of the entity providing health care with indication of the unit, in which the health care services were provided;
3) description of the patient's health condition or the health care services that were provided,
4) date of drawing up.

It is the framework that must be included in any medical documentation. With reference to other mandatory requirements, it needs to be pointed out, that there are different types of medical documentation, and their scope and type depends on the entity processing the documentation and the catalogue of patients to whom it refers. Each of them has their basis in a different legal act that is an ordinance of a competent minister managing a unit of government administration. Therefore, next to the most popular, „regular" medical documentation kept within the framework of the Ordinance of the Minister of Health of December 21st, 2010 (The Ordinance of the Minister of Health of December 21st, 2010 regarding the Types and Scope if Medical Documentation and the Ways of Processing thereof (consolidated text – Journal of Law of 2014, Item 177, as amended), further as: the Ordinance), there are also, among others medical documentations:

a) of occupational medicine (The Ordinance of the Minister of Health of July 29th, 2010 regarding the Types of Medical Documentation in Occupational Medicine, Ways of Documenting and Keeping the Records and Samples of Documents Used (Journal of Law, No. 149, item 1002),
b) kept in health care facilities for persons deprived of liberty (The Ordinance of the Minister of Justice of February 2nd, 2011 regarding the Types and the Scope of Medical Documentation kept by Health Care Facilities for Persons Deprived of Liberty as well as Ways of Its Processing (Journal of Law, No. 39, item 203, as amended),
c) kept in health care facilities established by the minister competent for internal affairs (The Ordinance of the Minister of Internal affairs and of Administration of May 18th, 2011 regarding the Types and the Scope as well as the Processing of Medical Documentation kept by Health Care Facilities established by the Minister Competent for the Internal Affairs (Journal of Law, No. 125, item 712),
d) kept in health care facilities established by the minister of national defence (The Ordinance of the Minister of Defence of October 2nd, 2014 regarding the Types and Scope of Medical Documentation in Health Care Facilities established by the Minister of National Defence and Ways of Its Processing (Journal of Law, item 1508),

The following study focuses on the analysis of the provisions regarding medical documentation in the broadest sense, i.e. on the basis of the provisions of P.R.A. and the Ordinance of the Minister of Health of December 21st, 2010 regarding the types and the scope of medical documentation and the means of its processing.

The basis to determine the character of personal data collected and processed in medical documentation is the Act on the Protection of Personal Data (The Act of August 29th, 1997 on the Protection of Personal Data (consolidated text – Journal of Law of 2014, Item 1182 as amended), further as: „P.P.D.A."). The Act in art. 27 sec. 1 provides an exhaustive list of the "so-called sensitive data (as the opposite to the so-called regular – common – data)" (J. Barta, P. Fajgielski, R. Markiewicz, Komentarz do art. 27 ustawy o ochronie danych osobowych [Commentary to art. 37 of the Act on the Protection Personal Data] [in:] Ustawa o ochronie danych osobowych. Komentarz [Act on the Protection of Personal Data. Commentary], J. Barta, P. Fajgielski, R. Markiewicz, LEX 2011). They include the data concerning:

a) the racial or ethnic origin,
b) political opinions,
c) religious or philosophical beliefs (it also refers to atheistic and agnostic views, the category, however, does not include moral principles),
d) religious, party or union affiliation (also the fact of non-affiliation and stepping out from the organisation),
e) health condition,
f) the genetic code,
g) addictions (including undergoing rehab treatment or its interruption, participation in groups and organisations the aim of which is to treat addictions),
h) sexual life,
i) convictions, penalty judgements, fines, and other judgements issued in court or in the administrative proceeding.

Even at first glance, it is clear that practically any of the above listed information (in principle, excluding data regarding political views) could, at least in theory, be found in medical documentation as information that may have a potential influence on the course of further treatment of the patient or consents and refusals regarding particular treatments expressed by the patient. The basis for recording particular entries in the documentation can be found in the provisions, which refer to the unclear term of „relevance" of information. Therefore, in accordance with §6 sec. 3 of the Ordinance, the individual internal documentation includes copies of documentation provided by the patient and notes information relevant for diagnostic, treatment and attendance process; on the basis of § 11 of the Ordinance, „consolidated documentation, if the provisions of the Ordinance do not stipulate otherwise, includes (…), if it results from the aim of documentation, relevant information regarding the provided health care services" and according to § 17 sec. 1 point 5 of

the Ordinance the medical history includes, among others, relevant data from the medical interview.

It is crucial, therefore, to decide whether sensitive data, in understanding of the provisions of the Act on the Protection of Personal Data, can be of relevance for the diagnostic, treatment and attendance process in understanding of the provisions of the Ordinance regarding the types and the scope of medical documentation and means of its processing.

The answer to such a question should be positive. For example, a doctor providing medical services recorded an entry in the medical documentation that the patient refused a blood transfusion due to religious reasons (For instance, Jehova witnesses refuse blood transfusions due to the principles resulting from the Old and New Testament, that they should avoid blood, after: http://www.jw.org/pl/%C5%9Bwiadkowie-jehowy/faq/%C5%9Bwiadkowie-jehowy-dlaczego-nie-przyjmuj%C4%85-transfuzji-krwi/, access on Septembet 27th, 2015). Such information may have an important bearing on the choice of the patient's treatment – in a situation, in which the doctor may choose an effective, yet a risky treatment that may potentially cause a massive haemorrhage that could cause the necessity of a blood transfusion in order to save the patient's life, he should decide on an alternative method, which may be less effective, but at the same time less risky. In the described case, if the doctor is aware of the patient's religious beliefs and consequences associated with it, he may have a better possibility for acting for the patient and prevent the situation, in which he might stand before a choice between the refusal to undergo medical treatment, but observing the religious principles or undergoing medical treatment yet infringing his religious principles. Nevertheless, it does not change the fact that the patient should be informed about any and all treatments available to him. In such situations noting in the medical documentation personal data, classified as sensitive, could at the entry stage of the treatment eliminate from the catalogue of available treatments those, which are against faith and believes of the patient, what in turn would definitely exert positive influence on the patient's psychical well-being. Moreover, an action such as this could potentially advance the treatment process – if at the entry stage the patient is not offered a treatment that might be against his beliefs, it may save time necessary to explain the reasons for refusal of the treatment by the patient.

Furthermore, the category of data indicated in letter e) of the above listing, i.e. data regarding the health condition, naturally require processing in the medical documentation, similarly, as the data about the genetic code or data concerning ad-

dictions. Especially the latter may have a major influence on the type and amount of drugs administered to the patient or the diagnostics of some illnesses.

Therefore, it can be assumed that although the personal data processed in the medical documentation undeniably might be and often are of sensitive nature, their collection and use is allowed, as long as it is strictly connected with provided medical treatments and if it is of relevance for the character of the treatments.

In the analysis of the character of the personal data processed in medical documentation, the issue of electronic documentation cannot be omitted. Currently, medical documentation can be kept in two ways – traditional, on paper and also in electronic form. Due to the advancing computerization of the activity in the public sector, also the health care became a part of that program (According to art. 2 sec. 2 point 2 and 6 of the Act of Feb. 17th, 2005 regarding computerization of activities of entities performing public tasks (consolidated text – Journal of Law of 2014, item 1114), further as: C.A.), leading to an obligation to hold the documentation only in electronic form.

Art. 24 sec. 1a P.R.A., added by art. 50 point 1 of the Act on the information system in health care (Act of April 28th 2011 on the information system in health care (consolidated text – Journal of Law of 2015 r., item 636 as amended), further as: I.S.H.C.A.), which shall come into force on August 1st, 2017, stipulates that medical documentation is held in electronic form. It shall become the only allowed form of keeping medical records and it is additionally referred to in interim provisions of the above-mentioned Act, which in art. 56 sec. 1 I.S.H.C.A. stipulate that until July 31th, 2017 medical documentation can be kept either in paper or in electronic form. Art. 56 sec. 2 I.S.H.C.A. specifies the issue of the form of keeping medical records documented before the date of entry into force of the above listed provisions, by pointing out that the obligation to document medical records in electronic form shall be applied to records documented from the day of August 1st, 2017.

Electronic medical documentation was defined in art. 2 point 6 letter a) and b) I.S.H.C.A. and it denotes:

1) electronic document that enables the client to obtain health care service of particular type, in case the service provider is an entity performing activities with regard to supply of ancillary supplies and medical devices, which are orthopaedic items; a pharmacy or a pharmaceutical dispensary;
2) medical documentation which is referred to in P.R.A., documented in electronic form, that contains data about provided, under provision and planned healthcare services, including an electronic document that allows the client to obtain

healthcare service of particular type in case of service provider other that referred to above.

The legislature distinguished medical documentation with reference to the entity being the service provider. In order to understand this method, it is necessary to explain the term „service provider".

In understanding of art. 2 point 15 I.S.H.C.A. a service provider is a health care provider in understanding of art. 5 point 41 of the Act on healthcare services financed from public funding (Act of August 27th 2004 r. on Health Care Services financed from Public Funding (consolidated text of 2015, item 581, as amended), further as: H.C.S.A.), a pharmacy and a pharmaceutical dispensary. Art. 5 point 41 H.C.S.A. referred to above, points out that the service provider, apart from the above indicated entity performing activities with regard to supply of ancillary supplies and medical devices, which are orthopaedic items, is an entity performing medical activity within understanding of the provisions on medical activity and also a natural person other than an entity performing medical activity in understanding of the provisions of M.A.A. that has obtained a professional licence to provide health care services and provides them within the scope of their business activity. As it is pointed out in doctrine, with reference to natural persons other than an entity conducting medical activity and which obtained professional licence to provide healthcare services "the lawmaker refers to physiotherapists, psychologists, feldsher working in a medical profession within the scope of their business activity and shops supplying medical devices – activity was not included in the provisions of the previous act on medical activity, yet these entities have the right to function on the medical services market as well as to apply for a contract with NFZ [National Health Fund]" (A. Pietraszewska-Macheta, A. Sidorko, K. Urban, Komentarz do art. 5 ustawy o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych [Commentary to art. 5 of the Act on health care services financed from public funding] [in:] Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych. Komentarz [Act on health care services financed from public funding. Commentary], ed. A. Pietraszewska-Macheta, LEX 2015).

In view of that, distinguishing the definition of electronic medical records is clear – entities conducting medical activity according to provisions of M.A.A. and particular natural persons that provide healthcare services and whose activity was not regulated by provisions of M.A.A. document medical records in understanding of P.R.A., however, it was necessary to extend this definition with reference to docu-

ments that allow the recipient of the service to obtain healthcare service by pharmacies, pharmaceutical dispensaries and entities conducting activities within the scope of supply of ancillary supplies and medical devices that are orthopaedic items that do not keep medical records.

On the other hand, art. 5 I.S.H.C.A specifies which databases are included in the information system – they include databases functioning under: the Medical Information System (further as M.I.S.) and domain ICT system, which are referred to in art. 5 sec. 1 point 2 I.S.H.C.A. In this study, data processed under M.I.S. are taken into account due to the fact that the system contains data concerning already provided, those under provision and planned healthcare services. The scope of the data is determined in art. 10 sec. 2 M.I.S.O. It includes:

1) personal data, among others:
   a) name (names) and surname,
   b) sex,
   c) citizenship,
   d) marital status,
   e) PESEL number,
   f) date of birth,
   g) address of the place of residence and address for correspondence,
   h) insurance numbers,
   i) degree of disability,
   j) type of entitlement and number and validity period of the documents confirming the rights to healthcare services of particular type and the date of loss of these rights,
   k) Date and cause of death;
2) individual medical data about the recipients of the services,
3) data on the service providers,
4) data on medical employees,
5) data on payers – entities financing or co-financing the provision of healthcare services,
6) prices of provided healthcare services financed or co-financed from public funding,
7) data enabling the exchange of electronic documents between service providers and payers that are referred to in point 5.

It can be clearly seen that personal data processed under M.I.S. are of no sensitive character in understanding of art. 27 sec. 1 P.P.D.A. and in this respect, they do not

need protection extending over the standard resulting from P.P.D.A. and provisions regarding the data processing security in ICT systems.

3. Guarantees of privacy protection of personal data in medical records against unauthorised access by third parties

Protection of personal data processed in the framework of medical records can be analysed in several aspects – technical, understood as all means and methods of protecting the data against unauthorised access by unauthorised persons and in a related organizational aspect, that can be seen in, inter alia, the number and position of persons having access to medical records, as well as in view to the law governing the rules for providing data to third parties. This aspect will be discussed in the next section of this paper.

Measures aiming at personal data protection have been scattered in many acts of different rank. The basis for protection of sensitive personal data has been outlined in P.P.D.A. In the case of data included in medical records, due to their special nature, data access policy should be laid down in more detail. The legislature regulated this issue in art. 26 P.R.A. by stipulating the list of entities, to which the entity providing health services provides medical documentation, however, the conditions and standards of protection of this records in the scope that would exceed the standards under Chapter 5 of the P.P.D.A. were not defined. Although in the Ordinance the types of documentation and the scope of the data it includes, were set out in detail, §73 and §74 of the Ordinance, merely indicate the responsibility of the entity providing healthcare services for ensuring appropriate conditions of securing the records against destruction, damage or loss and unauthorized access, allowing its use without undue delay and determining the place of storage of the current internal documentation, that is indicated by the entity itself. Therefore, to determine the conditions under which medical records must be kept and the rules of access to them, it is necessary to refer to the organizational regulations of a particular institution.

For example, the Organizational Regulations of Samodzielny Wojewódzki Szpital Zespolony in Szczecin (Organizational Regulations of Samodzielny Wojewódzki Szpital Zespolony in Szczecin of March 18th, 2015 r., http://spwsz.biuletyn-publiczny.net/page/6/regulamin-spwsz.html, accessed on 21.09.2015) [the Independent Regional Hospital in Szczecin] in Art. 18 regulate the conditions of access to medical documentation. It should be pointed out that Art. 18 sec. 1 cited above stipulates that rules of procedure of accessing the medical documentation are regulated by Chapter 7 P.R.A., and specifies only some issues, such as the form and the date the

documentation is accessed. According to art. 18 sec. 2 and 5 – 7 of the Regulations, the documentation is disclosed at the request of the patient, his legal representative or the person authorized by the patient during his life; on an application submitted to the Office of Hospital within 7 days, in the form of extracts, duplicates or copies, originals of documents (on receipt and subject to return), based on the decision of the Director of the Hospital or a person authorized by him. This Regulation is precise, when it comes to data access, but it lacks, in my opinion, the specific conditions for the retention of records, such as, indication that the records should be kept in a closed, or even sealed room, to which only certain people could have access.

From the content of the mentioned Regulation and the reference to the rules of P.R.A., one can only deduce that the documentation is stored on the premises of the hospital. Of course, determining too stringent standards would impede a smooth running of the treatment process, but a complete omission of this aspect may cause excessive carelessness of medical personnel in the handling of medical records and unauthorized access to it by third parties, e.g. by cleaning staff in a situation, in which the documentation has been left out on the desk without adequate protection by a doctor or a nurse. This issue should therefore be regulated, yet in my view, it is not necessary to regulate it on the statutory level, or even by an executive ordinance, as it would be sufficient to indicate the minimum standards, the entity providing healthcare services should fulfil, while determining the organizational regulations regarding the security of keeping documentation of medical records. It should be noted that general guidelines for regulations of medical service providers were laid down in Art. 24 of the Medical Activity Act (Act of April 15th, 2011 on Medical Activity (consolidated text – Journal of Law of 2015, item 618, as amended), further as: „M.A.A."), but in terms of medical documentation the legislature has only indicated that with reference to medical records the medical entity should indicate the fees collected for accessing these records. As it can be inferred from other provisions of M.A.A. an entity providing medical services shall only indicate the place of storage of medical records (See also: art. 18 sec. 3 point 3 M.A.A., art. 19 sec. 3 point 3 M.A.A., art. 101 sec. 1 point 4 M.A.A. and art. 102 sec. 1 point 4 M.A.A.). Therefore, to improve the security of the patients' data processed in medical records, it should be postulated to add a guidelines with regard to the medical records storage, taking into account the needs of the current activity of the medical entity, i.e. in such a way that the safety standards of such data do not interfere with the smooth conduct of the diagnostic process or treatment.

As it was indicated earlier, at the moment there is no obligation of keeping the

medical records in electronic form, though it is acceptable. It has to be highlighted that keeping records in electronic from must also be subject to data security standards, and the entity documenting the records – must comply with the standards of access to the data.

Regulations regarding the data kept as electronic medical records are scattered. Apart from the previously mentioned P.R.A., I.S.H.C.A and the Ordinance, there is also the Ordinance of the Minister of Health regarding the standards for the Medical Information System (Ordinance of the Minister of Health of March 28th, 2013 regarding the Standards for Medical Information System (Journal of Law item 463): further as „M.I.S.O."). Technical issues associated with keeping medical records in electronic form were regulated in detail in various provisions, from which a particular attention should be paid to I.S.H.C.A and M.I.S.O.

Art. 3 sec. 1 I.S.H.C.A is important with regard to protection of the data processed in electronic medical records, as according to the regulation, the system of medical information encompasses databases created by entities obligated to their keeping. It means that also provisions of the act on protection of databases (Act of July 27th, 2007 on Database Security (Journal of law, No. 128 item 1402 as amended), further as: „D.S.A.") should be applied, yet these provisions refer to legal protection, and for that reason they will not be the object of analysis in this paper.

From technical point of view for protection of personal data processed in electronic medical records, the provisions of M.I.S.O. §7 of the Ordinance are of crucial importance, as they stipulate that the organizational and technical conditions for processing, accessing, authorization and protection against loss of electronic medical records accessed by the service providers in M.I.S. are ensured by:

1) the refusal of access to the data in cases of the lack of full identification or authorization of the ordering entity;
2) refusal of access to the data in cases of the lack of the consent of the recipient of the service for access, subject to art. 35 sec. 4 I.S.H.C.A.;
3) application of technical and organizational measures ensuring protection of processing of data against their unauthorized change, loss, damage or destruction, appropriate to risks and category of data protected;
4) ensuring the integrity and reliability of the data.

Such described standards for security should be positively evaluated. Full identification details of the ordering party, in order to verify, whether the ordering party is an entity entitled to access the data contained in M.I.S. should guarantee proper protection of the data. It should be noted that the legislator did not define the term of

the ordering party, however, from the § 4 of M.I.S.O. it can be drawn that it means an entitled entity requesting the access to the data from electronic medical records.

Moreover, in accordance with § 9 of M.I.S.O., M.I.S. in the scope of organizational and technical conditions of entering into the system the electronic documents necessary for diagnostics, continuity of treatment and to supply the recipients with the medicinal products and medical devices, and their download from M.I.S., according to the scope of tasks performer by the service providers and the organizational and technical conditions of allowing the access and download of data processed in M.I.S., is compliant with the conditions stipulated in provisions issued on the basis of art. 18 C.A., and in the scope unregulated by them – with norms the object of which are the rules of collecting and sharing information on healthcare, for instance: PN13606-4:2009 – Information technology in Healthcare – Sending electronic medical records – Part 4: Security, PN-ENV 13608-2:2003 (U) Information technology in Healthcare – Security of data sent in healthcare – Part 2 – Secure objects of data, or PN-ENV 13608-3:2003 (U) Information technology in Healthcare– Security of data sent in Healthcare – Part 3: Secure channels of data transfer. Apart from that, § 11 M.I.S.O. stipulates that data processed in M.I.S. and data included in the electronic medical records are subject to protection of the high level, which is referred to in the provisions issued on the basis of art. 3a P.P.D.A., i.e. §. 6 sec. 1 point 3 of the Ordinance of the Minister of Inner Affairs and Administration regarding documentation of personal data processing and technical and organizational conditions with which the devices and internet technology systems used for personal data processing should comply (The Ordinance of the Minister of the Inner Affairs and Administration of April 29th, 2009 regarding the Documentation of Personal Data Processing and the Technical and Organizational Standards, the Devices and ICT Systems Used in Personal Data Processing Should Comply with (Journal of Laws No. 100, item 1024).

It can be clearly seen that the lawmaker has taken into account the proper protection of personal data contained in medical records, similarly in traditional, as well as in electronic form, and regulated the scope of protection of the data on the high level, at least in the scope, in which it refers to data included in M.I.S. and electronic medical records. It is undeniable also that the technical measures used for protection should continuously evolve with the development of new technologies for data securing. It is, however, obvious that information technology devices, which might be used to unauthorized access to databases by unauthorized entities, are more and more common, therefore, it is necessary to

prevent such actions.

4. Legal aspects of disclosing personal data from medical records to third parties

The basis for accessing of data processed within medical records is the earlier mentioned art. 26 P.R.A., which has quite broadly outlined the list of entities entitled to access the medical records of the patient. According to this provision, medical documentation can be accessed by:

1) the patient or their legal representative or a person authorized by the patient. The authorization must be made in writing, and after the death of the patient the documentation can be disclosed to a person that was authorized during the life of the patient;
2) the entities providing healthcare services, if the records are necessary to ensure continuity of healthcare services;
3) public authorities, Narodowy Fundusz Zdrowia [National Health Fund], authorities of medical professional self-government and domestic and district consultants, within the scope, necessary for execution of their tasks, especially for audit and supervision purposes,
4) entities, which are referred to in art. 119 sec. 1 and 2 M.A.A. (i.e. voivodes, national consultants that are referred to in the act of November 6th, 2008 on consultants in health protection, organizational units subject to or supervised by that minister, authorities of medical professional self-governments, medical scientific associations, medical higher education institutions, research institutes and particular specialists from relevant medical fields), in the scope necessary to conduct audit on the request of the minister competent for healthcare matters;
5) minister competent for healthcare, courts, including disciplinary courts, prosecutors, medical examiners and screeners for professional liability in association with the conducted proceeding;
6) authorities and institutions, the entitlement of which stems from other acts, if the examination was conducted on their application;
7) pension authority and disability evaluation boards, in association with a proceeding conducted by them;
8) entities keeping records of medical services, in the scope necessary for keeping these records;
9) insurance entities, if the patient consents;

10) medical boards subject to minister competent for internal affairs, military medical boards and medical boards of Internal Security Agency [Agencja Bezpieczeństwa Wewnętrznego] or Intelligence Agency [Agencji Wywiadu], heads of the relevant agencies;
11) doctor, nurse, midwife, in association with the procedure of the assessment of the entity providing healthcare services on the basis of provisions regarding accreditation in healthcare and in the scope necessary for its conduct;
12) regional commission for the adjudication on medical events, in the scope of the proceeding;
13) heirs in the scope of the proceeding before the regional commission for the adjudication on medical events;
14) persons performing audit activities on the basis of art. 39 sec.1 I.S.H.C.A. (i.e. research institutes, other organizational entities subject to or supervised by minister competent for healthcare and also to specialist of particular medical fields, pharmacy or fields having application in healthcare, in the scope necessary for their execution.

It has to be underlined that medical records, unconditionally, can be disclosed only to a patient or to his legal representative, potentially to a person that was authorized by the patient during his life. All other entities are allowed to gain access, if they prove the legal interest that is the indispensability of the medical records for the conducted proceeding or for other activities.

While analysing medical documentation as an evidentiary item, it should be taken into account that, although it is undeniable that the court can be granted access to medical records with regard to the conducted proceeding, it needs some more clarification, whether medical records, can also be accessed in case of extrajudicial proceeding. By assessing whether arbitration court is allowed to demand access to medical records within the scope of the conducted proceeding, it is crucial to determine the term „court", used by the legislator in art. 26 sec. 3 point 3 P.R.A. Having regard to the principle of reasonability of the legislature, I am of the opinion, that the term has to be understood broadly, not only as a common court, but also as any other judicial body like military court, arbitration court and the Supreme Court [Sąd Najwyższy]. Such understanding of the term „court" also implies the obligation of medical institutions to grant access to medical records to disciplinary courts and screeners for professional liability. As the legislator decided to enable these authorities to access the medical records of the patient, it is reasonable also to enable other judicial bodies including arbitration bodies. In case of

mediation, the matter seems different, as there is no express provision that would enable a mediator to request the access to medical records. Still, as the mediation is facultative, it might be assumed that in case, in which a patient decides to take part in mediation and for the correct conduct of mediation it would be necessary for the mediator to review the medical records, the patient may obtain the records from a medical institution on his own and then allow the mediator to access them. In practice, such situation should rarely take place – it cannot be ignored that mediation is a means of resolving not of adjudicating disputes; therefore, the parties make mutual concessions in order to work out a compromise and to reach a settlement. The mediator serves as a person that supports the parties in the pursuit of the settlement, helps to mitigate mutual demands and alleviates antagonisms between the parties. In connection to that his access to medical records seems unjustified, because the mediator does not provide any substantive resolution on the dispute, hence, the content of the data included in medical documentation does not seem to be necessary for completing this task.

The legislator has regulated separately the issue of the access to electronic medical records from the technical point of view that was referred to above. The provisions do not determine the catalogue differently to the above-mentioned art. 26 P.R.A. It is obvious, as in principle, one should not expect a different catalogue of entities entitled to access the data processed in medical records depending on the form of their keeping. Potential exceptions in this scope should stem from the technical reasons. An example of such exception is art. 12 sec. 7 I.S.H.C.A., according to which, the entities keeping the medical records are allowed to access the data, including the personal and individual medical data, processed in M.I.S., within the scope of the tasks performed by this entities, due to keeping of medical records. The reason for granting the access to data to this additional entity, beyond the catalogue stipulated in art. 26 P.R.A., stems from technical reasons.

While analysing the issue of granting access to data processed in medical records it is also necessary to mention the most important aspect of this issue, namely authorization by the patient of a natural person to access his/her medical records. Art. 26 sec. 1 and 2 P.R.A. stipulate that the medical records can be accessed by a person authorized by the patient, however, in case of the death of the patient, the medical records can be disclosed to a person the patient authorized before his death. The construction of these provisions needs to be highlighted, as it seems to suggest a different scope of the right to access the medical records subject to whether the patient lives or not. Art. 26 sec. 1 P.R.A. stipulates that medical records can be disclosed to

a person authorized by the patient, however, according to sec. 2 such a person, after the death of the patient, has the right to access the medical records. It means that a person authorized to access the records by the patient before his death, may access the data in one of ways indicated in art. 27 P.R.A., i.e.:

1) by reviewing, including also the databases regarding the healthcare, in the premises of the entity providing healthcare services;
2) by requesting extracts, duplicates or copies;
3) by being given the original documentation (under receipt and subject to return after use, if the entitled authority or entity requests review of the original documentation.

Nevertheless, in case of the death of the patient, the right of the authorized person is limited only to the way stipulated in art. 27 point 1 P.R.A., namely to review the records. This problem, similarly as its consequences, was also noticed by D. Karkowska, who expressly stated that such behaviour is completely irrational and it does not protect personal rights of the deceased patient and it infringes the procedural rights of the close persons to the patient, especially, as it makes it more difficult for close persons to collect evidentiary material in case the circumstances justify the suspicion of malpractice in the provided health care, committing a crime or infringement of the patient's right to die with dignity. It is difficult not to agree with such stated thesis, at the same time, it is difficult to state a reasonable justification for regulation laid down by the legislator.

It should also be pointed out that the provisions of P.R.A. do not regulate the forms of the authorization for the third party. Although from the provisions of § 8 point 2 of the Ordinance it can be inferred that it should be made in writing and that it should be included in the individual internal documentation, the doctrine notices correctly that this provision is of organizational character that aims at documenting the will of the patient.

With regard to this issue, it also should be analysed, what actions a healthcare service provider should take in a situation, in which the patient before his death does not authorize anyone to access his medical records. At this point, it should be underlined that there is a popular misconception that „close persons" and the "family members" are allowed to access medical records. The regulations of P.R.A. clearly state that the right of access to medical records refers to authorized persons. It means, therefore, that firstly, such a person does not have to be a person close to the patient, and secondly that there is a need for an express authorization from the patient. Although §8 point 1 and 2 of the Ordinance stipulate the authorization of a close person, still in my opinion, it cannot be inferred that there is a limitation of the

persons that can be granted the authorization by the patient only to persons close to the patient in understanding of art. 3 sec. 1 point 1 P.R.A. It can be inferred from the fact that the legislator has not provided a definition of the term close person in the previously mentioned provision and that the term is used with reference to protection of intimacy and dignity of the patient. According to art. 21 sec. 1 P.R.A. the presence of a close person is allowed while providing healthcare services. Having regard to the principle of reasonability of the law-maker, it would not be justified to interpret the provision of § 8 point 1 and 2 of the Ordinance in reference to art. 26 sec. 1 and 2 P.R.A. in such a way, that the patient can only authorize a close person to access his medical records. Moreover, the catalogue of persons who can be authorized, was stipulated in provisions of statutory rank, on the other hand the delegation from art. 30 sec. 1 P.R.A. includes the authorization for the Minister of Health to issue an executive ordinance that would regulate the types and scope of medical records, the way it can be processed and samples of types of medical records. The scope of the above mentioned delegation encompasses listing of the entities that may be allowed to access the patient's medical records, hence, it can be assumed that the catalogue was determined by the provisions of P.R.A., which includes natural persons. The provisions of §8 point 1 and 2 should be regarded as misleading and potentially causing doubts with regard to their interpretation.

The analysed issue of the lack of entitlement to access the medical records before the death of the patient was the object of the judgement of the Supreme Administrative Court [Naczelny Sąd Administracyjny], which decided that the director of the hospital cannot refuse the access to medical records to the spouse of the deceased, if he was not able to submit a relevant authorization for the close person. In such a situation the managing body of the hospital infringes the law and fails to act. Yet, the factual background of the case, which was the object of the judgement, depicts that the wife was previously entitled to access medical records in a different health care facility. In the case analysed by the Supreme Administrative Court, the patient was brought to the health care facility in such a state that he was unable to submit the consent about the access to medical records in case of his death, but in the moments, in which he was regaining consciousness, the employees of the hospital did not assure the receipt of the relevant consent, and that was also pointed out by the court. Moreover, the Supreme Administrative Court also highlighted the provision of art. 57 sec. 3 of the Act of 2 December 2009 on Medical Chambers (consolidated text of 2015, item 651, as amended), according to which on account of the death of the patient his rights regarding the proceeding associated with the professional li-

ability of the doctors, including the right to access medical information and records can be executed by the spouse, ascendants, descendants, siblings, persons related by affinity lineal or of the same degree, persons related by adoption and their spouses, as well as by a person that remained in cohabitation. In the Court's opinion, in such a case, if the organ conducting the proceeding is in disposal of information regarding such a person, it should advise at least one of them about their rights.

Although the argument about the obligation to disclose the medical records to a close person of the deceased was quite bravely structured, I would be careful with regard to granting it a universal character. It cannot be omitted that there might be some minor details of the factual background (as the previous authorization of the patient's spouse in the previous facility) and above all, that the legislator did not decide to provide a presumption of existence of the consent for authorization of close persons to access the medical records. Hence, that judgement should be treated as an interesting and undeniably just point of view with regard to the factual background, yet the key issue about the intention of the patient with regard to consent to access to medical records or lack thereof, cannot be disregarded. Hence, it can be assumed that the provisions were structured correctly, in a way that ensures the protection of the data included in the medical records and each exception should be individually and thoroughly considered.

5. Summary

Personal data processed within the framework of medical records of a patient may certainly be qualified as sensitive data in understanding of P.P.D.A., what in turn should lead to their greater protection. It should be noted that in reality practically all categories of these data, indicated in the statute, may have an influence on the treatment process, hence, their processing should not be limited in this regard. Nevertheless there might be some shortcomings of the legislator with regard to their protection.

Although the legislator has quite precisely regulated the above-analysed issue with regard to electronic medical records, while preparing the base for the system that will be in force from August 31st, 2017 when the medical records will be documented and kept in an electronic system, there seems to be no provisions protecting the records kept in paper form. Regulations regarding the safety of the data processed in the electronic form were crafted in every detail, with stipulation of the system of verification of the entity requesting the access to the records and the norms, which the system should fulfil, however, there are no security principles for the records that have already been documented and are stored in traditional form. Currently, the issue is regulated only by means of internal regulations of healthcare

service providers, yet there are no minimal standards on the statutory level or an executive ordinance, they would need to comply with. That matter should be negatively evaluated because very often the healthcare providers do not ensure the proper protection of the data against access of unauthorised persons that provide ancillary services, for instance, the cleaning staff. Clearly, as it was pointed out earlier, the regulations should not impede the access to documentation by the entitled medical staff. There are situations in which the need to access medical records is urgent and in such situations the level of security cannot impede the treating process.

At the same time, it may be assumed that the key issue in accessing medical records is the intention of the patient. It should be of the unconditional character, hence, the legislator correctly did not decide to assume *a priori* that the consent to access the medical records should encompass the persons closest to the patient. On the other hand, in case of any doubts with regard to granting consent by the patient, or if such a consent was previously granted and the patient remains in a state that prevents him from expressing his intention (for instance if the patient is unconscious), the staff of the hospital or the medical facility should fulfil all procedures in order to identify a person that on account of the death of the patient should be given access to medical records and to make sure to evaluate on the basis of circumstances, whether a third party, especially a close person, can be granted the access.

Therefore, it can also be assumed, that on the one hand the provisions in the scope of the security of data in the paper form could be improved, on the other hand the regulations regarding the access to medical records by third parties, fulfil the principle of the patient's intention and any changes in this matter should be very carefully considered.

Legal acts

The Act of August 29th, 1997 on the Protection of Personal Data (consolidated text – Journal of Law of 2014, Item 1182 as amended),

Act of August 27th 2004 r. on Health Care Services financed from Public Funding (consolidated text of 2015, item 581, as amended),

Act of February 17th, 2005 regarding computerization of activities of entities performing public tasks (consolidated text – Journal of Law of 2014, item 1114),

Act of July 27th, 2007 on Database Security (Journal of law, No. 128 item 1402 as amended),

Act of November 6th, 2008 on Patient's Rights and the Spokesman for Patient's Rights (consolidated text – Journal of Law of 2012, Item 159, as amended), further as P.R.A.

Act of April 15th, 2011 on Medical Activity (consolidated text – Journal of Law of 2015, item 618, as amended),

Act of April 28th 2011 on the information system in health care (consolidated text – Journal of Law of 2015 r., item 636 as amended).
The Ordinance of the Minister of the Inner Affairs and Administration of April 29th, 2009 regarding the Documentation of Personal Data Processing and the Technical and Organizational Standards, the Devices and ICT Systems Used in Personal Data Processing Should Comply with (Journal of Laws No. 100, item 1024).
The Ordinance of the Minister of Health of December 21st, 2010 regarding the Types and Scope if Medical Documentation and the Ways of Processing thereof (consolidated text – Journal of Law of 2014, Item 177, as amended), further as: the Ordinance.
The Ordinance of the Minister of Health of July 29th, 2010 regarding the Types of Medical Documentation in Occupational Medicine, Ways of Documenting and Keeping the Records and Samples of Documents Used (Journal of Law, No. 149, item 1002).
The Ordinance of the Minister of Justice of February 2nd, 2011 regarding the Types and the Scope of Medical Documentation kept by Health Care Facilities for Persons Deprived of Liberty as well as Ways of Its Processing (Journal of Law, No. 39, item 203, as amended).
The Ordinance of the Minister of Internal affairs and of Administration of May 18th, 2011 regarding the Types and the Scope as well as the Processing of Medical Documentation kept by Health Care Facilities established by the Minister Competent for the Internal Affairs (Journal of Law, No. 125, item 712).
Ordinance of the Minister of Health of March 28th, 2013 regarding the Standards for Medical Information System (Journal of Law item 463),
The Ordinance of the Minister of Defence of October 2nd, 2014 regarding the Types and Scope of Medical Documentation in Health Care Facilities established by the Minister of National Defence and Ways of Its Processing (Journal of Law, item 1508).

Inner regulations

Organizational Regulations of Samodzielny Wojewódzki Szpital Zespolony in Szczecin of March 18th, 2015 r., http://spwsz.biuletyn-publiczny.net/page/6/regulamin-spwsz.html, accessed on 21.09.2015.

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Pietraszewska-Macheta A., Sidorko A., Urban K., Komentarz do art. 5 ustawy o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych [Commentary to art. 5 of the Act on health care services financed from public funding] [in:] Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych. Komentarz [Act on health care services financed from public funding. Commentary], ed. A. Pietraszewska-Macheta, LEX 2015.
http://www.jw.org/pl/%C5%9Bwiadkowie-jehowy/faq/%C5%9Bwiadkowie-jehowy-dlaczego-nie-przyjmuj%C4%85-transfuzji-krwi/, access on Septembet 27th, 2015.