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

Alcide De Gasperi University
of Euroregional Economy in Józefów

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Edited by Magdalena Sitek & Peter Terem & Marta Wójcicka

Józefów 2015

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Reviewer:
Prof. dr hab. Stanisław Pieprzny
Prof. dr hab. Aladag Cadgas Hakan

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Introduction

The traditional concept of human rights recognized them as a category of claims of the individual to the community and its structures, including the state. Frequently the issue of the responsibility of the individual toward community and its rights regarding the individual is overlooked. In the face of globalization rights of the community play more and more important role. The reason of this fact is that community is the natural environment of human beings and allows them to satisfy their basic needs.

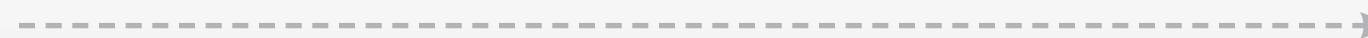
The editors of this paper, on a base of the concepts and the presentations during the 15th International Conference on Human Rights held on 1-2 June 2015 in Józefów, subarea of Warsaw, decided to systematize the collected materials so that publication shows both the human needs and rights while respecting the responsibilities of individual towards the community at the same time.

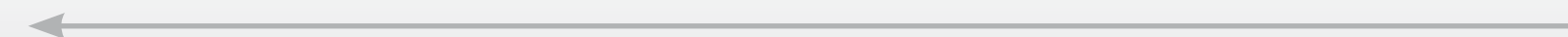
The structure of this monograph is based not only on the concept of human rights, but also human needs. The issues of rights and human needs in the community together with the issue of human duties towards the community were places in the first part of this joint publication. Subsequently they are discussed rights of nations, especially right to self-determination and the right to good administration, which became the main measure of the rule of law. Next are discussed human rights to the clean environment and human obligations towards the environment. An important group of issues is the contribution of religion to the concept of human rights. In the end, human rights are considered in the context of civil law solutions.

Editors

PART I

Human needs implemented in the community





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Freedom of assembly and its necessary restraints

Abstract
The right to freedom of assembly is enshrined in political instruments as well as in international law acts. It is established by Article 20 of the Universal Declaration of Human Rights; Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 21 of the International Covenant on Civil and Political Rights and Article 12 of the Charter of Fundamental Rights of the European Union. All these documents emphasize that they guarantee a right to "peaceful assembly". Freedom of assembly is considered one of the political prerogatives of people. It has frequently been analyzed by the European Court of Human Rights in Strasburg. In Poland, the main controversy revolves around the possibility of wearing masks during a demonstration that may prevent to verify the identity of the participants. This legal issue was subjected to constitutional review.

Keywords:
assemblies, meetings, demonstrations, civil rights, peaceful assemblies, spontaneous meetings, counter-protest, face mask

The modern legal doctrine defines the right to freedom of assembly as part of substantive law. It is regarded as one of the principles of constitutional law. Freedom of assembly belongs to a host of basic rights recognized early on in national constitutions as well as in international law acts. It is oftentimes linked to the right freedom of association and to the right to freedom of expression, and now constitutes a fundamental element underpinning civil liberties in a democratic society.

Freedom of assembly is provided for in a number of European political instruments and international legislation. It is enshrined in Article 20 of the Universal

Declaration of Human Rights (UDHR)[1]; in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedom (CPHRFF)[2], signed in Rome on November 4, 1950, and amended by Protocols No. 3,5,8 and supplemented by Protocol no.2[3]. It was also incorporated into Article 21 of the International Covenant on Civil and Political Rights (ICCPR) [4] and defined by Article 12 of the Charter of Fundamental Rights of the European Union (ChFR) [5]. The solutions adopted by these acts are thematically interrelated, but one should note the gradual enlargement of the concept of the freedom of assembly.

Article 20, paragraph 1 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of peaceful assembly and association", while the Convention for the Protection of Human Rights and Fundamental Freedom says: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".

Attention must be drawn to the fact that the latter article abandons the concept of "peaceful assembly and association" found in the UDHR for the sake "association with others", supplementing it with the right to form and to join trade unions for the protection of his interests". Due to the size of the CPHRFF document the issue of establishing trades unions had outside the scope of interest of the legislators. It is worth noticing that Article 11, paragraph 2 of the CPHRFF places restrictions on the exercise of the freedom of assembly[6]. Legal authors, reflecting on the word "peaceful" in Article 11, paragraph 1 of the CPHRFF, draw a distinction between a spontaneous, voluntary assembly and one of a more or less obligatory character[7]. The UDHR in Article 21 returned to the "peaceful assembly" nomenclature, adding to it the requirements that must be met prior the meeting takes place[8].

The most informative is Article 12 of the Charter of Fundamental Rights of the European Union. It repeats in part what Article 11 of International Covenant on Civil and Political Rights states, supplementing it with a proviso that the right to freedom of peaceful assembly is operative at all levels „in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests". It must underscored that Article 12 of the CPHRFF does not include the freedom of assembly restriction similar to that in Article 11, paragraph 21 of the ICCPR. The legal doctrine, seeing the right of assembly as a basic prerogative of people and a general rule of the EU law[9], claims that this right can not be infringed when authorities take reasonable measures to prevent disorder and protecting public safety during an assembly or a meeting[10].

All above international acts, save the Universal Declaration of the Humans Rights, concentrate on "peaceful assembly", one whose participants do not engage in acts of violence and its organizers profess peaceful intentions[11]. Certainly, the lack of the aggressive aspect does not preclude the participant from expressing strong verbal statements. This, however, burdens the organizers with the responsibility of exercising maximum control over the assembly.

Freedom of assembly is a fundamental human political right. The human being is the subject of this law, a law that targets i.a free development of a person's personality, in conjunction with other people, even when such development is contrary to the expectations of other participants of public life or officials who currently govern the country. Public authorities are then obligated to give a guarantee that freedom of assembly is fully implemented and enjoyed by people, notwithstanding the offi-

[1] Vide: K. Motyka, *Prawa człowieka. Wprowadzenie, wybór źródeł,* Lublin 2004, p. 120.

[2] Dz. U. 1993, Nr 61, poz. 284, with amendments, vide:. A. Wróbel, w: L. Garlicki (red.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności,* v. I, Warszawa 2010, p. 649 – 711.

[3] Dz.U. z 1993 r. No.1, pos. 84, with amendments.

[4] Dz. U. 1977, Nr 38, pos. with amendments, 167,. vide:. R. Wieruszewski (ed. *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Komentarz,* Warszawa 2012, p. 522 – 538.

[5] Zob. A. Wróbel, w: A. Wróbel (red.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz,* Warszawa 2013, p. 478 – 500.

[6] "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

[7] Zob. A. Ławniczak, *Wolność zgromadzeń,* w: M. Jabłoński (ed.), „Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym", Wrocław 2014, p. 299.

[8] Second sentence of Art. 21 of the ICCPR states: „No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

[9] ECHR verdict, 12 June 2003, C – 112/00, Schmidtberger Internationale Transporte und Planzüge przeciwko Republik Östericht; Zbiór Orzeczeń 2003, p. I – 5659.

[10] A. Wróbel, Uwagi do art. 12 Karty Praw Podstawowych, w: A. Wróbel (red.),*Karta Praw…*, Warszawa 2013, s. 485.

[11] A. Ławniczak, *Wolność zgromadzeń…*, p. 299.

cials' political and party beliefs, for this freedom is a constitutional value, not a value regulated by democratically elected political majority[12].

Freedom of assembly as provided for by Article 11 of the CPHRFF has been subjected to judicial review of the European Court of Human Rights (ECHR). This international court was of the opinion that freedom of assembly is closely liked to freedom of speech, guaranteed by Article 10 of the CPHRFF, and to freedom of thought, conscience and religion stipulated in Article 9 of the same Convention[13]. The ECHR's decision also pointed out that the freedom of assembly is one the indispensable elements of modern democracies as far as civil liberties are concerned. The ETHS judges, striving to define freedom of assembly, said this right, similar to freedom of speech, is fundamental to a democratic society[14]. They asserted that Article 11 of the CPHRFF protected two types of assemblies - both private and public, including a static one, limited to a particular place, and a procession[15].

If the right to freedom of assembly and freedom of expression is the pillar of a democratic society, it can not be narrowly interpreted. The rights includes assemblies that take place on privately owned premises or in public space. Besides, as the ETHS pointed out, they may be held by individual persons or by a group of organizers. The European Tribunal maintained that state authorities were responsible for taking steps to facilitate and protect a peaceful assembly. It was underlined that Article 11 paragraph 2 of the CPHRFF conferred upon states the privilege of placing legal restraints on the right to freedom of assembly. Limiting the freedom of assembly in public places serves to protect the rights of other people, to pursue legal law enforcement action, and to maintaining regular road traffic order.

The principle of proportionality requires keeping a balance between the rules specified by Article 11, paragraph 2 of the CPHRFF and freedom of peaceful assembly. The imposition of penalties for participating in an illegal demonstration is also in accordance with the Article 11. However, taking part in a legal peaceful

[12] Constitutional Tribunal verdict of 18 January, 2006, K 21/05, OTK-A 2006, no. 1, pos. 4, Lexis.pl no 397795.

[13] Young, James Webster v. The United Kingom, 13 August 1981, complaints no 7601/76 7806/77, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-62164; 01.05.2014, access: 14:00.

[14] Kazantseva v. Russia Rosji, 23 October, 2008, complaint no. 26365/05; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89040, access: 01.05.2014, 143: 10.

[15] Barraco v.France, 5 March 2009, final verdict of 5 June 2009, complain no. 31684/05, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91570, access: 01.05.2014, access: 13:13.

demonstration is of such importance in a democratic society that no-one could be administered even the lightest administrative penalty if a person did not commit any illegal act during the event[16]. It is worth noticing that in other rulings the European Tribunal for Human Rights linked freedom of assembly with freedom of expression[17].

Article 11 of the CPHRFF primarily aims at protecting the individual against arbitrary interference by public authorities in the exercise of his political rights. If the state resolves to intervene, it may infringe Article 11 unless the legal action is "prescribed by law" and is "necessary in democratic society" in order to fulfill a public purpose stated by Article 11, paragraph 2 thereof. The term "restrictions" in Article 11 of the CPHRFF must be interpreted as including measures taken before or during the public assembly, as well as those, e.g punitive ones, adopted afterwards[18]. In the opinion of the European Tribunal states must not only safeguard the right to assemble peacefully, but also refrain from applying unreasonable indirect restrictions upon it[19].

The ETHS admitted that a public demonstration might create the disruption to public order, including irregularities in traffic, however, authorities ought to show a certain degree of tolerance towards peaceful meetings if Article 11 of the CPHRFF is not to render freedom of assembly meaningless. In order to make it easier for government authorities to take the necessary preventive and safety measures, organizations and associations holding demonstrations, as entities of democratic processes, should respect the principles governing these processes and obey the existing rules and regulations. Incompatibility with the law does not necessarily justify the infringement of freedom of assembly, and state preventive

[16] Kudrevičius and Rother v. Lithuania, final verdict of 14 April, 2014, complaint no. 37553/05, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138556, access: 4.07.2015, 12:16.

[17] Stowarzyszenie „Poznańska Masa Krytyczna" przeciwko Polsce, decyzja z dnia 22 października 2013r., skarga nr 26818/11, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138639, access: 4.07.2015, 12:23; Berladir v. Russia, final verdict of 19 November, 2012r., complaint no. 34202/06, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112101; access:4.07.2015, 12:25.

[18] ECHS z dnia 31 lipca 2014, Nemtsovv. Russia, final verdict of 15 December 2014r., complaint nr 1774/11, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145784, access:4.07.2015, 12:07; LEX 1774/11.

[19] Stowarzyszenie „Poznańska Masa Krytyczna" przeciwko Polsce, decyzja z dnia 22 października 2013 r., complaints no. 26818/11, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138639, access:4.07.2015, 12:23.

regulations should not represent a hidden obstacle to peaceful meetings. According to ETHS notification procedures, including those that require obtaining prior permission before holding a public meeting, do not infringe Article 11 as long as their they enable authorities to ensure an unobstructed course of a meeting or a gathering, or any other political, cultural event.

The procedure of granting permission is in keeping with the requirements of Article 11 of the CPHRFF if its purpose is to facilitate maintenance of order during the assembly. If the state has the right to lay down permission requirements, it must also be able to impose sanctions on those who do not comply with the regulations[20]. In another ruling the ECHR concluded that even when the meeting was not notified in advance in accordance with the existing national law, it is still protected by Article 11 CPHRFF because lack of notification in itself can not be sufficient grounds for interference in freedom of assembly. The European Tribunal stressed that in exceptional circumstances the right to hold a spontaneous demonstration might make necessity of obtaining notification impracticable, especially when the demonstration is held in response to the current events[21].

The ECHR said state authorities have wide latitude how to prevent attempts of counter-protesters to disrupt a peaceful assembly. The participants of a counter- protest have the right to express their disagreement with the opinions the members of the assembly. The state has the duty to protect both demonstrating groups, but it should take pains to facilitate the holding of both demonstrations. The risk of a clash between the opposing groups can not be sufficient grounds for prohibiting the meeting from taking place. It was strongly emphasized by the ECHR the freedom of participating in a meeting is of such importance that it must not be restrained so long as the participants do not commit any reprehensible act on such an occasion[22].

Referring to the paragraph concerning the necessary restraints in a democratic society stated in Article 11, paragraph 2 of the CPHRFF and to holding a demonstration contrary to national law, the ECHR said a demonstration might be deemed illegal if the authorities were not notified of it in advance. Any public demonstration might cause disruption of public order and produce extreme reactions. Lack of official sanctions can not justify an infringement of freedom of assembly, while state regulations should not constitute an hidden obstacle to freedom of peaceful assembly as guaranteed by the CPHRFF[23].

The ECHR rulings indicate that restrictions placed on freedom of assembly can not be based upon presuppositions, assumptions or speculations[24]. They must rely on objective evaluation of concrete facts[25]. The European Tribunal said that the justification of the restraint must be relevant, sufficient convincing and compelling[26] and authorities should be obliged to state in detail the grounds for the restriction[27]. According to the ETHS the right to peaceful assembly held in order to exchange opinions allowed multiple exceptions that, however, must be interpreted narrowly, and the restriction implemented convincingly justified[28]. The sole justification for state interference is the necessity stemming from the „democratic society"clause"[29].

The ruling of the European Tribunal of 18 December, 2007 in the case Nurettin Aldemir v. Turkey seem of paramount importance. The court took the view that the necessity of seeking official permission by the organizers of a demonstration was not contrary to the spirit of Article 11 if the state were to maintain public order and pro-

[20] Berladir v. Russia, final verdict of 19 November 2012r., complaint no. 34202/06, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112101; 4.07.2015, access:12:25.

[21] Skiba v. Poland, 7 July, 2009r., complaint no. 10659/03, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93817, 4.07.2015, access:13:05.

[22] Fáberv. Hungary, final Verdich of 24 November 2012, complaint no. 40721/08, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112446, 4.07.2015, access:12:40. B. Rodak, ECHR verdict annotation of 24 June 2012r., 40721/08, LEX/el. 2012

[23] Akgöl and Göl v. Turkey, 17 May 2011, complaint no. 28495/06 28516/06, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104794, 4.07.2015, access:12:25.

[24] Vajnai v. Hangary, 8 July 2008, complaint no. 33629/06, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404, 1.05.0214, access:16:07.

[25] Christian Democratic People's Party v. Moldova, 14 February 2006, complaint no. 28793/02, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72346, odczyt 1.05.0214, 16:08; Zana v.Turkey 25 November 1997, complaint no 18954/91, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58115, 1.05.0214, access:16: 10.

[26] Ouranio Toxo v. Greece Grecji, 20 October 2005, final verdict 20 June 2006, complaint no, 74989/01, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70720, access:1.05.0214, 16: 11; Barankevich v.Russia, 20 October 2005, complaint no.10519/03 http://hudoc.echr.coe.int/sites/eng/pages/ search.aspx?i=001-71243, 1.05.0214, access:16:15.

[27] Ivanov and Rother v. Bulwary, 24 November 2005, complaint no. 46336/99 http://hudoc.echr.coe.int/sites/ eng/pages/search.aspx?i=001-71297, 1.05.0214, access:16:16.

[28] Galstyan v. Armenia, 15 November 2007, complaint no. 26986/03 http://hudoc.echr.coe.int/sites/eng/ pages/search.aspx?i=001-83297, access:1.05.0214, 16:19; Ashughyan v. Armenia, 17 July,2008, complaint no. 33268/03, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87642, 1.05.0214, access:16:20.

[29] Christian Democratic People's Party v. Moldova, 14 February 2006, complaint no. 28793/02, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72346, odczyt 1.05.0214, 16:21; Djavit v. Turkey, 20 February 2003, final verdict 9 July, 2003, complaint no. 20652/92, http://hudoc.echr.coe.int/sites/ eng/pages/search.aspx?i=001-60953, 01.05.2014, access:16:22.

tect public safety, safeguard the rights of others [30]and prevent disorder[31]. The Constitution of the Republic of Poland signed into law in 1997 does not place as much emphasis on the right to freedom of assembly, as it does on freedom of media and other means of public expression. The right to assemble is placed in Article 57 Chapter II of the national act, under the heading "Freedoms and Political Rights", while issues concerning freedom of media are included in Article 14, Chapter 1, entitled "Rzeczpospolita"[32].

Delineating the concept of freedom of assembly is no easy task. Certain elements, however, distinguish freedom of assembly from freedom of association. Unlike an association that assumes relatively permanent relations between its members, a public assembly has an occasional character, and does not foster any strong bonds among participants. Identification of the members of an association does not pose problems unless such an organization chooses to remain secret, and its existence remains unknown to state authorities. But in such a case the directors of the organization realize who their members are. Participation in a public assembly is anonymous. Anonymity is an important characteristic of normative elements of the constitutional freedom of assembly[33]. The legal system of the European Council shows that freedom of assembly posits the protection of the right of expression, providing the arena for public debate and open protest[34].

[30] Legal authors, analyzing ECHR's verdicts, claim that these rights include: the right to life (art. 2), the right to protection against degrading and inhuman treatment (art. 3), the right to free movement (art. 5)the right for respect of private and family life (art. 8), the right peaceful enjoyment of possessions(art. 1 of the Protocol no. 1). Zob. A. Wróbel, Uwagi do art. 11 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolność, w: L. Garlicki (red.), „Konwencja o Ochronie…", s. 710; R. Stone, *Textbook on Civil Liberties and Human Rights,* Oxford 2002, s. 85.

[31] Nurettin Aldemir, 18 December 2007, final verdict 2 June 2008, complaint no. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84054, access:1.05.0214, 16:30.

[32] The Polish Constitution of 1997separates freedom of assembly (art. 57) from freedom of association (art. 58). The different provisions of these normative acts seem to prove the separate character of these rights, in spite of their common historical and ideological roots.

[33] J. Robert, *Libertés publiques et droits de l'homme*, Paris 1988, s. 569 ; J. Israel, *Droits des libertés fondamentales,* Paris 1998, s. 492 ; vide: The Constitutional Tribunal verdict of 10 November 2004r., signature: Kp 1/04, OTK – A 2004, nr 10, pos. 105.

[34] Ezelinv. France, 26 April 1991, complaint no. 11800/85, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57675, access:01.05.2014, 14: 15; Éva Molnár v. Hangary, 7 October 2008, final verdict, 7 January 2009, complaint no. 10346/05, http://hudoc.echr.coe.int/sites/eng/pages/ search.aspx?i=001-88775, 01.05.2014, 14: 17; Djavit v. Turkey, 20 February 2003, final verdict 9 July 2003, complaint no. 20652/92, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60953, access:01.05.2014, 14:19.

Despite the occasional character of the public assembly, it is seldom a random gathering of people but it is deliberately called by its organizers with the aim of voicing concerns about a social, political or economic situation; expressing ideas, defending participants' interests. An association as defined by Article 57 of the Polish constitution does not also have a random nature. This legislative act provides for freedom of assembly but, most importantly, the freedom of organizing and participating in such assemblies. It is clear that not every gathering of people constitutes a public meeting. The Polish constitution distinguishes between a public meeting, regulated by the open meeting law[35], and mass events governed by mass events safety regulations[36]. Mass events in contrast to public meetings do not aim at exchange of thoughts and ideas that underlie public debate but are held to encourage broad participation at specific happenings.

It should be noted that Article 3, paragraph 3 of the 20 March, 2009 legislation on the safety of mass events, made considerable major exceptions to the definition of an event, leaving some of them outside the operation the law. Under the definition of mass event do not fall those that are held: in theatres, cinemas, operas, operettas, concert halls, culture institutions, educational institutions run by schools, art galleries, sport and competition events for youth and handicapped people, general outdoor free sport events and indoor sports events sponsored by employers for their workers. The fact that public meetings and mass events are governed by various laws that differently regulate the responsibilities of their organizers can not lead to the conclusion that freedom of assembly a specified by Article 57 of the Polish constitution does not apply to mass events. Such a conclusion would be absolutely unjustified.

Generally speaking, public assemblies in Article 57 of the Polish constitution differ from any other public meetings in two respects: in abovementioned purposes, and in having the element of organization. Doubtless, the events that do not fall under Article 57 also posses certain purposes but they seem to be different from those whose freedom is guaranteed by the Polish constitution. Most often the purpose of a meeting transforming itself into a spontaneous one will be far from the purpose of its organizer. This in turn create crucial questions about the duties of the organizer. Sometimes it might be difficult to control the emotions of participant. More onerous responsibilities, pursuant to the law, face the organizers of sports events.

[35] Open Meeting Act of 5 July, 1990 r., (Journal of Laws, 2013, pos. 397).

[36] Mass Events Security Act of 20 March, 2009 r., (Journal of Laws, 2013 r., poz. 611with further amendments.). This act substituted the Mass Events Security Act of 22 August 1997 r. (Journal of Laws z 2005 r. Nr 108, poz. 909 with further amendments.).

The Polish Constitutional Tribunal's decision of 28 June, 2000[37], clarified that the term "assembly" encompasses meetings held for the purpose of discussing or presenting a common position, regardless of whether the meeting's participants communicate their view orally or in any other way. The physical presence of the individual in a specified place might be a form of public expression.

It was indicated by the Constitutional Tribunal that freedom of assembly belongs to the category of rights which take a human being as their subject but are collectively exercised. That right, in particular, gives leeway to elect the time and place of the meetings, the form of communication and discussion, and the way the meeting is run. The right to participate in a meeting involves the right to refuse to attend it. The duty of state authorities is to remove obstacles to exercising freedom of assembly and refrain from unreasonable interference in it, and to take steps to realize this right. In keeping with the ETHS's judgments, people should be able to demonstrate without facing threats, intimidation or violence. The Polish legal theory links placing Article 57 of the Polish constitution under the heading "Freedoms and Political rights" with a high value attached to that sphere of political life. One can not, however, conclude that this article refers only to a meeting of a political character. It applies to all assemblies provided that they are peaceful. Article 11 of the CPHRFF confers upon state authorities a singular duty to take measures to secure a peaceful course of legal assemblies.[38] In the European Tribunal's opinion the state is obligated to provide procedural guarantees to protect the right to peaceful assembly against any unreasonable intervention of the state[39]. The European Tribunal did not fully define the term of "peaceful assembly", saying only that it was a meeting consisting of at least two people gathered together to fulfill some common purpose, with other people at

[37] Constitutional Tribunal verdict of 28 June, 2000r., signature: K 34/99, OTK ZU 2000, no. 5, pos. 142.

[38] ECHR verdict in Plattform Ärzte für das Leben of 21 June, 1988, complaint no. 10126/02, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558, access: 01.05.2014, 14: 27; *Publications of the European Court of Human Rights. Series A: Judgements and Decisions*, nr 139, 32. ECHR verdict in Djavitv. Turkey, 20 February 2003, final verdict of 9 July 2003, complaint no. 20652/92, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60953, access: 01.05.2014, 14: 55; Piermont v. France, 27 April 1995, complaint no. 15773/89 15774/89, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57925, access: 01.05.2014, 15:11.

[39] ECHR verdict in Éva Molnárv. Hungary, 7 October 2008, final verdict of 7 January 2009, complaint no.10346/05, http://hudoc.echr.coe.int/sites/eng/pages/ search.aspx?i=001-88775, access: 01.05.2014, 15:15.

one place and time[40]. Constitutional protection is afforded all public assemblies, and private ones that are unrelated to the sphere of public life, held in enclosed or open areas[41].

Without getting into detailed analysis of the freedom of assembly, it is worth noticing that in practice the second sentence in Article 57 of the Polish Constitution gives a possibility to restrict freedom of assembly by using the rules set down in Article 31, paragraph 3 of the constitution[42]. Legal authors claim that "no society would be able to function smoothly if its members could summon a meeting, in any place and time and for any purpose, open for an unspecified number of anonymous people" [43]. Labeling an assembly as peaceful, it is asserted, is not assigned to an assembly permanently, and that a meeting having such a character at first, might become violent, change into a riot or a mass infringement of public order under specific circumstances or due to unskilled or hypocritical organizers".[44] This necessitates placing restriction on the right to assembly. In keeping with the second sentence of Article 57 of the Polish Constitution such restrictions may be a regulated by a separate law. The Article 57 clause, however, do not formulate criteria for the restrains, requiring only to implement them by legislative methods[45].

One of the most crucial issues relative the freedom of assembly restraints concerns prohibition imposed on people who can not be identified – i.e masked or dressed up individuals. If such participants committed illegal acts it would be hard to establish their identity and in consequence bring them to justice. The issue of masked

[40] A. Wróbel, Uwagi do art. 11 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolność, w: L. Garlicki (red.), „Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do art. 1 – 18", t. I, Warszawa 2010, s. 693 – 694.

[41] Constitutional Tribunal verdict of 28 June, 2000, signature: K 34/99, OTK ZU 2000, no 5, pos. 142.

[42] zob. K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, in particular: p. 179 – 192.

[43] W. Sokolewicz, Uwagi do art. 57 Konstytucji, w: L. Garlicki (red.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. IV, Warszawa 2005, p. 28.

[44] W. Sokolewicz, Uwagi do art. 57…, s. 58.

[45] Oya Ataman v. Turkey, 5 December, 2006, final Verdich, 5 March, 2007complaint no. 74552/01, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78330; access: 1.05.2014, 15:52; Balcik and Rother v. Turkey, 26 April, final verdict, 26 July, 2005, complaint no.63878/00, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68888, access: 1.05.2014, 15:54 Stankov v. Bulgaria, 2 October 2001, final verdict, 2 January, 2002, complaint no. 29221/95 29225/95, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59689, access: 1.05.2014, 16:02; Balcik v. Turkey, 26 April, final verdict, 26 July, 2005, complaint no.63878/00 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68888 , access: 1.05.2014, 16:04.

people or those whose clothes or haircut hampers verification of their identity was the subject of deliberation of the Polish Constitutional Tribunal. The Tribunal set out to examine the compliance of the following acts with the Polish Constitution: Article 1, paragraph 1 of the 2 April, 2004 law that had proposed to change the law entitled: "Open Meetings Law"; Road Traffic Law that had proposed to change Article 3, paragraph 3 of the 5 July, 1990 law, entitled Open Meetings Act[46]. The Constitutional Tribunal sought to examine if the inability to identify a person could constitute a sufficient premise to impose restrictions on peaceful assemblies, and if such restrictions were necessary for the protection of public order and the rights of other people in a democratic state. This involved adjudicating if the implementation of such restriction would not constitute of a constitutional value and violation of Article 31, paragraph 3 of the Polish constitution.

On 10 November, 2004[47], the Constitutional Tribunal, basing its opinion upon Article 2 and 57 in connection with Article 31, paragraph 3 of The Polish Constitution, deemed the controversial articles of 2 April, 2004 law unconstitutional. It concluded that the prohibition against participation in an peaceful assembly of people whose clothes were just a form of expression of views, and not serve to incite to aggressive behavior, would constitute undue interference in the constitutional right to freedom of assembly. The Tribunal's decision insisted that a the situation when the identity of a person could not be verified left authorities too much latitude to delineate the ultimate scope of restrictions. According to the verdict, the proposed amendment was imprecise and unclear, and had too broad a range in comparison with the original construction of the law. It grossly interfered in the right of freedom to assemble, and did not explain how inability to establish a person's identity could threaten the values enshrined in Article 31, paragraph 3 of the Polish constitution. According to the verdict, restricting anonymous people from participation in a meeting was not necessary as the Police Force Law of 6 April, 1990[48], had furnished the police with sufficient means to intervene to prevent a violent disruption of a meeting and to check the identity of the participants(Article 15, paragraph 1, point 1).

The verdict raised the question to whom the statement regarding inability to identify a person refers to: to the active participants of a meeting or also to bystanders or passers-by who accidentally were stuck in the crowd? It should be added that

[46] Journal of Laws, 2004 No. 51, pos., 297.

[47] Constitutional Tribunal verdict, 10 November, 2004, Kp 1/04, OTK-A 2004, no 10, pos. 105.

[48] Journal of Laws, 2002 r. No 7, pos. 58, with amendments.

in a peaceful assembly are often found people who do not share the purpose of the meeting but are motivated by an opportunity of a clash with security forces, which they consider as a specific form of entertainment. It frequently takes place in an open space, accessible to anonymous persons. Legal authors, commenting on the Constitutional Tribunal's verdict, point out that the restrictions placed by law on masked participants applies also to those people whose do not pose any danger to democratic values protected by the Polish Constitution. Such a prohibition, it is argued, would be conformable to the constitution only when it was directed at those of the masked participants whose unknown identity directly bore on the danger they posed[49].

Public assemblies are of a political character, but one must bear in mind that they exert a serious influence on the shape of the political culture of whole society. They often serve as a platform to express views relative to cultural phenomena while, at the same time, reflect one's personal beliefs, fears and prejudices.

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Wieruszewski R. (red.), *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Komentarz,* Warszawa 2012,

Wojtyczek K., *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP,* Kraków 1999

[49] M. Szydło, *Opinia prawna na temat projektu ustawy o zmianie ustawy – Prawo o zgromadzeniach*, „Zeszyty Prawnicze" 2012, no. 2(34), p. 123.

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Human rights in the age of globalization

Abstract
The phenomenon of globalization has accentuated the necessity to protect social rights. These rights are, alongside an economic globalization, a legal globalization with a human face, which places at the Centre of the development process and its values. It involves an organization model of personal relationships inspired social constitutionalism, which limited size that subjecting the sovereign power in function of the needs of social rights. In the Italian Constitution and in the universal human rights, solidarity is a fundamental value expressed in social gatherings of the person's membership, against weak categories and State commitment to remove obstacles to economic and social order that restrict the development of the human person. The prospect confirms the multidimensional nature of human rights, characterized by a moral dimension and a legal dimension, and allows you to overcome the differences between the freedom and equality of individuals.

Keywords:
globalization; solidarity; social rights; human rights

Summary: 1. Postmodern globalization between production and the centrality of the person. Sustainable development, market rules and principles of economic ethics. – 2. The technology applied to human beings and respect for human rights. The basic needs of individuals and the necessity to combine environmental ecology and human ecology. New cultural and ethical sensitivity and the coexistence of a variety of diversity. The dignity of the person as the Foundation of a fair law. – 3. Sociology of roles, relationships, and behaviors beyond the individuality deserving of protection in sociality. The rights of individuals to social relevance. The community and is role according to man. – 4. The aspiration to solidarity in the teleological

vocation of the sources. The work of adaptation of the legal system to the principle of solidarity. Solidarity in the Italian Constitution and in the Universal Treaties on human rights. The multidimensional nature of human rights.

1. The care with which we look at the economic and social phenomena, in the age of postmodern globalization, marked by the multiplication of knowledge[1], is centered by a prior argumentation about the role of the person[2]. The same legislation production shows a strong interest in the protection and development of the individual in society[3].

[1] Comp. J.F. Lyotard, *La condizione postmoderna. Rapporto sul sapere,* Milan, 2002.

[2] P. Perlingeri, *La personalità umana nell'ordinamento giuridico,* Camerino-Naples, 1972, pp. 183 ff.; P. Stanzione, *Capacità e minore età nella problematica della persona umana*, Camerino-Naples, 1975, p. 44 ff.; P. Perlingeri, *La personalità umana nell'ordinamento giuridico*, in ID., *La persona e i suoi diritti. Problemi del diritto civile*, Naples, 2005, p. 5 ff.; ID., *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti,* 3ª ed., Naples, 2006, p. 720; F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella and F. Parente, *Persona Fisica*, in *Tratt. dir. civ. CNN*, directed by P. Perlingeri, Naples, 2012, p. 14 ff. The juridical science having reconstructed the path of thought that led to by the subject person (comp. G. Oppo, *Declino del soggetto e ascesa della persona*, in *Riv. dir. civ*., 2002, p. 835 ff.), in recent times, spoke about the subject of «theoretical configuration as the case of the person» (F.D. Busnelli, *Ai confini della soggettività*, in *Corti pugliesi*, 2009, p. 3 ff.).

[3] Comp . R. Di Raimo, *Date a Cesare (soltanto) quel che é di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale*, in *Rass dir. civ*., 2014, p. 1085 ff.; G alpa and Ansaldo, *Le persone fisiche*, in *Comm. Cod. Civ*. Schlesinger, Milan, 1996, pp. 16-17; V. Scalisi , *Ermeneutica dei diritti fondamentali e principio «personalista» in Italia e nell'Unione europea*, in Riv. dir. civ., 2010, I, p. 157; F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, in *Corti pugliesi*, 2007, p. 774 ff.; S. Cassese, *I Diritti umani oggi*, Rome-Bari, 2006, p. 75 ff; E. TRIGGIANI, *Un trattato per la futura "unità europea"*, in *Trattato che adotta una costituzione per l'Europa*, Bari, 2004, p. 9 ff; M.c. Colombo, R. Briani e A. Palazzo, *Riflessioni sulla Carta europea dei diritti*, in *Nuova rass.*, 2001, p. 932; A. Rizzo, *Il problema della tutela dei diritti fondamentali nell'Unione Europea*, in *Eur. dir. priv*., 2001, p. 59; A. Pace, *A che serve la Carta dei diritti fondamentali dell'Unione Europea? Appunti preliminari*, in *Giur. cost.* , 2001, p. 193; R. Calvano, *Verso un sistema di garanzie costituzionali dell'U.E.? La giustizia costituzionale comunitaria dopo il Trattato di Nizza*, in *Giur. cost.,* 2001, p. 209; G. Conetti, *La Carta dei diritti fondamentali dell'Unione Europea*, in *Studium iuris*, 2001, p. 1163; G. Vettori, *Carta europea e situazioni dei privati*, in *Riv. dir. priv*, 2001, p. 473 ff.; M. Cartabia, *L'efficacia giuridica della Carta dei diritti: un problema del futuro o una realtà del presente?*, in *Quad. cost*., 2001, p. 423; F.M. Di majo, *La Carta dei diritti fondamentali dell'Unione Europea: aspetti giuridici e politici*, in *Eur. dir. priv.,* 2001, p. 41 ff.; A. Rizzo, *La Carta dei diritti fondamentali dell'Unione Europea*, in *Corr. giur*., 2000, p. 1660; B. Conforti, *Note sui rapporti tra diritto comunitario e diritto europeo dei diritti fondamentali*, in *Riv. int. dir. uomo*, 2000, p. 423; G. Alpa, *L'applicazione della Convenzione europea sui diritti dell'Uomo*

Certainly the phenomenon of globalization has accentuated the need to protect public rights; in particular, economic and social rights, including freedom, the right of access to services of general interest, the right to fair working conditions, the right to healthy environment, the right to maintain control over economic and financial information[4]. These rights are, alongside an economic globalization, a legal globalization with a human face[5], which places at the Centre of the development process the person and its values[6].

In preliminary terms, then, a reflection on social rights entails a conception of the human person[7] as an individual and an organization model of personal relationships inspired social constitutionalism, as limited dimension that subjecting the sovereign power in function of the needs of social rights[8].

ai rapporti privati, in *Eur. dir. priv.,* 1999, p. 873; P. Perlingeri, *Mercato, solidarietà e diritti umani*, in *Rass. dir. civ*., 1995, p. 84; A. Corasaniti, *Protezione costituzionale e protezione internazionale dei diritti dell'uomo*, in *Dir. soc*., 1993, p. 589 ff.; ID., *Note in tema di diritti fondamentali*, in *Dir. soc*., 1990, pp. 189 ff.; M.R. Saulle, *Diritti umani, familiari e sociali: principi giuridici fondamentali*, in *Dir. fam*, 1992, p. 1117; C. Massini Correas, *Diritti umani «deboli» e diritti umani «assoluti»*, in *Iustitia*, 1991, p. 211; N. Bobbio, *Diritti dell'uomo e società*, in *Sociol. dir*., 1989, p. 15 ff.

[4] F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., p. 778, note 20; E. Capobianco, *Globalizzazione, rapporti civili e diritti della persona*, in *Vita not*., 2004, pp. 6-7.

[5] Comp, F.Parente *L'assetto normativo dei diritti fondamentali della persona tra* status civitatis *e posizione di migrante: le suggestioni della «condizione di reciprocità* in *Rass. dir. civ*., 2008, p. 1108 ff.; ID., *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, in *Corti pugliesi,* 2007, pp. 776-777, note 13, p. 778, note 20; P. Perlingeri, *I diritti civili dello straniero* (2001), in ID., *La persona e i suoi diritti,* Naples, 2005, p. 87 ff.; E. Capobianco, *Globalizzazione, rapporti civili e diritti della persona*, in *Vita not.*,, 2004, p. 8 ff.; E. Codini *Diversi ed uguali. Immigrazione extracomunitaria e principio giuridico di uguaglianza*,Milan, 2002, p. 47 ff.; L. Melica, *Lo straniero extracomunitario. Valori costituzionali e identità culturale*, Turin, 1996, p. 194 ff.; G. Tucci and A. Di Muro, *Diritti fondamentali, principio di uguaglianza e riforma della normativa in materia di immigrazione*, in *Riv. crit. dir. priv*., 2003, p. 184 ff.; E. Grosso, *Straniero (status costituzionale dello)*, in *Dig. disc. pubbl*., IV, Turin, 1999, p. 156 ff.

[6] F. Parente, *o.l.u.c.*; E. Capobianco, *o.l.u.c.* The hermeneutics of sources, legal institutions, be functionalized by virtue of transition from a productive setting to a conception that aims for the creation of better conditions of life for every individual, to whom is attributed the power to develop its own personality (see P. Perlingeri, *La personalità umana nell'ordinamento giuridico*, q., p. 7).

[7] F.J. Ansuátegui Roig, *Rivendicando i diritti sociali*, Naples, 2014, p. 10.

[8] F.J. ansuátegui Roig, *o.c.*, p. 13; F., Parente *La pace e la giustizia nel sistema globale: categorie giuridiche e storicità dei concetti*, in *Rass. dir. civ*, 2015, p. 329.

In this perspective, even the logic of the market must comply with the rules for the protection of the person[9], fundamental human rights[10] and principles of social ethics and economic[11]. On the verge It is significant the path traced by the alternative trade Institutions, non-profit agencies[12] and entities that distribute only products which they propose to pursue environmental protection, equity and solidarity among peoples and with the weaker countries[13]. The market, therefore,

[9] G. Resta, *Dignità, persone, mercati,* Turin, 2014, *passim*.

[10] On human rights, see A. Ollero Tassara, *Diritto positivo e diritti umani*, edited by J. Trujillo Pérez, Turin, 1998, *passim*; F. Viola, *Diritti dell'uomo: diritto naturale, etica contemporanea*, Turin, 1989, *passim*; N. Bobbio, *Diritti dell'uomo e società*, in *Sociol. dir.*, 1989, p. 15 ff.; A. Corasaniti, *Note in tema di diritti fondamentali*, in *Dir. soc.*, 1990, pp. 189 ff.; ID., *Protezione costituzionale e protezione internazionale dei diritti dell'uomo*, in *Dir. soc.*, 1993, p. 589 ff.; C. Massini Correas, *Diritti umani «deboli» e diritti umani «assoluti»*, in *Iustitia*, 1991, p. 211; P. Perlingeri, *Mercato, solidarietà e diritti umani*, in *Rass. dir. civ*, 1995, p. 84 ff.; ID., *A margine della Carta dei diritti fondamentali dell'Unione Europea*, in Id., *La pe sona e i suoi diritti. Problemi del diritto civile*, Naples, 2005, p. 65ff.; Id., *I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici*, in Id., *La persona e i suoi diritti*, cit., p. 73 ff.; Id., *Dichiarazione universale dei diritti dell'uomo: verso il duemila*, in Id., *La persona e i suoi diritti*, q., p. 81 ff.; M.R. Saulle, *Diritti umani, familiari e sociali: principi giuridici fondamentali*, *Dir. fam. pers*., 1992, II, p. 1117 ff.; F. P. Casavola, *Diritti umani*, Padua, 1997, *passim*; G. ZICCardi Capaldo, *Legittimità democratica, tutela dei diritti umani e produzione giuridica primaria nell'ordinamento internazionale*, in *Jus,* 1999, pp. 639 seq.; G. Alpa, *L'applicazione della Convenzione europea sui diritti dell'Uomo ai rapporti privati*, in *Eur. dir. priv*, 1999, p. 873 ff.; A. Rizzo, *Il problema della tutela dei diritti fondamentali nell'Unione Europea*, in *Eur. dir. priv*., 2001, p. 59 ff.; F. Parente, *L'assetto normativo dei diritti fondamentali della persona tra* status civitatis *e posizione di migrante: le suggestioni della «condizione di reciprocità»*, q., p. 1108 ff.; A. Ciancio, *I diritti politici tra cittadinanza e residenza*, in *Quad. cost*, 2002, p. 52 ff.; L. Melica, *Lo straniero extracomunitario. Valori costituzionali e identità culturale*, Turin, 1996, p. 194 ff.; N. Lipari, *Diritto e valori sociali. Legalità condivisa e dignità della persona*, Rome, 2004, p. 122; F. Mastropaolo, *Valori fondamentali e persona umana nell'evoluzione del diritto privato*, in *Iustitia*, 1987, p. 193 ff.

[11] P. Perlingeri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti,* q., pp. 477-478; V. Buonocore, *Etica degli affari e impresa etica*, *Giur. Comm*., 2004, p. 181; P. Schlesinger, *Mercati, diritto privato, valori*, in *Riv. dir. civ*., 2004, II, p. 325 ff.; G. Oppo, *Diritto dell'impresa e morale sociale*, in *Riv. dir. civ*., 1992, I, p. 16 ff.; A. Sen, *Codici morali e successo economico*, in *Mulino*, 1994, p. 194; F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., pp. 779-780.

[12] Comp. R. Di Raimo, *Date a Cesare (soltanto) quel che é di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale* q., p. 1088 ff. Current propensity to build a world of renewed horizontal solidarity, with particular reference to the non-profit world. V. Rizzo, *Contratto e costituzione*, in *Rass. dir. civ*., 2015, p. 351.

[13] S. Niccolai, *Mercato come valore o mercato come regola? Osservazioni minime su un tema importante*, in *Giur. cost.*, 1991, p. 3680 ff.; F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., p. 779; F. Rigano, *La tutela della corretta concorrenza fra associazioni non lucrative e imprese*, in *Giur. cost.*, 1994, p. 391.

can't clashwith the rules on protection of social utility, security, freedom and human dignity. Abstract protection of the market, therefore, takes over the concrete protection of the consumer, as worthy of protection[14].

The same freedom of private economic initiative, recognized by art. 41, par. 1, Constitution, on the one hand, it must be balanced by social utility and respect of security, freedom and human dignity (art. 41, para. 2, Cost), on the other hand, must be coordinated with the purposes that justify the provision of controls and social programs.[15] Indeed, economic freedom must be compressed if all the ordinary legislator the reserve to pre-eminent national interest. In the light of the perspective outlined, human rights incorporate an absolute value which becomes the basis of sustainable development[16].

2. In the global society, a peculiar role is the issue of the development of technology applied to the human[17]; for example, genetic manipulation,

[14] P. Perlingeri, *Le ragioni del mercato e le ragioni del diritto*, in *Rass. dir. civ*., 2005, p. 3 ff.; G. Guzzi, *Struttura concorrenziale del mercato e tutela dei consumatori. Una relazione ancora da esplorare*, in *Foro it.*, 2004, I, c. 283; L. Mezzasoma, *Consumatore e Costituzione*, in *Rass. dir. civ* , 2015, p. 311 ff.; S. Polidori, *Forme legali poste a tutela dei consumatori: funzioni e discipline*, in *Rass. dir. civ*., 2013, p. 119.

[15] F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*, in *Rass. dir.civ.*, 2008, p. 403.

[16] Comp. M. Pennasilico, *Contratto e uso responsabile delle risorse naturali*, in *Rass. dir. civ.*, 2014, p. 753 ff.; E. Giacobbe, *Autodeterminazione, famiglie e diritto privato*, in *Dir. fam. pers.*, 2010, p. 299; F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., p. 780. As art. 41., «private economic initiative is free ', even if ' cannot escape an activity ', which you configure in the creator of the function "social utility" and "connection that is not in any way gone to safety, damage ' to freedom, human dignity." In this perspective, the economic initiative can be carried out always and everywhere, but bound to respect for ' law ', i.e. the principle of constitutional legality» (P. Perlingeri, *Il principio di legalità nel diritto civile*, in *Rass. dir. civ.*, 2010, p. 185).

[17] On the limits that scientific research must follow to safeguard the value-man, see F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, in *Rass. dir. civ.*, 2009, pp. 452-453, notes 15 and 16; P. D'Addino Serravalle, *Questioni biotecnologiche e soluzioni normative* q., p. 71; ID., *Ingegneria genetica e valutazione del giurista* Naples, 1988, p. 14. While, on the protection of the individual in the face of technological development, v. F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*, q., p. 397, on relations between science and ethics, v. P. Perlingeri, *Riflessioni sull'inseminazione artificiale e sulla manipolazione genetica*, in ID., *La persona e suoi diritti*, q., pp. 169-170; S. Labriola., *Libertà della scienza e promozione della ricerca* Padova, 1999, *passim*; M. Nigro, *Lo Stato italiano e la ricerca scientifica*, in *Riv. trim. dir. pubbl.* 1972, p. 740 ff.

cloningtechniques and electronic commerce of sperm and ova[18]. The problem involves not only economic issues, but also cultural options, ethics, religion and politics, which often lead to an inconsistency between different fundamental rights guaranteed by the constitutions[19].The discovery of new techniques and advanced research tools, which could affect the existence of people, from beginning to termination of life[20], genetic investigtions, new techniques of medical assisted

18 F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, q., p. 447-449.

19 F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, directed by P. Parente, q., p. 7 ss.

20 On the beginning of human life, F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*,q., p. 447, note 9; P. Schlesinger, *Il concepito e l'inizio della persona*, in *Riv. dir. civ*, , 2008, p. 247 ff.; C. Casonato, *Introduzione al biodiritto. La bioetica nel diritto costituzionale comparato*, Trento, 2006, p. 30 ff.; G. Villanacci, *Il concepito nell'ordinamento giuridico. Soggettività e statuto*, Naples, 2006, *passim*; G. Oppo, *L'inizio della vita umana*, in *Riv. dir. civ*, 1982, p. 499 ff.; F. d. Busnelli, *L'inizio della vita umana*, in *Riv. dir. civ*., 2004, p. 535 ff.; P. Zatti, *La tutela della vita prenatale: i limiti del diritto*, in *Nuova giur. civ. comm.*, 2001, II, p. 157 ff.; P. D'addino Serravalle, *Questioni biotecnologiche e soluzioni normative* q., p. 39 ff.; G. Biscontini and L. Ruggeri (curated by), *La tutela della vita nascente. A proposito di un recente progetto di legge*, Naples, 2003, *passim*; P. Zatti, *Quale statuto per l'embrione umano?*, in *Riv. crit. dir. priv*., 1990, p. 458; G. Oppo, *Scienza, diritto, vita umana*. Lectio doctoralis by G. Oppo, *Riv. dir. civ.*, 2002, p. 14 ff.; C.M. Mazzoni, *La tutela reale dell'embrione*, in *Nuova giur. civ. comm.*,2003, II, p. 457 ff.; S Piccinini and F. Pilla (curated by), *Aspetti del Biopotere. Gli organismi geneticamente modificati. La procreazione assistita*, Naples, 2005, *passim*; G. Oppo, *Declino del soggetto e ascesa della persona*, in *Riv. dir. civ*, 2002, p. 830 ff.; G. Biscontini and L. Ruggeri (curated by), *La tutela dell'embrione*, Naples, 2002, *passim*; P. Zatti, *Diritti del non-nato e immedesimazione del feto nella madre: quali ostacoli per un affidamento del nascituro*, in *Nuova giur. civ. comm.* 1999, I, p. 112 ff.; G. Ferrando, *Diritto e scienze della vita. Cellule e tessuti nelle recenti direttive europee*, in AA. VV., *Il diritto civile oggi. Compiti scientifici e didattici del civilista*, Naples, 2006, p. 417 ff.; N. Lipari, *Legge sulla procreazione medicalmente assistita e tecnica legislativa*, in *Riv. trim*., 2005, p. 518 ff.; G. Oppo, *Procreazione assistita e sorte del nascituro*, in *Riv. dir. civ*., 2005, p. 101 ff.; M. Sesta, *Dalla libertà ai divieti: quale futuro per la procreazione medicalmente assistita?*, in *Corr. giur*., 2004, p. 1405 ff.; A.M. Azzaro, *La fecondazione artificiale tra atto e rapporto*, in *Dir. fam. pers*., 2005, pp. 231 ff.; C. Casini, *Tutela della vita umana nascente, con particolare riguardo alla tutela dei diritti dell'embrione*, in C. Romano and G. Grassani (curated by), *Bioetica*, Turin, 1995, p. 337 s.; F. Mastropaolo, *Lo statuto dell'embrione*, in *Iustitia*, 1996, p. 126 ff.; R. Promodo, *L'embrione tra etica e biologia. Un'analisi bioetica sulle origini della vita*, Naples, 1998, *passim*; E. Giacobbe, *Concepito*, S. Patti e P. Sirena (ed.), *Dizionari sistematici. Diritto civile. Famiglia, successioni e proprietà*, Milan, 2008, p. 83; F. D. Busnelli, *La tutela giuridica dell'inizio della vita umana*, in R. Rossano and S. Sibilla (curated by), *La tutela giuridica della vita prenatale*, Turin, 2005, p. 35 ff.; G. Baldini,. *Il nascituro e la soggettività giuridica*, in *Dir. fam. pers*, 2000, I, p. 362. On the phenomenon of cessation of life, which requires the determination of the legal notion of

procreation[21], protection of health and life, the right to die without therapeutic obstinacy unsuccessful[22], are current issues involving both the biomedical research and neuroscience[23] as the ethics , morality and the law, working to identify the boundaries to the evolution of scientific and technological progress, beyond which the same search and its applications put in danger the survival of the individual

death, see F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, q., p. 449, note 10; L. Cariota Ferrara, *Il momento della morte è fuori della vita?*, in *Riv. dir. civ.,* 1961, I, p. 134 ff.; V. Sgroi, *Morte (diritto civile)*, *Enc. dir.*, XXVII, Milan, 1977, p. 103 ff.; F. Mantovani, *Morte (generalità)*, *Enc. dir.*, XXVII, Milan, 1977, pp. 82 ff.; P. Rescigno, *La fine della vita umana*, in *Riv. dir. civ.*, 1982, I, p. 634 ff.; P. Rescigno, *Morte*, in *Dig. disc. Priv.*, *sez. Civ*., XI, Turin, 1994, p. 458 ff.; R. Barcaro and P. Becchi, *Morte cerebrale e trapianto di organi*, in *Bioetica*, 2004, p. 25 ff.; C. Casonato, *Introduzione al Biodiritto*, q., p. 19 ff.; F. Caggia, *Morte*, in S. Patti and P.SIRENA (curated by), *Dizionari sistematici. Diritto civile. Famiglia, successioni e proprietà* q., p. 138 ff.; F. PARENTE, *Le disposizioni in «forma indiretta» connesse alla morte*, in *Rass. dir. civ.*, 2008, p. 108, note 1.

21 On this point, comp. A. Luna Serrano, *Comparazione tra i diritti spagnolo e italiano in materia di filiazione da procreazione medicalmente assistita*, in *Rass. dir. civ*., 2014, p. 1281 ff.; A. Renda, *Lo scambio di embrioni e il dilemma della maternità divisa*, note to the Trib. Rome, Sez. I, ord, August 8, 2014, *Dir. succ. fam.*, 2015, p. 206 ff.; A. Nicolussi and A. Renda, *Fecondazione eterologa. Il pendolo tra Corte costituzionale e Corte EDU*, in *Eur. dir. priv*., 2013, p. 212 ff.; U. Salanitro, *Il divieto di fecondazione eterologa alla luce della Convenzione Europea dei Diritti dell'Uomo: l'intervento della Corte di Strasburgo*, 2010, p. 988 ff.; A. Nicolussi, *Fecondazione eterologa e diritto di conoscere le proprie origini. Per un'analisi giuridica di una possibilità tecnica*, in *AIC*, 2012, online; R. Villani, *La procreazione assistita. La nuova legge 19 febbraio 2004, n. 40*, 2004, Turin, 2004, p. 29 ff.; G. Sciancalepore, *Disposizioni concernenti la tutela del nascituro*, in P. Stanzione e G. Sciancalepore (a cura di), *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, n. 40*, Milan, 2004, p. 30 ff.; M. SESTA, *Procreazione medicalmente assistita Enc. giur. Treccani*, XXIV, *Agg*., Rome, 2004, p. 3; F. Modugno, *La fecondazione assistita alla luce dei principi e della giurisprudenza costituzionale*, in *Rass. parl.*, 2005, p. 373 ff.; P. Stanzione and G. Sciancalepore, *Tutela della vita e fecondazione assistita: prime applicazioni giurisprudenziali*, in *Corr. giur.*, 2004, p. 1531 ff.; M. Sesta, *Dalla libertà ai divieti: quale futuro per la procreazione medicalmente assistita?*, in *Corr. giur.*, 2004, p. 1408 ff.

22 F. Parente, *La fisicità della persona e i limiti alla disposizione del proprio corpo*, in G. Lisella and F. Parente, *Persona Fisica,* in *Tratt. dir. civ. CNN*, directed by P. Perlingeri, q., p. 470 ff.; C. Lega, *Il «diritto di morire con dignità» e l'eutanasia*, *Giur. it.*, 1987, IV, c. 472.

23 P. Perlingeri, *Amministrazione di sostegno e neuroscienze*, in *Riv. dir. civ.*, in *Rass. dir. civ*., 2015, p. 330 ff.; L. Tafaro, *Il futuro del diritto: il neurodiritto*, in AA. VV., *Estudios en Homenaje a Mercedes Gayosso y Navarrete*, Universidad Veracruzana, 2009, p. 709 ff.; ID., *Neuroscienze e diritto del futuro: il neurodiritto*, in AA. VV., studies in memory of Giuseppe Panza, Naples, 2010, p. 685 ff.; ID., *Le neuroscienze e le nuove prospettive del diritto alla salute*, in AA. VV., *Neuroscienze e persona: interrogativi e percorsi etici*, Bologna, 2010, p. 221 ff.; ID., *Security and human rights in the future: neurodiritto*, in *Journal of Modern Science*, 2012, p. 211 ff.

and of the human species[24]. From this point of view, inevitably, protecting the environment is combined with the protection of human health[25] and environmental ecology intersects with human ecology[26].

Law, as an expression of individual ethics and social responsibility, has to drive economic and technological development in a proper human dimension, which takes on essential importance. Indeed, social rights implies the necessity to meet the needs related to the basic needs of individuals[27].

It is still true that new needs arise in the changing social conditions, but it is also necessary to coordinate the protection with new cultural and ethical sensitivity, based on shared rules, a regulatory framework which should aim to achieve the coexistence of a "plurality of diversity"[28].

If the cultural contamination imposed by the globalization process increasingly invest the entire planet, however, technological innovations, cultural pluralism and socio-economic differences should not weaken the identity and dignity of the person[29]. This means that a fair law must be able to combine the need for progress in social and economic relations and in scientific discoveries with the knowledge to never lose sight of the value and the dignity of the person[30].

In terms of system, the unitary conception of the legal system, which tends to formulate innovative values to protect the individual, does not preclude that third-generation[31] rights, many and heterogeneous, including takes on the

[24] P. D'addino Serravalle,. *Questioni biotecnologiche e soluzioni normative*,, Naples, 2003, p. 30 ss.

[25] F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*,, q.., p. 397 ff.

[26] Pope Francesco, *Pensieri dal cuore*, 2013 Milan, p. 32; ID., *Lettera Enciclica Laudato si' sulla cura della casa comune*, given in Rome on May 24, 2015. On the relevance of ecological profiles, in the framework of sustainable development, M. Pennasilico, *contratto e uso responsabile delle risorse naturali*, q., p. 760.

[27] F.J. Ansuátegui Roig, *Rivendicando i diritti sociali* , q., p. 20.

[28] F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., p. 782; N. Bobbio, *L'Età dei Diritti*, Turin, 1997, p. XIV.

[29] F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q. p. 782.

[30] Comp. P. Morozzo della Rocca, *Il principio di dignità della persona umana nella società globalizzata*, in *Dem. dir.*, 2004, p. 209 ff.

[31] F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, q., p. 782, note 33.

righttohealthyenvironment, follow fourth-generation[32] rights, which tend to regulate increasingly unsettling effects of biomedical research, according to the preservation of the genetic heritage of the human individual[33].

3. Within the sociology of roles and more than individual[34] relations, the term "inviolable human rights" takes on the appearance of open clause to transpose the new rights drawn up by social[35] conscience and forces the legislature to adjust the content of the legal system to the mutability of social reality and to delineate human behaviors worthy of protection in sociality[36].

Therefore, the integral protection of person tents certainly to patronage of individual rights, but is also aimed at safeguarding social rights, which connote to the primacy of the moment of solidarity[37]. Regulatory instruments which stigmatize the person's rights lay at the heart of the order; this means that the individual is safeguarded in his other posturing in its changeability and individuality[38]. Nevertheless, the rights of individuals to social relevance in the definition of the person beyond the individual specificity, in the perspective of the individual integration in community life[39]. In fact, fundamental rights reflect the

[32] F. Parente, *o.u.c.*, p. 782, note 13, 20, 23, 30 and 33.

[33] F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, q., p. 467.

[34] On sociology of roles, see P. Perlingeri, *Relazioni pubbliche e persona umana*, in Id., *La persona e i suoi diritti*, q., p. 55 ff.

[35] F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella and F. Parente, *Persona fisica,* in *Tratt. dir. civ. CNN*, directed by P. Perlingeri, q., p. 17 ff.

[36] Comp. A. Baldassarre, *o.u.c.*, p. 20; A. Barbera, *Commento all'art.2*, in *Comm. Cost. Branca*, Bologna-Rome, 1989, p. 65 ff.; P.F. Grossi, *Introduzione ad uno studio sui diritti inviolabili nella Costituzione italiana*, Padova, 1972, p. 172 ff.; A. Pizzorusso, *Lezioni di diritto costituzionale*, Rome, 1978, p. 97.

[37] P. Perlingeri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, q.., p. 438; Comp. R. Di Raimo *Date a Cesare (soltanto) quel che é di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale*, q., pp. 1086-1087; F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella and F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, directed by P. Perlingeri, q., p. 17.

[38] P. Perlingeri, *A margine della Carta del Diritti fondamentali dell'Unione europea*, in Id., *La persona e i suoi diritti. Problemi del diritto civile*, q., p. 66.

[39] V. Scalisi, *Ermeneutica dei diritti fondamentali e principio «personalista» in Italia e nell'Unione europea*, Milan, 2008, p. 385 ff.; A. Falzea, *Introduzione alle scienze giuridiche. Il concetto di diritto*, 6ª ed., Milan, 2008, p. 385 ff.

needs and interests of the human person that are reflected in the social order and lifestyle of the community[40]. In the analysis of the phenomenon of subjectivity, this reconstruction requires a change of prospect than ever before, allowing you to protect the human person in its individuality without filter the values of solidarity[41]. Outlook also allows you to design the community, function as a means of integration of the individual in social system[42].

From this point of view, all social formations in which the person takes, especially intermediate communities represent the natural place of conduct of personality and need to ensure the full development of the person in respect of his dignity[43]. In turn, the value of dignity, as shared by other jurisdictions, assumes a special significance in all reports inter-subjective, which limit the activities that affect the development of the person or his psycho-physical health, and becomes an axiological transnational significance category[44].

In this regard, is emblematic the formula contained in the preamble to the two International Pacts of 1966: Pact on Civil and political rights and Pact on economic, social and cultural rights, which reiterates: "freedom, justice and peace in the world are based on recognition of the dignity inherent in all members of the human family"[45].

4. In modern legal systems, the aspiration to solidarity takes place, as well as in the action of social practice, in the vocation of teleological sources[46]. Indeed, the framework underlying values to a legal system that accommodates to its inside human rights embodies the real idea of solidarity[47]. Sorting allows the self-realization of individuals in solidarity with a regulatory system that is necessary to refer to the human person.

In the realization of the aspirations for solidarity, the programmatic work of adaptation of the legal system the principle of solidarity is made not merely, but purposeful in the effective implementation of those organizational structures of society that make possible the realization of "supportive person"[48]. Ultimately, social rights have a role, which should be conformed osmotic to economic instances, to the political hear, ethical, religious and cultural civil society.

The Italian Constitution has married a notion of solidarity that must be traced back to political and social purposes and is functional to the realization of the person, not the implementation of the property or the operation of the enterprise (art. 2)[49]. In the constitutional architecture, solidarity is compared to personalism, which places it at the heart of the sorting system the human person system and its dignity[50]. For this reason, all financial instruments are subject to the protection of the person and the principle of solidarity. The solidarity manifested in all areas of social relations and takes on a double meaning: altruistic dimension between the community members and selfish attitude towards those who are not part of the Group and does not benefit from the feeling[51].

In the Italian Constitution and in the universal principles on human rights, therefore, solidarity is a fundamental value expressed in social gatherings of the person's membership, against weak categories and State commitment to remove obstacles to economic and social order that restrict the development of the human person[52].

[40] F. Parente, *La persona e l'assetto delle tutele costituzionali,* in G. Lisella and F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, directed by P.Perlingeri, q., p. 18.

[41] Comp. V. Rizzo, *Contratto e costituzione*, q., p. 350; S. Rodota, *Solidarietà. Un'utopia necessaria*, Bari, 2014.

[42] F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, direct by P. Perlingeri, q., p. 18 ff.

[43] F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, q., p. 457.

[44] P. Perlingeri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, q., p. 439. On reconstruction, see P. Perlingeri and R. Di Raimo, *Sub art. 18*, P. Perlingeri and AA.VV., *Commento alla Costituzione italiana*, Naples, 2000, p. 97 ff.

[45] F.J. Ansuátegui Roig, *Rivendicando i diritti sociali* q.., p. 34;. F. Parente, *L'assetto normativo dei diritti fondamentali della persona tra* status civitatis *e posizione di migrante: le suggestioni della «condizione di reciprocità»*, in *Rass. dir. civ*, 2008, p. 1124

[46] F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella and F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, directed by P. Perlingeri, q., pp. 18-19; D. Messinetti, *Persona e destinazioni*, in *Rev. crit. dir. priv.*, 1999, p. 502.

[47] D. Messinetti, *o.u.c.*, p. 502.

[48] D. Messinetti, *o.u.c.*, p. 504.

[49] P. Perlingeri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, cit., p. 433 ff.; F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, direct by P. Perlingeri, q., p. 20

[50] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, cit., p. 433 ff.

[51] P. Perlingeri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, cit., p. 435; F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, direct by P. Perlingieri, q., p. 20.

[52] F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *In Tratt. dir. civ. CNN*, direct by P. Perlingeri, q., p. 20

In summary, given that human rights derive from the dignity and worth of the person[53], it must be concluded that the individual is the central subject of human rights and fundamental freedoms[54]. The prospect that assigns to the role of moral foundation of human rights confirms the multidimensional nature of these rights, characterized by a moral dimension and a legal dimension[55], and allows you to overcome the differences between the freedom and equality of individuals[56].

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Ansuátegui Roig F.J., *Rivendicando i diritti sociali* q.., p. 34;. F. Parente, *L'assetto normativo dei diritti fondamentali della persona tra* status civitatis *e posizione di migrante: le suggestioni della «condizione di reciprocità»*, in *Rass. dir. civ*, 2008, p. 1124

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[53] Declaration and programme of action of 1993 (comp Vienna. F.j. Ansuátegui Roig, *Rivendicando i diritti sociali*, cit., p. 39). On the theme, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, cit., p. 435 ff.; F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella e F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, direct by P. Perlingeri, q., p. 22 ff.

[54] F.J. AnsuÁtegui Roig, *o.l.u.c.*.

[55] F.J. AnsuÁtegui Roig, *o.c.*, p. 40.

[56] F.J. AnsuÁtegui Roig, *o.c.*, p. 34.

Morozzo della Rocca P., *Il principio di dignità della persona umana nella società globalizzata*, in *Dem. dir.*, 2004, p. 209 ff.

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Safety as a human right in context of using direct coercive measures, force and firearms by authorized entities – when an individual right encounters a collective right

Abstract
Safety is a vital human need and although it is not a right expressed by the legislator directly in the Constitution, the Basic Law treats about safety several times in different contexts and meanings. Through the prism of the use of direct coercive measures and firearms, safety is seen in two ways. On the one hand there are measures for ensuring public safety and order, on the other hand their use becomes a breach on personal safety of individuals. These goods, collective and individual, should be balanced in an apropriate way so that security as a human right is protected and respected in a democratic state ruled by law.

The concept of safety without specifying the type or category, is a set of attributes and values of the spatial denominator and indeterminate abstract. Clarification of subject explains the type of safety. Otherwise, it will be no significant guarantees to limit the freedoms and rights. It is important to define entities, communities, connections and the risk that accompanies safety. The range of goods may involve a number of protected areas. Security, safety are a vital need of every human being. It is a positive state identified with confidence and at the same time the lack of potential threats. As a phenomenon of the characteristics of objective, it is possible to diagnose using the right tools and knowledge, requires continuous assessment of the factors that could endanger occurring goods and rights.

Safety thus occurs in a double sense. On the one hand it is the right of an individual unit, closely related to the freedom and personal inviolability. On the other hand, it is a collective right and refers to the quality of life. In this sense, can be equated with the right to peace, but in this paper it is especially discussed in the context of public safety in the state. Thus, collective rights are vague and function as a standard program. Therefore, it is important to show connections between the individual and collective right to safety in order to assess their implementation and coexistance.

Keywords:
public order and safety, right to safety, human rights, individual and collective rights, coercion, direct coercive measures, firearms

1. Introduction

In a democratic state ruled by law ensuring protection of freedoms and rights of individuals by public authorities is to grant qualified entities legally defined measures that will serve the wider protection of goods. Society's expectations revolve around a sense of security to safeguard the interests, lack of invasion of privacy and non-infringement of freedom and personal inviolability, including personal security. Security, safety is a condition giving confidence to unit, which is the existence and the guarantee of the preservation and continuity of that existence, enables the further development and improvement of a person. In opposition to this, the good may in certain cases be affected in the clash of two spheres of values – individual and collective, what will be regarded as an interference permissible and lawful under certain conditions. About these conditions in detail and comprehensively treats the Act of 24 May 2013 on direct coercive measures and firearms specifying the types of coercive measures used by authorized entities, cases and rules of the use of force and firearms, both procedures before and after use, as well as documenting the use (Act on direct coercive measures and firearms on 24 May 2013). These measures serve to ensure the safety and public order, while allowing their use against personal security and safety.

Limitations of freedom and human rights in a democratic state ruled by law are always associated with a unique situation and need to protect even one good among those listed in the Basic Law in art. 31 par. 3. Constitution relates to the substantive aspect of the limitations of freedoms and rights specified in the general directory values – safety, public order, protection of the environment, public health or morals or freedoms and rights of others (Constitution). It is believed that the cumulative conditions express the general concept of the public interest, which is a general indicator of the limits of freedoms and rights of individuals (L. Garlicki, 2003, p. 22). On the legislator bears the burden of proving that the introduction of restrictions on freedoms and rights in the Act will be necessary due to the occurring conditions which correspond to at least one of the values which treats art. 31 par. 3 (Constitutional Tribunal judgment signature P 21/02).

The calculation is extensive, so if a restriction does not substantiate any of the specific values, as well as a special provision, the restriction can not be established.

Refunds are however very general in nature, making it possible to include in the conceptual virtually every potential limitations (L. Garlicki, 20013, p. 22-23). It should also be emphasized that the catalog is closed and can not be interpreted broadly (Constitutional Tribunal judgment signature K 23/98). The use has and evaluating character and possibility of limiting freedom and rights for the protection of various social goods, and to establish a detailed catalog would be impossible (K. Wojtyczek, 1999, p. 189). The use of specific, narrow concept is impossible for the protection of goods on a regular and planned way, as well as can bring many misunderstandings. Areas of life accessible to the entire population should be recognized generally, uniformly, to be able to interpret them in numerous value (J. Oniszczuk, 2012, p. 13). It should be noted that the order indicated in the provision of conditions does not matter, because there is a hierarchical display value. Such treatment would lead to an accentuation and the granting of special importance to safety, while protecting freedoms and rights would give less importance (L. Garlicki, 2003, p. 23).

Coercion, inherent feature of the state, is the mean to fulfill tasks of public authority. Forcing obedience of citizens, which takes place in the application of the broad coercion, is a kind of measure of individual respect to the state and to submit to authority. A public authority uses coercion in a systematic and explicit way, on a larger scale and with greater intensity than any other organizations. It has an extensive range of coercion and therefore picks up three kinds – physical force, psychological and economic (B. Szmulik, M. Żmigrodzki, 2010, p. 17-18; M. Granat, 1980, p. 241).

The use of coercive measures and firearms, which directly threatens the status of a personal freedom and leads to restriction of freedom and personal inviolability, so the essential for public security and public order remains the protection of freedoms and rights of others, therefore collective rights, common to all individuals.

The use of coercive measures is associated with restriction of the freedoms and rights of individuals. These measures are a separate category of the possibility of interfering in the free realm of a person. As a tool to enforce obedience, they are the consequence of the evolution of a police camera. The use of coercive measures and above all firearms against individuals, frequently encountered public resistance, particularly since the recognition of life and health as well as human dignity as the highest due in the state. At the same time these goods require enhanced protection in a democratic state ruled by law, and the essence of the use of coercive measures is to meet that target (L. Dyduch, R. Maciejczyk, 2012, p. 7).

Public order and safety and the use of direct coercive measures, force and firearms

Coercive measures in general definition constitute the characteristics of the human body (physical force) or objects or animals (as living beings), through which the public oficer, authorized person, exerts on pressure (causing physical and mental ailment) to obtain lawful conduct or overpowers dangerous animals (L. Dyduch, R. Maciejczyk, 2012, p. 10-11). Coercive measures have a preventive and ordinal character. They can not be equated with a repressive character, because the very nature is not the penalty, or to punish a person against whom they are applied. They lead to the enforcement of proper behavior, act in accordance with the law and the subjugation of the individual (R. Stefański, 2012, s. 8; M. Kaczmarczyk, 2009, p. 46-47). Measures of direct coercion rely on the use of necessary force in order to attain a state independent of the will and behavior of the person against whom they are applied and to resist possible countermeasures. As an action on limiting the constitutional rights and freedoms should be a subject to strict legal restrictions (R. Netczuk, 2011, p. 1307). The essence of coercive measures means such conduct which seeks to compel individuals to specific behavior. Preventing the broad security threats, restoring public order or influence by forcing them into submission, are the main and most important objectives of the use of coercive measures (J. Pepłowski, 1989, p. 6).

The legislator did not define the concepts of security and public order. Similarly international law concerning the matter of human rights do not explain, do not specify the content of these values (Convention for the Protection of Human Rights and Fundamental Freedoms). Concepts of security and public order, among others, are defined in art. 6 par. 1, which deals with the right to a fair trial, in art. 8 par. 2 discussing the right to respect for private and family life or in art. 9 and 10 par. 2 relating to freedom of thought, conscience and religion, and the freedom of expression. International Covenant on Civil and Political Rights brings concept of security and public order, similar to the ECHR, combined with certain freedoms – freedom of thought conscience and religion with art. 18 par. 3, holding and expressing views with art. 19 par. 3 freedom of assembly (International Covenant on Civil and Political Rights). For general interpretation of clauses restricting freedoms and individual rights contained in the ICCPR, Economic and Social Council of the United Nations on 28 September 1984 adopted the so-called Rules of Syracuse (United Nations, Economic and Social Council, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Doc E/CN.4/1985/4).

> *22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).*
> *23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.*
> *24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.*
> *33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.*
> *34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.*

Social order is a descriptive way of organizing society by taking into account cultural objectives, measures achievements, directory, roles and social institutions, as well as the undeniable fact of existence in society, even the rules of social conduct were violated. In contrast, normative approach combines the social order with the form of the organization of social space, taking into account the applicable standards (J. Guść, 2012, p. 11).

Protection of public security and order is one of the pillars of functioning in the state and its basic tasks, the implementation of which takes place in all segments of power. Ancient philosophers demonstrated that safety of a person is a very important goal for the state conceived in general and serves its proper functioning. Today this function is fulfilled by establishing norms of the rank of both constitutional and statutory and basic, as well as the activities of the executive. Generally these tasks are performed by the Police Administration in broad terms (Ł. Kamiński, 2013, p. 49).

Protection of public security and order in addition to the general understanding is to provide and maintain social order and the prevention of interference in the activities of public authorities, applies to the threats of an actual and real terms, which can not be merely hypothetical. Indeed threat should also have to be serious, possible in the future on a larger scale, which could lead to the emergence of the destructive effect (W. Sokolewicz, 2008, p. 33).

Security etymologically derived from the latin word *securitas*, which is a combination of the words *se*, meaning „separate" or *sine* explained as the preposition „without" and the meaning of *cura* „care", „effort", „attention" (L. F. Korzeniowski, 2012, p. 75; J. Potrzeszcz, 2013, p. 26).

Traditionally, security has been the subject of interest of military science, international law and international relations. With the development of the security sector, which was related to the transfer of aspects of that value to other areas of life of the individual and society, sociology, economics, science, and cultural studies to address the security research in the context of many other spheres of life, which concerns safety issues (J. Czaja, 2013, p. 34). Currently, the science of safety can not be reduced only to draw from polemology, peace and cionflict studies and the science of war or of irenology, the object of interest is peace (K. Drabik, 2013, p. 22-23). Understanding security at the same time moved the emphasis from the state per unit in the theory of human security, where the man is the primary subject of security. In terms of the concept are numerous types of security and safety among others political security, indicating the existence of a stable system of guaranteeing human rights, social security, which refers to the social security system and personal safety that protects freedom from violence, torture and other inhuman treatment or punishment and arbitrary detention (D. Kaźmierczak-Pec, 2013, p. 54-59). Theory of Human security as the main basis, as well as specific security core believes human dignity (P. D. Williams, 2012, p. 7).

The concept of security without specifying the type or category, is a set of features and value of spatial denominator abstract and is indeterminate. Clarification of subject and object of security explains the type of security. Otherwise, it will be a lack of significant guarantees for restrictions of freedom and rights (W. J. Wolpiuk, 2012, p. 87). To substantiate the safety concept, as well as research and interest in the phenomenon, processes in its sphere, it is necessary to define entities, communities, relationships and the risk that accompanies safety (B. Wiśniewski, 2011, p. 15). The range of protected goods can relate to many areas and thus function as a health security, environmental security, energy security, food security, economic security, the security of personal data, public safety, national security, the security of systemic, widespread safety, etc. (W. J. Wołpiuk, 2012, p. 182; B. R. Kuć, 2013, p. 12-13; M. Brzeziński, 2009, p. 34; R. Wajszczak, 2014, p. 384). The Constitution broadly deals with security, because the legislator used terms safety of citizens, security and inviolability of borders, external and internal security (Constitution). In art. 31 par. 3 security is concluded but in the most general premise (Constitution). The general character indicates important, protected value, which is not precisely defined as safety. It is connected with the survival of a nation, as well as self-preservation and realization (J. Czaja, 2013, p. 44). As a result, overall safety, especially the safety of citizens, a category of constitutional and guarantee functions of the state servitude (S. Kwiatkowski, 2013, p. 37).

Security is multi-faceted and multi-layered character, which is not conducive to clearly defined concept. Although there are numerous definitions of security, they remain consistent. At the earliest, in the interwar period, the issue of security were interested among others W. Czapiński and W. Kawka (K. Sienkiewicz-Małyjurek, 2011, p. 115; S. Sulowski, 2009, p. 12). W. Czapiński described safety as designation means, tools and techniques for counteracting measures to ensure the presence of acts of man (humans), threatening the sense of security of another individual. Therefore, to protect the security should refer prevention of crime and offenses against the life, property, liberty of persons, or constitute an attack on the community or the state. By contrast, it could not be taken into account to prevent offenses against a number of administrative rules aimed at avoiding various dangers (W. Czapiński, 1929, p. 317). W. Kawka defined public safety as a condition in which the general public and its interests as a state, together with its objectives, are protected from damage threatening them with any source (W. Kawka, 1939, p. 46). J. Zborowski explains that it is the facts within the state, which makes it possible, without compromising on damage of any source, the normal functioning of the state organization and implementation of its interests, preservation of life, health, property of individuals (...) and use these units in the rights and freedoms (J. Zaborowski, 1985, p. 128). E. Ura believes that it is a condition in which the general public unmarked individual living in the state and society, there is no danger, regardless of what would have been his source (E. Ura, 1974, p. 76). S. Pikulski says that security is a desirable state of affairs, guaranteeing the smooth functioning of public facilities in the country and the security of life for citizens, including the protection of their life, health and property (S. Pikulski, 2000, p. 101).

In contrast, the danger is a state distant from standards and is equal to the emergence of losses, tangible and intangible. Danger is identified with the position that threatens the individual, has a destructive effect and threatens the likely enlargement of damage. Subject to graduation by terms is such indication – minimum or maximum. State of emergency or danger can only be probable. It is therefore a possibility of a negative situation, but beyond a certain scale or detail the mechanism of formation. If the danger will cover the people, the environment or facilities, it is assumed that there is a real threat (M. Liwo, 2013, p. 63-64).

Safety is a state of absence of risk, objective and subjective, as well as the process by the overall security. State is a subject to change as a result of continuous human activity. Dynamic changes should aim to achieve a desired state at a time. Security is thus a value of a relative, variable, dependent on various circumstances. The

static approach security issues would lead to an actual hazardous conditions for many goods (E. Nowak, M. Nowak, 2011, p. 14; L. Hofreiter, 2012, p. 52-53; A. Szymonik, 2011, p. 15). Security should not be treated as a regular phenomena inherent in a number of processes taking place in the space which surrounds the people. The security situation can rapidly change. The dynamics and the multitude of factors affecting safety leads to the need for observation and creation of new tasks for the state (J. Jedynak, 2010, p. 61).

Public safety includes legal and administrative sphere, concerns the classic tasks of public administrations. Is the main task of the Ministry of Interior (police services, inspection), aims to protect or restore the violated order, order and social peace, in particular, life, health and property of citizens. It is therefore the domain of administrative law. In contrast, public safety, such as national security, is the domain of constitutional law (J. Gierszewski, 2013, p. 55). In the context of public safety national security functions having a narrower range because it concerns the functioning of institutions and state-owned equipment and constitutional order (A. Misiuk, 2011, p. 18). The premise of national security does not contain a personal aspect, and thus refers to the general national threats. Security in the private sphere includes the premise protection of freedoms and rights of others (B. Rakoczy, 2006, p. 112).

Coercion is therefore implementing measure for the government, which has the ability to impose the will and behavior of individuals. In order to protect and preserve coexistance of these two rights, state must require obedience to its will and orders. In other words, it is based on belief merging sufficient power of ruls and subjects, it is therefore widely recognized, what goes across the opposite right. Coercion combines with enforcing obedience of human individuals and social groups to conduct public authorities. Coercion is an integral part of any state, regardless of the type and form of government. However its intensity, severity depends on the characteristics of the state and methods of government. Totalitarian and authoritarian systems have recourse to violent means of coercion, often breach the law. In democratic countries, these measures have the effect on the principle of legality and the idea of humanity.

The use of coercive measures is a part of the limitation of freedom and individual rights. These measures constitute a distinct, special category and can not intervene in the free realm of individuals. As a tool to enforce obedience from the citizens, are a consequence of the evolution of the police camera. The possibility of the use of coercive measures, especially firearms, headed social encounter resistance along with the development of civilization and the appreciation of life, health and human dignity as the most important in the state. At the same time these goods

and rights need to be protected in a democratic state of law, therefore the use of coercive measures should meet that target. Firearms are treated in a special way by the legislature. Weapon is in fact an exceptional measure, requiring special care and caution. It is primarily a measure of last resort, as a result of its properties.

2. Personal inviolability and personal security while ensuring public order and safety

Freedom and personal inviolability are often understood as the right to liberty and security of person (W. Studziński, 2006, p. 108-109). Personal freedom is the antithesis of imprisonment by court order, temporary arrest or detention (D. Dudek, 1999, p. 143). The Supreme Court stated that freedom can be described as a possibility (independence, freedom) by a man making decisions according to their own will. For obvious reasons the concept of personal freedom only connects to human, but such a person (legal entity) can express will on its own behalf or as a body authorized to act on behalf of entities other than natural persons (Supreme Court resolution signature V KZP 33/89). But this is not an absolute ban. Public authorities care about security and public order, freedom and rights of others in a position of measures to ensure the broad sense of order and justice (G. Michałowska, 2010, p. 49-50).

Personal inviolability is non-interfering sphere with the physical and mental integrity of a person. Arbitrary interference of an entity or institution should not take place in a democratic state ruled by law. The regulations deprive the officer from possibility of illegal deciding (B.Banaszak, 2012, p. 266-267). The multiplicity of entities authorized to use coercive masures interfere in freedom and personal safety are related to the need to establish regulations defining the principles and procedure in a precise manner (Z. Kwiasowski, 2009, p. 183). Exposure to violations of personal inviolability primarily concerned with the situation of the application of procedural coercive measures, as well as activities of entities authorized to use force and firearms (Penal Code; Act of 24 May 2013 on direct coercive measures and firearms).

Personal inviolability is identified with personal security, freedom from coercion, non-infringement of bodily and spiritual totality of human. It is associated with personal freedom and the dignity of the individual (Constitution). Inviolability of the person must be understood in the context of the preceding provisions of the Basic Law, which guarantees legal protections of the integrity of each individual in terms of both physical and mental (D. Dudek, 1999, p. 141-143). Constitutional ban on subjecting scientific experiments, torture or inhuman or degrading treatment,

prohibition of corporal punishment, deprivation or limitation of freedom with the exception of rules and procedure established by law, the inviolability of the home, premises or vehicle except in the cases specified in the law, freedom of movement and the right to privacy, including the legal protection of honor and reputation they are directly linked with the concept of freedom and personal inviolability and personal safety of the individual (Constitution).

Held in the concept of personal freedom, safety and integrity of person are not defined by the constitutional lawmaker. Numerous prohibitions related to personal inviolability closer adversely affecting the behaviors catalog this sphere. However, personal freedom specifically, in the singular has no distinguishing features among the constitutional catalog of personal freedoms (D. Dudek 1999, p. 141-143). The Constitutional Tribunal evaluates personal freedom as one of the most important rights of individuals. Therefore recognizes the special importance of elementary freedoms (Constitutional Tribunal judgment signature SK 5/02).

Personal inviolability is inseparable connected with the personal liberty of every human being (D. Dudek, 1999, p. 141-143). Acceptable deprivation or restriction of personal freedom can not mean the possibility of neglect and violation of the guarantees for personal inviolability. In the case of deprivation of liberty, even short, personal inviolability must be respected as an inherent feature of freedom and personal safety (P. Winczorek, 2000, p. 60).

Freedom being philosophical and legal idea and one of the leading values in a democratic state ruled by law is entitled to every human, giving the opportunity to do everything that law does not prohibit. If the applicable law has to reflect the idea of justice and human rights, only then it becomes possible for actual respect for the principles of freedom both by the authorities and other entities. Respect for rights and freedoms of individuals by public authorities is a measure of the degree of development of the state, as well as the level of ethics in public spaces. Freedom lies in the possibility of shaping behaviors consistent with individually made choices (W. Skrzydło, S. Grabowska, R. Grabowski, 2009, p. 234; S.A. Paruch, 2012, p. 624). The constitutional catalog of freedoms and rights of a man and citizen legislator relied on axiological pillars of dignity, freedom and equality defining directions for legislation and application of the law (L. Wiśniewski, 2005, p. 121). The state apparatus thus has a secondary character, menial for the individual while creating the highest guarantees for the respect of the declared rights and freedoms which are recognized as significant by the sovereign (S. A. Paruch, 2012, p. 624).

Freedom can be individual or collective, depending on to which entities will be recognized and how the sphere of activities is related. Individual freedoms are mainly self-realization and concern aspects of private life. In contrast, collective freedom expressed in the vision of man in society and pursues common goods – freedom of assembly and association (A. Ławniczak, 2010, p. 370-382). The distinction thus depends on the determination of the idea of an individualistic or common good. Determinant of the way of understanding freedom and human rights can be communitary or liberal concept (P. Kaczmarek, 2010, p. 286-287).

The principle of legal protection of life in a democratic state ruled by law has an important role, because human life is a fundamental value, causing the actualization of the constitutional guarantees of the rights, freedom and personal inviolability of the individual. Existential value determines the existence of legal personality and respect for human dignity in a democratic state ruled by law obliges to provide protection of human life (D. Dudek, 1999, p. 75). Interference in the free realm of human rights and bodily injury as a result of the use of coercive measures or firearms, may have far-reaching consequences in the form of a deterioration in health of an individual or even death. Therefore, respecting this principle by public authorities is so important in a situation application of the factors most strongly affecting the individual. At the same time it imposes duties on public authorities to take actions that will eliminate or at least minimize, limit the potential threat to life (B. Banaszak, 2012, p. 257). Sens of ensuring the legal protection of life is expressed in the requirement for active protection of existence by ordinary legislation (D. Dudek, 1999, p. 73).

Important guarantees of respect by the public authorities of the provisions relating to freedom, are dependent upon specified in the Act permitted by law and therefore legal violations. They are an important complement to precise as to the duties and the treatment of organs, which prevents arbitrariness undertaken by authorized entities actions (Z. Świda, 2002, p. 748-749). Limiting the freedom of man can only be required by law, as well as borders and as it is necessary. It is also necessary to examine whether there are legal grounds for further restrictions (W. Daszkiewicz, 1989, p. 10).

Security is a vital need of every human being. According to A. H. Maslow's hierarchy of human needs takes the security high, in second place, which is borderline psychological needs, as well as biological (E. Żywucka-Kozłowska, M. Kowalczyk-Ludzia, 2011, p. 227). The need for security is however dependent on the individual educated properties. This sense is that it has a very subjective character in nature and

associated with such fundamental needs as spontaneously or survival and security, stabilization, own identity, independence, achieve a certain level and quality of life (E. M. Marciniak, 2009, p. 56; B. Czarnecki, W. Siemiński, 2004, p. 11). Risks and their perception by the unit may reflect real or falsified state. The feelings may in fact take the form of state of complete insecurity, obsession, state security or proper adulterated (M. Paździor, B. Szmulik, 2012, p. 3). Security is a positive state identified with confidence and at the same time lack of potential threats. As a phenomenon of the characteristics of objective, it is possible to diagnose using appropriate tools and knowledge that requires constant assessment of the factors which could jeopardize the goods. While confidence is subjective and related to the unit (S. Pieprzny, 2008, p. 11).

Public policy is closely linked with security. Without achieving an appropriate level of order and maintaining this state, the need for security can not be fully realized. Public policy is so closely associated with the general concept of security. In general, as claimed by W. Kawka, is a set of rules (not just legal), the observance of the normal condition for human coexistence among individuals in the organization of state (W. Kawka, 1939, p. 46). Another definition, more broadly, proposed S. Bolesta recognizing that it is a system of legal and public facilities and social relations emerging in public or non-public, which aim and mission is particularly to protect life, health, property of citizens and public property and ensure the normal operation of institutions, businesses, state-owned enterprises, social and private sphere and to eliminate (remove) all kinds of dangerous or inconvenient nuisance to socjety in general and individuals (S. Bolesta, 1983, p. 236). Public policy considers A. Misiuk, is actually existing system of social relations, regulated by a team of legal norms and other standards of socially acceptable, ensuring the smooth and non-conflicting functioning of individuals in society (A. Misiuk, 2008, p. 18).

The Constitutional Tribunal noted that the premise of the protection of public order, despite its far indeterminate in content of character, no doubt held the demand for such shape of the facts within the state that allows normal coexistence among individuals in the organization of the state. By making restrictions specific right or freedom, the legislator guided in this case, concern for the proper, harmonious coexistence of public, which includes both protect the interests of individuals, as well as certain social goods, including the public property (Constitutional Tribunal judgment signature P 2/98). For some standards concept of public policy is considered to ensuring harmonious coexistence state of social, health, and physical integrity of people and respect for property (W. Skrzydło, S. Grabowska, R. Grabowski, 2009, p. 251).

Generalizing, public policy is aimed at ensuring the proper functioning of society, which means that it is not only correlated with the state. The general nature of the evidence means that there is a wide spectrum of activities related to the others, essential goods. Even the remaining value of art. 31 par. 3 could be covered by a general concept of public policy. Those conditions are so cross with each other, unite in their ranges, therefore it is sufficient to prove one of them to justify restrictions (L. Garlicki, 2003, p. 25). There are no legal definitions and multifaceted concept of public policy as a result allows the inferred number of substantive conditions, convergent, similar in scope to set out in art. 31 par. 3 (B. Rakoczy, 2006, p. 114).

Personal freedom is the first manifestation of the constitutional libertarian status of the individual in sense of opening catalog of constitutional personal freedoms. It is associated with the freedom to conduct in public and private life, which should remain free from external human factor. Personal freedom is a narrower category than the general notion of human freedom and in accordance with art. 31 par. 1 of the Constitution it is a subject to legal protection. Guarantees of freedom and personal inviolability are also referred to the right to be free and right to safety of each person. Public authorities take care of security and public order but the rights and freedoms of other people shall take measures in accordance with the legal provisions that give a sense of order and justice.

Freedom and inviolability of person can be interpreted in the context of the preceding provisions of this regulation, which supply the legal protection of the integrity of every human being in terms of physical and mental health. Personal inviolability in the strict sense is closely related to the concept of personal freedom. Actually, this freedom derives from each of the freedom of that category. It's general and therefore difficult to define, and its proper understanding can take place only in the case of close analysis of the general concept of freedom and personal freedom.

Freedoms and rights are inviolable principles, but this is not tantamount to granting them absolute. In certain situations, public authorities interfere with the freedom of individuals, but the interference can not be characterized by arbitrariness and lack of legal basis. Established warranties of restrictions in the Constitution are direct general principles of exclusivity of the Act and it means that only by law or in accordance with the authorization contained in it limitations can be established common law rules on the matter of freedom and individual rights.

3. Conclusions

Development of the general concept of democratic security through international organizations, mainly the Council of Europe, aims to exchange experiences and expertise to seek, protect and respect the rights and freedoms of man and the rule of law (J. Jaskiernia, 2012, p. 59). In international documents term public order has a meaning for the provision of facilities for security, order and peace for people and is an expression of the general principle of society in the country, as well as the relationships that exist in the community (K. Wojtyczek, 1999, p. 184-186). The dynamic development of the security sector is a consequence of the continuous changes in the value of the catalog, which shall be completed within society and the challenges posed in front of the state in that field and menial functions to the people (M. Brzeziński, 2009, p. 30).

In a democratic state ruled by law individual liberty is not characterized by absolute dimension, and some situations, primarily related to the protection of public order and safety will ensure that the sphere of human freedom can be a subject of limitations, when sometimes the full use of it may not be possible. Conflict of goods, individual and public, can occur when these values in opposition come into contact with each other. It will need to take appropriate measures by public authorities. However, the behavior of operators in this matter can not be arbitrary nor devoid of legal basis, as well as beyond the boundaries of existing law. Therefore, it is important to establish clear, understandable law for those who will have used them and also for the recipients of these actions. State coercion is the general mean of ensuring compliance with the law and a sense of security. Coercive measures and firearms being a way to influence public authorities on the behavior of individuals, in fact are extremely intense intervention in the libertarian status of an individual. Often they constitute a serious violation of personal rights of the individual and the sense of security in the private dimension. Firearms are a specific measure and ultimate, which is used in exceptional cases and in a well-defined procedure. A significant change in the matter of the use of force and firearms, which drastically factors that interfere with the freedoms and rights of individuals, a comprehensive approach issues in a single act with proper rank, which for the realm of liberty and individual rights is the law in form of the act.

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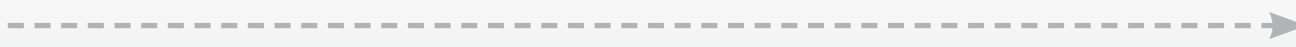
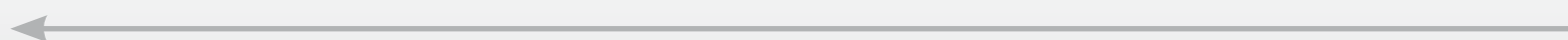
PART II

The relation of individual rights and the rights of the community

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Human Rights vs protection of the State Treasury's interest

Abstract
Human rights often come into conflict with the interests of the state that is understood as the interests of the political structures of state, state property or public administration. The rule of law and democratic state creates different instruments for the protection of man and his rights against any possible cases of violations. The mere statement of material fact records is mostly ineffective. The areas of most common violations of the state are human rights in a sphere of privacy, personal liberty and property. Conflicts emerging in these areas, come to courts then or to the Constitutional Court.

Keywords:
human rights, the Treasury, the right to justice, human dignity, international law.

1. Introduction

Human rights are endowed with legal and natural character. Their source is human dignity. These kind of statements appear in a number of international law acts. The most common place for such declarations are preambles so the introduction into the enacting legislation. Placing statements containing the recognition of human dignity as the source of human rights in the introduction to any international law act or internal law, especially to the Constitution, points to the fundamental importance also for jurisprudence.

The content of the preamble is an integral part of the fundamental legal documents, such as the Constitutions, declarations, conventions and international agreements. It includes contents that are behind entire legal system and concept of solutions of specific group of issues e.g. the rights of the child. The content of the

preamble is also the source of the basic principles of legal interpretation of the various provisions contained in dispositive part[1]. Thus, one can point to relevancy of legal contents in the preambles to international acts dealing with human rights. In particular with regard to further consideration in conjunction with the respect for individual human rights by the legislature in specific laws, by the state authorities in administrative decisions or by the courts in case law[2].

The preamble to the Universal Declaration of Human Rights (1948) contains the statement for the inherent dignity of human rights in the following words: *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* […]. Analogous utterance is located in the International Covenant on Civil and Political Rights (1966): *considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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* […]. The reference to the provisions of the Declaration can also be found in the Convention on the Rights of the Child (1989).

The Convention for the Protection of Human Rights and Fundamental Freedoms, by contrast, does not contain such a statement. In the preamble the reference to the Declaration of Human Rights can be noticed, that *governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration* […]. The inherent dignity of human being has been completely omitted in the Charter of Fundamental Rights of the European Union (2000). Only in the art. 1 it was mentioned that *human dignity is inviolable. It must be respected and protected* […].

Direct referring to human dignity or omission of this provision is important because of the conceptualization and interpretation of the content of human rights and their observance as well as respect. The inherent human dignity does not allow the state authorities or other centers of decision making, particularly of an economic

[1] See B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, pp. 4-5; E. Gdulewicz, W. Zakrzewski: W. Skrzydło, *Prawo konstytucyjne*, Lublin 1994, p. 30 et seqq.

[2] See J. Krzykowska, *Powrót do tradycji chrześcijańskiej gwarancją nienaruszalności godności człowieka*, B. Sitek i inni (red.), Wykorzystywanie człowieka w XX i XXI wieku, Olsztyn 2012, pp. 45-53.

nature, to interfere in the conceptualization of content and interpretation of individual records on human rights. In turn, the lack of such a reference to the inherent dignity of the human being can open the way to suspend or amend the content of certain human rights, and adapt them by stronger countries for their ideological, economic or even military needs. This kind of behavior can be currently seen in the Crimean conflict, where Russia carried out the annexation of part of the territory of a foreign state under the pretext of defending human rights of the Russian population living there.

Regardless of the adopted concept of human rights, they often face in open conflict with the interests of the Treasury and its protection. Human rights are in fact fundamental rights of an individual, rarely community, e.g. the right to assembly. In turn, the interest of the state is a fictional creation, both as to content and form. However, it has a significant impact on the functioning and safety of the various dimensions of the whole community, and hence its individual components that is individual. The same can occur and there is a conflict between the human rights and the public interest and its protection. Presentation of the conflict, including its exemplification is the subject of this study. Prima facie, it is necessary to characterize the concept of „interest of the Treasury".

2. State Treasury's interest

The State Treasury is a fictional creation, a legal entity *sui generis*. It is a concept found in legal language, it has collective nature and is used to designate public entities (*stationes fisci*) disposing of the national property. In each case against or involving the State Treasury, the appropriate *statio fisci* has to be determined. Hence, civil actions taken by state entities are *de facto* the State Treasury activities.[3]

The concept of the interests of the Treasury is present in numerous acts, such as in the Penal Code (art. 52), the State Treasury Solicitor's Office Act (Art. 1, 18 and 34), the Forests Act (art. 37 and 38), the Real Estate Management (art. 11 and 22) and others. *Stationes fisci* are therefore among others Ministers, Prime Minister's Office or the President, the central authorities, for example Human Rights Defender, the Children's Rights Defender, the State Treasury Solicitors' Office, the General Directorate of Roads and Motorways, the police or the military.

[3] See K. Piasecki. *Komentarz do art. 34 k.c.* [in:] Legalis.

The Treasury's interest can be in the materialized and immaterial form. A materialized form of Treasury's interest is the possession and disposal of state property and, consequently, its civil, administrative and criminal protection of items of property (land, buildings) belonging to various state entities. Treasury's interest may also take the non-material form, which is reflected in the rights or claims brought against the Treasury because of damage caused by the action of state officials, the issue or the failure to deliver act, unlawfulness of administrative decisions, not realizing privatization process. The Treasury may claim against natural or legal persons, both domestic and foreign, for example: fiscal receivable, repayment of unjustified public funds for various reasons, e.g. the subsidy granted on the basis of false documents or data or incorrectly used or disposition, for example funds coming from EU programs.

The State Treasury's interest is, therefore, seen from the point of view of the whole community formed by all citizens, or more specifically by the people of the whole country, also organized into formal and informal structures. However, the basic issue is the answer to the question whether Treasury's interest could be considered as the same as the public interest? In popular opinion the state and citizen are often perceived on two opposite sites. The state is a symbol of oppression or domination over the individual, instrument restricting freedom and the individual is perceived in terms of the victim. Hence, in popular opinion, any damage caused to an individual should be repaired by the state.

Protection of the Treasury's interest, broadly understood, the components of state property, material interests and assets is a value in itself. This protection may be undertaken by various bodies, including the State Treasury Solicitors' Office, as well as enforcement agencies (the police) and law protection authorities (e.g. the Railway Protection Service). Their task is to protect the state, so as to enabling the country to fulfill its basic functions, such as: realization of the common good, to guarantee the freedom of the individual, the safety of individuals and groups, participation in the distribution of wealth produced by society, securing the defense of territory and sovereignty of the state, the fight against terrorism[4]. The loss of material basis of existence of the state may in fact lead to its destabilization and consequently fall, as exemplified by former Polish partitions.

Pursuant to art. 67 § 2 of the Code of Civil Procedure, the State Treasury Solicitors' Office is a statutory body authorized to represent the state in civil proceedings. This institution is also known as the institutional representative of the Treasury.

[4] See S. Sagan, V. Serzhanova, *Nauka o państwie współczesnym*, Warszawa 2010, p. 55.

This body operates on the basis of the Law on the State Treasury Solicitors' Office. According to art. 8 par. 1 of the Law, the State Treasury Solicitors' Office obligatorily represents the state in in cases heard in the first instance by regional court, in cases on update of a land and mortgage register according to the actual legal status and on confirmation of usucaption if the value of the subject matter exceeds 1,000,000 PLN and in all proceedings before courts of arbitration, irrespective of whether the place of arbitration is in the Republic of Poland. Pursuant to art. 8a, par. 1 of the Act the President of the State Treasury Solicitor's Office may, however, decide to take over court if it is necessary for the protection of significant rights or interests of the State Treasury[5].

The State Treasury Solicitors' Office is highly specialized institution, which aims to protect the interests of the state. For this reason, its actions may not take into account the interest of other entities whether legal or natural one. The legislator did not foresee a possibility of any kind of limitation of Solicitors' actions by taking into account the specific interests of a particular individual. Such an action could be seen as a violation of the Law on the State Treasury Solicitors' Office, as well as a form of detriment to the Treasury. Therefore, it seems reasonable to further analysis of the state border interest and interest of the individual as such.

3. The State's interest versus human rights

As already stated above, the value of protection of the interest of the State may conflict with the interests of a single person, as well as smaller groups, e.g. professional, ethnic, religious and organizational units which are not public entities, e.g. local governments or unions. This conflict clearly evidents in the area of human rights, especially for such rights as the right to information, freedom of expression, the right to privacy and secrecy of correspondence, to freedom of movement, to right for asylum, property, family, child, freedom for assembly and many others.

Scope of activity, not always justified, or at least questionable state interference in the sphere of human rights is so wide that raises legitimate concerns of the individual and even a sense of powerlessness against the force of the state apparatus. It should be noted, however, that in many cases the specific individual infringement by the state, may be subjective experience, performance evaluation based on a unjustified projection of incorrect assessment of reality. It may happen when

[5] See K. Osajda, P. Sobolewski, *Komentarz do art. 34 k.c.* [in:] Legalis.

a person files a claim in the amount of 400,000,000 PLN to the Treasury from the construction of the fast road running approx. 4 km. at a distance from the appellant. Invented motive for filing the claim in this case was the destruction of the environment and excessive noise.

However, Safian rightly writes that *in the modern conception of the rule of law one definite model of the relationship of individual rights and public authority is contained. (...) This model, saying briefly, is based on the existence of impassable boundaries for the state interference in the sphere of individual rights and simultaneously establishes the right balance between the interests of the individual and the public interest*[6]. This is an assumption or even legal principle, the aim of which is the objectification of the behavior of the state towards the individual through the creation of an abstract pattern. Such a statement or even a rule of law is far from the thoughts of a strong socialist state power, dominant in the era of real socialism. The interests of working class was the main interest of the state as the absolute state of Enlightenment thought[7].

It is therefore necessary to define what is the interest of the State Treasury. It is often mistakenly equated with the concept of public interest, which is the sum of the interests of undefined individuals or social groups rather than the interests of the whole society. Public interest is also an instrument for evaluating administrative bodies that are required to implement the public interest.

The concept of "social interest" is used in legal language, such as in art. 93 of Public Procurement Law[8]. Clarification of this term is in art. 131 of the same Act and represents the interests of various social groups, unions, in this case the groups interest related to defense and security, it can apply to protect the interest of contractors. Public interest is therefore not the interests of the whole society, but its individual parts. Thus, according to art. 154 violation of an important public interest may invalidate the agreement signed under the Public Procurement Act.

In the legal texts there is the notion of legitimate interest of the State Treasury, which means the right to be a party in proceedings under the provisions of substantive law (*locus standi*). Establishing the existence of a legal interest depends on the facts, which is linked to a specific legal rule granting this privilege. An example of such interest of the state is to bring an action to establish invalidity of the sale of state property[9].

The State Treasury interest therefore is possession of such material measures (components of state property) and intangible (public administration structures, being capable of decision-making), which will allow the implementation of the interests of natural persons or legal persons (companies, associations, foundations, religious associations, etc.), local governments and unions, which are components of the whole society (the state). In this perspective, the practice imperious decisions (*imperium* - good money ensuring, law enforcement and ensure equal treatment of all parties by the authorities) or management (*dominium* - the management of state property) can come into conflict with various interests, including the specific human rights.

4. Exemplification of possible areas of conflict

Areas of possible conflicts of interest between the Treasury and human rights or individuals can be numerous. However, for reasons of the limited size of this paper, I will confine myself to present only a few of them. The first example of an area where it can lead to conflict between the state and human rights is the obligation to pay taxes. Its implementation may, however, restrict or otherwise violate human right to privacy or freedom. The obligation to pay taxes has constitutional status and is defined in art. 84 of the Constitution: *Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute*. For this reason, tax authorities have been equipped with numerous statutory instruments to take action in order to determine the amount of the Treasury payment due incurred by the individual. To this end, the legislator has introduced obligation for every citizen to make a property statement concerning ownership of property assets worth more than 10,000,00 PLN. This statutory solution is being appealed to the Constitutional Court as intruding too far into the privacy and the freedom. The Constitutional Court ruled the solution unconstitutional because of violations of the rights of individuals to privacy and freedom[10]. This time, won the rights of the individual to the interests of the Treasury[11].

[6] M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007, p. 48.

[7] See Z. Słowik, *Idea silnego państwa w polskiej myśli socjalistycznej*, [in:] M. Szyszkowska (red.), *Silne państwo*, Białystok, p. 69.

[8] Uniform text, Journal of Laws of 2007, No. 223, item 1655.

[9] Sentence of Supreme Court of 16.02.2011 in case IC I CSK 305/10.

[10] Sentence of Constitutional Tribunal of 20.11.2002 in case OTK ZU 2002 No. 6 item 83.

[11] See. M. Safian, *op cit.*, p. 49.

Another example is the case of the detained person and jailed because of judge's mistake. The victim spent in prison in total 134 days unlawfully, by which there has been a violation of his fundamental human rights, namely the right to freedom. For unlawful deprivation of liberty a victim demanded compensation of 300,000,00 PLN[12]. In this case, there has been a breach of the right to liberty and the right to a fair trial. In this case the State Treasury was represented by the State Treasury Solicitors' Office. In this case, there was an obvious conflict of individual's interest with the interests of the Treasury. According to the Act the State Treasury Solicitors' Office is obliged to protect the interest of the Treasury. Misunderstanding of statutory tasks of the State Treasury Solicitors' Office became the basis of media reports about the lack of empathy on the side of a solicitor from the State Treasury Solicitors' Office. Thus, the function of a court has been assigned to the State Treasury Solicitors' Office, seeking to determine the amount of compensation. Meanwhile, the court is entitled to determine the amount of damages, solicitor of the State Treasury Solicitors' Office has to behave professionally towards all sorts of claims against the State Treasury and endeavour to dismiss the complaint. Thus, the final decision on this issue will, however, belong to the court[13].

Another example of a possible conflict between the interests of the State Treasury and the interests of individual has until recently occurred in compensation for damages caused by a medical procedure. Currently, after the commercialization of hospitals, pursuant to art. 33 of the Act on medical activity from 15th April 2011[14], doctor and healthcare entity or nurse and health entity are jointly liable for damages resulting from granting health benefits or unlawful omission to provide health benefits.

By 2004, the State Treasury liability for medical errors was based on art. 419 of the Civil Code. The doctor was regarded as a public official. Also in this case the State Treasury Solicitors' Office defended the interests of the Treasury without empathy for the situation of a victim. The courts, in turn, have the power to determine the responsibility of the Treasury, which was justified by the general interest, social, and not just the interests of the victim[15].

[12] See *Trafił za kraty przez pomyłkę. „Odszkodowanie? Bez szans"*, [in:] http://www.rmf24.pl/fakty/polska/news-trafil-za-kraty-przez-pomylke-odszkodowanie-bez-szans,nId,1056529 [available: 2014-03-22].

[13] More about the State Treasury liability for unfair see P. Cioch, *Odpowiedzialność Skarbu Państwa z tytułu niesłusznego skazania*, Warszawa 2007.

[14] Journal of Laws of 2011, No. 112, item 654.

[15] Sentence of Supreme Court of 24.07.2009 in case II CSK 39/09.

In the end, an example of the conflict between the interests of the State Treasury and the interests of the individual may be practical realization of the right to trial. Since this right may be restricted by the need to bring legal fees or through attorneys‘ fees. A person who wants to realize his/her individual rights before the court, does not always have sufficient financial resources to do so[16]. Also in this case the court takes into account not only the interests of the Treasury, after taking into account the specific situation of the individual, may release it from these charges. Thus, the court realizes the human right to a trial. Such a possibility is provided also in § 2 in connection with § 13 par. 1 point 2 and § 6 point 7 of the Regulation of the Minister of Justice of 28th September 2002 on fees for lawyers and the incurring by the State Treasury unpaid costs of legal assistance provided from office[17].

5. Conclusion

The conflict taking place in the relationship between the individual and society, including the structures of the state, has been recognized as an object of scientific research, including legal ones, since Roman law. A western culture, including the legal culture is still based on anthropocentrism, despite polycentrism talking about the concept of the European legal system (rule of law, social state, the State Ecological etc.). A man and his rights are protected, and thus come into conflict with the interests of the group, especially the interest of the state as is identified with the interests of the Treasury, both in the form materialized and non-materialized. We can point to several areas of possible conflict of human rights with the interests of the State Treasury.

On the one hand, the state has a highly specialized central authorities responsible for protecting its interests such as the State Treasury Solicitor's Office, Prosecutor's Office, the police and other specialist services. According to the Act they have an obligation to protect the absolute interest of the State Treasury. On the other hand there are numerous national institutions guarding human rights, for example Human Rights Defender, the Children's Rights Defender and the Patients‘ Rights Defender. None of these institutions is entitled to state or settle a dispute that exists on

[16] See D. Cyman, *Pomoc prawna dla najuboższych jako istotny element praw człowieka*, [in:] G. Dammacco, B. Sitek, O. Cabaj (red.), *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej*, Olsztyn-Bari 2008, p. 559.

[17] Journal of Laws of 2002, No. 1163, item 1348.

the interest of the individual (human rights) and the interests of the State Treasury. It is in fact the task of the courts of general jurisdictions and the Constitutional Court. That division of powers between the various types of state entities illuminates the way to solve specific conflicts that appear on the line between the state and human rights. Emotional approach of victim, as well as some media's suggestions of solution to the existing conflicts in a manner far removed from the legislation. The remedy for this type of event is therefore a general legal education.

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The Right to Development in documents of institutions of the European Union – selected issues

Abstract
The right to development as a legal norm was formulated and accepted at the international forum after many years of discussion. The acceptance of the right to development by the world community was a crucial breakthrough in order to understand the development help. The discussion of the right to development is part of the global debate concerning the basis and principles of the development of societies, instruments and purposes of globalization. If a system of human rights is regarded as the main standard foundation of the human world seen beyond a national prospect, it shall be understandable that the development and the international order should be directly rooted in it.

The most important document which confirmed and specified forming the right for development was Declaration on the Right to Development[1] enacted in 1986 by the United Nations general assembly. The declaration of 1986 was a milestone in the field of perception and implementation of the right for development. The document shows that "the right for development is an inviolable human right pursuant to which any person and all people are entitled to participate in contributing and benefiting from the economic, social, cultural and political development in which all the rights and freedoms may be implemented"[2]. The practical aspect of the establishment in international relations of the right to development in the international relations is the development help organized by the European Union on

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[1] A. Sengupta, The Right to Development as a Human Rights, Working Papers Series nr 7, François-Xavier bagnound Center for Health and Human Rights, Harvard School of Public Health, Boston, 2000, pp.1.

[2] Art. 1 Declaration on the Right to Development. The Universal Declaration of Human Rights of 10 December 1948, http://www.un.org/en/documents/udhr/, online access 4.03.2015.

principles of law for development and for its implementation. The impact of the concept of the right for development as a human right and human rights is visible here – as principles and the aim for development of the European Union. the European Union focuses on the provision of help to the countries that need it most. The development help goes to approximately 150 countries in the world, from Afghanistan to Zimbabwe. Thanks to that, the help goes to the countries that need assistance most in the world. In the period 2014 – 2020 approximately 75% of the union's support will have gone to the countries which not only are the poorest, but they are often victims of the natural disasters or conflicts which makes their inhabitants suffer doubly.

The European Union is the only donor which grants help for all countries around the world which are in difficult situations or in which conflicts are present. The EU and its member countries spend the largest amounts of money in the world for the official development help. Together with its EU member countries, the EU is the biggest aid donor all over the world. In 2013, their contribution in "the official development help" (according to the OECD) amounted to more than half of the whole contribution of the world. In 2013, the EU and its member countries together dedicated €56.5 billion for the deprived countries that fight against poverty. As early as December 2013, PE parliamentarians decided to transfer another €51.4 billion for foreign help in the period 2014 – 2020.

The aim of the article is to indicate the most important documents of the European Union law governing the rules of giving development help to other countries. The article dealt with both documents of primary law and secondary law. The analysis of the legislation of the European Union in implementing the right to development through development policy indicates what areas of support the European Union recognizes to be particularly significant (economic, political, institutional and the ones that relate to the protection of human rights). Development co-operation is one of the most important and the oldest fields of external relations of the European Union. The records for promoting economic and social development of the overseas countries and territories and deepen economic relations between them and the EU community are already present in the Treaty having established the European Economic Community in 1957. The key importance for the EU development policy began on December 1, 2009 with The Treaty of Lisbon, under which the EU received greater capacity to impact the world affairs, including challenges of global development. The development policy of the entire EU, in a greater degree than ever, has been aimed at reducing poverty in developing countries having at its disposal all strengthened means that go beyond traditional instruments of development help. With the connection that presently the EU is the main entity in respect of its international development help, it is important to bring out this matter. The year 2015 is a particular

period in the implementation of EU development policy and support the right to development because it was established as the European Year for development. This is, therefore, an excellent opportunity to familiarize with the various aspects of EU development co-operation which plays a key role in help for other countries making the European Union an important entity in establishing aspects of functioning of the contemporary processes of globalisation. This is evidenced by the most recent statistical surveys. Europeans believe that it is an important duty to help people in poor countries, and many are ready to play a part in it. Despite all economic difficulties in Europe, 85% of EU citizens acknowledge that helping people in the developing countries is very crucial. 60 % of Europeans believe that help for these countries should be increased. The same percentage believes that extremely poor and unstable countries should be a priority for help. More importantly, the support for development co-operation was not declined substantially even in the European countries the most affected by the crisis. The majority of the people questioned agree that fighting poverty must be one of the EU's priorities and that help should be increased for development. The vast majority considers that the help that goes to poor countries has a positive effect on the Europeans themselves.

In terms of the analysis of the subject, the following test methods have been used: the analysis of the doctrine, the analysis of the international documents and legal acts, with particular regard to the European Union's legal acts and documents and the statistical analysis.

Keywords:
the right to development, the development policy of the European Union, globalization

1. Genesis of establishing the right to development

During preparatory work of the text of the Universal Declaration of Human Rights of 1948, Eleanor Roosevelt, who was firmly involved in the work, stated: "we are creating the charter for the world, and …one of the most important entitlements is the possibility to development"[3]. Article 28 was placed in the Declaration: "every man has the right to such social and international order, in which laws and freedoms included in this Declaration would fully be carried out"[4]. The imple-

[3] S.P.Marks, Obligations to implement the right to development: Philosophical, political, and legal rationales, [in:] B.A.Andreassen, S.P.Marks (eds.) Development as a Human Rights. Legal, Politicial and Economic Dimensions, Mortsel 2010, pp. 57-78.

[4] The Charter of the United Nations of 26 July 1945r., Dz.U. 1947 nr 23, poz. 90.

mentation of the right to development involves the realization of all other human rights, and an appropriate shape of the social order in domestic and international scale is its fundamental condition[5]. Both of these aspects were firmly stated in The Charter of the United Nations in Article 55 and 56, where states as well as international community were obliged to act for "raising the standards of living, full employment and conditions for social and economic progress and development", and also solving all international social problems and "universal respect as well as abiding all human rights"[6].

After establishing the Universal Declaration of Human Rights in international documents from the 50's and 60's of the 20th century they were repeatedly referring to the link between the human rights and development. It is, therefore, crucial to pay attention to the so-called Proclamation of Teheran of 13th May, 1968, which was established during the first International Conference Of Human Rights in 1968. It was stated in it among others that: "the growing chasm between economically developed and developing states impedes the realization of human rights in international community", "achieving long-lasting progress in the implementation of human rights depends on reasonable and effective domestic and international policies in the economic and social development"[7].

Declaration on Social Progress and Development[8] accepted by the General Assembly of the United Nations on 11th December, 1969 was the first international document devoted mainly to the right to development. In Article 1 of Declaration it was underlined that every human being and all people ought to have equal rights to "live in dignity and freedom, use fruits of the social progress and ought to contribute to them[9]. Another important aspect was written down in Article 2: "Social progress and development ought to be based on the respect of dignity and human value

[5] http://www.un.org/en/documents/, online access 4.03.2015.

[6] Declaration on Social Progress and Development (11 December 1969), A/RES/2542(XXIV).

[7] *Ibidem*.

[8] *Ibidem*.

[9] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, Dz. U. 1977 r., No 38, poz. 167 and International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27 Dz. U. 1977 r., No 38, poz. 169.

as well as ought to provide the promotion of human rights and social justice"[10]. For general conditions necessary to fulfill this aim was to eliminate all forms of inequality, exploitation, colonialism, racism as well as recognizing and effective implementation of all types of human rights, which were accepted in 1966 on the International Covenant on Civil and Political Rights[11].The next international regulation, which specified the right to development, appeared in the UN system only in 1986 when the General Assembly of the UN enacted the Declaration on the Right to Development[12]. It was a giant step in perception and exercise the right to development. For the first time a definition on the right to development was outlined: "The right to development is an inviolable right under which every person and all people are entitled to contribute and use economic, cultural, social and political development, in which all rights and freedoms may be carried out"[13]. It involves the right to achieving development – safety in water and food supplies, improvement in Health and Education Service, safe existence. It is also the right to make decisions independently, which shall not be discredited by other countries. In actual fact, it is about the constant social development, and the right to such development has to be recognised and protected in all conditions[14]. Furthermore, the Declaration of 1968 indicates that all countries are obliged to provide the right to development and, by contrast, rich countries are obliged to help the Southern Global countries. Member States of Organisation for Economic Co-operation and Development (thereinafter: OECD), the European Union states and the UN states were mainly obliged to grant the help.

The contemporary catalog of the most important international documents applying directly to the right to development presents the following:

- *The Declaration on the Right to Development on 4 December 1986*. It was entered by the General Assembly of the UN, states the right to development as an inviolable human right. It puts on countries the obligation to co-operation aimed on common carrying out this right.

[10] Declaration on the Right to Development (4 December 1986), A/RES/41/128.

[11] Art. 1 Declaration on the Right to Development.

[12] A. Allen, Paradoxes of Development. Rethinking the right to development, [in:] D.T. Meyers (ed.) Poverty, Agency, and Human Rights, Oxford 2014, pp. 249-260.

[13] Commission on Human Rights resolution 1998/72 The right to development, in : Commission on Human Rights, Report on the fifty fourth session, (16 March – 24 April 1998), E/1998/23, E/CN.4/1998/177, pp.232 – 23

[14] United Nations Millennium Declaration (8 September), A/RES/55/2.

- *The right to development on 22 April 1998 – Commission on Human Rights resolution 1998/72.* In this document a mechanism was established, which is to support the implementation and realization of the right to development, among others the Open Working Group was set up for this purpose[15].
- *Millennium Declaration of the United Nations on 8 September 2000.* Accepted by the General Assembly of UN. The mutual obligation of 189 countries of the North and the South, where the so-called 8 Millennium Development Aims were formulated focusing on giving equal opportunity on worth life of all residents of world[16].
- *Paris Declaration on Aid Effectiveness on 2 march 2005.* The aims and indicators of the Declaration drafted are to monitor global progress in terms of effective assistance. The decisions made ought to be in accordance with five principles: ownership of evolutionary concepts (ownership), alignment of help to strategy of development recipients (alignment), harmonisation of donors' actions (harmonisation), mutual accountability and managing for results[17].
- *Monterrey Consensus.* The document signed on the international conference, which concerned financing development, which took place in Monterrey (Mexico) on 18 – 22 March 2002. The conference was allowed to reach a consensus in financing global development in the developing countries. The EU, which contributes over 50% of the official development help on a world scale, made the conference a big success[18].

[15] Paris Declaration on Aid Effectiveness and Accra Agenda for Action, http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm, online access 05.03.2015. During the Third High Level Forum on Aid Effectiveness in Accra in 2008 the world community of recipients and donors expressed the belief that changes in the way of providing assistance are necessary. Comprehensive results of implementing Paris Declaration were assessed as insufficient, the rate of changes was too slow, they acknowledged that without further reforms and rapid actions fulfilling Paris obligations and purposes wouldn't be possible. As a result, Accra Department for Action (AAA) – 4.09.2008 was born – the continuation and elaborating decisions of Paris Declaration.

[16] http://europa.eu/legislation_summaries/development/general_development_framework/r12527_pl.htm, online access 05.03.2015.

[17] See more: A. Bąkiewicz, U. Żuławska (eds.), Rozwój w dobie globalizacji, Warszawa 2010.

[18] N. van der Have, The Right to Development and State Responsibility, [in:] D. Foeken et al. (eds.), Development and Equity An Interdisciplinary Exploration by Ten Scholars from Africa, Asia and Latin America, Leiden-Boston 2014, pp. 191-216.

2. Development help in the politics and legislature of the European Union

The discussion about the right to development is an element of the global debate concerning the bases and principles of societies' development, instruments and purposes of globalization[19]. If a system of human rights is recognised as the main standard foundation of the human world seen with the supranational prospect, therefore it shall be understandable that the development and international order ought to be directly rooted in it[20]. A practical outcome from this statement is development help organised by the EU on the principles of the right to development[21].

Development cooperation is one of the main branches of the EU foreign affairs and also one of the oldest mutual policies[22]. Originally, it was strictly linked to the postcolonial national interests of member states. The regulations regarding the realization the right to development within the EU are of different ranges – both primary and secondary law (including legally binding acts and soft law)[23].

Records concerning promotion of economic and social development of overseas countries and territories and deepening economic relations between them and the Community were in the Treaty establishing the European Economic Community in 1957. To the Treaty the administrative commission was enclosed, which established special development fund of overseas countries and territories financed by OCT's Member States. The fund (functioning since 1959) gave technical and financial help

[19] M. Farrell, Internationalising EU Development Policy, "Perspectives on European Politics and Society", 2008, vol. 9, No 2, pp. 225 and next.

[20] See more: P. Bagiński, Europejska polityka rozwojowa. Organizacja pomocy Unii Europejskiej dla krajów rozwijających się, Warszawa 2009.

[21] M.Carbone, International development and the European Union's external policies: changing contexts, problematic nexuses, contested partnerships, Cambridge Review of International Affairs, No.26 (3) 2013, pp. 483-496.

[22] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

[23] Example an issue of consistency has been incorporated into the text of the revised Cotonou Agreement – Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific, on the one hand, and the European Community and its Member States, on the other hand, signed in Cotonou 23 June 2000, as amended for the first time in Luxembourg on 25 June 2005 (OJ L 287, 4.11.2010) for more on the impact of the changes resulting from the TEU on development aid see: M. Frankowski, Spójność – efektywność – dialog polityczny. Analiza zmian drugiego przeglądu Umowy z Kotonu, „Wspólnoty Europejskie", 5 (204) 2010, pp. 37-44.

for countries and territories associated with the Community. Maastricht Treaty from 1992 sanctioned the Community policy for development as supplementing the analogous policies of Member States. The EU was obligated to acting in order to provide the integration of policies with development policy.

The Treaty of Lisbon (1 December 2009, signed on 13 December 2007)[24] had the key importance for development policy. By virtue of its decisions, the EU received greater ability to influence on the world cases, including challenges of global development. The Treaty of Lisbon included the cohesion policy of external actions in the catalogue of superior principles of the EU. This principle is stated several times in the Treaty on European Union, among others in Article 21(3), where they the need to keep the cohesion of different branches of external actions, including development policy as well as consensus with other policies. Whereas Article 208 of Treaty on European Union constitutes that "the politics of the Union in the field of development cooperation is pursued according to the principles and purposes of external actions of the Union", according to the cohesion policy. Entering the cohesion policy as superior to EU actions also affected international agreements after 2009[25] as well as reflected the EU official positions, in which its issues toward third countries were raised[26]. Article 208 is essential for relationships with African countries because it shows directly that help policy is becoming a policy of the European Union.

The Treaty of Lisbon also amended the system of institutions and organs participating in the European cooperation system for development. Competences in this direction have the following:

- The European Parliament, especially Development Committee
- The European Commission, especially the High Representative of the Union for Foreign Affairs and Security Policy, Commissioner for International Cooperation and Development, Commissioner for International Cooperation, Humanitarian Aid and Crisis Response, Directorate-General for Development and Cooperation – EuropeAid (DEVCO).
- The Council of the European Union, especially Foreign Affairs Council – FAC, there is Working Party on Development (CODEV) and African, Caribbean and Pacific (ACP) Working Party.
- European External Action Service (EEAS)

Expenditure for development cooperation is foreseen in the Long-term Financial Frames of the EU, in part 4 entitled "the EU as the global partner". The following financial instruments, development cooperation is carried out with their help, were included:

- *Development Cooperation Instrument*, DCI
- *European Neighbourhood Instrument*, ENI
- *Instrument for Stability*, IfS
- *Humanitarian Aid Instrument*, HAI

Aditionally, apart from the budget of the EU, European Development of Fund (EDF) functions, from which the cooperation of the group of African, Caribbean and Pacific (thereinafter: ACP) countries is financed.

As mentioned in the Treaty of Lisbon on 2007, there was a great emphasis on the stricter cooperation among the EU state members in the developing countries, including mutual propagation of help, harmonization of procedures and mutual realisation of help actions[27]. The Treaty of Lisbon introduced rather important modifications in the development policy in the area of the EU actions. Raising standards of living in poorer countries is seen as one of the goals of all international activity of the EU, not merely its development policy. Simultaneously, in Article 208 of the Treaty on the Functioning of the European Union (TFEU) the crucial law to the primary law of the EU was established; it was EU development cooperation policy of "reduction, and ultimately, elimination of poverty".

A change implemented by the Treaty of Lisbon of applying decisions of the complementary character and the policy coordination of the EU developmental is of great importance. According to the existing treaty decisions, the complementary character had one-way character: it meant that the development policy of the Community had to supplement development policies of Member States. In accordance to the Treaty

[24] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Policy Coherence for Development : establishing the policy framework for a whole-of-the-Union approach, COM (2009) 458, 15.09.2009, OJ C/2011/26/24.

[25] Art. 208 – 213 Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47–390.

[26] Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled "The European Consensus", OJ C 46 of 24.2.2006.

[27] Regulation (EC) 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/42, 27.12.2006

of Lisbon (Article 208 TFEU), "the politics of the European Union and policies of Member States in the field of development cooperation shall supplement each other and strengthen mutually". Simultaneously, pursuant to the new Article 210 TFEU it was established that "aspiring to the increase in complementarity and effectiveness of its action, the European Union and Member States coordinate their policies in the development cooperation and consult mutually in relation to help programmes at international organizations and during international conferences". Such strengthening of treaty decisions has a positive impact on further harmonization of policies in development interaction of the EU and its Member States.

Except for primary law regulations, documents received by the European Union's institutions are of great importance. In the following of this article, the most important of them, which were entered in the last decade shall be explained (in the chronological order).

European consensus on development on 24 February 2006[28]. The document is a mutual statement of the Council and representatives of governments of Member States gathered in the Council, the European Parliament and the Committee on development policy of the European Union. For the first time since fifty years of cooperation common principles of the development policy were determined in complementarity, i.e.: directing actions of the EU in development cooperation, both on Member States and the EU and also specific actions in order to implement this vision on the EU level. For the principal purpose reduction of poverty was established in the light of balanced development. In Consensus of 2006, the principles of the EU's development policy were stated. It was said that union's policy and the policy managed by the Member States had to be complementary in this direction.

Mutual principles shaping development cooperation of Consensus 2006 are: responsibility, partnership, deep political dialog, society's participation, equality of the sex as well as the EU involvement in shaping political stability of the countries. Developing countries are responsible for their own development, but the European Union is also responsible in this respect for efforts undertaken on the principle of the mutual partnership with developing countries.

[28] On 22.10.2013 Poland became DAC OECD. The Committee of the Development Help as the OECD organ it is the most important international cooperation forum of the biggest country-donors of the development help. From its arising in 1961, DAC OECD appoints standards of acting for the global development cooperation, determines the definition of the official development assistance and criteria for creating the list of country-donors help. It is updated every year.

The European Union has committed itself to increase budget intended to the development help up to 0.7% of the gross domestic income by the year 2015. A half of this foreign aid budget would be for Africa. The EU also decided to encourage and increase the effectiveness of system coordination and complementarity between donors for the long-term shared planning based on strategies and procedures of partner countries, common mechanisms of implementing cofinancing.

In accordance to the needs, which partner countries appoint as part of the expected development help, the EU focuses its actions in the following areas:

- trade and regional interaction
- environment and balanced management of natural resources, infrastructure
- water and energy
- rural areas' development, agriculture and safety of food
- administration, democracy, human rights, help for economic and institutional reforms
- conflicts' prevention and countries' instability
- social development, social cohesion and employment.

Strengthening the attempt of the EU joining development help in the countries receiving this help of appropriate political bases, typical of the state deserves a special attention, i.e. democratic principles, including administration, human rights' protection, with reference to the protection of laws of children and autochthonous population, equality between women and men, the balance in the natural environment and fight HIV/AIDS.

The regulation of the European Parliament and the Council 1905/2006 on 18 December 2006 of establishing a financing instrument for development cooperation[29]. The financing instrument for development cooperation (thereinafter: DCI 2007 – 2013) reformed, earlier established, frameworks for cooperation for the EU development linking geographical and thematic instruments into the uniform law instrument. On the

[29] Latin America: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela. Asia: Afghanistan, Bangladesh, Bhutan, Cambodia, China, India, Indonesia, Democratic People's Republic of Korea, Laos, Malaysia, Maldives, Mongolia, Myanmar/Burma, Nepal, Pakistan, Philippines, Sri Lanka, Thailand and Viet Nam. Central Asia: Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan. Middle East: Iran, Iraq, Oman, Saudi Arabia and Yemen. South Africa: South Africa. Annex I to Regulation (EC) 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/66-67, 27.12.2006.

basis of the Regulation of 1905/2006, the EU financed measures supporting geographical cooperation with developing countries, which are on the list of Development Assistance Committee of OECD[30] (the countries were listed in annex 1 to the Regulation[31]).

The previously established purposes of the EU development help were confirmed in the Regulation: the decrease of poverty, stable and balanced economic and social development, harmonious and gradual joining of developing countries to the world economy. In the Regulation law standard for granting development help on the basis of the so called geographical programmes, thematic programmes, and programmes for increasing help for African, Caribbean and Pacific countries was also established[32].

Geographic programmes encompass cooperation with partner countries and regions determined on a geographical basis. They cover five regions, namely Latin America, Asia, Central Asia, the Middle East and South Africa. Community assistance to these countries is aimed at supporting actions within the following areas of cooperation:.

- Supporting the implementation of policies aimed at poverty eradication and the achievement of millennium development goals
- Providing basic needs of the population, especially primary education and health
- Actions for social cohesion and employment
- Promoting good governance, democracy, human rights and support of institutional reforms
- Supporting countries and partner regions in trade and regional integration

[30] S. Bilal, F. Rampa, Emerging economies in Africa and the development effectiveness debate, ECDPM Discussion Paper, No 107, March 2011, p. 4 and next.; G.R. Olsen, Africa: still a secondary security challenge to the European Union, [in:] European Security in a Global Context: Internal and External Dynamics, ed. by T. Tardy, Routledge, New York 2009, p. 165 and next.

[31] /Barbados, Belize, Guyana, Jamaica, Saint Kitts and Nevis, Trinidad and Tobago, Fiji, Republic of the Congo, Côte d'Ivoire, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Annex II to Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/69, 27.12.2006. Republic, Tajikistan, Turkmenistan and Uzbekistan. Middle East: Iran, Iraq, Oman, Saudi Arabia and Yemen. South Africa: South Africa. Annex I to Regulation (EC) 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/66-67, 27.12.2006.

[32] The committee is also able to predict special assistance to strengthen cooperation between regions distant from the EU but bordering with partner countries and regions. Moreover, in case of natural disasters or crises not-qualifying to funds as part of dispositions of 1717 / 2006 and 1257 / 1996 can take special steps unpredictable in strategic papers or long-term framework programmes.

- Promoting balanced development through environmental protection and sustainable management of natural resources
- Supporting sustainable integrated water resource management and creating favourable conditions for wider use of sustainable energy technologies
- Support in post-crisis situations and supporting instable countries.

The European Union has established a rule in the development help that thematic programmes shall be complemented by the geographical programmes:

- they include the specific area of activities, being in the interest to a group of partner countries and not determined by geographical conditions, or
- activities related to development cooperation; they are directed to various regions or groups of partner countries.

The Regulation suggests five thematic programmes:

- Investments in human resources
- Environment and sustainable management of natural resources
- Non-state subjects and local authorities
- Improvement in food safety
- Cooperation in the area of migration and asylum

Apart from general principles of development help by the EU, the Regulation introduces a programme of support measures on 18 ACP countries of the Sugar Protocol (they were listed in annex 3 to the Regulation[33]). The measures were to support 18 countries in the process of adaptation in the face of new market conditions related to the EU sugar reform.

Ultimately, the Regulation defines the list of subjects that are able to benefit from funding in development help. They include: countries and partner regions and their institutions; government entities of partner countries (cities, provinces, departments, regions); mutual entities established by countries and partner regions and the EU; international organizations; EU agencies; institutions and authorities of the Member States, countries and partner regions or some other third countries if they contribute to the purposes of the Regulation.

The budget for entering the purposes of the Regulation for 2007-2013 was 16.897 billion euros, which 10.057 billion euros was for geographic programmes, 5.596 billion euros was for thematic programmes and 1.244 billion euros was for the ACP countries falling within the Sugar Protocol.

[33] Commission Regulation (EC) 960/2009 of 14 October 2009 amending Regulation (EC) 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation, OJ L 270, 15.10.2009, p. 8–11.

The Regulation of the European Parliament and Council (EC) 1905/2006 on 18 December 2006. It established a financing instrument for development cooperation and was amended by Commission Regulation (EC) 960/2009 on 14 October 2009[34]. Following the update of the list of development help recipients in annex 2 to the Regulation 1905/2006 on DCI, Saudi Arabia was deleted from the list of countries benefiting from the EU development help; Kosovo was added to the list. Furthermore, other changes were also made to the list to countries found in the annexes according to the reviews realised by OECD/DAC.

Regulation (EC) 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide. The Regulation established the financial instrument (for 2007-2013) that aimed to support democracy and human rights in the third countries[35]. The help on this instrument aimed at:

- strengthening the respect for human rights and fundamental freedoms in the countries or regions, in which such policies are endangered
- supporting the society as a supervisor of human rights and democracy, its actions for peaceful reconciliation of particular issues in the function of representation and participation in politics
- support of activities relating to human rights and democracy in areas covered by the Community guidelines
- strengthening the international and regional framework for protection of human rights, justice, rule of law, and the promotion of democracy
- establishing confidence for the democratic electoral process by enhancing its reliability and transparency, especially by monitoring elections.

[34] 1. EFR: 1959-1964
2. EFR: 1964-1970 (The Yaoundé Convention I)
3. EFR: 1970-1975 (The Yaoundé Convention II)
4. EFR: 1975-1980 (The Lomé Convention I)
5. EFR: 1980-1985 (The Lomé Convention II)
6. EFR: 1985-1990 (The Lomé Convention III)
7. EFR: 1990-1995 (The Lomé Convention II)
8. EFR: 1995-2000 ((The Lomé Convention IV and the reviosion of the Lomé Convention IV bis)
9. EFR: 2000-2007 (The Cotonou Agreement)
10 EFR: 2008-2013 (revised Cotonou Agreement)
11 EFR: 2014-2020 (revised Cotonou Agreement)

[35] Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, OJ L 077, 15.03.2014.

The financial instrument for supporting democracy and human rights in the world for 2007-2013 had the budget of 1.104 billion euros.

The decision of the Council 2013/759/UE of 12 December 2013 concerning transitional management measures of the EDF from 1 January 2014 till the 11th European Development Fund was established. The European Development Fund supports in the countries and in developing territories measures that promote economic and social development, and human development, as well as cooperation at the regional level. The European Development Fund (EDF) is a main instrument, by which the Community supports development cooperation in African, Caribbean and Pacific countries (ACP) and Overseas Countries and Territories (OCT). The 1957 Treaty of Rome made provision for its creation with a view to granting technical and financial help, initially to African countries, which at that time were still colonised and with which some Member States had historical links.

Although a heading has been reserved for the Fund in the Community budget since 1993 following a request by the European Parliament, the EDF does not come under the Community's general budget. It is funded by the Member States, it is subject to its own financial rules and is managed by a specific committee. The aid granted to ACP States and OCT's shall continue to be funded by the EDF for the period 2014-2020. Each EDF edition is concluded for a few years. Since the conclusion of the first partnership convention in 1964, the EDF cycles have generally followed the partnership agreement/convention cycles[36]. For the years 2000-2007 EDF has been allocated 13.5 billion euros. The tenth EDF Fund covers the years 2008 to 2013 and provides an overall budget of 22 682 million euros. Of this amount, 21,966 million euros is allocated to the ACP countries, 286 million euros to the OCT and 430 million euros to the Commission as support expenditure for programming and implementation of the EDF.

The Council Decision of 2013/759/EU lays down transitional EDF management measures until the entry into force of the 11th EDF. The 11th EDF shall run between the period 2014 and 2020 and its budget amounts to 30.5 billion euros.

The EU Regulation no. 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing for the period 2014-2020[37]. Through this instrument the EU wants to reduce poverty in the developing countries

[36] OJ. L 136, 9.5.2014

[37] See https://euaidexplorer.jrc.ec.europa.eu OJ L 077, 15.03.2014.

and promote sustainable economic, social and environmental development, as well as democracy, rule of law, human rights and good governance. Priority is given to countries that most need help: the least developed countries having a low gross national income and weak human resources, countries being in crisis or post-crisis situations, as well as unstable countries and the ones in a difficult situation.

The Union financial instrument cooperation for development includes:

- Geographic Programmes: cover the possible areas for cooperation and distinguish between regional and bilateral cooperation in elementary needs (health and education), employment, infrastructure, human rights, democracy and the balanced development. They include developing countries in Asia, Central Asia, Middle East and Latin America as well as South Africa.
- Thematic Programmes (where 27% of this program shall be allocated for purposes relating to climate change and environmental protection, and at least 25% of the program funds shall be allocated to promoting social integration and social development)
- Pan-African Programme: apart from the above mentioned programmes, using the Pan-African programme, the financing instrument for development cooperation shall support the EU's strategic partnership with Africa. the Pan-African programme shall be used to complement other financial instruments used in Africa such as the EDF or the ENI. Activities in the programme shall be of transregional, continental world-wide character.

Decision 472/2014/EU of the European Parliament and of the Council of 16 April 2014 on the European Year for Development. The motto of the European Year (2015) shall be "Our world, our dignity, our future". It is the first European Year devoted to development cooperation (the EU is the world's largest donor of official development help). The main objectives of the European Year of Development shall be:

- to inform Union citizens about the Union's and the Member States' development cooperation, highlighting the results that the Union, acting together with the Member States
- to foster direct involvement, critical thinking and active interest of Union citizens and stakeholders in development cooperation including in policy formulation and implementation
- to raise awareness of the benefits of the Union's development cooperation not only for beneficiaries of the Union's development assistance but also for Union citizens and to achieve a broader understanding of policy coherence for development, as well as to foster among citizens in Europe and developing countries a sense of joint responsibility and solidarity with the third countries.

3. The specification of the EU development help

EU development help goes to around 150 countries in the world from Afghanistan to Zimbabwe[38]. In recent years, several developing countries have experienced strong economic growth and have managed to reduce poverty. Therefore, in 2014 the EU phased out direct help to large countries such as India and other countries like Malaysia or many Latin American countries. This process is called "gradual phasing out of preferences". Thanks to the process, help goes to the poorest places in the world. In the period 2014-2020, about 75% of EU support shall go to these countries which, in addition, often are hard hit by natural disasters or conflict, something that makes their citizens particularly vulnerable. The EU is the only donor worldwide which gives support in all countries that are fragile or suffer from conflict. Over the last decade, thanks to the EU funding, almost 14 million pupils could go to primary school, more than 70 million people were linked to improved drinking water, and over 7.5 million births were attended by skilled health workers, saving the lives of mothers and babies. Since 1999, the world has managed to reduce the share of extremely poor people by almost a half. According to the international definition of being "extremely poor", it is a situation when one have to live up having less than 1.25 dollar per day. The number of people below this line has dropped by 700 million comparing to the year 1990. The EU has contributed to this, for example, by helping to build and repair more than 87,000 kilometres of roads to make sure that people can transport goods and food in their countries and to strengthen local economies. The EU has also provided money or other in-kind benefits to more than 46 million people to ensure their food security.

The EU help system is transparent – it is very easy to find out where the money goes. The EU has repeatedly been ranked among the most transparent help donors. Giving this information shall also prevent situations, in which different donors invest in the same objective, as well as to prevent corruption and misuse of money. There are various methods to find out where the EU money goes: The EU Aid Explorer gives access to complete and accurate data on helping organizations around the world[39]. The European Commission's financial transparency system shows who receives funding from the European Commission each

[38] See http://ec.europa.eu/budget/fts/about_en.htm

[39] More information about help: http://europa.eu/rapid/press-release_IP-14-388_pl.htm.

year[40]. The EU prevents financial misuse and corruption by means of special audits and controls. The EU programmes undergo regular independent audits to ensure that their budget is stable. Furthermore, the European Court of Auditors examines specific projects and country programmes every year. If there is a suspicion of fraud or corruption, the European Anti-Fraud Office is able to pursue an investigation. The European Commission and the EU Delegations in the countries that are given help monitor and control projects and programmes financed by the Commission. The controls include regular visits. The results of the projects funded by the EU are also checked by the independent experts. Thanks to this system of control and evaluation, if a serious suspicion arises that funds are misused, the EU can stop the financial assistance and take the necessary and important measures. This could even include the refund of money.

The European Union and its Member States give the most generous funding among donors for official development help in the whole world. In the year 2013, the EU provided more than half of public assistance or "official development assistance" (as defined by the OECD). In 2013, the EU and its Member States spent 56.5 billion euros to help countries fight poverty[41]. Yet in December 2013, PE parliamentarians decided to give another 51.4 billion euros to foreign assistance for the period 2014-2020.

The EU relies on organisations with the right experience to carry out its development projects on this ground. The EU often gives funding to non-governmental organisations – this may be a local association of female lawyers that helps women to protect their legal rights or the international organisation such as Amnesty International fighting for human rights. In this way, the EU tries to ensure that the funding shall be budged by those who know their countries best and are also experts in their branches. Among partners, there are also experienced partners in UN organisations like UNESCO or the Food and Agriculture Organization and development agencies of the EU Member States.

[40] More information contains the document on the interaction of Europe with the civil society in the field of external relations: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0492:FIN:PL:PDF

[41] P.Frankowski, Program zmian polityki współpracy rozwojowej Unii Europejskiej, „Unia Europejska.pl", nr 1(212) 2012, s.17.

While planning cooperation with partner countries, the EU consults the civil society organisation[42]. While preparing its programmes, the EU does not only cooperate with governments, but also with civil society organisations: non-governmental organisations, trade unions, human rights protecting groups[43], environmental organisations, chambers of commerce and others.

The EU tries to guarantee that its actions in such branches as trade and finance, agriculture, safety, climate change or migration contribute to fighting against poverty in the developing countries. This is called "coherence policy for development". Many of the EU's actions and its Member States in these branches are associated with development. More and more often, the European Union opens up a huge European single market to the developing countries, which leads to economic growth and the increase in employment in these countries[44].

4. Summary

The right to development was formulated and accepted on the international law after many years of discussion. Establishing the right to development by the worldwide society was a breakthrough for understanding development assistance. The consequence of the right to development is the fact that poorer countries have the right to help from richer countries and rich countries have a duty to provide support to poorer countries in order to reduce poverty. Approximately, 1.3 billion people in the whole world still live in the conditions of financial poverty, and development needs of many others shall remain unmet. By this way, development help stopped to be a sign of good will of rich countries, but it has become their commitment and involvement to the international

[42] The EU also entered into an agreement with a few countries in to fight the illegal felling of forests and to guarantee that wood imported to Europe was legally acquired. The other examples of the EU provisions which require the greater lucidity of agreements in the mining industry are: all payments exceeding 100 thousand euros on government administrations made by large EU enterprises active in the mining industry and dealing with acquiring wood shall be passed to the public message. This will provide information to force governments to account for profits on using resources for the civil societies in countries having a lot of natural resources like petroleum or minerals. More information about the policy coherence for the development one may find in the following report: https://ec.europa.eu/europeaid/node/45425

[43] See more: A. Zygierewicz, Pomoc humanitarna Unii Europejskiej, „INFOS. Zagadnienia społeczno-gospodarcze", nr 12(59) 2009.

[44] https://www.polskapomoc.gov.pl/IV,Forum,Wysokiego,Szczebla,ds.,efektywnosci,pomocy,,1427.html - ftn1

affairs. Furthermore, help granted to poorer countries cannot be subordinated to political or economic interests of Northern countries (unfortunately, this is seen very often) because its fundamental aim is to fulfill the obligation in relation to the poor in global South countries. The essence of every human right is the fact that there are rights on one hand, there are also specific obligations on the other hand.

The EU is a major donor in the field of international development help, which is one of the four most important aspects of its external policy[45]. The EU development policy changed gradually. Initially, it merely concerned the countries and overseas territories associated with the EU, but later it was expanded and now it is centered around all developing countries. The issue of effectiveness in development help is linked to development funding and implementation of the MDG's. It is becoming an important part of the European development help since the inception of commitments in Paris Declaration of 2 March 2005 during the Second High Level Forum on Aid Effectiveness in Paris[46].

The European countries are able to make use of the funds for development cooperation realizing it together with the EU institutions. There are numerous reasons for that. Firstly, more generous donor is able to give help more efficiently than 28 smaller donors. Secondly, the European Commission's assistance programmes are considered to be better than most of the programmes fulfilled by individual countries. And thirdly, the EU's help reaches the regions where the Member States do not have representatives, for example in Eritrea.

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Managing the system of personal data protection in the public sector

Abstract
Each right to public information about the activities of public institutions, has become a key pillar of public life. It is also an important element of control public opinion on any operating activities of its bodies and authorities. The right to public information is permanently attached to the principle of openness in public life. However, the limitation of rights may be relied on only in justified cases. This applies in particular circumstances, including the protection of the freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the state.

Keywords:
management, data protection, public information, public administration

1. Introduction

Restrictions on access to public information also include the subject of the article, discussing a system of personal data protection in public administration, where he successively collected by the employer employee records, defines a specific set of personal data, whose chief administrator is the employer. It should be remembered that each acquisition, collection, recording, storage and sharing of personal data of employees in the public administration employees, is a processing and is permitted only in justified cases the statute.

The aim of the study analyzed area is to identify the essence of the protection of personal data in public institutions from scratch the legal changes discussed topic in the context of the performance of their tasks. The article indicates the methods and

ways of managing personal data protection system, referring to the existing legislation on personal data which permanently joined in the idea of a democratic state of law.

2. The essence of law on personal data

The overarching piece of legislation, which determines the specificity of personal data protection Polish legal system is the Polish Constitution. The Constitution in article 48 guarantees everyone the right to legal protection of private and family life, honor and good reputation and to make decisions about his personal life (Constitution of the Republic of Polish). That approach reflects a realization of the fundamental principles of the rights and freedoms of citizens, which are assigned to each person, as assigned in with just the right birthday.

According to article 1 paragraph 1 of the law on personal data protection, everyone has the right to the protection of personal data concerning him. In this respect, any processing of personal data can only take place because of the public interest, the interest of the data subject or the interest of third parties, but only to the extent and manner provided by law (law on the protection of personal data). This act has legal situation of the person whose personal information is protected, determine the principles of personal data processing and the rights of individuals whose personal data are or may be processed in databases.

At a time where more and more uses information technology progress, the law applies to the processing of personal data in two areas:

1) files, indexes, books, lists and other registers;
2) computer systems, also in the case of processing data outside the data collection.

The provisions on protection of personal data, pursuant to article 3 paragraph 1 and paragraph 2 of the law on protection of personal data – applies to state authorities, local government and state and municipal organizational units (the law on protection of personal data). It should also be borne in mind the fact that any non-State actors, performing public tasks, and individuals and legal persons organizational units not being legal persons who process personal data in connection with the activities or professional activity or for the implementation of statutory objectives – are also subject to regulations on protection of personal data.

It should also be noted that in accordance with the disposition contained in article 6 paragraph 1 of the act on the protection of personal data – personal data shall mean any information relating to an identified or identifiable natural person. This means one thing, that 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 his physical, physiological, mental, economic, cultural or social. In this regard, the information is not considered possible to establish the identity of the person, if only at excessive cost, time or action (law on the protection of personal data).

At this point, it seems necessary to refer to judicial decisions. According to the judgment of the Supreme Administrative Court of 18 November 2009, the personal information shall include at least the information necessary to identify, or name and place of residence (judgment of the Supreme Administrative Court). However, such data is not limited to information that strengthen the level of identification of the person. Such information should also include pictures of the individual, which makes it easier to identify. However, when such a picture of a person is placed in addition to its name, it should be considered that it constitutes personal data to be protected under the law on personal data protection. Also on the classification of the information to the categories of personal data largely determine objective criteria for evaluation. It should be particularly take into account all the information, including the context of the transfer of such data, which are open to third parties.

Further analysis of passenger data sharing, this time involving the public sector, points to some mandatory behavior of the public administrations. In this respect, the term processing of personal data means all activities that occur most often on personal data. Such action should be first and foremost collection, recording, storage, organization, alteration, disclosure and erasure, particularly those performed in the computer systems.

This is acceptable only in the following situations:

- the data subject has given his consent, unless it comes to erasure of data;
- it is necessary for the exercise of rights and duties resulting from a provision of the law;
- is necessary for the implementation of the agreement if the data subject is a party or when it is necessary to take action before concluding the contract at the request of the data subject;
- it is necessary to perform certain tasks carried out by law for the public good;
- it is necessary for the fulfillment of the legitimate objectives pursued by the controllers or data recipients, the processing does not violate the rights and freedoms of the data subject (Bart, Markiewicz, 2002, p. 42-59).

In this respect, public authorities are obliged to respect the law on personal data protection. In this regard must ensure an adequate level of security of such data by limiting access to such personal information and to apply measures of physical protection (adequate collateral store information containing personal data of employees).

3. Changes in the rules on personal data protection

With effect from 1 January 2015 amendment came into force provisions on the protection of personal data. Most amendments concern the situation of Information Security Administrator. All public institutions have to quickly prepare for new responsibilities that were not too expensive. The new rules require the data controller to choose one of two options. The first concerns the implementation of independent data protection supervision. The second shows the determination and Information Security Administrator notification to the relevant registers kept by the Inspector General for Personal Data Protection. At that time, Information Security Administrator is responsible for implementing documentation and reporting annually to the Inspector General for Personal Data Protection.

Therefore it expanded responsibilities, but Information Security Administrator privileges. These obligations are primarily checking the compliance of personal data processing with the provisions on the protection of personal data. Frequency and precise form of carrying out verification activities, would determine the implementing regulation, which is currently still in the planning stage.

The previous legislation was not strict guidelines concerning persons holding the position of Information Security Administrator. There are no formalized also provides preparatory courses, examinations and certificates issued by the Inspector General for Personal Data Protection. The first guidelines on the qualifications of persons serving as Information Security Administrator introduced the latest amendment. However, they are so general that doubts about the competence of the persons occupying the position will be clarified in the course of proceedings before the General Inspector for Personal Data Protection or the court.

It should be noted that the new legal solutions are related to the need to incur certain expenses. On the one hand, these costs are directed to the functioning of the Information Security Administrator. On the other hand, costs must be incurred in connection with the obligation to maintain a register of open sets where you have to take into account the additional expenses associated with maintaining such a website.

These changes show that the Information Security Administrator will be required to fulfill certain responsibilities:

- keeping the register of personal data files processed by a public body in the form prescribed by the new regulation;
- annually to the check (audit), personal data processing compliance with the law;
- preparation of the report of the audit for Data Administrator;

- monitoring and incident management, security breaches of personal data and keeping proper documentation in this regard.

4. Public information and personal data protection system

Public information in accordance with article 1 paragraph 1 of the law on access to public information only public issues, including official documents. However, public information are not private matters or private documents that belong to the employee public authority (law on access to public information). In a situation where private document is in the possession of a public authority or when information in the field of private matters the employee is on file administrative matters – is by law in any way by not become a subject of public information. Such reasoning regarding the personal data sets already mentioned law on the protection of personal data. The personal data of each person employed in a public institution employee is all the information, covering a range of private and public. These are all personal interests whose protection derives from human dignity and the right to privacy (Mednis, 2006, p. 86-93).

It should also be noted that on the basis of article 47 and article 51 paragraph 1 of the Constitution of the Republic of Polish, as well as article 76 of the Constitution of the Republic of Polish can be traced right to privacy, namely the protection of the private life of every person, including an employee of the public finance sector units. Please be aware that all private matters are matters of personal, family, religious, along with personal possessions, assigned to each person. Therefore, some information in the field of scientific, artistic or social of such a worker can be conveyed to the public, which means that they can become open information. Like the situation concerns the protection of personal rights that should be protected to the extent appropriate, regardless of whether they are subject to explicit information in the sphere of public life or protected information in the sphere of private life.

Legal regulation concerning the protection of personal data is a key means to protect freedom and human rights. This situation causes that are imposed obligations on these entities, which a private individual had to provide information in the implementation of public duty. A similar effect can be seen in the mysteries of unions, control, treasury or bank, where the standards against which protection of personal data in the law on personal data protection, dispositions and sanctions are aimed at people who gain information protected these secrets (law on the protection of personal data).

The law on access to public information at the disposal contained in article 5 paragraph 2 indicates the privacy of the individual and the mystery of the entrepreneur, as the main reasons limiting access to public information. For practical purposes, can the application of this law specifying the use of classified data, however, be remembered that the legal title to protect the right to privacy recruited employee and the specific secrets protected by law (law on access to public information). We should also bear in mind the fact that the publicity of data in the field of public life does not mean that they are deprived of personal data protection under the law on personal data protection. Any action on the data that are treated as non-confidential, the process of processing, or using them in a manner derogatory or otherwise infringing goods protected by the law is strictly prohibited (Krasuski, Skolimowska, 2007, p. 98-121).

Personal data of employees for various reasons and in various forms, may find themselves at the disposal of public authorities or other state or local government legal persons. However, only sometimes such personal data are becoming content or official document which fall within the specified public affairs. However, if the employee's personal data will be content or official document which will form part of public affairs, only then can become possibly the subject of public information, understood on the basis of the provisions on access to public information. The basic premise remains the same fact of performing a public task, and thus perform actions that affect the rights and obligations of private parties. It will be an act of legal and technical material and shaping the rights or obligations of private parties. However, in the existing legal system appropriate to public awarding authorities competent to issue decisions and carry out administrative acts, prejudge the legal status of public servants.

5. Methods of protection of personal data in public administration

The data controller who is employed in public administration institutions, is obliged to take appropriate technical and organizational measures. They ensure the protection of personal data processed, which should be appropriate to the risks and category of data being protected. In addition, the controller to protect data against their unauthorized disclosure, takeover by an unauthorized person, processing with the violation of the act, any change, loss, damage or destruction (Drozd, 2008, p. 67-73).

On the basis of article 36a paragraph 1 of the act on the protection of personal data – a data controller may appoint an administrator of information security. The practice associated with the functioning of public administration authorities shows

that increasingly are appointed information security administrators who watch over the implementation and ensuring security policy in public administration. The main tasks of the information security administrator should in particular ensuring that the provisions on the protection of personal data, in particular by:

- checking compliance of personal data processing with the rules on personal data protection and the development in this area report to the controller;
- overseeing the development and updating documentation related to the protection of personal data;
- possession registry data sets processed by the controller.

We must also remember that data processing may be authorized only people with the authority granted by the controller. In addition, the controller is obliged to ensure control over what personal data when and by whom have been to the filing system and to whom they are transferred (Szewczyk, 2007, p. 125-141). The controller also keeps records of persons authorized to process them, which should include:

1) the name of the person authorized;
2) the date of granting and expiring, and the scope of authorization to the processing of personal data;
3) identifier in a situation where the data are processed in a computer system.

However, people who are authorized to process personal data, are obliged to keep secret any personal data and the ways of their protection.

In accordance with article 39a of the act on the protection of personal data – the minister responsible for public administration in consultation with the minister responsible for the information defined by regulation, the manner of keeping and scope of documentation and basic technical and organizational conditions which should be fulfilled by devices and computer systems used to processing of personal data. Such requirements must also take into account to ensure the protection of personal data processed appropriate to the risks and category of data being protected (law on the protection of personal data).

6. Personal data of candidates, as public information

It should also take into consideration the issue related to the personal data of potential candidates for employees in public administration. The right to public information about the activities of the authorities is an important factor in public life and control over the activities of public bodies and the authorities. It is extremely connected with the principle of openness of public life. Citizens who exercise their

electoral rights can sometimes be interested in the activities undertaken by elected bodies. This situation applies, for example, the share of residents in decision-making bodies sessions where they can through active participation in it affect the affairs of the local community. Discussed earlier act of 6 September 2001 on access to public information indicates that any information about public affairs is public information and shall be made accessible. Open Directory matter considered public information referred to in article 6 of the act. Based on the decision of the Provincial Administrative Court of Gdansk of 10 July 2013, a public matter is the activity of bodies of the wider public authority which is exercised in the exercise of official authority and the management of public property or property belonging to the Polish State.

The right to obtain public information generally includes access to all documents and entry to sittings of collective organs of public authority formed by universal elections. In this case, it is also possible audio or video recording of that meeting. To provide public information are often obliged public authorities. In addition, public information provide economic self-government bodies and professional organizations and entities representing state legal persons or legal entities of local government (the law on access to public information).

Limiting cited the right to access to public information may be made only for the protection of the freedoms and rights of other persons and economic subjects, public order, security or important state interest. The right to public information based on article 5 paragraph 1 of the law on access to public information is limited in scope and principles laid down in the regulations on protection of classified information and the protection of other secrets protected by law. The right to public information is also subject to limitation due to the privacy of an individual or a trade secret (Szustakiewicz, 2014, p. 76-93).

It should also be noted that the judgment of the Provincial Administrative Court in Krakow of March 20, 2014, which indicates the need to protect personal data, does not relieve the body of public information. The public administration body should only restrict access to information that would effectively make it possible to identify individuals. This approach means in practice limited access to the documents respectively in content. The need for such action must not be equated with a refusal to provide public information for the protection of classified information or other secrets protected by law. The information, which includes identification numbers of plots, which have been granted administrative decisions on establishing zoning – they are not public information, relating to an identified or identifiable natural person.

The problem of access to public information is largely in indicating the extent to which this matter is public information. In this regard, personal data shall mean any information relating to an identified or identifiable natural person by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural and social.

Personal data of the candidate, as a future worker employed in the public sector, should be used only for the purposes of recruitment. That is why it is important to proper protection of such data, which are often treated as sensitive data, which by law are subject to special control. Under the current rules, the employer is entitled to require the person seeking employment to provide personal data including:

- name and surname;
- parents' names;
- date of birth;
- place of residence (address);
- education;
- course of the current employment.

Product personal data, which the employer has the right to require the employee is wider and irrespective of the above data, it includes the right to request, in particular:

- other employee personal data as well as the names and dates of birth of children employee if such application is necessary due to the use by an employee of the special powers provided for in labor law;
- number of the Universal Electronic System for Registration of the Population employee assigned by the Government Information Centre.

7. Providing internal auditor personal data of employees

Internal audit, in accordance with the provisions of article 272 paragraph 1 of the act of 27 August 2009 on public finances, is an independent and objective activity, which aims to support the minister in charge of department or head of the unit in achieving the goals and objectives through a systematic assessment of management control and consulting activities (the act on public finances).

Any request for an internal auditor for the availability of data on employees in the public finance sector unit, special when it comes to those involved in the processes of public procurement can be justified in terms of the level of education or qualifications. You can reflect on whether it becomes legitimate for information which relates to completed university, which was successfully completed by the employee.

In this regard, it should also consider the question of whether such information may be related to the scope of the checks carried out. However, in the case of checks involving personal data of employees, working for an employer – always internal auditor may request access to personal files of employees, which include answers to questions asked by the auditor. In the event that a request for specific personal data, the auditor must be remembered that the overall responsibility for providing such information or its refusal – bears the head of the business unit. In accordance with the provisions of the Law on the protection of personal data, personal data can therefore be used by the administrator for any purpose other than that for which they were collected, unless they violate the fundamental rights and freedoms of the data subject (law on the protection of personal data) .

In the event of an inspection carried out by the internal auditor, in particular, the provisions concerning the rights and duties of the auditor, as well as the purpose of the checks carried out. As part of performing internal audit work of internal auditors who have access to different information in public institutions. In accordance with article 282 paragraph 2 of the act on public finances, the internal auditor has the right to enter any premises unit and inspect any documents, information and data and other materials related to the functioning of the entity, including fixed on electronic data carriers, as well as to draw up their a copy or copies of the regulations on secrecy protected by law (the act on public finances).

However, in the case of sharing, as well as the processing of personal data of people who are employees of entities controlled by the auditor, there is no doubt that these data should be made available at the request of the auditor, as long as it is reasonable to carry out the controlling interest in the public finance sector. Also the range obtained under the control of the data must be appropriate to the subject of control and only serve its purpose. The internal auditor is guaranteed the right of access to all documents of all employees and any other sources of information needed to carry out internal audit. The need for access to documents, including personal data contained therein is determined by the scope of the internal auditor conducted inspections of public institutions.

8. Summary

System management of personal data in the public finance sector units has become a key task in the correct method of public tasks. Efficient management of such a process provides the management unit to ensure that all activities in this area are carried out according to law, and are properly supervised.

Undoubtedly, the management of personal information in public institutions is a process of dynamically changing, where the direction of new legal solutions is focused on ensuring adequate protection of personal data of employees in the public institution.

Proper protection of personal data by public institutions, becomes a role model for other entities determining the manner and scope of due respect for existing law. This approach allows for a better respect for the law and use it to ensure the adequate protection of personal data of employees that are beginning to be sensitive information for which duly in all circumstances be treated with care.

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The Right to be Forgotten under the EU Personal Data Protection Regime

Abstract

In its seminal[1] *Google Spain* ruling[2], the Court of Justice affirmed the existence of a 'right to be forgotten' under the current framework of the Directive 95/46/EC[3]. While a right to deletion of unlawfully processed personal data has been provided for in article 12 of that Directive[4], the Court introduced therein a right to erase personal data that were published lawfully. The exact content of that right[5], along with the issue of what the name for it actually denotes[6] are subject to an ongoing international controversy[7]. Given the above, the subject of research for the

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[1] Or at least important enough to be included in the Vice-President of the Court's outline of relevant case-law of the CJ for the years 2004-2014. See K. Lenaerts, *The Case-law of the ECJ and the Internet (2004-2014)*, ELTE Law Journal 9/2014, p. 12.

[2] Judgment of the Court of 13 May 2014, case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317, hereinafter *'Google Spain'*.

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31, as amended), hereinafter either 'Personal Data Protection Directive' or 'Directive 95/46/EC'.

[4] V. Reding, *The European data protection framework for the twenty-first century*, International Data Privacy Law, Vol.2, 3/2012, s. 125, W. Wiewiórowski, *Nowe ramy ochrony danych osobowych w Unii Europejskiej*, Monitor Prawniczy 7/2012, s. 1002.

[5] H. Nys, *Towards a Human Right 'to Be Forgotten Online'?*, European Journal of Health Law, 18/2011, p. 470.

[6] Case report, Harvard Law Review vol. 128, no. 2, December 2014, available at http://cdn.harvardlawreview.org/wp-content/uploads/2014/12/google_spain_sl_v_agencia_espanola_de_proteccion_de_datos.pdf.

[7] M. Wagner, Y. Li-Reilly, *The Right to be Forgotten*, The Advocate (Vancouver, USA) 72 part 6, November 2014, p. 824.

paper herein is the scope of such a right, along with its legal basis in EU law, under both the current and the upcoming[8] data protection regime. The objective of the research in question would therefore be to, in addition to the analysis of the right in question, to assess whether the decision in *Google Spain* remains within the boundaries of EU law, with the hypothesis that it indeed does. As regards to the methodology, the author would make use of the analytical[9] and constitutional[10] approaches, with reference to the Hohfeldian analysis. The paper would take account of the law as it stood at the 25th of June 2015.

Keywords:
Data protection, European Union law, personal data, right to be forgotten, Google Spain

1. Introduction and facts of the case

The aim of this article is to analyse the so-called '*right to be forgotten*' under the law of the European Union, as interpreted by the Court of Justice of the European Union (hereinafter 'CJEU'). Such an aim warrants an extensive analysis of the judicial outcome in the relevant landmark case of the Court of Justice, viz. the decision in *Google Spain*. Conversely, other iterations of the right in question (under other legal norms that lay outside EU law), *e.g.* the one to which the judgment of the European Court of Human Rights (ECtHR) in *Węgrzynowski and Smolczewski v. Poland*[11] pertains, remain excluded from the scope of this paper.

The case brief for the decision in *Google Spain* contains the following facts of the case. The dispute originated under Spanish jurisdiction, between Mr Mario Costeja González (a Spanish national) and *Agencia Española de Protección de Datos* (the Spanish Data Protection Agency, hereinafter 'AEPD') and Google Spain SL – a type of a company equivalent to a private limited company (Spanish *sociedad de responsabilidad limitada*, or 'SL', a legal person) incorporated under Spanish law and a sister company to Google Inc., a corporation under Californian state law.

Mr Costeja González applied to the AEPD for a decision requiring, *inter alia*, Google Spain and Google to stop displaying links (via 'Google Search') to Internet pages showing information on real estate attachment proceedings involving a public auction, which featured Mr Costeja González's name and personal data, as an owner of that real estate. Those proceedings concerned recovery of social security debts and information on these proceedings (and, therefore, the fact that Mr Costeja González was once a social security debtor) has been made public by an official order of the Ministry of Labour and Social Affairs, by way of a two-time press publication. The relevant time of publication was 19 January and 9 March 1998, respectively, in a Spanish daily *La Vanguardia*. The information concerning the above events (that occurred in 1998) was still available to be displayed at 5th of March 2010, when Mr Costeja González lodged his application.

The head of the complaint directed at Google[12] was to remove or, in the alternative, to conceal his data so that it ceased to be included in the search results that were revealing links to the above-mentioned newspaper.

The AEPD has granted that part of the application and required Google Spain and Google Inc. to stop displaying web links. They were ordered by a decision of the Director of the AEPD to 'take the measures necessary to withdraw the data from their index and to render future access to them impossible'. The Agency construed the activities of both Google Spain and Google Inc. as constituting 'processing of personal data' within the meaning of Article 2(b) Directive 95/46/EC, with the two companies being data 'controllers', according to Article 2(d) of that Directive. Google Spain and Google Inc. brought two appeals against the decision before the *Audiencia Nacional* (*i.e.* the National Court of Spain), seeking its annulment. The *Audiencia Nacional* stayed proceedings and referred several questions to the Court of Justice, by decision of 27 February 2012, received at the Court on 9 March 2012. One of these questions expressly covered the 'right to be forgotten'[13], with the caveat that information to be erased has been published lawfully.

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[8] *i.e.* the European Commission's Proposal for the new Regulation, no. COM/2012/011.

[9] R. Cryer, T. Hervey, B. Sokhi-Bulley, A. Bohm, *Research Methodologies in EU and International Law*, Oxford and Portland, Oregon, 2011, p. 37.

[10] *ibidem*, p. 50.

[11] Application no. 33846/07, judgment of 16th of July 2015.

[12] The applicant also petitioned the AEPD to require *La Vanguardia* to stop displaying information on its source website. The Agency dismissed that part of the application, however.

[13] From the preliminary reference : "3. Regarding the scope of the right of erasure and/or the right to object, in relation to the "derecho al olvido" (the "right to be forgotten"), the following question is asked:
3.1. must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by Article 14(a), of [the Directive], extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties' web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?".

This particular set of proceedings under Article 267 TFEU, which governs preliminary ruling procedure, was accompanied by an Opinion of Mr Advocate General Niilo Jääskinen, delivered on 25 June 2013[14]. The AG had therein distinguished, for the purposes of his opinion, three factual situations to which Directive 95/46/EC applies. He then classified them as, first, the publishing of elements of personal data on any web page on the internet[15], second, the case where an internet search engine provides search results that direct the internet user to the source web page, and third, the instance where an internet user performs a search using an internet search engine, and some of his personal data, such as the IP address from which the search is made, are automatically transferred to the internet search engine service provider[16]. The case in question had been identified as belonging to the second category. It has been further added that the Internet revolutionized the way information is accessed and the manner in which it is accessible, with the AG noting that the broad definitions of personal data, processing of personal data and controller are likely to cover an unprecedentedly wide range of new factual situations due to technological development. This would be so, because many, if not most, websites and files that are accessible through them include personal data, such as names of living natural persons. According to the AG, this would oblige the Court to apply a rule of reason, in other words, the principle of proportionality, in interpreting the scope of the Directive in order to avoid unreasonable and excessive legal consequences.

To solve this dilemma, the AG suggested that, even if publishing content on indexed web pages constituted data processing, particular attention would have to be paid to the type of activities search engine service providers (hereinafter : 'SESPs') were engaging in. He stressed that a SESP may automatically acquire personal data relating to its users, that is, persons who enter search terms into the search engine, which can include IP addresses, user preferences (language, etc.), and of course the search terms themselves which in the case of so-called vanity searches (that is, searches made by a user with his own name) easily reveal the identity of users. Such automatic processing was the case in regard to Mr Costeja González's legal dispute. However, SESPs may also function differently, when users register themselves to have a personalized account (*e.g.* a 'Google Account' or a 'Microsoft Live' account as

[14] ECLI:EU:C:2013:424.

[15] see judgment of the Court of 6 November 2003, case C-101/01 *Criminal proceedings against Bodil Lindqvist*, ECLI:EU:C:2003:596, para. 1 of the operative part.

[16] Para. 3 of the Opinion.

to the Bing service offered by Microsoft Corporation, to name but two), or when a SESP liaises with individuals seeking advertisements.

It has been recommended by the Advocate General that – in regard to the status of data during such an automated search and indexing process and during a search made by an user – to deem them personal data that are 'processed', as defined in the Directive[17]. Nevertheless, it has been added that a SESP that performs an automated search of the World Wide Web. The grounds for that, given by the AG, would be that a SESP which is 'merely supplying an information location tool does not exercise control over personal data included on third-party web pages. The service provider is not 'aware' of the existence of personal data in any other sense than as a statistical fact web pages are likely to include personal data. In the course of processing of the source web pages for the purposes of crawling, analysing and indexing, personal data does not manifest itself as such in any particular way'. In addition, a SESP, in the AG's view, 'has no relationship with the content of third-party source web pages on the internet where personal data may appear. Moreover, as the search engine works on the basis of copies of the source web pages that its crawler function has retrieved and copied, the SESP does not have any means of changing the information in the host servers, as provision of an information location tool does not imply any control over the content. It does not even enable the internet search engine service provider to distinguish between personal data, in the sense of the Directive, that relates to an identifiable living natural person, and other data'[18]. Therefore, in general, a SESP is not a data controller, at least according to the Advocate General. In that regard, SESPs would only be data controllers if they actually controlled the processed data (*i.e.* a SESP controls the index of the search engine which links key words to the relevant URL addresses, determines how the index is structured, may technically block certain search results, for example by not displaying URL addresses from certain countries or domains within the search results. Additionally, a SESP controls its index in the sense that he decides whether exclusion codes on source web page are to be complied with or not). Due to the automated nature of the search in the present case, the AG found that these criteria were not met as to Mr Costeja González's case.

At this point, the Advocate General turned to the last question the national court wished answered – namely, the right to be forgotten itself. The AG went on to analyse

[17] At para. 73 *et seq*. The AG, *inter alia*, mentioned the 'googlebot' function of Google search that caches webpages for further display by users.

[18] Para. 84 *et seq*.

'whether the rights to erasure and blocking of data, provided for in Article 12(b) of the Directive[19], and the right to object, provided for in Article 14(a) of the Directive[20], extend to enabling the data subject to contact the internet search engine service providers himself in order to prevent indexing of the information relating to him personally that has been published on third parties' web pages'. The answer was given in the negative by the Advocate General; he considered that 'subjective preferences' of the data subject do not create, by themselves, a ground for rectification, erasure or blocking of personal data that is neither incomplete nor inaccurate[21].

Moreover, a possible inference of a 'right to be forgotten' from the Charter of Fundamental Rights of the European Union (esp. Article 7) was considered. Nevertheless, it has been concluded that 'such pivotal rights as freedom of expression and [to receive] information' preclude such a finding[22], with Article 7 CFR being

[19] 'Member States shall guarantee every data subject the right to obtain from the controller (…) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data'.

[20] 'Member States shall grant the data subject the right (…) at least in the cases referred to in Article 7(e) [*i.e.* 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 or in a third party to whom the data are disclosed]) and 7(f) [*i.e.* processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1) [*i.e.* 'In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'.])]), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data'.

[21] At para. 104 *et seq*. The AG added (with an implicit reproach) that, if the Court were to find that SESPs are data controllers *in general*, they would have to act as 'publishers' of the data on original source pages, with the addendum that their task would be to censor the Internet (at para. 109).

[22] At para. 133. Curiously enough, the AG *did not* consider the sheer audacity of even *trying* to found a self-standing, horizontally effective, applicable and enforceable right on the basis of a *directive*, coupled with a duty to comply borne by an individual (a legal person in this instance). The *Marshall* line of case-law does not feature in the Opinion whatsoever. It is also perhaps puzzling why the plausible grounds of a horizontally effective right – the Charter and the FEU Treaty – were either analysed only sparingly (26 paragraphs out of a 138-paragraph-long Opinion, or less than 19%, with the omission of Article 8 CFR, yet with the inclusion of the ECHR) or *not at all* (FEU Treaty, esp. Article 16 thereof), respectively. No mention was made of a triangular situation, if the AG considered the case in question as one.

unable to imbue data subjects with a 'right to be forgotten'. In the end, the AG expressly denied the existence of a 'right to be forgotten' (para. 137).

2. Judgment of the Court

It must be said from the beginning that the views expressed by the Advocate General were not heeded by the Court. Indeed, the Opinion is not mentioned at all in the *obiter dicta* of the decision. Instead, the Court of Justice elected to, through a 100-paragraph-long decision, express a rather different construction on the issues previously commented on by the AG. The judgment was rendered by a Grand Chamber of the Court, composed of 13 judges[23]. Five Member States were intervening, along with the participation of the European Commission.

The Court agreed that activities of a SESP constitute data processing. It added that the fact that a search engine does not alter the content of a source web page does not change this finding. An earlier case - *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* - has been cited[24], wherein the Court indeed endeavoured to say that a publication of data that has been previously published in itself should be considered as processing, by virtue of safeguarding the effectiveness of the Directive. The development in *Google Spain* was that such activities still count as 'processing' despite the fact that the source data is not modified (*Satamedia* concerned excerpts from press articles, and therefore data that has been consciously edited).

However, the Court did not follow the AG as to whether a SESP was a data controller (whom, according to the Advocate General, a SESP generally was not). After reiterating the definition of a 'controller'[25], the Court simply found that a system of searching and indexing the Web (even if it is automatic) is set up by no-one other than a given SESP. Therefore, it is that SESP who determines beforehand the purposes and means of processing data. Additionally, activities of a SESP may be

[23] Those were V. Skouris, President, K. Lenaerts, Vice-President, M. Ilešič, Rapporteur, L. Bay Larsen, T. von Danwitz, M. Safjan, Presidents of Chambers, along with Judges J. Malenovský, E. Levits, A. Ó Caoimh, A. Arabadjiev, M. Berger, A. Prechal and E. Jarašiūnas.

[24] Judgment of the Court of 16 December 2008, case C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727, para. 48 therein.

[25] Per Article 2(d) of the Data Protection Directive, a controller is 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.

distinguished from those of those controllers that publish the content on websites indexed by a search engine, and it is the SESP that organizes the manner and structure in which data is displayed to the user (para. 33 *et seq.*).

After finding that a subsidiary and a parent company, such as Google Spain in regard to Google Inc. in the main proceedings, are subject to the Data Protection Directive by virtue of their activities being carried out 'in the context of the activities' of an establishment of a data controller[26], the Court turned to assess the nature of a right a data subject would have against data controllers. It stated that the application of (national law that implements) the provisions of Directive 95/46/EC requires a balancing of fundamental rights. It is so because interests of original webpage owners, Internet users at large and search engine operators – all of whom possess a fundamental right to freedom of expression (and, possibly, a right to conduct a business) have to be reconciled with the rights to privacy and to protection of personal data that data subject possess (para. 74 of the judgment).

Nevertheless, while noting the above need to reconcile the competing fundamental rights, the Court clearly ruled in favour of the data subjects. In para. 81 of the decision the Court went on to say that the data subject's rights protected by Articles 7 and 8 of the CFR override, as a general rule, that interest of internet users. Moreover, interference with the data subject's right may not be justified by a SESP's economic interest, as the interference is potentially severe. A possibility of obtaining a detailed personal record of a data subject by way of an Internet search was also noted by the Court (para. 80 *et seq.*).

What is more, the need of effective protection was stressed. Such effectiveness might not be secured if data subjects were required to obtain prior removal of personal data from source websites, many of which are prone to be replicated or administered by individuals or bodies in third states, outside the scope of EU law (para. 84).

Furthermore, the Court of Justice noted that legal positions of a SESP and of a source page owner may differ. This is, first, because the fact that interference made possible by a SESP could actually be *greater* than that of a source page owner, due to the dissemination of that information by a search engine. According to the Court, a SESP makes 'appreciably easier' to find an information that otherwise would

[26] See para. 55 of the judgment. The Court deemed Google Spain, a legal entity that has separate legal personality from Google Inc. and does not actually administer Google Search services, as a part of an establishment of the data controller. Advertising services carried out by the subsidiary were considered linked to the establishment of the parent company, and the Court pointed out that the subsidiary needs not by itself process data to qualify for 'being in the context of activities' of a data controller.

have had a significantly lesser impact on Internet users (para. 87). Additionally, the original publisher may avail itself of a journalistic privilege[27], possibly avoiding or being able to resist requests for data erasure, whereas a SESP may not.

Conversely, the Court was relatively unwilling to elaborate upon the 'balancing' in regard to a SESP's rights, as it noted that 'balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life (*infra* para. 81)'.

In the end, the Court decided that the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful (*e.g.* by virtue of a journalistic privilege). However, the question of a 'right to be forgotten' remained.

That issue has been answered by the Court in the last part of the judgment in question. Again – as it was the case with the Advocate General – the question was whether the data subject has any right to 'require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time'. The respondents, a majority of the interveners and the Commission stressed that there was no right to be 'forgotten', should processing of personal data be legitimate. The applicant and the Spanish and Italian governments asserted that fundamental rights to the protection of data and to privacy, held by the data subject, override the legitimate interests of the operator of the search engine and the general interest in freedom of information, encompassing a 'right to be forgotten'.

[27] In addition to other grounds. Article 9 of the Data Protection Directive reads that 'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression'. See also para. 85 *et seq.* of the decision in *Google Spain*, where the Court expressly notes that a data subject may find itself unable to enforce his or her rights against the original publisher, but would be free to do so against a SESP.

The Court shared the view of the data subject. It took note of Article 6 of the Directive[28] and stated that incompatibility 'may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes (paras 92-93)'. The Court added that, should processing remain to be authorised under Article 7(f) or 14(1)a of the Directive, it is to be authorised through the entire period of processing, not just initially (para. 95). What is more, the data subject needs not to establish prejudice against him (para. 96).

The Court confirmed that data subjects' rights indeed override – as a general rule – the interests of a SESP and of the general public (para. 97). However, according to the Court, if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question, the data subject's rights would be unable to be asserted.

Lastly, the Court applied these principles to the facts of the case. It held that 'having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer

[28] Which, being entitled 'Principles relating to data quality', reads as follows :
'1. Member States shall provide that personal data must be:
(a) processed fairly and lawfully;
(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.
2. It shall be for the controller to ensure that paragraph 1 is complied with'.

be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results (para. 98)'.

3. Analysis and conclusions

As can be seen above, the Court differed in its opinion from the AG, the Commission, the respondents and a majority of participating Member States and affirmed that there is a 'right to be forgotten' under EU law. Therefore, it needs to be ascertained to what exactly this right amounts to. First of all, this 'right' is derived from fundamental rights of a data subject present under EU law, both in general principles of law and the CFR, *viz.* paragraph 68 of the judgment. The Court based its reasoning on the Charter (*i.e.* Articles 7 and 8 CFR) and the Directive, yet relatively little attention has been devoted to the interplay between the two sources of law. No mention is made by the Court how specifically a Directive is made applicable to a *private individual* in a *horizontal* situation at hand, by virtue of the data subject's fundamental rights, yet a significant amount of space is devoted to satisfying a *directive* by a SESP. It is the Personal Data Protection Directive that supplies, throughout the decision, much of the prerequisites for the 'right to be forgotten' to apply, with the CFR simply stated to 'override' other interests, unless a condition of 'preponderant' interest is satisfied. Similarly to the Opinion, the Court omitted the question of Article 16 TFEU in its entirety.

The right to be forgotten is a right held by a data subject; it applies against a data controller, whom a SESP is. According to the Hohfeldian framework of juridical analysis[29], a 'right to be forgotten' is a 'right' *stricto sensu*, while a data controller has a 'duty' to oblige, by way of erasure of impugned search links. However, if 'particular reasons' that block the application of a 'right to be forgotten' are found to exist in a given case (*e.g.* a preponderant general interest) this relation is altered; a SESP acquires a 'privilege' that nullifies (or blocks) the data subject's right. The latter finds itself in a 'no-right' situation – a SESP may not be required to perform his duty of erasure.

[29] W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale Law Journal, November 1913, available at http://www.kentlaw.edu/perritt/blog/2007/12/some-fundamental-legal-conceptions-as.html.

As to the issue of the judicial construction of that right, it appears that a 'right to be forgotten' is a specific construction of the fundamental right to the protection of data and to privacy (with the former, as more specific, being more relevant). The lack of any reasoning on the possible 'enabling' of the Directive (vis-à-vis *Mangold*[30] and *Kücükdeveci*[31]) or on a triangular situation (along the lines of *Wells*[32] and *Arcor*[33]) places this case in the realm of 'true' horizontal application of a fundamental right. This is not unthinkable under EU law, as the *Åkerberg Fransson*[34] line of the Court's case-law stresses that fundamental rights apply in all situations in which EU law at large applies. The Court already has had an occasion to state in *Association de médiation sociale v CGT*[35] that this includes horizontal situations. As it has been stated in *Google Spain*, a request made by the data subject is to be addressed directly to the controller (paras 94 and 77), the case in question should be deemed an instance of such a horizontal application. It may be mentioned that Google has set up a form to erase links due to the right in question[36]. Therefore, a ruling does fit with the existing scope of EU law, albeit it sets an unusual example of a horizontal application of a norm of primary EU law - the CFR.

The ruling is however controversial in that the Court does not elaborate as to *why* the rights to personal data protection and to privacy – the legal basis of the decision – would 'as a rule' override that of a SESP and the general public. From a constitutional point of view, the balancing of fundamental rights – as a focal point of the decision – would need analysis far more extensive that the simple statements provided by the Court. The fact that rights to protection of data and to privacy would override other competing fundamental rights is far from obvious, as even in

[30] Judgment of the Court (Grand Chamber) of 22 November 2005, case C-144/04 *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709, para. 78.

[31] Judgment of the Court (Grand Chamber) of 19 January 2010, case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21.

[32] Judgment of the Court of 7 January 2004, case C-201/02 *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, para. 58.

[33] Judgment of the Court (Grand Chamber) of 17 July 2008, joined cases *Arcor AG & Co. KG (C-152/07), Communication Services TELE2 GmbH (C-153/07) and Firma 01051 Telekom GmbH (C-154/07) v Bundesrepublik Deutschland*, ECLI:EU:C:2008:426, para. 36 *et seq.*

[34] Judgment of the Court (Grand Chamber) of 26 February 2013, case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21.

[35] Judgment of the Court (Grand Chamber) of 15 January 2014, case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2, para. 43 (a horizontal case between a trade union and an association).

[36] https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en.

Google Spain the applicant was only partly successful to become forgotten, failing to require *La Vanguardia* to take down his personal data. Both of those rights constitute primary law of the EU, which precludes a simple hierarchical superiority, even if it is said that the right to protection of data is one of the most 'basic' EU values[37].

The ruling also does not elaborate on the issue of the right to be forgotten being applied to other data controllers than SESPs. Certainly, granted that a right to be forgotten is an expression of a fundamental right (which applies anytime EU law does), it should not be restricted to SESPs. Yet, as the decision in *Google Spain* remains the only one to date that covers the right to be forgotten, subsequent jurisprudence must clarify the scope of that right.

Lastly, attention must be given to the 'right to be forgotten' found in the Commission's Proposal for a Data Protection Regulation. The Proposal is has been adopted by the European Parliament[38]. It includes a 'right to erasure', which has been explicitly termed 'right to be forgotten and to erasure' in the original proposal. The adopted text reads :

'Article 17: Right to erasure

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, and to obtain from third parties the erasure of any links to, or copy or replication of that data, where one of the following grounds applies:
   (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed,
   (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;
   (c) the data subject objects to the processing of personal data pursuant to Article 19;
   (a) a court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased;
   (d) the data has been unlawfully processed.

1a. The application of paragraph 1 shall be dependent upon the ability of the data controller to verify that the person requesting the erasure is the data subject.

2. Where the controller referred to in paragraph 1 has made the personal data public without a justification based on Article 6(1), it shall take all reasonable steps to

[37] V. Reding, *The upcoming data protection reform for the European Union*, no.1, vol.1, International Data Privacy Law 2011, p. 3.

[38] http://www.europarl.europa.eu/oeil/popups/summary.do?id=1342337&t=d&l=en.

have the data erased, including by third parties, without prejudice to Article 77. The controller shall inform the data subject, where possible, of the action taken by the relevant third parties'.

While the text itself seems to forgo the normal course of alphabet, placing an 'a' after a 'c', it also makes several changes to the workings of the right in question. The 'necessity' appears to be the ground to pursue in regard to lawfully processed data, yet paragraph 1a introduces the notion of the right being applicable provided that a data controller is able to verify that a person is a data subject[39].

What is more, the wording suggests that Article 17 of the new Regulation would be applicable not only against data controllers, but also 'third parties' that link to, copy or replicate personal data. This would be novel, given that – currently – the 'right to be forgotten' applies only in relation to data controllers.

It remains to be seen how the 'new' right to be forgotten would be interpreted and applied, and, indeed as it has already been pointed out[40], the right in question needs to be further clarified by the Court.

It is certain, however, that the issue in question will not be easily forgotten.

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[39] The EP's amendments may be accessed at the European Parliament website http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf. The proposal is significantly altered as to Article 6 and the grounds on which a controller may plead that it is *his* rights that override that of a data subject.

[40] S. Biernat, *Prawo do bycia zapomnianym (w Internecie)?*, LEX/el., no. 201666.

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The right to sexuality in the context of transgender people – selected problems

Abstract
A right to sexuality includes the right to express own sexuality and assumes freedom from discrimination in relation to sexual orientation. It refers in a specific way to the human right of persons of various sexual orientation, including lesbians, gays, bisexuals and transsexuals (LGBT) and to protection of these rights, although it relates equally to heterosexuality. The right to sexuality and freedom from discrimination in relation to sexual orientation is based on universality of human rights and inalienable character of the rights which belong to every person by virtue of being a human.

The issues related to a gender reassignment are inconsistently regulated by national legislations and consequently, determination of the specific solutions under the international law and human rights is hindered. The universal documents, covering with their protection the human rights are not directly related to sexuality. There is a document devoted to sexual rights and this is the World Declaration of Sexual Rights.

The right to sexuality incorporates the right to express one's sexuality and to be free from discrimination on the grounds of sexual orientation and gender identity.

Sex change – respecting the right to gender identity – as an opportunity to make use of human rights on the basis of international standards.

Keywords:
human rights, right to sexuality, transgender/transsexual

1. Introduction

Today, the fundamental rights of transsexual persons are still violated, encompassing right to life, physical integrity and the right to health. Moreover, it is still noted a gross discrimination,

intolerance and violence against these persons (Dr Carsten Balzer, Dr Jan Simon Hutta, 2011, http://www.transrespect-transphobia.org/uploads/downloads/Publications/Hberg_pol.pdf, p. 5, access date: 21 May 2015). International instruments for protection of human rights aim to protect every people and to eliminate any and all forms of discrimination. However, any of these documents is not related directly to gender identity. Transsexual persons, whose rights have been violated, are granted protection on the basis of the right to privacy[1]. Since gender identity, in the light of Article 8 of the European Convention of Human Rights (Journal of Laws (93) 61/284) belongs to the sphere of privacy and is subject to protection on the basis of this Article (A. Śledzińska-Simon, 2010, p. 159). However, despite such an interpretation, the Tribunal leaves a big margin of freedom in this respect to the states which is manifested by a conservative position of this Tribunal (the more detailed discussion will take place hereafter). Certainly, a breakthrough was the decision in Case of Goodwin v. UK (Judgment Strasbourg 11 July, 2002, application No. 28957/95, source: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596, access date: 06 June 2015) and only in this decision the Tribunal determined that a refusal of the legal acceptance of gender reassignment may constitute an infringement to the Convention, however the same Tribunal did not find the Convention infringement in previous judgments just in result of leaving the wide margin of freedom to the states (M. A. Nowicki, 2013, p. 306).

A right to sexuality includes the right to express own sexuality and assumes freedom from discrimination in relation to sexual orientation. It refers in a specific way to the human right of persons of various sexual orientation, including lesbians, gays, bisexuals and transsexuals (LGBT) and to protection of these rights, although it relates equally to heterosexuality. The right to sexuality and freedom from discrimination in relation to sexual orientation is based on universality of human rights and inalienable character of the rights which belong to every person by virtue of being a human.

2. Notions of sexuality and gender identity

In accordance with L. Starowicz's definition, the notion of sexuality is understood as one of the fundamental components of being human and covers human sexual activity, eroticism, sexual identity and its role, reproduction, sexual orientation, desire

[1] It is Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November, 1950 (Journal of Laws (93) 61/284) that is the basis for complaints addressed by transsexual persons to the European Court for Human Rights.

and intimacy (Lew-Starowicz, 2010, p. 25). A correct defining of the notion *gender identity* is relevant for the issue of transsexualism (the "gender identity" phrase is used in English, while alternatively "*sexual orientation*" or "*gender identity*" alternatively on the ground of the Polish language), which is understood as the notion which: *refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms*[2] [2](Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity).

Worth mentioning is also which way the Committee for Economic, Social and Cultural Rights stated that the *gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace* (CESCR General Comment no. 20. Non – Discrimination in Economic, Social and Cultural Rights E/C.12GC/20; 2 July 2009, http://www.refworld.org/docid/4a60961f2.html, access date: 21 May 2015).

Coming back to the definition of sexuality and quoting L. Aresin and K. Starke one may indicate that sexuality encompasses physical and mental processes. They are directly and indirectly connected with expressions of individual and social sexual spheres. In addition, the authors mention three sexuality factors: *biological, as a condition for reduction, the second – subjective, as an individual experiencing of sensual contentment and satisfaction, and the last but not least – social or interpersonal and unique communication between the partners that makes them able to give happiness one to another and thanks to this contributing to stabilise the partnership between them* (Encyklopedia pedagogiczna XXI wieku, 2006, p. 681). Kazimierz Imieliński emphasises that sexuality is an innate need and function of human organism. He indicates simultaneously that every human is born with a defined sexual physiological experience, which is formed by many factors (K. Imieliński, 1982, p. 28).

The definitions of sexuality indicated as an example show that they may be formulated, focusing only on individual, personal elements or referring also to the social aspect, forming also both human's personality and his/ her gender identity.

[2] The definition included in *Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity*, www.yogyakartaprinciples.org, access date: 10 May 2015.

It is easy to note a certain irony in this respect, because just this society, in which a given individual is formed, in the later stage makes this individual subject to trouble and manifests lack of acceptation to this individual's different gender identity which is out of the limits of moral standards acceptable in a given society. In the light of law the gender identity[3] is a well-being for every human (W. Dynarski, A. Grodzka, L. Podobińska, 2010, pp.21-22).

3. Sexual rights in accordance with World Association of Sexual Health

Sexual rights belong to universal human rights which based on inalienable freedom, dignity and equality of all human beings. The issues related to a gender reassignment are inconsistently regulated by national legislations and consequently, determination of the specific solutions under the international law and human rights is hindered. The universal documents, covering with their protection the human rights are not directly related to sexuality. In August 2002 the World Health organisation (WHO) presented the Declaration of Sexual Right[4] (http://www.worldsexology.org/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf, access date: 20 May 2015) prepared by the World Association of Sexual Health (Lew-Starowicz, Długołęcka, 2006, p. 265) to ensure a health development of sexuality of human individuals and societies. It was adopted during the fourteenth World Congress of Sexologists in Hong Kong on August 26, 1999. In accordance with its content, all the societies have to recognise, promote and respect the sexual rights indicated in this Declaration and defend it with all possible means. The sexual health develops in the environment that recognises, accepts and respects these sexual rights. Mentioned Universal Declaration of Sexual Rights guarantees, among others, the right to the sexual individuality, integrity and sexual safety of body and allows human to make independent decisions related to own sex life, accordant to own morality and social ethics. It covers also a possibility to exercise control and satisfaction of own body with exclusion of tortures, harassments and any kind of violence.

Mentioned World Association for Sexual Health was established in 1978 in Rome and was one of the most important, global in scope, organisation involved in sexual rights and sexual health. Its members include not only sexologists, but also scientists and various spheres practitioners. The aim for the World Association for Sexual Health is to support the development of the sexual health through education, health promotion. What more, the World Association for Sexual Health has involved in past years also in promotion of changes in the public policies. This Association acts in support of the sexual health for everybody, covering with its protection and scope of activities also transsexuals. The World Association for Sexual Health recognises that persons of different sexual orientation, gender and variety of corporal expression require the protection of human rights. Therefore all the kinds of violence, discrimination, exclusion and stigmatism constitute violation of the human rights and their families or societies. Interventions in clinic sexology aim to promote, maintenance and recovery of sexual health. The World Association for Sexual Health bases its mission mainly on promoting of sexual life. It implements the aims of activities by advocacy, networking and facilitating information exchange of ideas and experiences, while concurrently advancing scientifically based sexuality research, sexuality education and clinical sexology with a trans-disciplinary approach (the information referring to this Association was taken from its official website: http://www.worldsexology.org). The World Association for Sexual Health is an organisation of the global range that arranges a professional cooperation towards supporting, promotion, and first of all, sexology development, putting a big impact on development of sexual rights guaranteed to everybody (*erga omnes).*

4. Declaration of Sexual Rights

In 1997, during the thirteenth World Sexology Congress in Valencia it was drawn up a document including the definition of the sexuality of human being and the list of 11 sexual rights. Then, the Declaration of Sexual Rights was adopted by the World Association for Sexual Health during the fourteenth World Sexology Congress in Hong Kong. In 2002 the Universal Declaration of Sexual Rights[55] (http://www.worldsexology.org/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf, access date: 20 May 2015) obtained the recommendation of the World Health organisation (WHO). Pursuant to the content of the Declaration of Sexual

[3] The authors have included the narrower notion of the gender identity in a general notion of identity.

[4] Z. Lew-Starowicz was the first, who published the Polish translation of that Declaration.

[5] The official publication may be found on the website of the World Sexology Association: http://www.worldsexology.org/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf, access date: 20 May 2015.

Rights: *Sexuality is an integral part of the personality of every human being. Its full development depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love. Sexuality is constructed through the interaction between the individual and social structures. Full development of sexuality is essential for individual, interpersonal, and societal well being. Sexual rights are universal human rights based on the inherent freedom, dignity, and equality of all human beings. Since health is a fundamental human right, so must sexual health be a basic human right. In order to assure that human beings and societies develop healthy sexuality, the following sexual rights must be recognized, promoted, respected, and defended by all societies through all means. Sexual health is the result of an environment that recognizes, respects and exercises these sexual rights.*

The Declaration of Sexual Rights of 26 August, 1990 guarantees the following rights:

1. *The right to sexual freedom.*
2. *The right to sexual autonomy, sexual integrity, and safety of the sexual body.*
3. *The right to sexual privacy.*
4. *The right to sexual equity.*
5. *The right to sexual pleasure.*
6. *The right to emotional sexual expression.*
7. *The right to sexually associate freely.*
8. *The right to make free and responsible reproductive choices.*
9. *The right to sexual information based upon scientific inquiry.*
10. *The right to comprehensive sexuality education.*
11. *The right to sexual health care.*

On Sexual Health Day, 2014 World Association for Sexual Health issued an amendment to the Declaration of Sexual Rights as a respond to critical discussions that have been occurring within the United Nations regarding sexual and reproductive health and rights.

It was indicated in the revised Declaration that the obligations to respect, protection and implementation of the human rights shall be used for all the sexual rights and freedoms and also to protect the rights of everybody expressing one's sexuality and enjoying the sexual health, of course with respect to the rights of other persons, i.e. pursuant to the principle indicated in Article 29 of the Universal Declaration of Human Rights:

> *in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society* (ed. M. Zubik, 2008, p. 16).

The latest version of 2014, ensures the following rights[6]:

1. *The right to equality and non-discrimination.*
2. *The right to life, liberty, and security of the person.*
3. *The right to autonomy and bodily integrity.*
4. *The right to be free from torture and cruel, inhuman, or degrading treatment or punishment.*
5. *The right to be free from all forms of violence an coercion.*
6. *The right to privacy.*
7. *The right to highest attainable standard of health, including sexual health; with the possibility of pleasurable, satisfying, and safe sexual experiences.*
8. *The right to enjoy the benefits of scientific progress and its application.*
9. *The right to information.*
10. *The right to education and the right to comprehensive sexuality education.*
11. *The right to enter, form, and dissolve marriage and other similar types of relationships based on equality and full and free consent.*
12. *The right to decide whether to have children, the number and spacing of children, and to have the information and the means to do so.*
13. *The right to the freedom of thought, opinion, and expression.*
14. *The right to freedom of association and peaceful assembly.*
15. *The right to participation in public and political life.*
16. *The right to access to justice, remedies, ad redress.*

The rights, guaranteed by the discussed Declaration, constitute a part of the fundamental human rights and should be promoted, protected and monitored for infringement of the human right. In relation to the transsexual persons the important is to recognize that the gender identities are protected as the human rights and confirmation that the obligations to observe and protection of the human rights relate to all the sexual rights and freedoms and also to the recognizance that everybody has the right to implement and express one's own sexuality. It is also worth mentioning that the catalogue of the rights guaranteed by the revised Declaration is more complex comparing to the version of 1999. The particular attention shall be

[6] The original text of the Declaration is available on the official website of the World Association for Sexual Health: http://www.worldsexology.org/wp-content/uploads/2013/08/declaration_of_sexual_rights_sep03_2014.pdf, access date: 20 May 2015.

paid in the context of transsexualism on the present Articles 2 and 3[7]and previous 2 which covered only the ability to make autonomous decisions about one's sexual life within a context of one's own personal and social ethics. It also encompasses control and enjoyment of our own bodies free from torture, mutilation and violence of any sort. Currently, Article 2 which directly indicates that the right to life, freedom and safety cannot be limited, among others, because of the gender identity. While the Article 3 states that everyone has the right to control and decide freely on matters related to their sexuality and their body. So this also applies to transgender people and their right to the possibility of passing treatment in the form of a surgical sex change.

5. Activities of the European Parliament

The European Parliament in European Parliament Resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations (Dz.U.UE.C.2013.56E.100), encouraged the *Member States* in the scope of the human rights and sexuality *to engage constructively, and in partnership with third countries, with the Universal Periodic Review and treaty body procedures to ensure that human rights in relation to sexual orientation and gender identity are fully upheld in the European Union and in third countries; to this end, encourages Member States and the High Representative to ensure consistency between the EU's external and internal action in the field of human rights, as provided for by Article 21(3) of the Treaty on European Union*. In this resolution the European Parliament expressed the disappointment *that the rights of lesbian, gay, bisexual and transgender people are not yet always fully upheld in the European Union, including the right to bodily integrity, the right to private and family life, the right to freedom of opinion and expression, the right to freedom of assembly, the right to non-discrimination, the right to freedom of movement, including the right to free movement for same-sex couples and their families, the right of access to preventive health care, the right to medical treatment and the right to asylum* and additionally condemned *the fact that homosexuality, bisexuality and trans sexuality are still regarded as mental illnesses by some countries, including within the EU, and calls on states to combat this; calls in particular for the depsychiatrisation of the transsexual, transgender, journey, for free choice of care providers, for changing identity to be simplified, and for costs to be met by social security schemes*. These are only a few issues, to which the European Parliament referred. It is also worth indicating that the Parliament recoursed in this Resolution to works which were initiated, also by the Council for Human Rights, the European council or the United Nations, just to promote and protect the human rights, vested in lesbians, guys, bisexuals and transsexual persons (LGBT). The European Parliament has expressed the particular its satisfaction of adopting by the Council for human Rights the Resolution A/HRC/17/19[8] concerning the human rights, sexual orientation and gender identity. In this document, the Council for Human Rights referred not only to the rights, guaranteed by the Universal Declaration of Human Rights[9] (A/RES/3/217 A.), but also by the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights (the International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, Journal. Laws of 1977, No. 38, item. 165) and other relevant core human rights instruments, expressing that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms.

The Resolution indicated became a contribution to initiate a panel discussion, which took place on 7 March, 2012 in the Council for Human Rights on the violence and discrimination of humans because of their sexual orientation and gender identity (document summary of discussion http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf, access date: 15 May 2015). The panel aimed to facilitate a constructive, informed and clear dialogue concerning the rights and discriminative practices because of the sexual orientation and gender identity. It was particularly expressed a necessity to initiate a more complex cooperation among states in future, and the panel itself enabled exchange of experiences and used positive national practices, which also was to facilitate the work of the Council for Human Rights in future.

[7] Original text of these two Articles:
2. *The right to life, liberty, and security of the person.*
Everyone has the right to life, liberty, and security that cannot be arbitrarily threatened, limited, or taken away for reasons related to sexuality. These include: sexual orientation, consensual sexual behavior and practices, gender identity and expression, or because of accessing or providing services related to sexual and reproductive health.
3. *The right to autonomy and bodily integrity.*
Everyone has the right to control and decide freely on matters related to their sexuality and their body. This includes the choice of sexual behaviors, practices, partners and relationships with due regard to the rights of others. Free and informed decision making requires free and informed consent prior to ant sexually-related testing, interventions, therapies, surgeries, or research.

[8] Resolution adopted by the Human Rights Council, on that day of 14 July, 2011; adopted by a recorded vote of 23 to 19, with 3 abstentions; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement, access date: 13 May 2015.

[9] The Universal Declaration of Human Rights of 10 December 1948. United Nations General Assembly Resolution (A/RES/3/217 A.).

During the panel there was subject to discussion the Report of the High Commissioner for Human Rights *Study on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, 17 November 2011, http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf, access date: 15 May 2015). It was: *submitted to the Human Rights Council pursuant to its resolution 17/19, in which the Council requested the United Nations High Commissioner for Human Rights to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity* (A/HRC/19/41; 2011).

There were issued eight recommendations, of which the essential for the needs of this dissertation is that they refer directly to the transsexual persons and their legal situation and that the states should *facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights*.

This is worth adding that recommendation indicated in this way is formulated in a very broad way and it is known that the states, executing this recommendation should enter to their legislature such legal solutions, which would regulate the issues of the transsexual persons and their civil status in a clear way, which would fully fulfil the premise of eliminating a discriminative attitude of the state towards such persons, which from the other side would ensure the transsexual persons passing the entire process of sex change in a clear way, where the legal and medical aspects would not remain contrary one to another and the state would not constitute an obstacle to comply with the formalities related to change of the civil and family status of the person after the surgical procedure of sex change.

6. Protection of transsexual persons – scope of protection on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms and The Yogyakarta Principles

Analysing judicial decisions of the European Court of Human Rights[10] it is impossible not to start from indication of the Case of Goodwin v. UK (Judgment Strasbourg 11

[10] The comments on judicial decisions will be minimised because of the length of this abstract, wider on the ECHR judicature related to transsexual persons, among others in: K. Osajda, 2009, pp.35-41, W. Burek, 2007, pp. 114-128.

July, 2002, application no. 28957/95, source: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596, access date: 06 June 2015). In this judgment for the first time from 1986[11] the Court determined that ensuring the rights to transsexual persons belongs to the obligations of the states[12] (§ 86-88 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95).

It was a breakthrough judgment, just because of that time current point of view of the judicial authority. The Court indicated that *while is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (…) since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review* (§ 74 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95).

In this judgment the Court referred to the meaning and interpretation of the Convention in a way which allowed to use its provisions in a practical and current way and to encompass the that time issues with its protection – noting a necessity for its dynamical interpretation orientated towards development (wider: W. Burek, 2007, pp. 114-128, M. A. Nowicki, 2013, p. 701). It was the judgment in which the Court determined that *in the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society*

[11] That year was rendered the first judgement related to a transsexual person who demanded his/her rights under Article 8 the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws (93) 61/284), Case od Reese v. UK, Judgment Strasbourg 17 October 1986, application no. 9532/81, source:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57564, access date: 06 June 2015.

[12] It is worth mentioning that the Court did not order to enter the changes of the system of civil status in the Great Britain directly, but only included the suggestions concerning changes in the outdated system of the civil status see also § 86-88 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95.

cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved (§90 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95).

Determining the scope of rights related to the gender identity and simultaneously the legal position of transsexual persons, it is impossible not to mention about Principle 3. – The Right to recognition before the law The Yogyakarta Principles (Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity, www.yogyakartaprinciples.org, access date: 10 May 2015): *Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity. States shall:*

a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
c) Take all necessary legislative, administrative and other measuresto ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity;
d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
e) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Any of modern states should not act against the above mentioned principles,

resulting from both the Yogyakarta Principles[13] and with the Declaration of Sexual Rights, despite providing these documents by experts (lawyers, sexologists), not by the states. However, as they were developed by the experts from the entire world, they are considered as the sets of principles of the universal character which support enforcement and observance of human rights.

5. Summary

To sum up the current considerations which have mainly concentrated on the essence of the Declaration, this is to indicate that this Declaration is supported on three pillars. First of all, sexuality is an integral part of personality of every human being. Human being's full development depends on meeting the basic human needs, like desire to interact, intimacy, expression of feelings, pleasure, affection and love. Secondly, sexuality is formed in result of interactions between persons and social structures. A full development of sexuality has an essential significance for individual, interpersonal and social good. And thirdly, sexual rights are the universal human rights based on inalienable freedom, dignity and equality of human beings. As health is the fundamental human right, in the same way the fundamental human right is human sexual health and that is why for transsexual persons essential is not only the ability to perform the surgical gender reassignment, but also regulation of his/ her legal status on the ground of the administrative law, through the ability to change the vital record and in the civil law, particularly through regulation of his/ her family situation.

The major for the needs of this abstract is the statement that if the European Tribunal for Human rights accepts protection of gender reassignment on the basis of the Convention, then simultaneously the member states have to anticipate a mode which allow to perform it on the ground of the internal legal order

[13] Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, defined the Yokagarta Principles as the appellation of *sign of progress*. Their most important aim is combating violence and prosecuting its perpetrators against homosexual, bisexual and transsexual persons as well as guaranteeing those persons their fundamental rights, wider: *Tożsamość płciowa a prawa człowieka*, dokument tematyczny autorstwa Thomasa Hammarberga, Komisarza Praw Człowieka Rady Europy, publikacje projektu *Transrespect versus Transphobia Worldwide* (TvT), tom 3, opracowanie: Dr Carsten Balzer, Dr Jan Simon Hutta, Rio de Janeiro, Warszawa, styczeń 2011, http://www.transrespect-transphobia.org/uploads/downloads/Publications/Hberg_pol.pdf, access date: 21 May 2015.

(K. Osajda, 2009, p.40). Therefore, the need to unify the approach to the issue of transsexualism in the global aspect has been recognised for many years for the reason that the states present the different approaches. A solution of this problem would be creation of a Convention regulating a given issue in a complex way and which would simultaneously have a universal and common character (J. K. Dziura, 2009, p. 102). This demand remains current and – most definitely and appropriately needs to be protected, as, very unfortunately, the documents presented in this abstract do not ensure this common and universal protection and consequently the states are not obliged to perform the full regulation in this respect. This is to remember that it relates to the issues of both medical and legal nature. Concerning the legal issue, the spectrum of emerging problems is really huge and covers simultaneously the civil law and civil procedure, administrative law and administrative procedure, the criminal law or even constitutional principles and first of all and definitely the human rights. Despite many solutions existing in this respect on the grounds of both internal law of particular states and international law, there is still no full acceptance and full regulations concerning the surgical gender reassignment, because of which the transsexual persons are still exposed to acts of discrimination.

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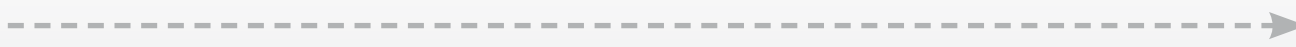
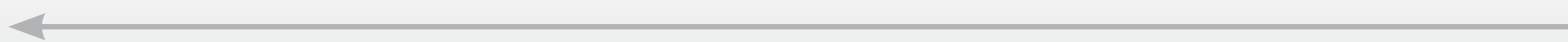
PART III

The rights of nations

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The right of nations (peoples) to self-determination. Origin, development and application

Abstract
The right of nations (peoples) to self-determination is one the most important collective human rights of our times. The article presents the evolution of the right of nations (peoples) to self-determination – from political principle to one of the key, legally binding principles of the public international law. Although the right of peoples to self-determination was primarily focused on and linked to the decolonization process, nowadays it is addressed to all peoples. Authors analyse different modes of application of the right of peoples to self-determination and its relation to the principle of respect for territorial integrity of the State. While the decolonisation process that was taking place in Africa and other continents was not questioned by the international community, when the Cold War has ended, several European States began to employ the principle of self-determination for more spectacular political purposes. Commenting the question of the abuse of the principle of self-determination of peoples Authors focus on the Crimea case – one of the most widely debated international problems of recent years.

Keywords:
self-determination, territorial integrity, human rights, abuse of international law, Crimea

1. Introduction

The right of nations (peoples) to self-determination is one the most important collective human rights of our times (Bieleń, 2010, p. 125). Historically, its origin can be traced to two sources: the American Declaration of Independence of 1776 and the French Revolution, which started the process of affirmation of peoples'

subjectivity (Polish: *podmiotowość*) and of their right to determine by themselves their existence within a clearly defined territory and in a self-determined political environment. Nevertheless, it was only after the end of the Second World War that the right in question came to be established in international law. Prior to that, and before the right to self-determination was expressed in several crucial international law instruments of universal application, it had been adopted as one of the elements of the blueprint for peace in Europe, described in U.S. President Woodrow Wilson's fourteen points presented at the Paris peace conference in 1919 (Kukułka, 1998, p. 40). Although not incorporated subsequently into the League of Nations Pact, the said right underlined the guarantee of self-determination within new borders that was extended at Versailles to numerous nations of Europe, including Poland.

2. Evolution of the right of nations (peoples) to self-determination in international law

In the interwar period (1919-1939), the principle/right of nations (peoples) to self-determination was treated as more of a political concept than a principle of international law. For various reasons, it was denied the authority of an international law directive for the benefit of peoples striving for independence. Those affected were primarily the peoples whose aspirations to independence failed to be affirmed during the construction of a peaceful order in Europe at the 1919 Paris Conference.

Another contribution to the development of the principle of national self-determination came from the actions taken by the Western Allies in preparing the groundwork for a future peaceful order in Europe after the victory over the German Reich and its allies. The first step in this direction was the **Atlantic Charter** of 1941, with its promise to prevent in the future "*any territorial changes that do not correspond to the freely expressed will of concerned nations*" (*Wybór dokumentów*, 1976, pp.59-64). The next (and decisive in this context) step was the incorporation of the national self-determination principle into the UN Charter (Article 2) as one of the purposes of this organisation, and its restatement, albeit still in the sense of a political notion, in Article 55 of the Charter. However, in terms of its practical application, the affirmation of the principle of national self-determination in United Nations instruments proved normatively ineffective. Indeed, it was argued that not every political aim can become an obligation of international law.

Such strictures regarding the legal status of the principle in question were "softened" only when the UN GA adopted in 1960, with 89 votes in favour and 9 votes abstaining, Resolution no. 1514, known as the **Declaration on the Granting of Independence to Colonial Countries and Peoples**. It stated that "*all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*" (*Wybór dokumentów*, 1976, pp. 108-110).

The declaration laid down, in the first place, the conditions for its implementation in the colonial context. Yet, it was also interpreted as a rebuke of separatist movements. Its impact was strengthened by the establishment of the Special Committee on Decolonization. Both the Committee's activities in support of decolonisation and, as legal scholars observe (Shaw, 2008, p. 155), all the UN resolutions that deal with self-determination refer directly to the Declaration and take it as the basis for decolonisation processes, thus consolidating the principle of peoples' self-determination in the practice of international law.

Against this background, successive UN international law acts not only reaffirmed, but also developed this principle, leaning on the formula adopted in the 1960 Declaration. The instruments in question were:

- **International Covenant on Civil and Political Rights** and **International Covenant on Economic, Social and Cultural Rights** (1966), which included the wording to the effect that "*All peoples have the right of self-determination*" (*Prawo w stosunkach*, 2004, p. 227),
- **Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations** of 1970, which proclaimed that "*all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development …* " (*Prawo w stosunkach*, 2004, p. 67).

Legal scholars acknowledge these UN instruments as providing authoritative interpretation of the UN Charter, also in respect of the matter at issue. Consequently, it is the established view that "*the principle of self-determination has become a **right under international law** through the process of interpreting the UN Charter*" (Shaw, 2008, p. 155). The subsequent position adopted by International Court of Justice, as stated, inter alia, in Advisory Opinions concerning Namibia, Western Sahara, and also East Timor, further enhanced the status of this principle as a **legal principle** considered as one of the fundamental principles of contemporary international law (Shaw, 2008, pp. 155-156).

3. The scope and range of implementation of the principle of self-determination

The principle of self-determination as defined in international law using the 1970 Declaration on Principles of International Law is composed of three paradigms elements; namely:

a) acquisition of **the status of a subject** in international law and international relations by **peoples**, who are entitled to certain rights by virtue of that principle,
b) **specific identification of the modes of implementing the right to self-determination** by peoples,
c) and finally, **the free choice by a people of the political status** for a newly created subject of international law (Declaration on Principles).

The right of each people to self-determination thus defined was primarily focused on and linked to the decolonization process. It should be emphasized, however, that it also entailed conflict resulting from the clash of interests between a people seeking to exercise its right of self-determination and the State inhabited by such people pursuing political emancipation in relying on this basis of international law.

The Declaration also reflected an imperative aspect of the implementation of the self-determination principle in stipulating that "*every State has the duty to refrain from any forcible action which deprives peoples … of their right to self-determination and freedom and independence*" (Prawo w stosunkach, 2004, p. 62), while justifying and approving the use of force or other means with the aim to resist any actions detrimental to such peoples when taken by a State resisting the process of self-determination within its own territory (Prawo w stosunkach, 2004, p. 62).

4. The right to self-determination versus the respect for the territorial integrity of a State

International law scholars continue to debate the limits of application of the right to self-determination. The key issue is to determine the substance and scope of this right as set against the principle of respect for the territorial integrity of a State. The latter is seen as tending to preserve the *status quo*, in contrast to the principle of self-determination, which presupposes territorial modifications. Hence, territorial integrity is a factor of stability, while self-determination represents a dynamic force in international relations. In the Polish language, the concept of integrity connotes wholeness, indivisibility and inviolability. With regard to a State, territorial wholeness

implies the prohibition of any forcible fragmentation of the State's territory or on the separation and taking over of any part of that territory. Further, inviolability of the State's territory implies the duty of other States to refrain from making any armed or other attempts against the State's territory or from annexing it (Tyranowski, 1990, pp. 12 and 181).

The notion of territorial integrity emerged in international law at the beginning of the 19th century, when it was formulated for the first time in the Act of Recognition and Guarantee of Eternal Neutrality of Switzerland and Sabaudia, signed at Paris on 20 November 1815. When recognising the eternal neutrality of Switzerland, the Great Powers guaranteed its integrity and the inviolability of its territory within the borders defined at the Congress of Vienna. The notion of territorial integrity appeared consecutively in the Paris Treaty of 30 March 1856 ending the Crimean War, the London Treaty regarding Denmark of 8 May 1852, the Japanese-Korean treaty regarding Korea of 23 February 1904, and in the British-Japanese treaty of 12 August 1905 concerning the integrity of China (Tyranowski, 1990, pp. 15-16) .

In the course of drafting the Covenant of the League of Nations, an attempt was made to regulate the issues relating to territorial integrity. The outcome of those efforts was the language of Article 10 of the Covenant, which provided that: "The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled". The interpretation of this article caused considerable controversy. Nevertheless, there is no doubt that any changes affecting the territorial integrity and political independence may be effected only by peaceful agreement (Prawo w stosunkach, 2004, pp. 22-28).

The only provision of the United Nations Charter (UNC) that explicitly refers to this obligation is Article 2 point 4, which states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The obligation to respect territorial integrity expressed in the UNC rests on two pillars: the principle of sovereign equality and the prohibition of use of force against the territorial integrity and political independence of States. These was affirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UNC, adopted by the UN General Assembly (GA) on 24 October 1970 (Resolution 2625 – XXV) (Declaration on Principles) .

There is a noteworthy connection between this principle and the prohibition of use or threat of force. The prohibition of territorial modifications effected by force or by threatening the use of force applies both to the situation where the legal right to a territory is legally established and unquestionable and the case where territorial claims are being raised because the title of a State to a specific territory is doubtful and contested (Tyranowski, 1990, pp. 45-46). According to J. Symonides, the obligation to respect territorial integrity as enshrined in the UNC means that the territory of a State is not only inviolable, but also that it must be left intact (Polish: *nietykalność terytorium*) (Symonides, 1971, p. 93).

The fact that respect for territorial integrity became a self-contained principle of international law is evidenced by the incorporation of the relevant formula in many international instruments: the Chinese-Indian treaty of 1954, the Bandung Declaration of 1955, the OAU Charter of 1963, the Charter of Economic Rights and Duties of States adopted by the UN GA on 12 December 1974 (Resolution 3281 – XXIX), and finally the Declaration on Principles Guiding Relations between Participating States of the Final Act of the CSCE. The Declaration on Principles Guiding Relations between Participating States, attached to the Final Act of the CSCE, provides that each of the ten principles should be interpreted taking into account the others.

It affirms therefore the special connection among the following principles: inviolability of frontiers (Principle III), sovereign equality and respect for the rights inherent in sovereignty (Principle I); refraining from the threat or use of force (Principle II); territorial integrity of States (Principle IV); equal rights and self-determination of peoples (Principle VIII), and non-intervention in internal affairs (Principle VI). (Rotfeld, 1973, pp. 110-123; Tyranowski, 1990, pp. 123-124). It is worth noting that alongside the strengthening of the principle of territorial integrity, there has been the process of development of the principle of inviolability of frontiers in international law. While the latter still remains in part a component of the principle of territorial integrity, it has acquired a degree of independent significance. In this respect the principle of inviolability of frontiers is reflected and implemented in two special principles, viz.: the principle of inviolability of treaties setting frontiers and the principle of inviolability of frontiers established by treaties and of frontiers established otherwise. The principle in question does not prohibit all territorial claims from being asserted, but only such claims that are purely political in nature and have no grounds in international law (Tyranowski, 1990, pp. 101-102).

5. Some aspects of the implementation of the right of peoples to self-determination

a) Various modes of application of the right of peoples to self-determination

The right of self-determination which the international community granted after the Second World War to peoples remaining under the rule of colonial States accorded legitimacy to all national liberation movements to take action to pursue political emancipation in the territories inhabited by them. Following the Second World War, the decolonization process took various courses. Thus, it is possible to distinguish four variants of this process:

- **by separation (secession)** of a new State established by the national community. An example of secession in Africa is the separation of South Sudan with its Christian population from Sudan;
- **by disintegration of a State**, used as an opportunity to create new nation States. An example is a group of States (for example, Baltic States) that regained their independence and sovereignty following the disintegration of the Soviet Union. This is also the case of the Czech Republic and Slovakia, which dissolved Czechoslovakia;
- **by integration** of the area inhabited by a national community with its own State organisation with another existing State of the same ethnic composition. This is how Tanzania emerged in 1964 in Africa, through the unification of Tanganyika and Zanzibar.
- **by establishment** of a new State entity within an area not subject to the rule of other States. An example is the creation of Cameroon in 1960 and Namibia in 1961.

b) Implementation of the right of self-determination through violent conflict or peaceful means

In many cases the process of decolonisation involved conflicts, during which colonial peoples made legitimate use of force (national liberation struggles) by invoking the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, because "*peoples [are] fighting against colonial domination, alien occupation or racist regimes in the exercise of their right of self-determination*" (Journal of Laws, 1992), enshrined in the UN Charter and in the cited Declaration of Principles of International Law.

Yet, the right of self-determination has not always been implemented in an atmosphere of conflict. Legal scholars agree that for this process to take place in a conflict-free/peacefully manner, it should represent the culmination of a process of

political emancipation of a people that is ethnically and territorially homogenous and reflect the will of the majority seeking secession. This aim is achieved by organising **plebiscites** to decide the international status of disputed territories or **referenda on independence** (the most recent example of which is the referendum held in Scotland), followed by **free elections** to establish the political representation of a people seeking independence and sovereignty.

c) *secession or autonomy of ethnic groups within the framework of the territorial integrity of a State*

Decolonisation processes that found reflection in state-to-state disputes before international tribunals also produced further legal developments affecting the principle in question, two of which deserve particular mention.

The first development involved the determination that the separate status of a colony from that of the territory of the colonial State remains in effect only so long as the indigenous population does not avail themselves of the right to self-determination. In this way the UN encouraged decolonisation by rejecting the colonial States' view that a separate status for the colony satisfies the self-determination claims of local peoples.

The second development was intended to counter secessionist tendencies of ethnic groups/national minorities that, in invoking the right of self-determination, sought territorial separation from an existing State, violating the territorial integrity of the State in question. This situation affected multinational or multi-ethnic States. It is the view of scholars of international law and also of the UN practice/policy that the right to self-determination may also be applicable to internal affairs of a State where a national or ethnic minority wishes to exercise this right without violating the integrity of the State it inhabits. In such case, it is entitled to invoke this right in the pursuit of regional autonomy in the territory inhabited by such minority (Shaw, 2008, p. 179). As the examples of Canada and Quebec's autonomy and of certain federal States indicate, the right of self-determination may be applied to internal relations, provided that the territorial integrity of a State is not affected (Doehring, 1974, p. 108).

6. Contemporary cases of implementation and abuse of the right of peoples to self-determination in Europe

a) *Disintegration of the Soviet Union and the fragmentation of Yugoslavia*

The disintegration of the Soviet Union and Yugoslavia led to the creation, on the basis of the self-determination principle, of a number of new nation States both within the post-Soviet area and in the Balkans. While the creation of new nation

States or the recovery of independence by some former Soviet republics in the Soviet hemisphere occurred, with some exceptions, generally without conflicts (save for Lithuania and Moldova), it was quite the opposite with the disintegration of the federal States and proclamation of new State structures in the area of the former Yugoslavia, which in most cases involved conflict.

In this respect, a particularly negative role was played by Serbia, which engaged in local wars with, among others, Slovenia and Croatia or used its military advantage over other emerging Balkan nations to carry out ethnic and religious cleansing. This caused other European States to become involved in the peaceful "fragmentation" of Yugoslavia. When peaceful dispute and crisis resolution methods, as with the use of a UN mission, failed, force was applied (NATO in Serbia) with the aim to stop hostilities and, most importantly, the extermination of certain ethnic groups. The result of those actions, that is of the international law-sanctioned fragmentation of Yugoslavia, was the emergence of a group of new nation States. Their right to self-determination was implemented using the recognised, democratic procedures for bringing new statehoods into existence . In this respect Kosovo was a special case.

b) *Abuse of the principle of self-determination of peoples in Europe*

While the decolonisation process was taking place in Africa and on other continents, during the 1970s several European States began to employ the principle of self-determination of peoples for more spectacular political purposes. It is quite obvious that the principle of self-determination of peoples was treated expediently in cases such as:

- **secession of the so-called Turkish Republic of Northern Cyprus**, which was inspired and guided by Ankara, and led to the political and territorial division of this island;
- **secession of Kosovo**, which was accepted by the majority of European States because of the aggressive policy characterised by human rights violations that was pursued by Serbia towards this province,
- **secession of Transnistria**, whose separatist tendencies inspired and supported by the Russian Federation led to the separation of this province from the territory of Moldova;
- **secession of Abkhazia and South Ossetia** from Georgia, supported by the Russian Federation, led to the establishment of new statehoods that are recognised only by Russia (Czachór, 2014);
- and finally the **secession of Crimea** and its incorporation into the state territory of the Russian Federation as a self-contained autonomous province.

7. Abuse of the right to self-determination: the case of Crimea

One of the most widely debated international problems of recent years, with serious consequences for international law, is the conflict between Russia and Ukraine, and, in particular, the change in the State affiliation of Crimea. The case of Crimea clearly illustrates the most important problems relating to the practical application of the right to self-determination.

a) The population of Crimea and the entities entitled to the right of self-determination

The most difficult problem, from both the theoretical and practical perspective, in the whole issue of self-determination is the question of catalogue of entities entitled to benefit from the principle of self-determination. The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted under Resolution 1514 (XV) of the UN GA (Declaration on the Granting), stated that all peoples (nations) have the right to self-determination; by virtue of this right, they determine, according to their own will, their political status and freely define their economic, social and cultural existence. Although the text of the declaration includes the expression "all peoples (nations)", yet the declaration's title and introduction leave no doubt that the authors of these instruments had in mind colonial peoples (Tyranowski, 1990, p. 192). However, it should be noted that the drafts of the said Declaration prepared by some States attempted to make that principle universal in character. The U.S. draft included statements that the principle self-determination is applicable to: 1) colonies or other non-self-governing territories; 2) areas occupied following the end of combat operations; 3) trust territories, and furthermore where a State exercises sovereignty over a territory that is geographically separate and ethnically or culturally distinct from the rest of that State's territory, even if not a colony or non-self-governing territory. On the other hand, it is emphasized that, regardless of the terms used, those provisions were addressed primarily to colonial peoples (Tyranowski 1990, pp. 195-196). In conclusion, it should be emphasized that currently any State practices that deny the right to self-determination to peoples living in their territories or in areas under colonial rule are considered illegal (Góralczyk, Sawicki, 2015, p. 120).

There is relatively broad agreement that the principle of self-determination, as a principle of universal international law, needs to be made more specific as far as the subjects of self-determination are concerned. Therefore, it seems desirable to distinguish the right to self-determination from the principle of self-determination. The principle of self-determination, as a general rule, is addressed to all peoples, but is not directly applicable. In contrast, the right to self-determination can be

said to exist only in relation to entities that have been identified as entitled to self-determination. Independently of this right of colonial peoples, the international community may always grant the right to independence on a case by case basis, in relation to any specific people that is not a colonial people.

In order to address the question as to whether or not the population of Crimea should be granted the right to self-determination, it is necessary to examine its legal status, on the basis of both formal and substantive sources of international law, which requires in practice that this population be classified under one of the groups distinguished by international law scholars, viz. colonial peoples, peoples of multinational States, national and ethnic minorities, and indigenous peoples.

In describing the condition of the Crimea population in February-March 2014, the Russian Federation frequently used the term "Crimeans" to suggest that the inhabitants of the Peninsula form a special community residing in a portion of the territory of Ukraine (without specifying whether that community is predominantly political or ethnic in character, and merely asserting strong links of residents of Crimea with Russia), whose rights were not fully respected, which justified their separatist aspirations, grounded in the right to self-determination. In reality, the population living in Crimea does not constitute any separate ethnic or political community. According to the official data provided in 2013 by the UNDP, the composition of the population of the Ukrainian Autonomic Republic of Crimea (total population of about 2.3 million) was as follows: 58% Russians, 25% Ukrainians, 12% Tatars and 5% other nationalities (including Armenians, Jews). This means that Russians, Tatars and other non-Ukrainian groups living in Crimea should be considered – from the perspective of international law – national minorities living in the territory of Ukraine.

The predominant view among international law scholars denies the right to self-determination to minorities in its external aspect, that is entailing the establishment of an independent State. Next, in referring to the International Covenant on Civil and Political Rights, they draw attention to the possibility of minority representatives asserting the right to self-determination in its internal aspect (International Covenant on Civil). A similar approach to the rights of national and ethnic minorities is found in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted on 18 December 1992 in the Resolution 47/135 of the UN General Assembly (declaration on the Rights of Persons). That instrument includes a broad catalogue of minorities rights to protect the identity, culture, language, participation and, to a limited extent, self-association

(Preece, 2007, pp. 207-208). At the same time, it is striking that Article 8(4) of the said instrument includes an express provision that "… Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States".

Thus, if we examine the position of ethnic groups living of Crimea, none of them – save for Crimean Tatars (that nation does not have a State of its own) – could invoke the right to self-determination in its external aspect. Moreover, the Russian nation's right to self-determination is realised through the existence of the Russian Federation.

b) Change to the territorial affiliation of Crimea and methods of self-determination

Crimea formally changed its territorial affiliation on the basis of the results of the so-called referendum held on 16 March 2014, during which the peninsula's residents had two questions to answer: 1) Are you in favour of the reunification of Crimea with Russia, as a subject of the Russian Federation? 2) Are you in favour of restoring the 1992 Constitution of the Republic of Crimea and the status of Crimea as a part of Ukraine? According to the official results, 83.1% of eligible voters took part in the poll, of which 96.77% voted to join Russia. On 17 March the Supreme Council of the Autonomous Republic of Crimea declared independence of Crimea, and the president of the Russian Federation issued a decree on the recognition of the Republic of Crimea; next, on 18 March an agreement between the Russian Federation and the Republic of Crimea regarding the admission of the latter into Russia was signed in Moscow.

As indicated before, international law scholars describe the emergence of several peaceful methods of implementing the right to self-determination, which include the plebiscite, independence referendum, free elections, and secession. In the case of interest here, it is particularly relevant to examine how international law scholars approach the issue of secession. According to a view expressed in the report of the International Committee of Jurists on the Aaland Islands, positive international law does not recognise the right of national groups, as such, to separate themselves from the States of which they form part by the simple expression of a wish (Carley, 1996, pp. 16-17). Likewise, there is no recognition for the right of another State to demand such a separation. This is because international law leaves this question entirely to the domestic jurisdiction of the State concerned. The right to secession is not universally recognised and it conflicts with the principle of territorial integrity of the State as evidenced by numerous legal scholars, Polish and international alike, and

the experience arising from State practice. In 1967 during a visit to Canada President de Gaulle of France shouted "Long live free! Quebec". Canadian Prime Minister Pearson considered it an intervention by the head of a foreign State in the internal affairs and foreign policy of Canada. Had the right of secession been recognised under international law, the government of Canada would have had no grounds to treat that action as interference in its domestic matters (Crawford, 1997).

The literature often cites the views of two special rapporteurs of the Sub Commission on Prevention of Discrimination and Protection of Minorities, Hector Gros Espiell and Aureliu Cristescu. According to Cristescu, the principle of equal rights and self-determination of peoples, as laid down in the UNC, does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State. A right of secession supported by foreign States would clearly be in glaring contradiction with the principle of respect for territorial integrity of States on which the principle of sovereign equality of States is based. Hector Gross Espiell maintained that the right to self-determination does not apply to peoples already organised in the form of a State which are not under colonial or alien domination. The right to secession, i.e. the right to separate from an existing State Member of the UN does not exist in the instruments and in the practice followed by the UN, since to invoke that right in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the UNC.

Firm opposition against the right of secession was also voiced during the debate over the draft Declaration on Principles of International Law. In its written comments of 1964, the government of Cyprus stated that, as regards independent States, the right to self-determination is subsumed under the principle of sovereign equality. It should not apply, however, to racial or religious minorities in existing States, as this would connote the destruction and disintegration of the present State system (Tyranowski, 1990, pp. 230-238).

In assessing the referendum held on 16 March 2014 in the context of the aforementioned methods of self-determination, we need to consider if the criteria adopted and recognised under international law were satisfied. The Crimean referendum was neither free elections nor a plebiscite. Hence, it should be examined if it met the criteria for independence referendum or secession. The independence referendum consists in a sovereign government's asking the public to vote on previously formulated proposals relating to the status of a specific territorial unit. On the other hand, secession, as a method of implementing the right to self-

determination, may take place in a State where violations of individual or group human rights occur, threatening the existence or interests of a people (peoples). It is worth pointing out, however, that secession must spring exclusively from the will of a people proclaiming it, and must not be the result of interference by a third State.

Given the conduct and circumstances surrounding the referendum held in Crimea, it cannot be deemed that the criteria established under international law were fulfilled. In the first place, the voting was held in Crimea while Ukraine's territorial integrity was being violated by Russia, with Russian military units' infiltrating the territory of Crimea (beginning with the end of February 2014). Second, the vote was ordered in breach of the Ukrainian law, which did not provide for the possibility of holding a referendum on the matter in question, and consequently it did not define the procedure for it. Moreover, the date of voting was changed several times by the authorities of the Autonomic Republic of Crimea. Originally, the referendum was scheduled for 25 May, later it was pushed back to 30 March, and eventually held on 16 March 2014. Third, the so-called referendum took place without the presence of any international observers (save for representatives of Russia and several other CIS States). The officially announced result of the vote was questionable. Already in May 2014 the real reports comprising the results of voting were accidentally disclosed in Russian sources, showing that the turnout was about 30%, of which only half of the votes were in favour of joining Russia (*Russian government*, 2014). Fourth, the proposal of secession, put forward by the local, pro-Russian Crimea authorities, cannot be justified in the context of the practice followed in this area under international law. Contrary to the Russian narrative, in the period preceding the referendum there occurred no violations of local population's individual and group human rights, which is, as mentioned before, one of the criteria justifying the possible recognition of a community's right of secession. Fifth, as noted before, legal assessment of the right of secession is always made against the background of the principle of respect of the territorial integrity of States. In this respect, the decisive voice belongs to the international community, which expresses its standpoint through the act of affirmation of certain events as having effects in international law. In the case of the so-called referendum conducted in Crimea on 16 March 2014, the States (bar a few exceptions: Russia, Afghanistan, Armenia, Venezuela, and Syria) and international organisations alike refused to recognise its results and the resultant incorporation of Crimea into the Russian Federation.

In its official narrative, the Russian Federation very frequently invokes the analogy to the announcement of independence by Kosovo, resulting from its separation (secession) from Serbia. That analogy is completely without grounds from the perspective of international law. First, a clear majority of international community recognised the right of Kosovo's population to self-determination (at present, Kosovo is recognised as an independent State by more than 100 UN Member States). Second, the cause of secession were the persisting and massive violations of individual and group rights of Kosovo inhabitants (ethnic cleansing initiated and carried out by the Serbian government until the humanitarian operation was conducted by NATO forces in 1999). And third, in the case of Kosovo there was a real political conflict between the local population and the central government. Secession occurred when all other political options for settling the conflict had been exhausted (the process of political conflict resolution was pursued in 1999-2007). In the case of Crimea there was no real conflict between the peninsula's population and the central authorities; even if there had been such a conflict, it would be difficult to justify that a period of one month (that was the period of time between the announcement of referendum in Crimea and the moment when it was held and Crimea was incorporated into Russia) is sufficient to conclude that all the means of political solution to the dispute had been exhausted.

* * *

The case of Crimea and the other previously described instances of the Russian Federation's use of the right of self-determination suggest the abuse by that State of the principle of self-determination of peoples. From the point of view of international law, these are instances of both distortion of the idea of self-determination, which provided legal grounds for the decolonisation process in the contemporary world, and of its misapplication relative to the purpose of its recognition by the United Nations as a principle of international law.

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The rights of nations to self-determination in the 21st century

Abstract
This article presents characteristics of the rights of nations to self-determination with regards to factors limiting the right in the contemporary world. The right to self-determination of nations is a right to determine own political status, shape won economic, social and cultural development. Each nation has the right to free authority to own wealth and natural resources for own purposes, pursuant to the principle of mutual benefits and with respect to provisions of the international law (Krzysztofik, 2008, p. 179).
How much is the realization of the right to self-determination possible in the contemporary world, during the EU's functioning, alliances, military pacts? The dilemma is also used in a smaller environment, namely self-governmental self-determination in Poland. Indeed, the experiences of smaller organizational units in that matter may be easily referred to functioning of any international consortiums. A widely comprehended policy concerns any political levels.

Keywords:
The United Nations' Chart, rights of nations, the international law, the European Union, the protection of self-government independence, self-determination of nations

1. Introduction

The issue of self-determination of nations derives from the international law. The international law is assumed to be a universal group of legal norms, common for states included in an international society. Therefore, there is no reason to talk about "Polish, Italian or French international law". Contrary to internal, proper law characterizing

particular countries, the international law is not divided into legal branches, although it is more and more often heard about the international penal code, international economy law or international administration law. Their separation is undoubtedly connected with international agreements concluded in those areas and widely comprehended legal integrality of states (Cała-Wacinkiewicz, 2007, p. 8).

Self-determination of states means ability to independent functioning. The significant role of independence is noticeable in the example of the Polish local self-government units. Local self-government independence should be considered first of all with the reference to the financial sphere, since "those who have money may rule". Financial independence of local self-government units (LSU) is comprehended as the right to independent performance of self-governmental financial economy, namely collecting incomes described in acts (income governance including tax governance) as well as their management within the limits determined by acts for realization of legally described tasks (expenditure governance). The LSU financial independence is not only an element of general notion of the LSU independence being the subject to juridical protection, since the LSU performs financial economy independently basing on the budget passed by the LSU constituting body (Jastrzębska, 2012, p. 31).

2. Protection of self-government independence

The protection of local self-government units' independence is performed before an administrative court or the Constitutional Tribunal. The Constitutional Tribunal as well as administrative courts clearly highlighted in their verdicts the principle of local self-government units' independence and its legal protection. The symptom of legal protection of municipal (city) independence is expressed in art. 4 par. 6 of the European Chart of Local Self-Government, in the principle that could be called "nothing about us without us", namely the principle that local societies should be consulted as much as possible in proper time and course, during drafting and making decisions in all matters concerning it directly. That legal pillar of subjecting cities that function in the local self-government system in the assumption to guarantee local community stability, stability of its status, its borders and organizational structures and shows clearly the difference in instrumental treatment of a local unit in the system of united state government from the totalitarian times with subjecting a local community treated as a local public and legal union (Niziołek, 2007, p. 77).

3. Self-determination of nations – analogy of principles

The formulae concerning the need to self-determination of nations is generally repeated by the Declaration of Principles ruling relationships between participating states in OSCE, enclosed to the Final Act of the Conference of Safety and Cooperation which explains equal right and the right of nations to self-determination as the eighth principle of the international law, namely participating states shall respect equal rights of nations and their right to self-determination, always acting with regards to objectives and principles of the Chart of United Nations and proper norms of the international law, including the norms referring to local integrality of states (OSCE).

Pursuant to the principle of nations' equal rights and self-determination, all nations have always right, in full freedom, to determine when and how they wish their internal and external political status with no intervention from outside, and aim at political, economic, social and cultural development according to their view. Participating states confirm common significance of respect and effective use of equal rights and self-determination of nations for the development of friendly relationships between them as well as all countries; they also remember the importance of elimination of any form of infringement of that principle (Sitek, 2008, pp. 473-480). Considering the above, it is worth highlighting that secession (in the wide - local and political comprehension) being the most common objective of the opposite side in an internal conflict may not always be identified with self-determination. On the other hand international law would enhance to provocation or use force on condition self-determination and, simultaneously, condemn sanctioned and inevitable reaction of a state (Breczko, Lempa, 2013, pp. 68-71).

4. The United Nations' Charter on self-determination of states

Article 1 of the UN Charter defining the UNO objectives indicates that the organization intends to develop friendly relationships between nations based on respect of the principle of equal rights and self-determination of nations and use other proper measures to strengthen common peace. Despite such empowerment of self-determination, it was attempted to be limited to the process of de-colonization, there were also attempts to limit its content. It did not decrease the importance of self-determination which was included *expresis verbis* among the legal international principles in the Declaration of principles of international law concerning friendly relationships and cooperation of states pursuant to the United Nations' Charter from

1970. It says that *(…) pursuant to the principle of equal rights and self-determination of nations expressed in the Charter of United Nations, all nations have right to determine, freely with no external intervention, their political status and aim at its economic, social and cultural development, and each state is obliged to respect the right pursuant to the provisions of the Charter. Each state is obliged to support, by common and individual action, realization of the principle of equal rights and self-determination of nations, pursuant to the provisions of the Charter and provide assistance to the United Nations in performing tasks put on them by the Charter referring to realization of the principle in order to support friendly relationships and cooperation between states and leading to prompt end of colonialism considering properly the will expressed freely by the interested nations and remembering that subjecting nations to strange ruling and exploitation means violation of that principle as well as objecting basing human rights and it is contrary to the Charter"* (The Charter of the United Nations).

5. International quality of fight for a nation's self-determination

According to art. 1 par. 4 of the Additional Protocol I from 1977 to the Geneva Conventions from 1949, recognition of an internal conflict as a fight for a nation's self-determination makes an international quality. In art. 1 of the International Covenant on Civil and Political Rights (the International Covenant on Civil and Political Rights, December 16th, 1966 Journal of Laws from 1977 No 38 pos. 167) and the International Covenant on Economic, Social and Cultural Rights (the International Covenant on Economic), there were collective rights and duties indicated included in the right to self-determination. The regulation shows that all nations have right to self-determination, pursuant to which they freely determine their political status and freely assure their economic, social and cultural development. Moreover, they may freely manage their wealth and natural resources for their purposes with no harm to any obligations resulting from international economic cooperation based on the principle of mutual benefits and international law and in any case may not be devoid their own measures for existence. Whereas, states-parties, according to art. 1 shall support realization of the right to self-determination and shall respect the right pursuant to the UN's Charter. The significance of the international law and normative shape of art. 1 of both Covenants of Human Rights from 1966 are indisputable virtue f that regulation from the point of view of legal doctrine, especially when most countries are connected by the Covenants (Breczko, Lempa, 2013, p. 70 and next).

6. Self-determination of nations in the process of integration

Proponents of integration claim that indeed it is widening not narrowing sovereignty, whereas it should be remembered that over-national bodies care for realization of interests of the whole group, a common good moving particularisms aside. Its progressing relativism (namely referring to such values as wealth, human rights, safety, reducing civilization delay) and resignation from classically comprehended sovereignty seem to be an objective process. Remaining with it and strict protection of a state's competences for the sake of nominal sovereignty, lead a state to the role of an extra in contemporary international relationships.

It is worth highlighting that delegating competences does not mean their loss but their use on an international level. Resignation from a part of competences may create a state more effective. Poland is an example to prove it, thanks to joining the EU it reached and access to many new instruments (resources) which make its endeavors in the home and foreign political sphere are more effective. Increasing resistance to international crisis and external pressures as well as strengthening economic competitiveness and citizens' wealth, they create a state stronger. The price is however a strong correlation and direct impact of other actors on the Polish politics. Participation in the European Union means that the process of determination being in force in Poland is partially performed outside the Parliament (Seym and Senate). The main legislative body in the EU is the Council of European Union, therefore, the community law is not created by a body coming from democratic elections. As a consequence, the government is responsible for preparation of attitudes towards all new drafts of the EU's legal acts (Domagała, 2008, p. 227). Parliaments of particular states (including Poland) directly participate in the legislative process which serves to strengthen legitimization and reduction of democracy shortage in the EU's actions. Legal basis and principles of cooperation of national parliaments with the EU's member states within *acquis* determining were included in the *Protocol on the role of the EU's member states parliaments* which is enclosed to the Treaty of Amsterdam from 1977 (The EU's Treaty of Amsterdam, 1997). Detailed range and course of cooperation were described by particular member states on the way of constitutional or legislative regulations.

7. Economic policy as a fertile ground to realization of a nation's self-determination principle

The notion of economic policy is relatively wide. It overwhelms principally a monetary policy, exchange rate policy as well as budget policy and structural policy

(labor market, goods markets and capital markets). Basic reason which causes the necessity to coordinate national economic policies (although from the point of view of effectiveness it is not as good solution as unanimous policy) in one currency area, it aims at minimalizing potential negatives results of economic policies shaped separately by member states. Those negative effects could result from the fact that those countries would perform their politics in improper, irresponsible way or aimed only at realization of particular interests of one state of a group of member states. It could threaten a harmonious functioning the Euro zone as a whole, including contesting monetary policy effectiveness of European System of Central Banks and act for the loss of other participants. Coordination of national economic policies prevents such phenomena. It is a way of correlation to economic situation of each member states of Economic and Monetary Union, including that overwhelmed by derogation by other EU's states. It should be highlighted that coordination of economic policies, being an element of certain external pressure on a given state, may also sometimes facilitate reaching social support in that country for planned, difficult changes in a home policy necessary for economy. Since the Treaty of Maastricht, which became a basis of re-shaping the European Union into a one-currency area, has been shaped in such a way that it concerns all member states, also those overwhelmed by derogation as regards participation in that area in the process of economic policy coordination also all EU's member states should participate (the EU's Treaty of Maastricht, 1992). All those countries are obliged to care for monetary stability and good condition of public finances. General principles of the EU's states economic policy coordination, including the states of the Euro zone, result from art. 98-104 of Treaties of Rome. The starting point of those provisions is an assumption that the countries lead their economic policies taking into consideration reaching aims resulting from art. 2 of the Treaty of Rome. Generally speaking, the aims are, first of all, harmonious, balanced and constant development of economic activity, high level of employment and social care, constant and non-inflation economic growth, increase of economic and social cohesion, increasing the level and quality of living as well as solidarity between member states. Economic policy should be based on respecting the principle of open market economy with free competition. It should also be favorable to effective allocation of resources, the provision of the treaty obliging member states to respecting economic policy as a subject to common interest and to coordination the Council pursuant to the treaty regulations, have an important meaning.

Both countries that shall enter the Euro zone and those which not should participate in coordination since all they take part in common market. The

coordination should be based on detailed observation of macro-economic phenomena in all EU's states, supervision over realization of budget policies performed by them and monitoring structural forms in relation to labor, service and capital markets. The Council confirmed the existing division of competences between the EU's institutions in the area of coordination. The European Central Bank is responsible for unanimous monetary policy and the EU's Council (Ecofin, namely the Council including ministers of finances and/or economy) for coordination and supervision over economic policies and other areas. The basis of such cooperation is so called general guidelines concerning economic policies of the member states and the Community, indicated in art. 99 of the Treaty of Rome (described in practice as general guidelines of economic policies). There are also regulations referring to budget policy included in the treaty, namely procedures of proceedings in case of extensive deficit (Oręziak, 2009, p. 28 and next).

8. Democracy as a symptom of self-determination in the European Union

Self-determination of nations may be perfectly shown on the example of functioning of particular EU's member states. There is a dominating view in the doctrine that the right to self-determination is of dichotomy shape including: an external aspect namely the right to state and an internal aspect namely the right of "a nation" to free choice of preferable political and legal status as well as the right to social and economic development. Imposing a system by international society would be contrary to that outlook. Such contradiction is however illusory as regards democracy.

Democracy is ruling the law based on recognized values in a civilized world. The idea of ruling the law is connected with widely comprehended notion of legal safety. It overwhelms the principle of law certainty (including the principle of protection of entitled expectation or entitled expectations and the principle of non-retroaction) as well as the principle of proportionality. The principle of law certainty is a common rule of legal systems of all EU's member states (although they may differ in details). It is based on the assumption that using law to particular situations must be anticipated. It means that legal subjects while performing in certain way, taking decisions, must be able to expect what kind of law shall be used in a given situation and what legal effects of that behavior shall occur. According to the principle of law certainty, legal norms should be clear

and expected for all interested subjects, therefore, for example an EU's act must be based on proper legal basis in order to have legal consequences. Moreover, a legal act must include justification and must be notified to all interested subjects (Treaty on the European Union, 2012). Moreover, a unit's obligations may not derive from the decree whose official language version has not been published yet in the EU's Office Journal, even if there had been Journals in other languages and there is informal electronic version in a given language, it is not allowed to refer to a list of forbidden objects on a plane included in the enclosure to the decree, if the enclosure has not been published yet. Each penal regulation must determine clearly both crime and punishment. Penal code regulations may not be used in an extensive way with harm to an accused person. Law may not also act backwards; retro-active activity is possible only in exceptional cases when there is an important public interest and there is entitled protected expectation of interested subjects (Sitek, 2009, pp. 383-394). The principle of law certainty is also a part of wider concept of law to good administration reflected in art. 41 of The EU's Charter of Fundamental Rights which states that "each person has right to objective and just examination of own case in a reasonable time by institutions, bodies and organizational units of the EU.

The right overwhelms:

- the right of each person to be heard before individual measure shall be undertaken that would negatively influence his/her situation;
- the right of each person to the access to acts of own case with the respect of entitled interests of confidentiality and professional and trade secret;
- the obligation of administration to justification of own decisions. Each person has right to demand from the EU to repair the harm caused by institutions or their employees while performing their duties, pursuant to the general principles common to Member States. Each person may request in a written form to the EU's institutions in one of the Treaty languages and must receive a reply in the same language (Barcz, Górka, Wyrozumska, 2011, p. 97 and next).

Political system as the only one includes mechanisms allowing determining really and freely by "a nation" a widely comprehended system of own state. Therefore democracy is a guarantee to perform self-determination in its internal meaning and maintaining constant effect of external self-determination. However, there is doubt if there is indeed a need to distinguish external and internal self-determination, if the international law regulates first of all the "beyond state" sphere.

9. The principle of priority in the right of nations to self-determination

The principle of priority of the community law was specified by the Court of Justice of the European Union (CJ) for the first time in the verdict from July 15th, 1964 in the case of Flamingo Costa vs. ENEL. The Court of Justice claimed in that verdict that the principle is a basis of legal order of the Communities and its infringement would make the order doubtful. In the verdict, CJ specified the principle in the following most important areas:

- it overwhelms the whole community state: all norms causing a direct effect are overwhelmed by the principle of priority;
- it concerns the whole national law including the constitution;
- it concerns all public bodies of a state that are obliged to provide effective implementation of the community law.

There are significant consequences resulting from the principle of the EU's law priority towards the national law (specified also in the CJ verdict) for the member states. They are especially obliged to provide effective implementation of the community law, namely they must annul the national law that is contrary to the community law, they may not create a new national law contrary to the community law in force and they must provide such organization of public authorities (including legislative, judicial and executive authorities) in order to guarantee the effectiveness of the community law. Moreover, the ember states' national bodies may not question the community law validity: if a national court, while examining a case, has doubts as for the validity or interpretation of a community law act, it turns to the CJ to explain it in the course of prejudicial course pursuant to art. 234 of the Treaty of the European Union (Barcz, 2007, p. 116).

10. Self-determination in the protection of human rights

Self-determination in the "internal sphere" of a state is present via human rights' protection both in an individual and group dimension. Adopting a motion that the content of the nations' self-determination principle is the right to create sovereign and democratic state, besides, it reflects the international practice and makes functional simplification. What is more, the argumentation of international law analytics including an internal aspect of self-determination directly to a state sovereignty is not devoid fundaments. There may be an assumption risked that it is not the matter

of an internal aspect of self-determination as long as using the principle of nations' self-determination in the shape of the right to create a sovereign, democratic state in multi-national countries that do not act pursuant to it, namely in states that have no authorities representing the whole "nation", national territory regardless the race, religion, etc. The right to sovereign and democratic state does not limit to creation of it but it overwhelms the right to its preservation, it means the "nation" may not be devoid a state against its will. In that way, the right of "a nation" to self-determination is a significant supplement to it, while existing independently to the principle of sovereign equality and principal right of a state to existence. The right to self-determination of " a nation" of a given state may be claimed to decide on illegality of potential annexation of its territory. In the doctrine, the legal aspect to self-determination is described as defensive, i.e. expressing the right to defend the whole territory against aggression or secession (Bareczko, Lempa, 2013, p. 70 and next.).

11. Conclusions on the international law – the right or obligation?

Respecting the international law is not the Polish right. It makes a legal obligation expressed in art. 9 of the Polish Constitution, pursuant to which the Republic of Poland respects the binding international law. The subject provision corresponds with one of the basic principles of international law, namely the obligation to keep assumed obligations. The formulation used by the legislator that the Republic of Poland respects the binging international law refers not only to international agreements, where Poland is a party and according to art. 87 of the Polish Constitution *explicite* is a source of the Polish law, but also to the custom, being a source of international law, in the Polish legal system has not reached such a status. Therefore, in the doctrine of the international law, it is claimed that the provisions of art. 9 of the Polish Constitution create the basis to use a common law in the Polish legal order. Moreover, together with the increasing role of international organization, Poland is obliged also to respect the law created by the organizations to which Poland belongs to (international organizations' law).

It should be highlighted that states may not refer to the provisions of own internal law to excuse not performing treaties concluded by them. The principle was expressed in art. 27 of the Vien Convention on the Law of Treaties (VCLT, 1969), determining that on the one hand internal law should remain with the agreement with the international law, on the other hand, states are obliged to adjust own legislation to the international law. The principle is especially reflected in the

reference to the obligation to harmonization of the Polish law to the EU's law in relation to joining the European Union by Poland.

12. Summary

The discussed issue may induce to reflection on the fact if the obligation expressed both in internal and international law (not the right) to respect the international law does not infringe a state sovereignty. The answer to the question must be unanimously negative since states create the international law themselves, what is more, they ire bind with the norms absolutely voluntarily. An international agreement concluded by force is illegal. Thus, while concluding agreements or joining and international organization, a state may make a decision if the actions shall be pursuant to their national reason of State or not. A country admits it should or should not bind itself with the provisions of an international agreement or join an international organization (Cała-Wacinkiewicz, 2007, p. 13).

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The Palestinian Right for Return

Abstract
The article is going to present the issue of the Palestinian Right of Return *(Haq Al-Awda),* as the one of the most sensitive and complex aspects of the Palestinian-Israeli conflict. It shows the legal aspects of this right by mentioning the key documents. It also provides the historical background of the Palestinian refugees' origin. In this context the UNWRA cannot be omit as the Agency dealing with the expelled Palestinians. It focuses on arguments for the right of return and responses to them. The Palestinian approach towards the Right for Return has changed – from the demand for bi-nation-state towards a new more realistic approach – two nations existing side by side. The Israeli standpoint denies the Right for Return as a considerable risk for the State of Israel existence.

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 Palestinian refugees, legalization and the coherence with the international law; the historical – for presenting the origin of the Palestinian refugees and the extrapolation method – for showing the geopolitical trends in treating the issue of the Palestinians refugees.

Keywords:
citizenship, diaspora, human rights, Palestinian Refugees, Right for Return, UNWRA

1. Right for Return

The right for return is one of the fundamental human rights therefore a plenty of documents treat about this issue. It is worthy to mention the most essential ones.

According to Article 13 of the Universal Declaration of Human Rights:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

This right was also confirmed by many documents among them there is the International Covenant of on Civil and Political Rights (ICCPR). Article 12 of the ICCPR says:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

It should be mentioned that as of June 30, 2000, 143 countries accepted ICCPR, including Israel in 1992 (Human Rights Watch, 2005, p. 23). This nearly universal acceptance for the right for return does not mean in practice freedom of international movement (Hannum, 1987, p. 3).

2. Historical Background of the Issue of Palestinian Refugees

In 1947, the United Nations General Assembly voted to partition Palestine (Map 1). Due to this decision, or maybe even because of Balfour Declaration (Gelber, 2001, p.33), 56% of the Palestine under the British Mandate would go to the Jews for a future state. At this time the Jews were still a minority (they stood for about 30 % of the population and owning less than 7% of the land) (A/364 of 3 September 1947).

Map 1: Plan of Partition with Economic Union proposed by the Ad Hoc Committee on the Palestinian Question [Annex A to resolution 181 (II) of the General Assembly, dated 29 November 1947].

This partition of Palestine caused fierce hostilities between Palestinians and Israelis followed by a civil war. On 15 May 1948, the state of Israel was declared, the Arab countries stood on the side of the Palestinians. In January 1949, Israel controlled 78% of Palestine, while Jordan and Egypt took control of the West Bank and Gaza.

About 50,000 Palestinians had to flee their homes forced by the Israeli forces (Ben-Ze'ev 2011 pp. 15, 23).

Source:http://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/164333b501ca09e785256cc5005470c3?OpenDocument#sthash.Rzn3FVvT.dpufhttp://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/164333b501ca09e785256cc5005470c3?OpenDocument (access10.02.15

As a response to the 1948 crisis UN General Assembly passed resolution 194 which states:

> "...the (Palestinian) refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity,
>
> should be made good by the Governments or authorities responsible".
>
> (A/RES/194 (III) 11 December 1948)

This document did not stop the waves of the Palestinians leaving their native soil.

The amounts of about 450,000 Palestinians were displaced from the West Bank, including eastern Jerusalem, and the Gaza Strip between 1949 and 1967 (Hastedt, 2009, p. 273). According to UNWRA, there were more than 5 million Palestinian refugees in 1995 (Hawary, 2001, p. 35), the number has been still increasing. The Palestinian sources provide the number of 7.2 million Palestinian refugees, which stands for 70% of the whole almost 11- million- Palestinian population (Al-Awda).

194 Resolution includes the genesis of the modern claim of the refugees' right for return (Long, 2013, p. 72).The right of return is both individual and a collective right. It is also the combination of a historical claim and a national right as well as an individual personal claim. It is considered as the right to a specific personal property what is more it is usually psychologically connected to personal memories of the particular goods and its neighborhood, within the context of the national affection of the Palestinian people to their native soil (AbuZayyad, 1994, p.77).

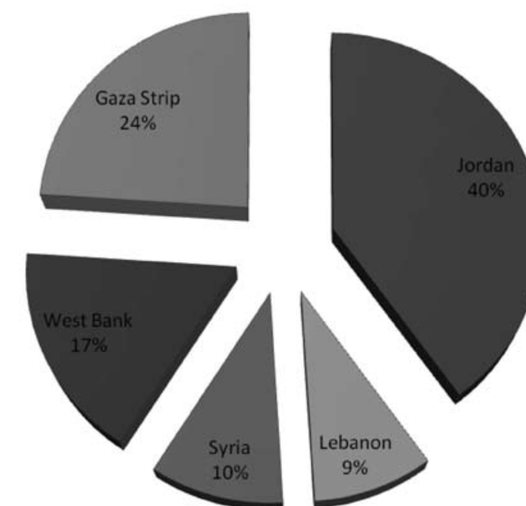
In that way, the right is not defined only to the actual physical return to the country from which the Palestinians were expelled (in accordance with the Universal Declaration of Human Rights and Geneva Convention) but also as their claim to remunerate for their distress and the damages caused by their displacement and expulsion, as well as the compensation for the property they had left (Ginat**,** Perkins 2001, p. 9; Hawary, 2001, p. 34).

3. Unwra

The *United Nations Relief and Works Agency* for Palestine Refugees in the Near East was set up by United Nations General Assembly resolution 302 (IV) of 8 December 1949 to deal with direct relief and works programmes for Palestine refugees. The Agency started its operations on 1 May 1950. It was established for three years but the lack of a permanent solution to the Palestinian refugees' problem, has forced the General Assembly to renew UNRWA's mandate every three years (Lizak, 2004, p. 265). The current renewal is valid until 30 June 2017 (UNWRA c).

The main goal of UNWRA is to provide humanitarian aids to hundreds of the Palestinian refugees and the displaced ones. This organization takes care of the people who were forced to leave the Palestinian territories, which were previously under the control of the United Kingdom (A/RES/302 (IV) 8 December 1949).

Nowadays the *United Nations Relief and Works Agency* for Palestine Refugees in the Near East operates in five regions located in the Middle East such as Jordan, Lebanon, Syria, the Gaza Strip and the West Bank with East Jerusalem (Chart 1).



Distribution of Palestinian Refugees in 2012

Source: UNWRA, *Palestinian Refugees*, http://www.unrwa.org/etemplate.php?id=253 (access 20.06.2015)

Among UNWRA's responsibilities, there are providing the direct aid in the field of education, health care, welfare to the Palestinian refugees as well as improving of the life quality in refugees camps. The Agency is also in charge of giving financial support in the form of little loans and the instant help in emergencies (UNIC Warsaw, 2009).

UNWRA operating is financed by governmental grants, international organizations and other donators. The data published in the reports covering the years of 1975 and 1976 shows the scale of the Arab states grants, which were provided between 1950 and 1974. The amounts of money given by the Middle East states, mentioned above, are such as: Egypt gave almost 5.5 million US dollars; Saudi Arabia – 5.4; Jordan – 3.4; Kuwait – 3.4; Libya – 2.6; Syria – 2.2; Lebanon – 1.1. During the following years the grants from the Arab states were not too high. It was one exception – the year of 1999, during this period Kuwait gave 2.6 million US dollars and Saudi Arabia – 5.8. In 2007, 4 percent of the whole 400-miilion-UNWRA budget was the 3-million-grant from the Arab countries which stands for 4 % of the whole UNRA budget (Chen, 2009, p. 42). In 2013, the most prominent donators were the United States of North America and the European Union. Their 512- US dollar-contribution into The *United Nations Relief and Works Agency* for Palestine Refugees in the Near East budget made 42 percentage of this year – UNWRA- inputs.

In the same period of the Arab governments and non-governmental organizations offered UNWRA the amount of 205 million US dollars (UNWRA a).

It is worthy to consider whether it is possible to solve the problem of the Palestinian refugees and if there is anyone who believes in this possibility, taking into consideration that UN provides the UNWRA goals for the year of 2020 (UNWRA 2013)

4. Palestinian Approach

One can observe the modification in the Palestinian authorities' attitude towards the Right of Return and a character of the future Palestinian state. Since its establishment in 1958, the Fatah movement has struggled for the rights of the Palestinian people, including the Right of Return. The Fatah program declared the need of the founding of a democratic binational Palestinian state for Arabs and Jews in the framework of the Mandatory Palestine (AbuZayyad, 1994, pp. 77).

In the early 1970's, we have been able to notice a new more realistic approach. Some intellectuals wanted to reach the compromise with Israel and promote a Palestinian state in part of Palestine next to Israel. They believe in these two nations existing side by side so they are often treated as traitors who have neglected Palestinian people. The first significant change was observed in 1974 when the PLO used the idiom of the right for return – *Haq Al-Awda.* Since then, the right for return started to play an important part – as a political tool – in the field of Israeli-Palestinian conflict (Klein, 2001, pp. 47 – 48).

The current standpoint of the Palestinians was expressed in "Affirmation of the Palestinian Right of Return", March 2000. The signatories [1] agreed that:

> "The Right of Return is derived from the sanctity of private ownership, which cannot be extinguished by new sovereignty or occupation and does not have a statute of limitation; it is according to this principle that the European Jews claimed successfully the restitution of their lost property in World War II, without the benefit of a single UN resolution;
>
> The Right of Return is essentially an individual right which cannot be delegated, diminished, reduced or forfeited by any representation on behalf of the Palestinians in any agreement or treaty;
>
> The Right of Return is not substituted or affected in any way by the establishment of a Palestinian state in any form"
>
> (Al-Ahram Weekly, 2000).

[1] There were over hundred signatories – prominent Palestinian personalities all over the world. Among the sponsors one can find: Edward Said, Ibrahim Abu Lughod, Salman Abu Sitta, Bilal Al-Hassan, Faisal Darraj, Anis F Qassim, Khalil Hindi, Haidar Abdel-Shafi, Rawiya Shawwa, Wakim Wakim, Mohamed Mi'ari and Shafiq Al-Hout. The declaration was written in order to be presented to heads of Arab and European governments and the PLO, European governments and the UN.

5. Israeli standpoint

The Jews have always insisted on providing an Israeli state. They have passed a plenty of laws maintaining that Israel was the state of the Jewish people. In the same time, they have always rejected the return of Palestinians to their homeland and have not implemented UN Resolutions (Hawary, 2001, p. 37). What is more, the Israeli leaders succeeded in enacting the Law of Return in 1950, which gives every Jew citizenship and opportunity to settle in the State of Israel, obtaining Palestinians' properties. In addition, the Israeli Government destroyed hundreds of Arab villages making life there impossible (Hawary 2001, p. 38). The Law of 1950 gave a lot of privileges to Jewish migrants encouraging them to take over Palestinian soil. Two years later, Knesset passed another anti-Palestinian act – The Law of Citizenship. The citizenship was granted to all of inhabitants of the area of the Mandatory Palestine, but only to these ones who lived on this territory the end of the 1948 war. Therefore the Palestinian refugees were not only expelled but also denied the citizenship (Pedahzur, 2012, p. 27).

The Israeli authorities appointed in November 1945 the term of abandoned property to prevent and resettlement of the Palestinian and give a possibility to transfer these previous Palestinian belongings to Jew immigrants. The date of 29 November 1947 was chosen to indicate the official loss of entitlement to one's possessions. Therefore every Palestinian who was in another part of Israeli or in Egypt, Lebanon, Syria, Saudi Arabia, Transjordan, Iraq and Yemen after this date was treated as an absentee person without the right to a his/her property. This law also included the Palestinians -who as former Palestine Mandatory citizens- had not gained the official permit from the Palestine mandate authorities for leaving their own possessions. Israeli's Absentee Law has prevented Palestinians from returning to their homeland (Talhami, 2003, p. 42).They have been afraid that Palestinian return would destroy the Jewish state. During and following the War 1948 and 1950, the Israeli authorities made such a huge effort to take in 700,000 Jewish migrants (Golan, 2007,

p. 43), including reprisals raids under the leadership of Ariel Sharon which led to the death of dozens unarmed Palestinians (Abdel Jawad, 2007, p. 94). Moreover, recognizing the Palestinian refugee's right for return would indicate Israeli leaders' responsibility for the problem of Palestinian refugees (Peled, Rouhana, 2007, p.142).

In 1950, because of the international pressure, the State of Israel expressed the willingness to accept 100,000 Palestinian refugees. This kind of the return was supposed to base on the term of the family reunion. Soon after that, against international agreements, the Israeli authorities decided not to implement this conception. The question of the Palestinian refugees is one of the key issues during the Middle East peace negotiations. The Israeli government has taken a definite stand on the right for the return; it is showed by evading responsibilities for the Palestinian refugees which leads to not allow them to come back to their soil (Yin, 2002, pp. 319-323).

6. Conclusion

There is no hope for resolving the Palestinian refugees' problem successfully, partly because of external political strategies, like Western donors. They seem to focus on dealing with the current social-economical situation in refugee camps without the understanding the political background (Bowker, 2003, p. 54). They are likely to be convinced that the agreement between Israel and Palestine can be reached without figuring out the question of dispersed Palestinian people (Peled, Rouhana, 2007, p. 141). Many of Palestinians are aware that practically this ultimate justice is not possible in the near future. The members of the Palestinian diaspora have always perceived their residence in the host countries or in the refugee camps as a temporary situation. They have never given up hope that one day they would go back to Palestine (AbuZayyad, 1994, p.77).

In order to solve the problem of Palestinian refugees the following issues should be taken into consideration:

1. Family reunification
2. Status of Jerusalem and refugees
3. Absorptive capacity of the West Bank and Gaza Strip
4. Transfer of the UNWRA functions to the Palestinian National Authorities jurisdiction
5. Estimation of the relative costs

(Hassassian, 2001, p. 59)

So far the Palestinian refugees do not have a right of return to Israel. Taking into consideration the appropriate solutions, it is worthy to discuss Palestinian return to their homeland or to Israel, resettlement and absorption in other countries (Lapidoth, 2002). Overpopulation of the West bank and Gaza Strip is a reason why the Palestinian refugees should consider the right of return in the means of society not land (Hanafi, 2007, p. 40).

According to Article 5 of the Palestinian National Charter, passed in 1969:

> "The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there.
> Anyone born, after that date, of a Palestinian father – whether inside Palestine or outside it – is also a Palestinian".
> This interpretation treats the members of the Palestinian diaspora as the rightful representatives of the Palestinian nation. It should be noticed, that Palestinian refugees[2] living in the host countries are not willing to accept this state citizenship. It is connected with the fear of losing the national identity[3]
> (Chen, 2009, p.53).

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[2] According to the 1951 Refugee Convention a refugee is someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. In South America and Africa this term has more exclusive meaning – it is a person who leaves their own homeland because of war.

[3] The research conducted in Lebanon in October 1999, shows that 67% of the Palestinian diaspora members living there want to possess both Lebanese and Palestinian citizenship 96 % of them deny to move out Lebanon to move into another than the Palestinian state.

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Natural Resources as a Vehicle or Barriers for Development in the Central African Republic Context

Abstract
Central Africa Republic, listed as fragile State and classified as a top most worsened country in 2013-2014, following by Libya, South Sudan, Burundi, Somalia, Democratic Republic of Congo (DRC) etc., is endowed with immense natural resources. Those often play a central role in the socioeconomic development of a country have the potential to catalyze transformative change, but those natural resources are viewed as causes of conflict and sources of financing for rebels groups in Central African Republic. In fact, the better managing natural resources in Fragile State can lead to development and strategies for state building. The research aims to find out ways the natural resources can on the one hand, be viewed as causes or sources of financing conflict, and on the other can contribute to the crisis management or State-building in Central African Republic. The method uses to achieve this goal, consists on collecting information and data from journals of Peace Research and Journal of Conflict management researches, including local country journals. The result of the study will be used to CAR's local authorities, NGO for peace to the better crisis management in Central African Republic, requires a sensitization workshop process orienting to the main mining sector opportunities of country's development.

Keywords:
Natural Resources, Self- Determination, Fragile-State, Peacekeeping and Development

1. Introduction

Gold and diamonds in Central Africa easily conjure up images of conflict, rebel fund. Located in the center of Africa, Central African Republic is one of the countries with the largest unexploited mineral resources: Gold, Diamonds, Oil deposit and Timber

in Central Africa easy conjure up of conflict, rebel funding, Human Rights Violation and smuggling. As a country landlocked within an unstable region neighboring like Democratic of Republic of Congo (DRC), South Sudan, Chad and Cameroon. Recently the scene of another coup, the Central African Republic might be considered as an appropriate candidate for analysis within the conflict-mining perspective. Natural resources have a potential to transforming the CAR's economies. However, the resources have often been a curse rather than a blessing. The discovery of CAR's natural resources such as Oil deposits has been followed by conflicts both political and military or armed conflicts, human rights abuses, including the environmental destruction and economic instability. CAR's natural resources include: extractive resources such as oil deposits, Uranium, Minerals, Diamonds, Gold Copper, Coltan etc. Renewable Resources, including: Forestry, Timbers, Fisheries, livestock, and lands, water both them play a crucial role in conflict management. Historically, natural resources have not been an explicit consideration in peacebuilding activities. Increasingly, though, natural resources are recognized as a crucial to establishing a lasting settlement, they can both unite and divide post-conflict societies. Effective use of natural resources is a key to achieving most peacebuilding objective and development ***(1) The Environmental FORUM, Vol. 29 Number 4 July/August 2012)*** in fragile state. Researchers argue that better managing natural resources in fragile State can lead to solid development and sustainable peace. Others, in fact, consider natural resources are principal causes of conflicts and serving of financing. The research aims are to demonstrate the linkage between natural resources in conflict management in CAR, by driving to development and peacebuilding or state-building. The first part of analysis offers general background information on the CAR's mining sector as causes of conflict and insecurity and sources of financing rebels groups, including a short overview of the mining sector's history **(I).** The second part focuses on the role of natural resources in state-building or development. **(II)**

2. Natural Resources as Barriers for Development in CAR

The catastrophic situation of Central African Republic in connection with natural resources can be regarded as causes of conflict and at the same time, serving of financing a rebel groups.

Natural Resources: causes of conflict? French former Colony, most of political changes were/still are perpetrated by coup d'état, since the CAR's accession to independence in 1960

Mining Sectors Historic- Diamonds and gold were discovered for the first time in the Central African Republic in the early twentieth century, when the country was still under French colonial rule. The colonial administration exerted strong control over access to the natural resources and granted concessions to private companies to exploit rubber, coffee, cotton and mineral resources. Diamonds soon became the CAR's second export product, after cotton***.(2) International Crisis Group (ICG), Dangerous little stones: Diamonds in the Central African Republic, December 2010, p. 1.)***International mining companies experienced their heyday in the CAR in 1950s, with diamond production figures amounting to 147,104 carats in 1954. As these figures declined and exploration results flagged towards the end of the 1950s and early 1960s, mining companies confined their operations to the commercialization of minerals extracted from their concessions by artisanal miners.***(3) Barthélémy F., Eberlé J. M. & Maldan F., Transborder artisanal and small-scale mining zones in Central Africa: Some factors for promoting and supporting diamond mining, in: Vlassenroot K. & Van Bockstael S. (eds.), Artisanal diamond mining: perspectives and challenges, Antwerp, Academia Scientific, 2008, pp. 20-40, p. 33.)*** *During the* colonial period, exploration exercises were carried out for gold and diamonds. After independence, however, international mining companies retreated from the country and investments in exploration disappeared.***(4) EITI-CAR, Premier rapport de l'ITIE-RCA: Collecte et reconciliation des données statistiques du secteur minier année 2006, March 2009, p. 25.)*** Diamond production, on the other hand, increased considerably after the end of colonial rule in 1960. The new Central African government liberalized the diamond sector, opening the mines to all citizens, which resulted in a rush to mining zones.(**5*) Barthélémy F. et al (2008), op. cit., pp. 32-33.)*** Annual diamond exports consequently rose from 70,000 carats in 1960 to almost 537,000 in 1965.5 After CAR's independence, successive rulers treated the country's mining sector as an important cash cow to sustain their patron-client network. Rulers would demand a share of production and impose high taxes on mineral exports. The most striking example is president emperor Jean-Bédel Bokassa, who came to power in 1966. After an initial period of high production figures, diamond exports soon fell back because of Bokassa's greed, the exhaustion of the most easily exploitable deposits, and a lack of investment in new exploration.***(6) ICG (December 2010), op. cit., p. 3.)*** By the end of Bokassa's rule in 1979, production fluctuated at around 290,000 carats per year.(7) ***N'Zolamo-N'Zilavo (Civil servant at the Mining service), Note mines inachevée, unpublished document, 2012)*** During the next decade, however, export

statistics were revived once again with the introduction of a certification system developed by the World Bank, the creation of the *"Bureau d'évaluation et de controle de diamants et d'Or" (BECDOR)8, the lowering of export taxes*, and the tapping of deposits that are less easily exploitable. Former president Ange-Félix Patassé also openly did business in the mining sector during his reign. His company Colombo Mines possessed several mining sites and he commissioned middlemen to collect diamonds for him. Furthermore, he awarded concessions to mining companies and exempted them from legal obligations.

Official Gold and Diamonds Exploited Figures in CAR

Diamonds

1950-1954	147.104 carats
1960	70.000 carats
1965	537.000 carats
1979	290.000 carats
2010	301.557,62 carats
2011	323.575,30 carats
2012	210.684,78 carats

Gold (Grams)

2010	56.475,70
2011	72.834,51
2012	30.670,40

In terms of quantity, the CAR is therefore a relatively minor diamond producer compared to Angola and the DRC

Total
13.800
310
27.700

Conflict, insecurity and mining in CAR. When discussing the link between conflict and insecurity on the one hand and natural resources on the other, terms like "conflict diamonds" or 'blood diamonds' easily come to mind**.** The wealthy basement are causes of conflict and insecurity in CAR despite of the provisions resulted to international Human Right convention that authorizes each nation to self-determination of the natural resources, the farmer French colony still has a negative influence towards CAR's natural resources, including the poor quality of politic governance. For this purpose, the article1 of International Convention on Economic, Social and Cultural Rig hts, stipules that: "*All people have the right to self-determination. By virtue of that right, they decide freely their political statute and freely pursue their economic, social and cultural development. To achieve their ends, all people can freely dispose of their riches and their natural resources which are present without prejudice to any obligation arising out of the cooperation international, founded on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*"***(13) Patto adottato dall'Assemblea Generale il 16 dicembre 1966 é in vigore il 3 gennaio 1976)*** Researchers have showed that there is a big gap between the respect of the convention provisions and the economic interests of former colonizers in Central African Countries. But one should ask the following question: How do natural resources become a curse rather than a blessing in CAR? ***(14) High-value natural resources: A blessing or a curse for peace? Päivi Lujala and Siri Aas Rustada a Norwegian University of Science and Technology (NTNU)- Online publication date: June 2012 Suggested?)***

Petroleum Deposit as Causes of Political Instability and Military-Conflict in Central African Republic. The petroleum deposits are the main causes of political instability, and insecurity in CAR. Thereby, the attempt to oil contracting for exploitation always ends with coup, or rebellion formation.

So what are the factors immediately triggering the crisis in CAR? In fact, the control of the exploration of the Oil deposits in Gordil, namely, Boromata, situated in North Eastern in Vakaga region ***(15,) la Centrafrique et les Richesses de son sous-sol ou les enjeux reels d'un conflict permanent, publie par CENTRAFRIQUE LIBRE LE 03 MARS 2014),*** the most conflictual areas of CAR, are sources of conflicts. Firstly, a former President Ange Felix PATASSE has conceded an Oil license with American Glimbert, (1996-2003), that led to the end of PATASSA's reign. The Boromata deposit discovered by the Chinese in 2009 was the subject of contracts to operate in four blocks which should take effect in September 2013 after four years of successful exploration. According to information relayed ***(16)by Aida Maïmouna***

in Kangbi-ndara.net , of June 24, 2014:) *"The exploitation of oil agreement between Consortium China, National Petroleum Corporation and the Central African Government under former President F. BOZIZE, offered 55% of the shares to the Central African state and 45% to the Chinese state company. In addition, china proposed to offer immediate budget support 200 million dollars and then a budget of 5 billion dollars budget support including funding construction of roads and rail infrastructure in CAR and connecting to neighboring countries. At the same occasion, the French company Total had proposed 10% of shares to CAR's Government. So, former President Bozizé brushed aside the hand that shabby and unworthy proposal for Total".* Also, the **Block A** with an area of 55 000 km2 is the equivalent of 25 blocks with international standards, overflowing of 1 million barrels per day. Discovered in 1983 by the US Company Conoco. This deposit extends on both sides of the Central African and Chad border but is in a geological fault that slopes towards the Central African Republic, so that the bulk of deposit is found in CAR, in which an attempt of oil operation of the Central African side, could disadvantage Chad, and Congo. And worse, is that the Boromata is 20 km from the birthplace of Djotodia, (rebels leader) and situated exactly in the headquarter of Seleka rebellion group. These facts reported, show that the involvements of Idriss Deby Itno of Chad and Denis Sassou Ngessou Congo self-proclaimed mediator in this conflict are not for free but rather significant. Manipulated by France, Idris Deby and Denis Sassou Guesso are fiercely opposed to the exploitation of the CAR's oil deposits. Then, Former President Bozize has been considered as a traitor in the sub-region to have signed the contract of oil exploitation with China without French company Total and Areva. That why, in march 24th 2013, the "Seleka" a coalition of several rebel factions seized power with the hidden help of the former nebulous colonial power with the complicity of presidents of the Central African countries, cited over. Since then, Central African Republic has been rocked by political violence since March 2013, when the President François Boizizé was deposed by Seleka rebels headed by Michel Djotodia. Although a transitional government has now been established, the country is still overrun by armed groups the CAR is like a tsunami, never seen, the rebels have destroyed everything on their passage; CAR remains a stateless or failed State because of its natural resources, thousands of people have been killed in the conflict which followed a coup by the Seleka rebel group in March 2013, right now the country must be rebuilt from "zero"

What should we know about CAR Conflictual Petroleum Deposits? The Oil deposits are a threat to peace, security and political instability in CAR. The natural resources attract the greed of the nebulous former French colonial power supported by bordering countries that negatively impact operating perspective for development. In fact, since independence of the CAR until today, France considered CAR's natural resources as its own reserves especially oil and uranium reserves. The attempt of oil license to another state than French companies triggers the end of the reign of President. This analysis is justified by concrete following facts: the former Ange Felix PATASSE, in power from 1996 to 2003, has conceded an Oil license to American Business man, Glimbert. This led to the end of PATASSE reign. The power will return to the hand of Francois Bozize, following coup organized from Chad with the hidden French government support. Bozize Francois, a former president, once in power (2003-2013), conceded several operating Oil licenses, especially in China and South Africa excluding French companies Total. This distasteful act led to the end of the Bozize reign. Consequently Michel Djotodja, rebel leader of the coalition seized power in March 24th 2013, following a triggered rebellion from northern CAR.

Other aspects are related to the geographical position of the oil reserved in CAR. Chad and Congo Republic shares the same deposit also the Republic of Cameroon which must ensure the transit to the port of Kribi. One should ask the following questions about:

3. Linkage between Insecurity and Mineral Resources in CAR

The situation today is much more nuanced. Despite some links between the country's minerals and insecurity, and the fact that some conflict actors occasionally gain profit from CAR's natural resources, these resources should not be regarded as only a conflict motivator. None of the country's rebel groups "raison d'être" is the potential profit that can be made from diamonds or gold***.(17), For an analysis of the country's rebel groups motivations, see: Spittaels S. & Hilgert F. (February 2009), op. cit.)*** In addition of seleka group, some kinds of banditries are highlighted: In September 2011, the Convention des Patriotes pour la Justice et la Paix (CPJP) clashed with the Union des Forces Démocratiques pour le Rassemblement (UFDR) in Bria, over the control of the area's diamond mines***.(18) Seleka is a rebellion coalition formed by factions of Wa Kodro Salute Patriotic Convention (CPSK), Convention des Patriotespour la Justice et la Paix (CPJP), and Union des Forces Démocratiques pour le Rassemblement (UFDR). The coalition began itsinsurgency on 10 December 2012, claiming that President Bozizé had failed to adhere to the terms of peace accords signed with various rebel groups in 2007 and 2011. (Source: AFP, C. Africa rebels threaten capital, say president must go, 31 December)***

2012.) In June 2012, between 70 and 100 armed men, alleged to be LRA rebels or Baba Ladé fighters, attacked AREVA's Bakouma mining project. Baba Ladé, rebel leader of the Chadian Front Populaire pour le Redressement (FPR), which operates in the centre-north of the CAR, earned incomes from the sale of gold in Bangui. It is supposed that he has even bought machinery to increase the effectiveness of his gold extraction activities. Nevertheless, cattle breeding have always been a much more important source of revenues for Baba Ladé.

Other important, if not the biggest, security issue is the presence of bandits network, or "coupeurs de routes", throughout the country. These gangs profit from lack of state security services, lack of control outside of the capital and randomly attack traffic on the country's dilapidated road network. Banditry is also a major problem in mining zones and on mineral trading routes, where these bandits demand diamonds and taxes from diggers and diamond traders. Since 2013, the threat of bandits or gunmen has apparently increased in whole CAR territory. At least, conflicts might, arise between migrant workers (Sudan's and Chadians operating illegally in diamond and gold sites) and local communities over access to mining lands, or the migrants' alleged lack of respect of local social norms and customs. However, because of the CAR's low population density and the rural location of most mining sites, the number of conflicts over access to mineral resources is quite limited. (19)**(World Bank (November 2010), op. cit., p. 24.).** At last, a tension between artisanal miners and government officials. Non-registered miners are wary of avoiding capture by mining brigade units. Furthermore, artisanal miners are often distrustful of government agents, suspecting them of rent-seeking incentives. Government agents are, indeed, often cited as perpetrators of harassment.

Natural Resources as sources of financing Conflict- Gold, copper, uranium, coltan, oil, diamond, timber, no longer control the Central African State actually in CAR. But, those resources undre control fo two opposit faction rebel groups, such as Seleka*(Coalition of several armed groups Seized the North Estern of CAR)* and Anti-Balaka militia (known as Youth Native self-defensed groups) and the proliferation of illegal weapons in circulation within CAR' territory has increased the phenomenon of banditries network or gunmen that control mining sectors.The country is effectively partitioned and overrun by armed groups with Seleka militia in the North and East of the country, Anti-Balaka militia present in the South and West and incursions from the Lord's Resistance Army into the East. ***(20) Final report of the International Commission of Inquiry on the Central African Republic, 22 December 2014.*** The government has no control power, being very week without any national army, his power is limited into the Capital Bangui level. Even Banqui is not totally in security, despite the presence of international peacekeeping forces. The country houses part of the world's second largest rainforest in the Congo Basin. Timber are officially the country's number one export. Both rebel groups are the masters on Central African territory, so they each occupy all

mining areas, including: oil deposits, Gold, Uranium, Timber that they exploit an traficking illegally to finance they nebulous orgaization. Indeed, the risk of conflict finance from the diamonds trade was taken seriously, albeit not immediately. CAR, which had traded 59 million Euros worth of diamonds in 2012,8 was suspended from the Kimberley process in May 2013. Efforts were made to shut down the trade. Belgian authorities seized Central African diamonds in Antwerp in May 2014.9 ***(18) March 2015 EU FLEGT week conference, Brussels).*** In their murderous progression, the aim of the Seleka was to destroy socially, economically and culturally CAR. Thereby, Dzanga Sangha National Park also suffered the barbarism of Seleka.

Seleka Rebels Invade Dzanga-Ndoki National Elephant Park, Central African Republic

A group of at least 17 heavily armed men presented themselves as part of CAR's transitional government forces Seleka entered the Dzanga-Sangha national park and asked for directions to Dzanga Bai, locally known as the "village of elephants". The park has more than 3 000 forest elephants. Dzanga-Sangha, national park, in the south-western corner of the country bordering Cameroon and the Republic of Congo, was declared part of a three-nation World Heritage Site last year. The Seleka rebel groups, who have entered in Dzanga Sangha started to massacre forest elephants in Dzanga Sangha Park. Gunfire was open with a large clearing where between 50 and 200 elephants congregate every day. About 26 elephants were massacred and 200 were gunshot injuries. Those gunmen were Sudanese linked to the Seleka group. "They entered the park early and camped next to Dzanga Bai. "Gunshots were heard

throughout the night": said a former Durban man, Cassidy who set up a tourism lodge in the elephant sanctuary four years ago.

Noting that almost 30 000 elephants were being shot for ivory every year across Africa „pink" ivory is prized in Japan. "Unless swift and decisive action is taken, it appears highly likely that poachers will take advantage of the chaos and instability in the country to slaughter the elephants in this unique World Heritage Site."CAR has to immediately follow through on its promise of two weeks ago to mobilise troops to end poaching in the region. WWF also calls on the international community to immediately provide assistance to CAR in restoring peace and order in the country." said ***Jim Leape***, WWF international director-general,

However, if Seleka rebel group and Anti-balaka militia are accused of traficking illegal minerals, some repports published have showed the involvement of European and chinese companies in financing rebel groups to illegally timbers traficking during the conflict in march 2013.

4. European Timber Companies Funding Rebel Groups in Central African Republic Conflict (19) Press Release/March 17.2015)

Three foreign timber companies, such as SEFCA *(Société d'Exploitation Forestière Centrafricaine)* French IFB, Chinese VICA are accused of involving in Financing Armed Groups in CAR and traficking blood timbers. Timber is CAR's number one export, but suffers from an absence of government controls and has failed to deliver development benefits in the country, which languishes at the bottom of the UN Human Development index and near the top of Transparency International's Corruption index as one of the world's worst offenders. Logging companies were recognized as a source of income for CAR's armed groups by the UN Panel of Experts on the Central African Republic in July 2014. European timber companies have helped fund the war in the Central African Republic through lucrative deals with militia groups, particulary Traders in France and Germany have paid more than $4m (£2.5m) to rebel groups accused of war crimes, in violation of the terms of EU's Forest Law Enforcement, Governance and Trade (FLEGT.*"There were three companies logging in CAR after the fall of Bangui: the* Lebanese *SEFCA, the French **IFB**, and the Chinese **VICA**. All three, the report says, paid the Seleka in order to continue working*". The companies preside over an area of CAR rainforest over two hundred times the size of Paris, and together account for 99 percent of timber exports from the country. ***(19)By Tom Dale July 15, 2015 / 2:18 pm).***Those three companies would

have had to pay fees to Seleka militia men guarding checkpoints along the route out of the country, a sum estimated at around 1.2 million euros ($1.3m) in total. They also paid an estimated 1.77 million euros ($1.95m) in protection payments for their employees and facilities, according to the report.The companies themselves have been making a lot of money. The two Lebanese guys who own SEFCA, the logging company which was exporting most timber, have made a dividend jointly with a French business associate in France of over 600,000 euros last year in France. Their profits have trebled in three years. They are making a lot of money, and obviously they didn't want to shut down because of some pesky conflict.

"Blood Timbers Traficking by European Companies and Chinese Company"

Other companies either did not want to play ball with the Seleka, or did not know how to approaching them, they lost permission to continue logging.

The EU's Reaction towards "Blood Timber traficking"in CAR? Any EU's companies involving in financing rebels and trafrickingTimbers was punished. The European commission action was based only on simple declaration of call for urgent action to end impunity of logging industry in Central African Republic and adopt an EU framework of action on conflict timber was initiated by brussels. (20) ***(BRUSSELS, 17 March 2015***). Then, the European Commission has invited a representative of Société d'Exploitation Forestière Centrafricaine (**SEFCA**), which has been active in war-torn Central African Republic (CAR) since 1988 and has become the country's largest timber exporter, will be participating in the EU's Forest Law Enforcement, Governance and Trade***(21) Excluding illegal timber and improving forest governance:***

The European Union's Forest Law Enforcement, Governance and Trade initiative Duncan Bracka aChatham House(Royal Institute of International Affairs) Online publication date: June 2012 (FLEGT) Conference. This urgent appeal aims to end the impunity of the industry of exploitation of ilegal wood in CAR, and adopt and EU framework to on wooden conflict.***(22)***, ***Centrafrique : Après le diamant de sang, c'est au tour du bois de sangPublié le 19 mars 2015 par La Voix de Centrafrique sous POLITIQUE/SOCIETE***
BOIS Bruxelles (17 Mars 2015)
Critical viewpoint towards European Commission. SEFCA active in CAR since 1988, contributed to a significant amount of Money to weapon groups (CFA 250 million (€ 381 000)*. "SEFCA belongs to the courte"* And *"Blood timber is just as harmful as blood diamonds". The EU's multi-million euro illegal logging agenda risks becoming a rogues' gallery and discredited if it legitimizes companies like SEFCA. If the EU decides to pursue a commercial timber trade agreement with CAR's failed state involving SEFCA, that's exactly what it will be doing,"* ***(23)Pardal said.(Read Alexandra Pardal's speech on conflict timber from Central African Republic here, delivered at the EU's FLEGT conference on Wednesday 18 March, Global Witness, an NGO that fights for Human Rights and Environmental conservation).*** CAR was suspended from the Kimberley Process, which exists to prevent conflict diamonds entering the international market, in May 2013. But no similar steps were taken for CAR timber, despite the fact that it was worth more.

If a previous analysis has demonstrated that natural resources are causes of conflict in CAR, others, in contrast, argue that good management of natural resources can drive to peace-building and development.

5. Better Managing Natural Resources in Central African Republic can drive to peace-building and development

The natural resources that are relevant to post-conflict peacebuilding fall into for broad\ Categories: extractive natural resources, such as Oil, gas, gold, and diamonds) and renewable resources, other than land and water such as timbers, fisheries and agriculture. The value of extractive resources can be substantial, creating crucial opportunities to collect government revenues while a country rebuilds, but also creating governance and insecurity risk. Extractive resources can be central to rebuilding the post-war economy by providing employment opportunities and generating tax revenue to finance the government in CAR. The loot ability of some mineral such as coltan, diamonds may make them both difficult to regulate and susceptible to illegal exploitation. Renewable resources such as timbers, fisheries are important for livestock for combatants as well for government.***(24) (Summer Reading Issue and EIL Annual Report. Vol. 29, Number 4, July/ August 2012, The Environmental Forum : Clearn Water Act and the Limits of Federal Jurisdiction)***

Managing the CAR's Precedent Oil Licenses could its lead to Peace-keeping? Now, to avoid a repetitive rebellions formation coup d'état, the CAR's precedent Oil licenses and the coming up oil, Uranium, Diamond, Gold license must be granted in a transparency , respecting international standards and must be submitted to the National Transition Council. The Central African people must be informed about the percentage of benefits or incomes from natural resources, including the nature of the operating company.

How to manage several oil licenses granted to different companies knowing that those licenses were viewed as sources of conflict? For restoring the peace in Central African Republic, the oil issue should be on the agenda of the political debate, otherwise the CAR's crisis will never find a solution. So there, requires the organization of a round table or an international summit by the Transitional Government with the main protagonists such as holders of operating Oil licenses, the CAR's international and regional partners: This requires a round table including the following actors: **(a)** Glimbert who holds an Oil License granted by former President PATASSE, (b)Consortium China Petroleum, and South Africa' holders of Oil licenses granted by a former president François BOZIZE (c) The Qatari-holder Oil license granted by M.DJOTODIA (d)The former nebulous French colony French colony who is making CAR's Oil deposits as its future reserve. (e)The Chad and Republic of Congo who share the same Oil deposits and the Republic of Cameroon which must ensure the transit to the port of Kribi.***(25)"Valerie ADAM on" 03/15/2014 7:56,)***

Rebuilding Natural Resources Governance- Institution- Capacity buiding, to achieve State-building and Development in CAR requires that: The Transitional Government should adopt a new political agenda based on: (a) Supporting the implementation and enforcement of targeted commodity sanction and ensure that program activities involving natural resources do not contribute to financing conflict**,** (b)Promoting transboundary coordination and legal harmonization to monitor, combatants and control illicit cross-border trade in natural resources**,** (c) Supporting effort by peacekeeping mission to extend state authority and to secure natural resource extraction sites and trading hubs, (d)Encouraging the demilitarization

of the extractive industries' value chains by removing armed groups from resource production areas **,** **(e)**Implementation of international and domestic legislation and standard on transparency.

Natural resources and good governance in CAR. In post-conflict societies, the design of a NRM system may be constrained by the bargains struck in the process of reaching a peace agreement. In some cases, there may be an immediate need for capacity building or at least a capacity "loan" during the course of peace negotiations. Parties to a negotiation may have unequal access to information about the value and condition of the resources at stake, and this may frustrate attempts to reach a peace agreement. Further, well informed negotiators are more likely to reach an agreement that is adhered to in the long run**.*(26), The United Nations Interagency Framework Team for Preventive Action TOOLKIT AND GUIDANCE FOR PREVENTING AND MANAGING LAND AND NATURAL RESOURCES CONFLICT) with funding and support from the European Union) pg11, 2012***

The RCA is going towards a sustainable peace following the National Forum in Bangui based on Brazzaville agreements for the cessation of hostilities between two opponents militia groups and which should lead to transparent and democratic elections

In any society, but particularly in a fragile or conflict-affected state, a system that effectively and inclusively shares NRM functions between government and civil society can help convince powerful stakeholders to "buy in" to the governance system and address resource conflicts peacefully. This requires the government to not only fulfil technical functions such as to develop negotiation, mediation, and dialogue skills, but a culture of accountability, responsiveness to the public, tools for effective communication, and a willingness to share power with other stakeholders. In CAR's contexts, the capacity building challenge is to integrate these and other "peacebuilding capacities" into the design and the practices of government agencies and civil society organizations for which peacebuilding is secondary to a primary mandate such as resource extraction, or environmental protection. Capacity-building must be a gradual, sustained, and country-owned process. Institutions and infrastructures cannot be imposed or imported, and strengthening or reforming existing ones takes time***(27),The United Nations Interagency Framework Team for Preventive Action TOOLKIT AND GUIDANCE FOR PREVENTING AND MANAGING LAND AND NATURA L RESOURCES CONFLICT with funding and support from the European Union, pg 12, 2012m)***

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PART IV

The right of the community to the good administration

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Right of the society to the good administration (*good governance*) and democracy

Abstract
The concept of a good administration or good governance is immanently linked to the concept of human rights. In practice, these two concepts intersect each other in many cases. Practical realization of the right to good public administration or to good administration done by large national and international corporations is the guarantor of the implementation of many human rights, for example: equality, predictability, right to privacy, the right to participate in elections or the right to participate in the decision making process. A prerequisite for this participation is to introduce very wide access for all citizens to public information and the fight against all forms of corruption. It is necessary to analyse the level of needs of the participation of citizens in decision making processes. For this purpose, the computerization of the administration, including e-democracy elements, in the relationship citizen – administration is introduced in the Member States and the European Union.

Keywords:
human rights, good governance, corruption, the right to information, human dignity.

1. The causes of the democracy crisis as an impulse to create *good governance*

In various publications, press reports, politicians' statements, "the lamentation" over the crisis of modern democracy can be more clearly hear. This phenomenon is often associated with the economic, financial, social, political crisis and, above all, with the crisis of values, otherwise known as moral crisis. The tangible proof of the democracy crisis is decreasing participation of the European society in the elections, especially in elections to the European Parliament and in decision-making processes.

It is the expression of the universal belief that the individual has no impact on decision of the administrative authority.

Such an approach to this problem is not coincidental. The experiences of the twentieth century, especially its first half show that such scenario is possible. Very well developing, that time, democracy in the Western Europe countries, especially broad public participation in the elections and the development of parliamentarism, gave a chance to build solid foundations for democracy.

However, the economic crisis during late twenties of the twentieth century, particularly severe in Germany, led to the collapse of democracy. In its place, the totalitarian regime was born, Nazism which was widely accepted in Germany. The Germans have expressed acceptance of the new reality at the time of the parliamentary elections in 1932, when the Nazi party NSDAP won, and when on 20th January, 1933, Hitler became the Chancellor of Germany. It was rightly stated by E. A. Purcell that the economic crisis put to sleep democratic social desires and awakened the expectations for simple solutions to the economic problems. And those were just presented by Nazi leaders and dictators of Europe including Stalin and Mussolini (Purcell in 1973, p. 129).

Driven by the Roman aphorism *historia magistra vitae*, today, we have to analyse with great attention the causes of the democracy crisis in a previous era and this is due to the need for adequate protection of human rights. Led by the historical experience and the analysis of contemporary causes of the democracy crisis we should seek new solutions. All the more, that the crisis of democracy, even though it has many sources, the most important of them is the maladjustment of democracy to the processes of globalization.

Until recently, the democracy were observed from the perspective of the state and individuals living in it. The far-reaching symbiosis between these two realities occurred. The decision-making centres were quite clearly defined, and almost everyone knows of what national or local values he or she should identify him or herself. Meanwhile, the globalization processes, which are in fact the child of democracy, abolish all previous boundaries and fixed points of reference. M. Zachar rightly says that people travel and communicate without barriers of time, but first of all, regardless of political or geographic boundaries. There are new forms of business culture and human interaction. The new types and areas of human needs were created (Zahar 2012, p. 15 ssg.). Moreover, the decision-making centres are increasingly unify and they have global, not national, nature. As a result, fewer and fewer individuals feel the relationship with the state, its structures and the existing ethos.

These changes raise the need for the evolution of thinking about democracy and abandonment of existing solutions appearing in the administration, often having their nineteenth-century origin. It is increasingly difficult to talk about democracy in the traditional sense, especially from the perspective of the state (Bentkowski 2012, p. 415-437). It is necessary to build, or at least to adapt, an important expressions of democracy to the new conditions. Human rights are just expression of the global world, global thinking, and especially evaluation. Global, or at least European or transnational centres and procedures for the protection of human rights are created. The European Court of Human Rights, which became the ultimate decision-making centre for evaluation of respecting or violations of human rights in specific cases, is an examples of such centre.

In this new global reality, connected with the crisis of traditional democracy, it is necessary for better protection of human rights to implement the principles of good administration – good governance – thanks to this, the protection of human rights becomes more efficient and more independent from local political or economic crises. The right to good administration and good management has become one of the human rights (B. Lewenstein, J. Schindler, R. Violin 2010, p. 35).

2. The evolution of the concept of *good governance*

The right to good governance is the group right. The very concept of *good governance* comes from the Anglo-Saxon culture of democracy. As it is rightly noted in the document of the United Nation Economic and Social Commission for Asia and the Pacific, the concept of *governance* is as old as the existing various forms of organized society. This term means the decision making process of a public nature and implementing it in life. The term *governance* may be used in the context of state governance, local governance but also in the context of the international management or *governance* of large corporations (*What is good governance*).

The concept of *good governance* is not a sharp term and its meaning is clarified more intuitively in connection with such issues as social participation, rule of law, transparency, public administration suitable to the individual and social needs, develop the consensus between many actors in decision-making processes, the efficiency of management and the responsibility of public institutions. M. Witkowska indicates that due to the multiplicity of entities involved in the management process, we can talk about multi-level governance (MLG) (Witkowska 2013, p. 30-53). The concept of multi-level governance has been introduced by J.N. Rosenau (Rosenau 1992, p. 1-29).

Good governance and human rights are the concepts or terms that imply indeed two different areas of activity, but mutually are dependent. The human rights are natural or moral postulates estimating objectives of the concrete actions of the government and other actors in the decision-making process of a public nature. They are an inherent part of decision-making processes such as: creating of legislation, law enforcement, creation of sectoral policies and budgeting process. On the other hand, human rights cannot be duly respected without the implementation of the principles of good governance.

One of the postulates of the doctrine of the human rights is the requirement of sufficient quality of legislation, it means the legislation consistent with the exacting standards of national law. In addition, it is necessary to build the institutions sensitive to human rights and to build the policy appropriately sensitive to these rights. You can point to four areas of good administration coherent with human rights, while guaranteeing their implementation. These are democratic institutions, public services of appropriate quality, sensitive law and anti-corruption activities (*Good Governance and Human Rights*).

The human right or the rights of social group (society) to good administration, in the literature, are recognize as the fundamental rights of third-generation (previous two generations are the classic rights of individuals). However, they can be assigned to the rights related to human demand to meet the needs of belonging, and indirectly the need of security. This right therefore belongs to the same group of rights as the right to a good environment. It is conferred more to the community than to the individual. Therefore, it is not purely subjective law. Good governance is a reflection of the trend, aiming to increase the level of self-governance of society with a tendency to increasingly strong shrinking of the state power.

3. The legal bases of *good governance*

The right to *good governance* was not *expressis verbis* defined in any of particular national or international law regulation. However, it is inherently included in the assumptions and principles of reasonably well-functioning public administration.

3.1. *Good governance* in the light of union regulation (EU)

Indirectly, the rules establishing good governance phenomenon have been included in various political and normative acts or the European Union. The most important of them are:

- The Lisbon Strategy adopted during the European Council Summit in March 2000 in Lisbon and simplified and renewed by the decision of the European Council in March 2005. One of the aims of the Strategy was undertaking social actions, especially in the area of better implementation of human affairs through the more efficient functioning of administration (*Strategia Lizbońska*);
- The European Code of Good Administrative Behaviour adopted by the European Parliament on 6th September 2001. It is now a basic document containing the principles of good administration that sets work standards of the EU administration with Member State citizens. The activities of the administration should be based on the principle of legality, non-discrimination, proportionality, impartiality, independence, objectivity, consistency, reliability and courtesy (*Europejski Kodeks Dobrej Praktyki Administracyjnej*);
- Action Plan for Better Regulation from 2001. This initiative aims to better regulation on the EU level, in particular by reducing bureaucratic burdens for businesses, industry and consumers. In the latter case, it will be about the rights of human being understood as the individual who is weaker in relation with the producers (*Inicjatywa Better Regulation Initiative*);
- European Governance. The White Paper adopted by the European Commission on 25 July 2001 (*European Governance. A White Paper*). The White Paper was a response to the need for a change in the exercising of power in the European Union. The five criteria of European governance are introduced in this book. There are: the openness, the participation, the accountability, the effectiveness and the coherence. It was found that the Union, as an administrative unit, must meet the global denominations, including the need to build public trust in the transnational dimension;
- The Community strategic guidelines on cohesion adopted by the Council Decision 2006/702/EC on 6th October 2006 (OJ L 291/11, P. 11-13). It is pointed out in this document that the administrative procedures in the Member States and in the EU bodies are often complicated and not understandable to the average person. It is necessary to promote information processes, including e-government;
- The fourth Cohesion Report adopted by the European Council on 12th June 2006. This document served the promotion of the construction of social participation.

An important normative act for the implementation of the principles of good administration is the Charter of Fundamental Rights of the European Union from 2000. The article 41, paragraph 1 of the Chart states that *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the*

institutions, bodies, offices and agencies of the Union. This provision put emphasis on the timely processing of cases using the impartiality and the proceedings by them in compliance with the material and formal law.

In the next part of the article 41, there are presented specific actions considered as a sign of good administration and at the same time as an implementation of collective rights and human rights. The paragraph. 2 decided that everyone has:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
b) right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.

In the article 41, paragraph 3, of the Charter it was decided that *Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States*. The paragraph 4 states that *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language*.

Presented article 41 of the Charter shows the wide range of activities, which includes the concept of good administration and an extensive program of activities of the Union. Adoption by the European Union's task of implementing the principles of good governance stems from the fact that there are still areas where there are unmet or unrealized social and public needs in contact with the public administration, where the Member States and the European Union itself cannot work out appropriate solutions. It is necessary to increase the rights of individuals, improving the quality of life, the exchange of information between Member States about their and the Union's actions and keeping constant public education in order to raise awareness about the organization and functioning of the European Union. Good, efficient and transparent governance is a chance to build deeper European identity.

3.2. The implementation framework of good governance in Poland

The principles of good governance are also being implemented in regional policy, and thus in Poland. N. Drejerska points to the necessity of implementing the concept of good governance both at the level of the European Union and individual countries, including Poland. The implementation of these principles is important because of the new programming period, especially in programs such as Human Capital, Innovative Economy and Regional Operational Programmes, where

the fifth priority axle is simply called: good governance. The basic document of implementation in Poland the principles of good governance is a document named as National Regional Development Strategy 2010 – 2020: Regions, Cities, Rural Areas (NSDR), in which the assumptions of the regional development policy for the next programming period 2014-2020 are included (Derejska 2010 p . 45-54).

In 2008, the Ministry of Regional Development has prepared a document entitled "The concept of *good governance* – reflections for discussion". The primary purpose of this document is to start a public discussion on the shape of good administration in Poland. In principle, this policy should be implemented in all areas of state action in order to build the modern and friendly to man administration. As a consequence of the adopted approach, the several further documents were written down (*Koncepcja good governance* 2008, p. 6).

The first one is the Strategy of public administration reform 2008-2015, which highlighted the significant barriers to the development of effective and efficient administration. There, it was pointed out the problem of too high turnover of staff in the administration, which is the instability of employment, making it impossible to implement long-term programs.

The second document is the Strategy to support the development of civil society in the years 2009-2015, which indicated the weakness of civil society in Poland and the need to strengthen it. Finally, the Directional Strategy for informatisation of Poland to 2013 was developed. This strategy assumes, among others, the creation of an internal, secure network of public administration (central and local), the creation of national, multi-channel, integrated platforms provide electronic administration services, the implementation of a national identification system and creating the conditions for opening the *e-democracy* systems.

4. The contact areas of good administration and human rights

As it was stated above, there are four areas of activity of public administration that have a significant impact on the functioning, and respecting the human rights. There are: democratic institutions, an adequate level of public services, creating a law which is sensitive to human rights and taking action against corruption.

4.1. Democratic institutions – social participation

The concept of "democratic institutions" with the addition of "public" means institutions which not only work efficiently, but also allow the society and at the

same time individual entities to participate in the decision making process. It is about decisions affecting the local community, for example, the construction of new roads, initiatives related to the environment, or the new investments that may have an impact on the local community. A noticeable is the increase of different types of expert community (*policy community*) and expert networks (*policy networks*), including think-tanks, university institutes (Zybała 2012, p. 101).

The public participation requires two elements. The first is the establishment of mechanisms for public participation. The entities the most able to attend are social organizations. Their activity is not sufficient. Despite the increase in the number of registered social organizations, their activity is still small and according to the data contained in document of the Ministry of Regional Development entitled "The concept of *good governance*", the number of members of non-governmental organizations is going down. Also, there are fewer number of volunteers. Perhapsl this phenomenon is caused by not ideological nature of the actions taken. It may be showed by the increasing number of volunteers for religious events, for example: Pope's arrival to Poland or sporting events like Euro 2012. It therefore appears necessary to take steps to better engage the public in all sorts of important for them projects (Olech 2012 p. 34).

The second element of public participation is to create appropriate mechanisms necessary for the effective involvement of people in decision-making process. The social consultations of the administrative or even political decisions is the first, and seems to be the basic instrument. There are: the public consultation, advisory committees, forums for dialogue, consultation documents publicly available, open discussion meetings, complaints procedures, many forms of tele-democracy or e-democracy and referendums. Such civic participation is recognized as one of the most important principles of good governance (Kulesza, Halfling 2010, p. 131).

The most important is the issue of the involvement of the society in the decision-making processes. The authorities do not do a lot to increase the presence of the public in decision-making processes. The meeting of municipality or city council may be an example here. Not many residents of the municipality comes to such meetings. Also, there is not a great social awareness about the need to listen to the deliberations of the municipal council. Anyway, the council meetings are organized mostly in the time when residents are not able to come to such meeting. The presence of residents at meetings, especially in smaller towns, often is treated as the opposition to local politics. It is therefore necessary to maturation on the side of society and local government officials to a full cohabitation in decision-making.

The third element of social participation is participatory budgeting, implemented in some municipalities in Poland. The idea of public participation in decision-making process concerning the development of the municipal budget spending was created in the United States. This very good idea due to the errors in its implementation led almost to bankruptcy of California State. The essence of this idea is to allow residents to give priority to certain expenditure from the budget. The community organizations and individual citizens have the ability to vote in the form of electronic voting or by the introduction of a system of social grants by groups of residents. Usually, the upper limit of public funds, which can be spent in such way is defined.

The doctrine frequently points out to the negative occurrence of the administration functioning, not always in conjunction with a violation of the law but as a sign of derogation from the new standards of administration. Cz. Kłak points out that the violation of the right to good administration is the excessive length of judicial proceedings (Kłak 2011, p. 97-136). The author refers to the article 6, paragraph. 1 of the Convention of 1950 and the article 45 of the Constitution of Poland. In the jurisprudence of the ECHR it is stated that the lawsuits should be resolved within a "reasonable time" or without undue delay, for example in the ECHR's judgment of 8 February 2005, on Miller v. Sweden (complaint no. 55853/00 complaint, LEX No. 148012).

4.2. The appropriate level of public services

One of the functions of the modern state is to meet the basic needs of not only social, but also individual and this should be at an appropriate level. These needs are linked to the following human rights: the right to education, health and nutrition. In addition, the state should guarantee to every person the access to meet the cultural needs and the access of equal for all active and passive participation in politics, especially in decision-making process.

Satisfying the above-mentioned needs by the public administration is dependent on the level of advancement of the process of computerization. It is now necessary to assess positively the adoption by the Parliament of Act of 17th February 2005 on computerization of entities performing public tasks (Dz.U. 2005 nr 64 poz. 565). This Act introduced, among others, the ePUAP – the program designed to improve communication inside and outside the administration. The Act is the implementation of the proposals contained in the prepared by the European Union plan "eEurope 2005". According to this plan, the EU member states have committed themselves to implement new technological and normative solutions, allowing citizens to settle matters related to public administration by using the Internet.

The prepared Act on the Computerisation was the beginning of computerization of public administration in Poland on a large scale. The legislator, in the explanatory memorandum to the draft, submitted a list of the means by which this computerization is to be made. "Achieving minimum technical standards of hardware components and software ICT systems – such which will enable collaboration of systems used by different public entities in their respective public duties and to ensure a favourable legal environment in the information society, in particular through the creation of a regulatory framework for electronic functioning of the administration."

4.3. The appropriate level of legislation

The contemporary legal culture is a system of multi-level nature and increasingly complicated by the increasing pace of the amount of new legislation. Only the Polish Parliament in 2014 gave approx. 20 thousand pages of various kinds of normative acts, and there are additional thousands of pages of the EU laws and the international law. It make for the average person, that the legal system becomes unclear and incomprehensible. Therefore, the possibility of effective implementation of the human rights to court and the efficient resolution of his or her case is reduced.

The appropriate level of legislation depends not only on quantitative criteria. The most important are the qualitative criteria, and therefore precisely the proper level of legislation. From the point of view of human rights, it is important that the certain regulations of the international, national or local law respect developed standards of the protection of man and his or her rights. It is also important that human rights are taken into account as a criterion for the reform of the legal system and any institutional reforms.

For the EU law and, indirectly, for the law of individual Member States, the guidance about the quality of law have been written down in the mentioned document: the Action Plan for *Better Regulation* from 2001. According to this Plan, it is necessary to:

- reviewing and simplifying the existing EU law, including improving its accessibility, clarity and legibility;
- organize the multilateral consultations at the stage of legislative initiatives by the European Commission;
- quantify and reduce administrative costs and burdens arising from the EU law;
- look for alternatives to legislation and regulations (such as self-regulation or co-regulation with the participation of legislators and stakeholders) (Witkowska 2013, p. 37).

An important element of better regulation is to improve the flow of information, ideas and not immaterial content, including the provisions of the law. Thus, the aim is to raise public awareness to the applicable law and the ability to apply it, especially using it. As a result of the Plan of 2001, the further documents relating to improving the quality of the EU and Member States law were developed. These include:

- Communication from the Commission on the strategy for simplifying the regulatory environment of October 2005
- Communication from the Commission on promoting economic growth and employment in the European Union

4.4. Anti-corruption activities

The corruption is one of the biggest threats to human rights. It is a threat to one of the foundations of human rights protection system, namely the equal treatment of all members of society. According to M. Balcerzak corruption undermines the social justice and human dignity. The corruption distorts the principle of good governance, the standards of *fair trial*, the principle of equality in front of the law and the right to free elections. Therefore, the protection of human rights is quite effective instrument for combating corruption (Balcerzak 2010, p. 534-535). An important instrument to fight corruption in this perspective is the access to public information by society, which is the access to all decisions taken by public authorities.

In a corrupt society, the representatives of state authority or local government are the favoured group who benefit from the allocation of public goods for any form of payment, including concept, permits or positive administrative decisions. These goods are available only to the wealthier social classes. In this way it perpetuates the division of society into the rich and the poor. The poor are deprived of the possibility of different opportunities for social advancement and training, while the rich are the elite defending at all costs their position. As a result, it generates economic and other kind of crime (Pearson 1999, p. 3). Meanwhile, one of the basic functions of the state is the protection of human being and his or her rights, regardless of wealth. Equal opportunities for all is today regarded as a measure of the level of democracy and the level of fight against corruption in each country (Kiai, Kuria 2008, p. 247-250). As rightly observes P. Chodak, it is necessary to take measures against corruption, even as there is social acceptance (Chodak 2013, p. 201).

The concept of good administration require that the activities of public, state and local administration were responsible, transparent and consistent with the principles of anti-corruption policy. Anti-corruption activities of the state requires

the establishment in each office the anti-corruption commission, or at least a policy coordinator, to allow reporting cases of corruption, for example by creating an electronic mailbox or appointment hours on-call for coordinator and wide public information about the actions and financial and political decisions taken by the authorities.

5. Conclusion

The concept of a good administration or good management (*good governance*) is immanently linked to the concept of human rights. In practice, these two concepts intersect each other in many cases. Practical realization of the right to good public administration or to good administration done by large national and international corporations is the guarantor of the implementation of many human rights. First of all, the creation of good administration policy guarantees respect for human dignity through equal treatment of citizens of the certain State or now of the European Union. For the law, all human beings are equal regardless of the civil, administrative or criminal provisions.

An important instrument for implementing the human right to good administration is the attendance of the widest number of people in decision-making process. A prerequisite for this participation is to introduce very wide access for all citizens to public information and the fight against all forms of corruption. Practice and research shows that the need for the participation of citizens in decision-making process is not yet fully understood. It is not enough to introduce full computerization, including e-democracy elements in the relationship citizen – administration in the Member States and the Union. It is necessary to continuous maturation of public administration and citizens to implement the concepts of good administration and human rights at the same time.

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Human right to good administration

Abstract
The right to good administration is guaranteed in Article 41 of the Charter of Fundamental Rights of the European Union. Before being proclaimed as a fundamental right, good administration had been recognised by the European Courts as a general principle of law. The right to good administration was established as a response to the needs of European society.

Since the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights has the legal value. As a result, everyone is now legally entitled to good administration of his or her affairs. This paper discusses the meaning of the Article 41 of Charter, the scope of the right to good administration, the status of this right as a subjective, fundamental right, rules which are included in the The European Code of Good Administrative Behaviour, and finally – the right to good administration in a multi-level legal system.

Keywords:
Administration, human rights, Citizens rights, Fundamental Rights on Member States

1. Introduction

The main human rights recognised at Community law are catalogued in a Charter of Fundamental Rights of the European Union (2000 O.J. (C 364) 1, Dec. 7, 2000), which was proclaimed in 2000. The Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. The right to good administration is guaranteed in Article 41 of the Charter. Being proclaimed as a fundamental right is special in this respect, 'perhaps even revolutionary' – the

words coming from Jill Wakefield' monograph *The right to good administration* (Kluwer Law International, 2007, p. 3). It was the first time that any legal system has proclaimed right to good administration. That's mean that every person has the right (even a fundamental right) to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. What is more every person has the right to have the Community make good any damage caused by its institutions in the performance of their duties. Taking into account the legal nature of the right to good administration, we can include this right as so-called "third-generation human rights".

2. Meaning of article 41 of the Charter

Article 41 of the Charter of Fundamental Rights of the European Union is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law, which enshrined inter alia good administration as a general principle of law (*Explanations relating to the Charter of Fundamenta Rights,* source: FRA European Union Agency for Fundamental Rights, http://fra.europa.eu/en/charterpedia/article/41-right-good-administration). For example the wording for that right in the first two paragraphs of 41st Article results from the European Court od Justice case-law from 1987 to 1999[1]. First paragraph states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. The second paragraph clarifies what right to good administration includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and the obligation of the administration to give reasons for its decisions. The principle of good administration wich includes giving reasons for decisions was indicated by the Court of Justice for example in judgment of 15 October 1987 in Case 222/86, where we can read that: „the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request" (paragraph 15 of the grounds). The importance of respect for the rights guaranteed by the Community legal order in administrative procedures

[1] Some sholars indicate, that we can find origins of the appearance of the principle of good administration even in case-law from 1982 – more: H. P. Nehl, p. 327.

was highlighted in judgment of 21 November 1991 in Case C-269/90. In this case, Court of Justice pointed that: „those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision"[2].

Thus, the right to good administration was established as a response to the needs of European society. Before being proclaimed as a fundamental right, good administration had been recognised by the European Courts as a general principle of law[3].

It must be stated that second paragraph of 41st Article of Charter, as follows from its very wording, that provision is of general application. But the Court for exapmle in case C- 277/11 indicated that in its jurisdiction, the Court has always affirmed „the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person". What is more – in accordance with the Court's case-law, observance of that right is required even where the applicable legislation does not expressly provide for such a procedural requirement (case C-349/07). As a conclusion in case C 277/11 we can read, that the right of the Rwandan applicant for asylum to be heard „must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System".

The right to good administration includes also the right to have the Community make good any damage caused by its institutions in the performance of their duties, in accordance with the general principles common to the laws of the Member States (third paragraph of 41st Article). Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union, that in the second paragraph states that „In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

[2] More case-law, which enshrined good administration as a general principle of law, we can find there: J. Raitio, 2003, p. 148-156.

[3] We can not forget that many scholars highlighted, that meaning of this principle was uncertain and ambiguous. It was not treated automously in case law, but rather used in assosiation with other principles. See: J. Mendes, 2009, p. 9

The last paragraph of Article 41 of the Charter states that every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. The languages of the European Union are languages used by people within the member states of the European Union. The last paragraph of Article 41 of the Charter highlighted linguistic diversity of European Union.

3. The scope of the right to good administration

Since the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights has the legal value. As a result, everyone is now legally entitled to good administration of his or her affairs by the EU institutions.

The European Union Charter of Fundamental Rights contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Despite the fact that article 41 is in Title V of the Charter (Citizens rights), right to good administration is guaranteed to every person. This is a declaration of individuals' subjective right to good administration. Accordingly good administration is not limited to being a factor in the realization of other rights. As scholars said: it is not a gateway to other rights, but an end in itself (Kanska 2004, p. 301). So there is not only the citizens right but also the human right to good administration. Not only citizens but also third country nationals or stateless persons have the right to have their affairs handled in a certain way by the institutions and bodies of the Union.

Article 41 is applicable to the institutions and bodies of the European Union. By omitting to provide for its applicability to Member States when implementing Union law, Article 41 seems to define the scope of the right to good administration as being narrower than that generally laid down by the Charter. If this means, that bodies of the Member States of UE are not obliged to provide good and efective administration? In my opinion: no. As a general principle, the right to good administration requires certain administrative standards of the Member States in their implementation of EU law. The Member States must therefore respect the right to good administration, not because of Article 41, but in spite of its wording. Because the wording of Article 41 does not preclude the applicability of the general principle of good administration to Member States. The Charter provision does not displace it. What is more – in my opinion – right to good administration should be respected by national authorities not only when they are implementing Union law.

We can also find others opinions in publications about right to good administration. M. V. Kristjansdottir, the same as X. Groussot, L. Pech and G. T. Pétursson indicate

that national authorities must respect right to good administration when they act within the scope or field of Union law (M. V. Kristjansdottir 2013, 243; Groussot, Pech and Pétursson 2012, 135). This means, that on the other hand, when they act on the basis of national law, outside the scope or field of Union law, they are not under any such obligation (M. V. Kristjansdottir 2013, 243). It is because of the meaning of Article 51 of the EU Charter of Fundamental Rights, which defines the general scope of the Charter. The first paragraph of Article 51 of the Charter states that „The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties". But, it should be added that the right to good administration is one of the fundamental rights nad what is more – one of the principles of EU law. According to the Court's settled case-law, „the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law" (Joined Cases C-411/10 and C-493/10, paragraph 77 C-277/11, paragraph 93). Therefore, national authorities should respect right to good administration even when they act on the basis of national law. Otherwise, Member States rely on an interpretation of their national law, which would be in conflict with the fundamental right to good administration.

As it was said – Article 41 of the Charter refers to EU institutions and bodies. Despite this, the Court of Justice of the European Union has used it also to scrutinise actions taken by Member States. Furthermore – very often highest national courts in their decisions refer to the right to good administration, which was established by the EU. For example polish Constitutional Court (K 52/02 or P 37/09) stated that the elements of the right to good administration should be taken into consideration when law-making activity. In case K 52/02 polish Constitutional Court stated, that the aim of the stability of employment in the public administration, is to guarantee the right to good administration to the citizens. In case P 37/09 we can read, that the obligation of the administration to give reasons for its decisions is one of the fundamental principles of European administrative procedure. Polish Supreme Administrative Court also refer to the right to good administration (see polish Supreme Administrative Court judgment

of 25 July 2013 in Case I ONP 1/12). In Poland, violation of EU law by a national administrative court (including violation of the right to good administration) could become the basis for an action for annulment of judgment – even judgment of Supreme Administrative Court (see: Art. 285a, paragraph 3 of polish Law Act on proceedings before administrative courts, Dz. U. 2012, poz. 270). It should be "flagrant violation of norms of the European Union"[4]. As Supreme Administrative Court stated (case II GNP 2/13), violation of EU law by a national court can rely on the fact that the court did not apply directly effective provision of Union law, which should be applied, or will apply conflicting national law with EU law or apply national law in a manner that is incompatible with the expectations of EU law. What should be highlighted – even incompatibility with expectations of EU law during interpretation national law by polish courts, could become the basis for an action for annulment of judgment.

Different examples of highest national courts decisions, which relate to the right to good administration are: Romanian High Court of Cassation and Justice judgment in case 554/1/2012 (where it was found that the internal rules applied by the administrative authority cannot infringe the principle of handling an application within a reasonable time, as part of the right to a fair trial and the right to a good administration); judgment of the Supreme Court od the Slovak Republik in cases 5Szo/17/2011 and 5Szo/20/2011 (in that cases Supreme Court stated that „the administrative acts should be properly justified. This obligation is also covered by the Article 41 of the Charter establishing the right to good administrative practice. The decisions […] are not properly justified if they do not indicate reasoning / legal or factual / which rector and dean followed when issuing decisions". What is more, the Supreme Court is highlighting that the applicant reasonably refers to the provisions of Article 41 of the Charter of fundamental rights of the European Union); Spanish Supreme Court judgment, Third Chamber in case 4968/2013 (Supreme Court indicated that UE Charter proclaims in the article 41.2, the right of every person to be heard, so that right is not only required in their domestic system but also in the system of European Union Law. And – what is more – „this requirement is at

[4] Flagrant violation, which means: obvious violation, undisputed, remaining in a clear and obvious contradiction with the content provision, in fact, which are exceptional or unambiguous manner, having elementary and certified nature, not requiring deeper legal analysis, as a result of a manifestly erroneous interpretation or faulty application of the law, as can be seen at first sight (see B. Dauter, LEX 2013).

the highest level, in the Charter, which, according to article 6.1 of the Treaty on European Union has the same legal value as the Treaties". As a conlusion, Spanish Supreme Court highlighted, that national administrative authority must also respect the requirements of European Union Law.

4. The European Code of Good Administrative Behaviour

An extension of Article 41 is The European Code of Good Administrative Behaviour which was proposed by the European Ombudsman in 1999 to the European institutions, bodies and agencies. The approval by the European Parliament in 2001 enhanced its political legitimacy, and the association with Article 41 of the EU Charter of Fundamental Rights pointed the way to the Code's possible constitutional relevance. As the Ombudsman highlighted: "the Code is intended to explain in more detail what the Charter's right to good administration should mean in practice" (J. Mendez, 2009, p. 1).

The Code sets out 22 principles, rights and rules. Some of them has a procedural nature, some are as important as we can say that they are general principles of European administrative law, the others correspond to the rights listed in Article 41 of Charter, and finally – some of them are rather the *savoir vivre* rules (as for example courtesy).

Firstly, the Code includes a codification of general principles of European administrative law. From articles 4 to 7 we can find as principles as: 1) **lawfulness** (what means that the official shall act according to law and apply the rules and procedures laid down in EU legislation); 2) **absence of discrimination** (The Code lists the features that can not be a basis of discrimination: nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation); 3) **proportionality** (measures taken should be proportional to the aim pursued and the official shall respect the fair balance between the interests of private persons and the general public interest); 4) **absence of abuse of power** (in particular, the official shall avoid using powers for purposes which have no basis in the law or which are not motivated by any public interest).

Secondly, Codes restites fundamental rights which are enshrined in the Charter: 5) **data protection** (article 21 of Code, which in first paragraph stated that: „The official who deals with personal data concerning a citizen shall respect the privacy and the integrity of the individual in accordance with the provisions

of Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data") and 6) **right to complain to the European Ombudsman** (article 26 of Code; in accordance with Article 228 of the Treaty on the Functioning of the European Union and the Statute of the European Ombudsman).

The next principles enshrined in the Code correspond to the rights listed in Article 41 of Charter: 7) **impartiality and independence** (Article 8 of Code, this principle means, that the official shall abstain from any arbitrary action adversely affecting members of the public, and the conduct of the official shall never be guided by personal, family, or national interest or by political pressure. The European Code of Good Administrative Behaviour stated that „the official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest"); 8) **objectivity** (the official shall take into consideration the relevant factors and give each of them its proper weight in the decision – Article 9 of the Code); 9) **reasonable time-limit for taking decisions** (Article 17 of the Code, reasonable time-limit means „without delay, and in any case no later than two months from the date of receipt", except the situation, when a request or a complaint to the institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit. Then the official should inform the author and a definitive decision should be communicated to the author in the shortest possible time); 10) **right to be heard and to make statements** (which should be respected at every stage in the decision-making procedure, this right includes the right to submit written comments and, when needed, to present oral observations before the decision is taken, Article 16 of the Code); 11) **duty to state the grounds of decisions** (Article 18 in first paragraph stated that „Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision". Every decision should be based on clear grounds (second paragraph). What is more: „if it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore sent, the official shall subsequently provide the citizen who expressly requests it with an individual reasoning" – third paragraph of Article 18); 12) **reply to letters in the language of the citizen** (Article 13 of the Code – every citizen of the Union, any member of the public, the same like every legal persons such as associations (NGOs)

and companies, who writes to the institution in one of the Treaty languages, should receive an answer in the same language). This six principles (from impartiality and independence to reply to letters in the language of the citizen) are specific extension of Article 41 of the Charter.

Particularly noteworthy is the next principle set out in the Code: 13) **notification of the decision** (Article 20). As J. Mendes said, this principle "correspond roughly to long-standing primary rules of European law" (J. Mendes, 2009, p 7). In the Code it is drafted in more detail "that places a stronger emphasis on procedural protection" (Ibidem). The code states that it should be ensured that „persons whose rights or interests are affected by a decision are informed of that decision in writing, as soon as it is taken" (First paragraph of Article 20). In addition, there is a rule that "the official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed", what is a specific rule, unknown for example in Polish administrative law.

The European Code of Good Administrative Behaviour includes also some rules of administrative practice. In Article 10 we can find an obligation of officials: 14) **legitimate expectations, consistency, and advice.** This rule means that the official shall be consistent in his or her own administrative behaviour, they should follow the institution's normal administrative practices, unless there are legitimate grounds for departing from those practices in an individual case (if so – they shall be recorded in writing). Second paragraph of Article 10 states that: „The official shall respect the legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past". What is more – official should helpfull and where necessary, advise the public on how a matter which comes within his or her remit is to be pursued. The next rule of administrative behaviour, which we can find in the Code is 15) **acknowledgement of receipt and indication of the competent official** (Article 14). Officials have a period of two weeks to deliver an acknowledgement of recept or to sent a substantive reply. These writings shall indicate the name, the telephone number and the service to which the official who is dealing with the matter belongs. Sometimes there is no obligation to respond – especially in cases where letters or complaints are abusive (because of their excessive number or their repetitive or pointless character). Officials have also an 16) **obligation to transfer to the competent service of the institution** (Article 15 of the Code). If a letter is addressed to Unit which has no competence to deal with it, its services shall ensure that the file is transferred

without delay to the competent service of the institution. Additionally – the service should inform the author of this transfer and indicate the name and the telephone number of the official to whom the file has been passed. Article 15 also states that the official shall „alert to any errors or omissions in documents and provide an opportunity to rectify them". The next, very important rule of administrative practice is: 17) **indication of appeal possibilities** (Article 19). It shall in particular indicate: „the nature of the remedies, the bodies before which they can be exercised, and the time-limits for exercising them". The decisions of the EU institution, body, office, or agency shall in particular refer to the possibility of judicial proceedings and – what is more – complaints to the Ombudsman. In Article 22, the Code states what should be done with 18) **requests for information.** The official should, „when he or she has responsibility for the matter concerned, provide members of the public with the information that they request" – it is a general principle. What is more – when appropriate, the official shall give advices in a clear and understandable way. Thus, EU officials need to have high communication skills and the ability to translate incomprehensible bureaucratic language expressions. Article 22 in Section 3 explains what an official should do when there is no posibility to disclose the information requested because of its confidential nature. He or she shall indicate to the person concerned the reasons why an official cannot communicate the information.Where appropriate, the official shall, „direct the person seeking information to the service of the institution responsible for providing information to the public" (paragraph 5 od Article 22). The next rule of administrative practice is: 19) dealing with **requests for public access to documents** (Article 23). „The official shall deal with requests for access to documents in accordance with the rules adopted by the institution and in accordance with the general principles and limits laid down in Regulation (EC) 1049/2001" – as firt paragraph of Article 23 states. The last of rulet of administrative practice is: 20) **keeping of adequate records** of the institution's incoming and outgoing mail, of the documents they receive, and of the measures they take (Article 24 of the Code).

The last type of principles, which are listed in the Code, are rules which we can named the *savoir vivre* and ethic rules. In Article 11 there is a principle called 21) **fairness**, what means that the official shall act impartially, fairly, and reasonably. In Article 12 we can find principle which is titled: 22) **courtesy.** This article inter alia states that: „The official shall be service-minded, correct, courteous, and accessible in relations with the public". The code also states, that the official shall try

to be as helpful as possible and reply to questions which are asked as completely and accurately as possibile. The official should be able to apologize for an error which negatively affects the rights or interests of a member of the public. The official shall also „endeavour to correct the negative effects resulting from his or her error in the most expedient way" (third paragraph of Article 12). Courtesy should result from the sense of servitudes role of the civil servant and their personal culture. Placing this principle in the Code confirms how high should be the standard of UE administration.

The European Code of Good Administrative Behaviour is directly applicable only to the institutions and civil servants of the European Union. Nonetheless, The Code has also encouraged efforts to improve the quality of administration throughout Europe and beyond. As Ombudsman indicated –„From Wallonia to Greece, and from the Former Yugoslav Republic of Macedonia to Djibouti, codes of good administration have drawn inspiration from the European Code, the most recent example being the Code of Good Administration adopted by the Serbian Ombudsman in June 2010" (European Ombudsman, 2013, p. 3).

The Code is not legally binding. These are only recommendations of the EU Ombudsman. But the Code should be understood as a sort of explanation of what is meant by the right to good administration. Member States should endeavor to provide their citizens and residents such a standard of administration, which is established in the Code.

5. The right to good administration in a multi-level legal system

EU is a multi-level legal system. It is not easy to maneuver between diverse sources of EU law, starting with constitutional pluralism and ending up with non-binding measures of soft law. The right to good administration was expressed in a Charter of Fundamental Rights of the EU, which is a primary law, and it was extended in the European Code of Good Administrative Behaviour, which is non-binding soft-law. What is more – public administration bodies in the Member States currently exists in the "multi-multi-level" of legal system. The national law must coexist with the European system, and also with international law (more: E. Łętowska, 2005).

In my opinion, right to good administration should be respected by national authorities not only when they are implementing Union law but also when they act on the basis of national law (see: third part of this paper). And here may appear

the difficulty – which of the regulations should be used in a particular case? The answer is: both. In polish legal system the right to good administration is not directly expressed. But at the polish Code of Administrative Procedure (14 June 1960, Dz. U. 2013, poz. 267) we can find the same rights as have been expressed in Article 41 of Charter, and we can find most of principles and rules expressed in European Code of Good Administrative Behaviour. Polish public authorities should use polish administrative procedure in the light of the EU right of good administration. European standards should determine the way in which Member States go.

6. Summary

Right to good administration is guaranteed to every person, not only to citizens. That means, that we can say about human right to good administration (third-generation human rights).

This right is a quite young human right. Article 41 draws up the boundaries of good administration as a public subjective right. Moreover, the Code clarifies the content of good administration to the extent that it highlights the legal and non-legal ramifications of the concept, thereby pointing out its specific trait: the combination and the continuities between its legal and non-legal dimensions. In particular, it recalls that the administration should endeavour to further certain aspects of good administrative practice that stand beyond the strict legal realm.

EU Ombudsman constantly takes steps to raise the quality of public administration. For example in June 2012, the Ombudsman published a high-level distillation of the ethical standards to which the EU public administration adheres. These took five public service principles: 1. Commitment to the European Union and its citizens, 2. Integrity, 3. Objectivity, 4. Respect for others, 5. Transparency (see: European Ombudsman, 2013, p. 8-10). The principles help to raise the standards of EU administration, and make it less likely that discretionary power will be used arbitrarily. The right to good administration takes on a new – ethical dimension. This young human right is developing before our eyes. So it is worth to spend a little more attention to the right of good administration.

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Family as a party to administrative proceedings

Abstract
The legislator has granted parties to administrative proceedings with many rights. However, how can they be executed in a situation where pursuant to the Social Welfare Act some benefits are provided to a 'family'? Within the meaning defined by the legislator, a 'family' means relatives or non-relatives staying in a *de facto* relationship, cohabiting and maintaining a common household. Therefore, a party to a proceeding may be comprised of several natural persons.

The paper aims to find an answer to the question whether it is deliberate on the part of the legislator to use a collective notion of a 'family' for an entity whose legal interest is to have its issue of obtaining social assistance resolved. And, whether the legislator has taken into account procedural consequences of such a definition of a party to an administrative proceeding. How shall such a proceeding be pursued and statutory obligations specified in the Code of Administrative Procedure met towards a party being a group of persons?

Keywords:
family, party to an administrative proceeding, parties' rights in proceedings, social assistance, administrative decision.

An individual as a member of a given society and a citizen of a given country, is subject to responsibilities laid down by locally binding provisions, and may satisfy his/her needs in the scope and forms defined by the rulemaking process controlled by the legislative authorities of the country whose citizenship he/she holds or where he/she resides. Polish people resident in Poland, in accordance with the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws no. 78, item 483, as amended), are subject to the acts passed by Polish parliament, to the regulations

issued by executive authorities specified in the acts, and to local law adopted by local government authorities and self-government bodies.

Many issues relating to individuals are decided on by public administration authorities in a sovereign and unilateral manner by way of administrative decisions. This individual administrative act is a final determination of an administrative proceeding which always concerns a specific issue of a specific entity. As it ensues from Art. 1 item 1 of the Code of Administrative Procedure of June 14, 1960 (consolidated text: Journal of Laws of 2013, item 267, as amended), an administrative proceeding is a sequence of procedural activities undertaken by a public administration body in individual cases that are within jurisdiction of this body and that are resolved by way of administrative decision. Both the decision and the proceeding are always related to an individual entity – a party or parties to the proceeding.

Pursuant to Art. 28 of the Code of Administrative Procedure, a party is "any person whose legal interests or responsibilities are the object of the proceedings or who requires the intervention of a body in respect of their legal interests or responsibilities". Apart from the legal definition of a party, the Code lays down (Art. 29) that "both natural persons and corporate bodies can be parties and where national and local government organizational units and social organizations are involved, they can also be entities that do not have legal personality".

In spite of the regulations quoted above and included in the underlying legal act – the Code of Administrative Procedure of 1960 – the notion of a party to an administrative proceeding is one of the most obscure and controversial issues related to the said procedure. Procedural provisions are not sufficient for its analysis. The Supreme Administrative Court in its sentence of February 22, 1984 (I SA 1748/83) emphasized that a notion of a party used in Art. 28 ff. of the Code of Administrative Procedure, may be derived only from substantive administrative law, i.e. from a specific legal standard which may form a basis for defining the citizens' interests or responsibilities. The Court has also explained that "having a legal interest in administrative proceeding" is equivalent to specifying a generally binding provision under which it is possible to effectively demand an authority to act with a view to meet one's need, or to demand an authority to cease or limit its action if the latter is contrary to one's needs. Hence, the parties to a proceeding conducted under the Building Law Act of July 7, 1994 (consolidated text: Journal of Laws of 2013, item 1409, as amended) and concerning a building permit shall be different from those featured in a proceeding related to an issue decided by way of the so-called environmental approval, conducted under the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments of October 3, 2008 (consolidated text: Journal of Laws of 2013, item 1235, as amended), or in a proceeding on reimbursement of healthcare services, provided for in the Act on Healthcare Services Financed from Public Funds of August 27, 2004 (consolidated text: Journal of Laws of 2015, item 581, as amended). In the same sentence, the Supreme Administrative Court has also stipulated that legal interest shall be distinguished from actual interest, i.e. a situation wherein a citizen is directly interested in having an administrative case resolved, but he/she is not able to support it with generally binding provisions which are a basis for effective demanding an administrative body to undertake proper actions. In the latter case, a citizen shall not have a status of a party to administrative proceedings.

The function of administrative proceedings is i.a. execution of substantive law. It is just procedural provisions where many rights have been granted to parties to administrative proceedings. First of all, in Art. 10 of the Code of Administrative Procedure a principle is expressed of the parties' active involvement in proceedings. This principle results in specific obligations which must be met by public administration bodies. They include: notification of all the parties about commencement of the proceeding *ex officio* or at the request of one of the parties (Art. 61 § 4); serving of documents – including decisions – on the parties, their representatives or attorneys (Art. 39 and 40, Art. 109); allowing the parties to view the files and to make notes or copies thereof (Art. 73); an at least 7-day-notice of the location and date for the conduct of the evidentiary process involving witnesses, experts and examinations (Art. 79); a notice of the date of the hearing (Art. 92); information on an appeal that has been brought by one of the parties (Art. 131). These obligations are mandatory, not discretional for an authority (cf. sentence of the Supreme Administrative Court of February 13, 1986, II SA 2015/85, ONSA 1986, no. 1, entry 13). These provisions apply to all types of administrative proceedings, including ordinary and extraordinary ones (cf. sentence of the Supreme Administrative Court of January 6, 1998, III SA 1415/96, LEX no. 44765). These obligations may not be waived due to multiplicity of parties or high costs of notifications (Korzeniowska-Polak, 2007, p. 74).

Art. 10 paragraph 2 of the Code of Administrative Procedure provides for and lists the cases where derogation is possible from the principle of the party's active involvement in administrative proceedings. Public administration bodies may only derogate from the discussed principle in cases where resolution of the case requires

urgent attention because of threats to human life or health or the threat of irretrievable material damage. Admissibility of an administrative proceeding being conducted without active participation of a party thereto is strictly defined, as an exception from the general principle (Adamiak, 2008, p. 90). A failure to get a party involved in a proceeding results in a breach of law and in an obligation to recommence the proceedings as a result of a party's failure to participate in proceedings through no fault of its own (Art. 145 paragraph 1 item 4 of the Code of Administrative Procedure) (see i.a. sentence of the Supreme Administrative Court of November 18, 1999, II SA 1210/99, Lex no. 46806; sentence of the Supreme Administrative Court of October 6, 2000, V SA 316/00, Lex no. 50116; sentence of the Province Administrative Court in Gdańsk of October 19, 2005, II SA/Gd II SA/Gd 359/02, Lex no. 235071). In judicial practice, attention is drawn to the necessity to conduct this extraordinary proceeding both if a party does not participate in the proceedings at all, and if the party does not participate in appeal proceedings or in any activities crucial for its final determination (see e.g. sentence of the Supreme Administrative Court of July 1, 1999, IV SA 595/99, Lex no. 47888; sentence of the Province Administrative Court in Warsaw of September 30, 2004, I SA 149/03, Lex no. 156896; sentence of the Province Administrative Court in Warsaw of November 3, 2006, III SA/Wa 2157/06, Lex no. 298185).

There are, however, some cases where the legislator, while creating substantive law solutions, introduces some notions or institutions which preclude public administration bodies from or make it difficult for them to meet their responsibilities defined by the procedural regulation. One of these cases shall be discussed in detail in this paper.

In 2013 in Poland, 1.3 million people (13% of the employed) earned a minimum wage. It comes as no wonder, then, that as many as 17.3% percent of Polish citizens are at risk of poverty. Among children under 17, the rate is 23.2% (while in the Czech Republic it is 8.6%, and in Greece 23.1%) (data for 2013; Report of the Central Statistical Office of Poland "Incomes and living conditions of the population in Poland"). The risk of poverty is highest among the residents of the following provinces: Świętokrzyskie, Lubelskie, Warmińsko-Mazurskie and Podlaskie. The situation is most difficult for large families, families where at least one child is disabled, and for single mothers or fathers. In case of couples with 3 children, every fifth person lives in abject poverty, and among couples with 4 or more children – every second (Falkowska, Telusiewicz-Pacak, 2013). Many of those in need apply for assistance to various bodies and institutions. Some of the benefits are granted by

public administration bodies in a manner defined in the Act of March 12, 2004 on Social Assistance (consolidated text: Journal of Laws of 2015, item 163).

Pursuant to its provisions, some benefits are provided to a 'family'. Art. 8 section 1 item 3 of the Act on Social Assistance stipulates that, subject to Art. 40, 41, 53a, 78 and 91, families whose income does not exceed the total of the income criterion per person in the family shall be eligible for cash benefits. This right is further specified in Art. 38 section 1 item 2, where the right to periodical benefits is defined, in Art. 40 (the right to purpose benefits), and in Art. 41 (the right to special purpose benefits, and the right to periodical or purpose benefits or in-kind assistance providing that a part of or entire benefit or in-kind assistance expenditure is repaid).

In a glossary at the beginning of the Act (Art. 6 item 14), we can find a definition of a family which is used in subsequent provisions. A 'family' means relatives or non-relatives staying in a *de facto* relationship, cohabiting and maintaining a common household. In its sentence of August 29, 2008, I OSK 1429/07, the Supreme Administrative Court emphasized that sheer consanguinity is not enough for a group of co-residents to be called a family. The Court found that what is vital here is creating some sort of community. "According to this interpretation, a domestic partnership is also a family" (sentence of the Supreme Administrative Court of August 29, 2008, I OSK 1429/07, LEX no. 490168). This sentence may be also a basis for deliberation who is a family for the so-called 'Euro-orphans'[1]. Although their parents or one of them go abroad to earn a living, the problem of these children and their guardians is inadequate funds and a necessity to apply for social assistance benefits. Under these circumstances it seems justified to ask whether a family within the meaning defined in the Act shall be understood as children and their parents who stay abroad, or children and e.g. their distant relative who is actually taking care of them? Following the standpoint of the court that a 'family' means relatives or non-relatives staying in a *de facto* relationship, cohabiting and maintaining a common

[1] In 2014, every 5th pupil of Polish schools experienced separation from at least one of his/her parents, who went abroad to work for at least several weeks (20%; in 2008 it was 27%) (survey "Child, family, and school vs. parental migration: 10 years of EU membership" conducted upon order of Polish Ombudsman for Children by the University of Social Sciences PEDAGOGIUM in December 2014). As many as 17.2% children experienced separation from both parents, in 2/3 cases the parents left alternately. 3.2% children were separated from their parents for over 1 year. Most Euro-orphans live in the following provinces: Warmińsko-Mazurskie, Podkarpackie and Śląskie. Polish Ombudsman for Children started works on proposals of legal regulation of the situation of children whose parents went abroad.

household, I would share the opinion that a family is formed by 'Euro-orphans' and their actual guardians in Poland.

The paper aims to find an answer to the question whether it is deliberate on the part of the legislator to use a collective notion of a 'family' for an entity whose legal interest is to have its issue of obtaining social assistance resolved. And, whether the legislator has taken into account procedural consequences of such a definition of a party to an administrative proceeding. How shall such a proceeding be pursued and statutory obligations specified in the Code of Administrative Procedure met towards a party being a group of persons?

Answering the first question, it shall be noted that distinguishing between a natural person and a social group comprising several natural persons maintaining a common household – as two types of entities using social assistance – was deliberate. From the perspective of an authority granting cash benefits it is more reasonable to grant one aggregated benefit for several persons in a common household, having a common income (incomes) and expenses, than to grant several higher benefits. It is also easier to determine the as-is state, as there is no need for various persons to report the same data over and over again, e.g. how much they pay for electric energy in their household. However, conducting the proceeding whose party is a family in a way ensuring observance of the provisions of the Code of Administrative Procedure, which is necessary in order to secure lawfulness of the decision resolving the case (Art. 145 paragraph 1 item 1 of the Act of August 30, 2004 – Law on Proceedings before Administrative Courts, consolidated text: Journal of Laws of 2012, item 270, as amended), can hardly be assessed as easier.

Taking into account the wording of the provisions of substantive law, i.e. analyzing Art. 6 item 14 of the Act on Social Assistance along with Art. 29 of the Code of Administrative Procedure, it is worth asking who is a party to an administrative proceeding on granting a family with e.g. a periodical benefit? Is a party to be understood as all the persons making up the family, i.e. relatives or non-relatives staying in a *de facto* relationship, cohabiting and maintaining a common household, or just as a person who filed an application that initiated the procedure? The answer shall form a basis for determination who will be granted active participation in the proceeding, on whom letters will be served, who is entitled to refer to relevant documentary evidence, who may view the files, and – what is most important – who shall be indicated as a party in the administrative decision. Indeed, the decision may not indicate a "Doe family" as a party to the proceeding. All the documents exchanged in the administrative procedure shall be sent to particular addressees, e.g. individual natural persons. Even

serving a letter on both spouses in a common envelope is contrary to Art. 40 of the Code of Administrative Procedure (sentence of the Supreme Administrative Court of May 29, 2003, II SA/Gd 1735/00, Lex no. 203427). Neither is it correct to fill in only the names of spouses (domestic partners) if the family includes also some minors and elderly relatives by consanguinity or affinity who are cohabiting and maintaining a common household. If the applicant were the only addressee, it would mean that only he/she is a party and the benefit is granted only to him/her. Therefore, it seems reasonable to assume that all family members whose common income is taken into account are parties (or a party) to the proceedings related to granting them – as a community – with a social welfare benefit.

This reasoning is confirmed by analysis of Art. 1 section 1 item 2 and 3 of the Act on Social Assistance. In Art. 8 section 1 thereof, the income criterion has been differentiated into three types of beneficiaries. The highest criterion is that of a person maintaining a one-person household[2]. The second income criterion has been defined for a person living in a family. It is taken into account when a beneficiary is a natural person staying in a family community. The third criterion is used in those cases where a beneficiary is a family. The income threshold has not been defined as a fixed amount; it is dependent on the number of family members. The wording of the analyzed regulation proves that in items 2 and 3, benefits granted to one person living in a family have been clearly distinguished from those granted to a family as a whole – to all family members instead of just one. Within the meaning of the Act, in case of a proceeding aimed at granting social assistance to a person staying in a family, a party to the proceeding is one individual – i.e. the applicant, while if a proceeding concerns a decision on a benefit for a family – a party is a family. In the latter case, within the procedural meaning pursuant to the provisions of the Code of Administrative Procedure (as no relevant regulations can be found in the Act on Social Assistance) – all family members having the same procedural rights shall be deemed to be parties to the proceeding.

This standpoint is also confirmed in jurisprudence. In its sentence of March 5, 2003, SA/Ka 878/99, the Supreme Administrative Court found that in a proceeding on granting social assistance to a family, the rights of a party shall be held by each family member (*Prawo Pracy* 2003, p. 39). In legal literature it is also emphasized that a party to a social assistance proceeding is an entity that is directly interested in obtaining a benefit – it may be an individual or a family (Sierpowska 2007, p. 139).

[2] It is due to higher cost of living in case of persons maintaining a one-person household in comparison with family households.

It is also indicated that under the Act on Social Assistance, a family possesses a limited and special capacity, as it is the entity that rights and obligations are assigned to. The family has no legal capacity, but is capable of performing actions in social assistance proceedings (Jończyk 2006, p. 403).

If so, acting in line with the provisions of the Code of Administrative Procedure referred to above, a notification of a proceeding being initiated upon the applicant's motion shall be sent to all family members. This is the only way for an administrative body to avoid a party's pleading a failure to be provided with an opportunity to get involved in the proceeding (see sentence of the Supreme Administrative Court of June 19, 1998, I SA/Lu 652/97, Lex no. 34721). Similarly, all family members should receive a notification of the proceeding on repayment of a benefit unduly received by a family being initiated *ex officio*[3]. All the family members are entitled to refer to relevant documentary evidence and to seek remedies, including an appeal against the decision. All family members should have all the letters served which are created during the proceeding. The same applies to the decision issued by the authority of the first instance, as it is only proper serving of the decision and enabling an addressee to learn its essence ends the decision-making process and settles the case within the meaning of Art. 104 of the Code of Administrative Procedure. A decision which has not been served on a party has no legal effects and is not binding upon the parties or the issuing authority (Taras, OSP 2003/11/139; see also sentence of the Supreme Administrative Court of April 9, 2008, II GSK 22/08, Lex no. 468741; sentence of the Province Administrative Court in Gliwice of July 30, 2009, IV SA/GL 53/09, Lex no. 514455). An appeal is not admissible if the decision has not gained a status of a valid legal transaction, so for example in a case where it had been issued but not served on a party. In such case, pursuant to Art. 134 of the Code of Administrative Procedure, the appeal body shall make a ruling on the inadmissibility of an appeal (sentence of the Province Administrative Court in Warsaw of February 6, 2008, II SA/Wa 1839/07, Lex no. 501025). If the appeal body takes such a decision, it shall also be served on all family members. All family members are also allowed to view the files of the case, to make notes or copies thereof, and to require the body to certify these copies or to issue certified copies of the files. All family members shall sign a social enquiry report sheet.

[3] Pursuant to Art. 6 item 16 of the Act on Social Assistance, a benefit unduly received shall be understood as a cash benefit obtained on the basis of false information or of failure to notify of a change of personal situation or financial standing.

Such a strict adherence to formalities seems to be contrary to the principle (expressed in Art. 12 of the Code of Administrative Procedure) of public administration bodies dealing with cases quickly and using the simplest available methods to resolve them. This principle is of particular significance in social assistance cases, which should be settled within shortest possible notice, so that individuals in need of support are able to obtain it quickly, or unduly received benefits are immediately repaid and support is provided to those who need it most. The proceedings may not be too expensive either, so that procedural costs (e.g. postage fees) are not much higher than the amount of the benefit granted.

These are only some of procedural problems arising out of creating a notion of a family as a party to administrative proceedings exclusively for the purposes of the Act on Social Assistance[4]. Another problem is an issue of enforceability of a decision granting a social welfare benefit to a family. Who the benefit should be paid out to? Are only applicants, or every member of the family who is of lawful age, entitled to receive a payment? What about the obligation to provide information about every change of the family's situation or income – is it binding upon every member of the family, or the one who received the benefit, or the one who signed the social enquiry report sheet (including relevant instruction about this statutory obligation)? As a consequence, by whom – by which family member – shall this obligation not be met for a legitimate assumption to be possible that the benefit was unduly received? Who is obliged to repay a benefit that has been unduly received? It is hardly reasonable to say that if a benefit is granted to all family members, then all of them – including children – are obliged to repay it. And what if a benefit that had been unduly received is not willingly repaid, then who should a writ of execution should be issued for? The answer to this question is extremely important. Pursuant to Art. 27 paragraph 1 item 2 of the Act of June 17, 1966 on the Enforcement Proceedings in Administration (consolidated text: Journal of Laws of 2014, item 1619, as amended), a mandatory element of a writ of execution is "full name or business name and address of the obligor". An enforcement authority initiates administrative enforcement upon the motion of the creditor, on the basis of a writ of execution issued by the same and prepared in line with a defined model (Art. 26 paragraph 1 of the Act on the Enforcement Proceedings in Administration).

[4] Former Act on Social Assistance of November 29, 1990, consolidated text: Journal of Laws of 1998 no. 64, item 414, provided for a possibility to grant benefits only to strictly indicated categories of natural persons.

Administrative enforcement is initiated the moment a copy of the writ of execution is served on the obligor, or a notification of attachment of liability or another proprietary interest is served on the debtor of the attached liability, if the latter is served before the copy of the writ of execution is served on the obligor (Art. 26 paragraph 5 of the Act on the Enforcement Proceedings in Administration). The legislator has also clearly specified the consequences of incorrect indication of the obligor in the writ of execution. Pursuant to Art. 33 paragraph 1 item 4 of the Act on the Enforcement Proceedings in Administration, incorrect indication of the obligor enables a person against whom administrative enforcement is held to seek a remedy in the form of objection. If this defect is confirmed, incorrect indication of the obligor in the writ of execution is a basis for discontinuation of the proceeding (Art. 34 paragraph 4 in connection with Art. 59 paragraph 1 item 4 of the Act on the Enforcement Proceedings in Administration).

It shall also be noted that a social assistance authority may find it difficult to meet its statutory procedural obligations towards all family members due to other reasons. For example, one can analyze the obligation to serve notification of initiation of proceedings, as laid down in Art. 61 paragraph of the Code of Administrative Procedure. As it results from legal definition of a notion of a 'family', included in Art. 6 item 14 of the Act on Social Assistance, formal relationships between particular persons play no role at all; what is relevant is cohabitation and maintaining a common household. When the procedure is initiated, the social assistance authority may not be aware of the fact who is cohabiting and maintaining a common household with an applicant; it may be determined only later. In order to find out what is the personal and family situation, income and financial standing of persons and families, it is necessary to prepare a social enquiry report (sentence of the Province Administrative Court in Warsaw of April 18, 2006, I SA/Wa 495/06, Lex no. 209731). Therefore, when the proceeding is initiated, it is impossible to determine who may be viewed as a member of the given family, enjoying a right resulting from a status of a party to an administrative proceeding, and who should be an addressee of a notification of initiation of proceedings. Considering the arguments referred to above, it shall be concluded that application of Art. 61 paragraph 4 of the Code of Administrative Procedure in cases related to granting social assistance to families is very difficult or even hardly possible.

Still other problems arise in case of families of 'Euro-orphans'. The Supreme Administrative Court emphasized that omission by the administrative body of a party's statutory representative is equivalent to omission of the party itself, and

forms a basis for recommencement of the proceeding under Art. 145 paragraph 1 item 4 of the Code of Administrative Procedure. "It shall be applied to serving documents, taking into account that performing a procedural activity in the absence of a statutory representative, if there is no evidence that a notification was served upon the same, is a breach of Art. 40 paragraph 1 of the Code of Administrative Procedure" (sentence of the Supreme Administrative Court of November 19, 2001, I SA 450/01, Lex no. 82000). The Province Administrative Court in Warsaw in its sentence of May 16, 2006, V SA/Wa 2521/05, Lex no. 257185, emphasized that "in a situation where a minor has no statutory representative (parent) and has not been placed in a foster family yet, a decision may not be served directly on him/her". This fact is of particular significance insofar that until the decision is communicated to a party, it has no legal effects. "Announcement of a decision creates a new procedural situation for a party. It is only from that moment on that the public administration body is bound by the decision" (sentence of the Supreme Administrative Court of April 9, 2008, II GSK 22/08, LEX no. 468741). It means that as a result of no possibility to correctly serve the administrative decision on a party in line with procedural regulations, and thus to turn it into a valid legal transaction, the families of Euro-orphans are not going to receive the benefits they were awarded.

If the party to the proceeding is a family, the responsibilities of public administration bodies towards parties to proceedings, as specified in the Code of Administrative Procedure, are met by social assistance institutions only to a minimum extent. Most members of the family are in fact deprived of the opportunity to obtain information on the activities undertaken in the proceedings which are pending, and, as a result, they are unable to participate in them. These procedural problems occurring in proceedings on social welfare benefits granted to families may be summarized with an apparently legitimate conclusion that the legislator had not foreseen that a new procedural entity was not going to simplify the proceedings, but *de facto* would result in procedural provisions being frequently breached by public administration bodies – social assistance authorities. This results in defective decisions gaining a status of valid legal transactions, or – as a result of an incapability to conduct the proceeding – in failures to grant benefits to persons meeting statutory criteria, or to enforce repayment of benefits that were unduly received. Both situations are unacceptable from the perspective of protection of party's rights and the "state of law" principle. State is expected to create 'good' law. It may not compromise a possibility to execute the party's right to actively participate in proceedings. Such a situation (in its extreme form)

may be classified as normative tort (sentence of the Supreme Court of June 30, 2004, BSN 2004, no. 11, entry 12). Pursuant to the jurisprudence of the Court of Justice of the European Union (Grzesiok, 2008, p. 156 ff. and jurisprudence of the CJEU and literature referred to therein), "the legislator's sovereignty is broad, but also limited, and the legislator (state) is responsible for the law it creates".

The demand for a state creating good law applies also to administrative procedure regulations. On the one hand, provisions of the Code of Administrative Procedure should be enforceable, on the other – they should to a largest possible extent safeguard execution of the party's rights and protect its interests. In the described issue, the biggest difficulty consists in finding such a wording for a legal standard that meeting procedural requirements does not preclude examination and settlement of an administrative case within a reasonable deadline. Therefore, it seems necessary to make the following proposition *de lege ferenda*: if the legislator creates substantive law provisions that are contrary to procedural regulations, procedural issues should be specified in these substantive law provisions. In my opinion, it would be sufficient to state in one of the regulations included in the Act on Social Assistance that in case of proceedings where a family is a party, documents are served on 1 person (e.g. the applicant). A model for such a solution might be Art. 40 paragraph 2 sentence 2 of the Code of Administrative Procedure, which stipulates: "If several attorneys are appointed, then documents shall only be served on one of them. The party may indicate the attorney on whom the documents shall be served." It would be also necessary to create *lex specialis* with regard to Art. 107 paragraph 1 of the Code of Administrative Procedure, which would lay down a separate manner of identifying a family as a party. The fact that no such regulations are introduced shall be assessed as a tacit blessing for social assistance authorities that are breaching procedural provisions on a day-to-day basis.

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The right to food – Considerations in the context of multicentricity of the legal system

Abstract
Wanting to assess multicentricity as a certain phenomenon accompanying modern legislative processes, a category of human rights would appear to be a sufficient point of reference. However, determining the scope of these considerations and taking into account the futility of their addressing human rights *in genere*, the right to food in terms of international law has been adopted as a research perspective. Even just the fact that 900 million people suffer from hunger and malnutrition and that every year over 6 million children die of starvation and related causes (Ziegler, www.righttofood.org.) entitles one to undertake these issues and at the same time provides justification for narrowing down the analyses carried out within them.

Therefore, the main objective of this study adopts a description of the essence and content of the right to food, often undertaken in the category of collective rights. It will allow for giving an answer to whether it is reasonable *de lege lata* to speak of its normative character. In turn, a specific objective takes on presenting the right in question in the context of the aforementioned multicentricity, which forms a certain background to considerations and induces posing the question – to what extent does it weaken the normative nature of the right to food and to what extent does it strengthen it?

Keywords:
the right of food, international law, multicentricity

1. Multicentricity of the legal system – preliminary issues[1]

The essence of the concept of multicentricity of the legal system[2] boils down to a presumption that "modern legal systems are becoming less like a monocentric system (described by H. Kelsen and most frequently pictured as a pyramid at the top of which there is a state as the main decision-making centre), and increasingly like a conglomerate, where there are many autonomous and independent, but mutually interacting decision-making centres" (Kalisz, 2007, p. 36). Multicentricity understood in this way – as noted by E. Łętowska – results in the validity the on Polish territory of positive law made not only by the Polish parliament and applied not only by Polish courts (Łętowska, 2011, p. 4), but made also (and perhaps in the context of this study – primarily) by the international legislator.

Going further along the reasoning outlined by E. Łętowska, (although as noted – detaching her thought from the Polish context) it can be said that in every country – member of the international community, valid are – apart from the rules derived directly from the legislative power – also provisions that are a derivative of obligations incurred by the State under international law. Multicentricity can therefore be considered in the internal context[3], (referring it to the application in individual states of varied, given the origin, legal regulations), but also in the external context. The latter will be noticeable with the international law order[4], arising mainly as a result of legislative activities of states and international organizations. Thus – referring to the

[1] Preparing this study was possible thanks to a library query carried out in the libraries of the Vilnius University and Trinity College in Dublin in June this year. Translated by Agnieszka Kotula, Ewelina Cała-Wacinkiewicz.

[2] This issue is presented on the basis of Polish doctrine by E. Łętowska, Multicentryczność współczesnego systemu prawa i jej konsekwencje, „Państwo i Prawo" 2005, No. 4. See also the polemic with the views of the Author: W. Lang, Wokół „Multicentryczności systemu prawa", „Państwo i Prawo" 2005, No. 7; and also: E. Łętowska, „Multicentryczność" systemu prawa i wykładnia jej przyjazna, [in:] Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana, (eds. L. Ogiegło, W. Popiołek, M. Szpunar), Zakamycze – Kraków 2005; A. Kalisz, Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, p. 4.

[3] The discrimination between the internal and external aspect can be found in A. Kalisz, op. cit., p. 36.

[4] What is worth emphasizing, W. Lang believes that „international public law is a classic multicentric system of law". Nevertheless, according to the Author, it is „the relationships between national legal systems that creates, in the international legal order, a multicentric system based on a horizontal coordination of these systems". See: W. Lang, op. cit., p. 95.

above – this order can be considered as an effect (result) of interaction between various decision-making centres, taking into consideration even if the personal diversification of public international law.

This fact can be assessed in two ways. In the negative context, the multitude of legal regulations in the absence of a central legislator may result in the creation of conflicts between specific divisions of international law and content-related overlapping of legal regulations. This in turn may contribute to the formation of often conflicting forms of redress by international law actors, but also (which is particularly important) by individuals. In turn, in the positive context it is worth paying attention to the strengthening of their legal protection, which is especially important when the national law does not explicitly regulate certain rights, despite the fact that they result from both the universal and regional international law. Going further, one can also notice another situation where the state, despite its taking on international law obligations (as being party to international agreements), fails to comply with them for various reasons.

The described state of affairs can be referred to the protection of human rights that is to this division of international law which, in some sense, being the domain of domestic legal orders, was transposed to the international law level of regulation. This did not entail, naturally, depreciation of the role and importance of national law, especially as one can point to numerous reasons for this state of affairs. The most important of them was, however, a need to strengthen legal protection of individuals (which became apparent especially after World War II), and hence the need to grant them an additional opportunity to redress often "beyond" borders and outside the territories of individual states. As emphasized by W. Vandenhole and M. Gibney „much has changed and the exclusively territorial basis of international human rights law is now being challenged" (Vandenhole, Gibney, 2014, p. 1).

Beyond any doubt, therefore, wanting to assess multicentricity as a certain phenomenon accompanying modern legislative processes, a category of human rights would appear to be a sufficient point of reference. However, determining the scope of these considerations and taking into account the futility of their addressing human rights *in genere*, the right to food in terms of international law has been adopted as a research perspective. Even just the fact that 900 million people suffer from hunger and malnutrition and that every year over 6 million children die of starvation and related causes (Ziegler, www.righttofood.org.) entitles one to undertake these issues and at the same time provides justification for narrowing down the analyses carried out within them.

Therefore, the main objective of this study adopts a description of the essence and content of the right to food, often undertaken in the category of collective rights. It will allow for giving an answer to whether it is reasonable *de lege lata* to speak of its normative character. In turn, a specific objective takes on presenting the law in question in the context of the aforementioned multicentricity, which forms a certain background to considerations and induces posing the question – to what extent does it weaken the normative nature of the right to food and to what extent does it strengthen it?

2. The content of the right to food

Determining the content and scope of the right to food, and thus a precise definition of it is not – despite appearances – a matter of ease. Despite the widespread, or even intuitive, understanding of it in everyday life, in the sphere of *stricte* legal considerations some doubts may appear as to the scope of the term "right to food"[5] or its qualified form, i.e. "the right to adequate food", as well as individual designates of the name. This task is all the more difficult as the invoked right – albeit in a different context – not only is the subject of doctrine analysis but it is also is a category which (indirectly or directly) is used by the acts of international law and which was taken up in the course of work of international organizations, especially the United Nations and its specialized agencies.

Analysis of the fairly extensive literature devoted to the issues of the right to food indicates that the categories that make up its scope are freedom from hunger and malnutrition (Szkarłat, 2014, p. 66), or, using the terminology introduced by P. Van Esterik, the right to feed and the right to be fed (Van Esterik, 1999, pp. 228-229). What is particularly important, the distinction of the active and passive side of the right in question on the one hand proves its comprehensive nature, on the other expresses everyone's legal obligation to implement the right to feed (others) and

[5] The right to food was defined in one of the reports on the Special Rapporteur on the right to food, Mr. Jean Ziegler. He concluded that „the right to food is defined as the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear. See: The right to food. Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, 7 February 2001, E/CN.4/2001/53.

the right to demand the implementation of this right by being fed (by others). The latter – as stressed by M. Szkarłat in the context of P. Van Esterik's study – has the most passive character as it is carried out in crisis situations where intervention of humanitarian institutions is necessary, but also applies to prisoners of war and inmates and persons chronically ill (Szkarłat, 2014, p. 68).

The right to food apart from the fact that it is a relatively capacious conceptual category is also cited in various aspects and referred to issues concerning various topics. In an attempt to carry out certain ordering, one can single out the following groups thereof:

Firstly, the right to food is juxtaposed with other human rights, which is highlighted by M. Szkarłat who describes it as an example of their interdependence[6]. In this context it is considered very obvious to combine the right to food with such rights as the right to life (and so: Douglas, 2014, p. 180.), the right to health and the right to education (Osmani, 2000, pp. 272-298). For it is a question of fact that its implementation will somehow set (or even condition) the use of other rights, giving it a fundamental importance. Therefore, one may view as accurate seeing in the right to food a right relating to quality (standard) of life (and so e.g. Herwig, 2014, pp. 31-47). This is reflected in provisions of the Universal Declaration of Human Rights of 10 December 1948 (GA Res. 217A (III), U.N. Doc A/810 at 71 (1948), which in Art. 25 para. 1 clearly shows that each person has the right to a standard of living adequate for the health and well-being of himself and of his family, including indeed (and perhaps primarily) food.

Similar regulations were contained in the International Covenant on Economic, Social and Cultural Rights signed on 19 December 1966 (Journal of Laws of 1977, No. 38, item 169). At the same time, expressed on the basis of the provisions of Art. 11 para. 1 of the Covenant, the right of everyone to an adequate standard of living for himself and his family, including adequate food, "clashes" as it were with the necessity for the states to take appropriate steps to ensure the realization of this right. This means that the international legislator, adopting the provisions of the Covenant, did realize that the full realization of the right to food does not depend so much on individuals, but on the states and their policies. Therefore the

[6] The cited Author addresses more broadly the issues in question pointing to such rights as the right to non-discrimination, the right to health, education, work, water, ownership rights (particularly to land), cultural rights, freedom of speech and expression, the right to information, the right of assembly and association, the right to participate in social and political life, the right to enjoy the fruits of technological progress. M. Szkarłat, op. cit., p. 71ff.

Covenant clarifies that essential significance in this regard should be attributed to international co-operation[7], grounded in the voluntary base. One may regard para. 2 of said Article as a certain continuation (and refinement at the same time) of these provisions, the disposition of which once again evokes international cooperation as one of the forms of exercising the right of everyone to be free from hunger.

And although the juxtaposition of the right to food with other rights says little about the content of the former it gives sufficient rise to assigning it the status of a "right – synthesis"[8] and to moving on to the second group of issues. This, in turn, is indirectly associated with the signalled necessity of international cooperation and addresses the issues of food security (and so e.g. Olowu, 2013, pp. 5378-5392; Margulis, 2013, pp. 53-67; Gonzalez, 2010, pp. 1345-1352; Paveliuc-Olariu, 2013, pp. 169-173), (a term which was first incorporated into international policy during the early 1970s[9]) and food aid (and so Riches, Silvasti, 2014, pp. 1-15) or food support, the concept category that emerged a little later on, which we shall return to.

The first two concepts – what is especially interesting – have found their own normative dimension and were included (but not defined[10]) in the Food Aid Convention signed on 13 April 1999 (Journal of Laws of 2007, No. 118, item 813),

[7] It is also pointed to by H.M. Haugen who says that „there is an increasing emphasis on human rights, more specifically the right to adequate food, in the context of international cooperation and international organizations. As the right to adequate food stands out from other human rights, by its strong emphasis on international cooperation for the realization of the right to adequate food, this is no great surprise. States have international obligations with regard to the right to adequate food. See: H.M. Haugen, International Obligations and the Right to Food: Clarifying the Potentials and Limitations in Applying a Human Rights Approach when Facing Biofuels Expansion, „Journal of Human Rights" 2012, vol. 11, p. 421.

[8] The term after A. Łopatka, who used it in the context of the right to privacy saying that for its realization it is necessary to enjoy all other human rights. See: A. Łopatka, Prawo do rozwoju, [in:] Prawa człowieka. Model prawny, (ed. R. Wieruszewski), Wrocław -Warszawa – Kraków 1991, p. 50.

[9] An unexpected shortage of wheat caused panic on international food markets that drove grain prices skyward. Food-importing countries – the vast majority of states – desperately scrambled to secure food supplies. This was the first recognized world food crisis and it led to severe hunger in many countries. The crisis revealed a new driver of hunger to policymakers: price volatility and the unreliability of food supply on international markets. See: M.E. Margulis, op. cit., p. 56.

[10] The definition of food security was developed at The World Food Summit in 1996, that is before the adoption of the abovementioned Convention. According to it, food security exists when all people, at all Times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life. See: G. Riches, T. Silvasti, op. cit., p. 6.

concluded, inter alia, by the European Community by Council Decision 2000/421/EC (OJ L 163, 4.7.2000, p. 37), the binding power of which, nevertheless, expired by 30 June 2012. The Convention's main purpose (in accordance with Art. 1) was to contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries. If we assume (both in general terms and in the context of the invoked provisions) that at the basis of creating a system of food security (and hence providing food aid) lies the need for international cooperation, then this cooperation is a *sine qua non* condition for ensuring security in this respect. Going forward, it constitutes an expression of the implementation of the obligation resting on the international community to take action to implement the right to food, through – among other things – the creation of a food security system.

In connection with the loss power of the binding Convention of 1999, appreciating its importance for the realization of the right to food, the adoption on 25 April 2012 of the Food Assistance Convention (the text of which is attached to Council Decision 2012/738/EU of 13 November 2012 on the conclusion on behalf of the European Union of the Food Assistance Convention, OJ L 330, 30.11.2012, pp. 1-8) should be evaluated unequivocally positively.

The Convention – in accordance with its Art. 1 – aims to save lives, reduce hunger, improve food security and the nutritional status of the most vulnerable populations by, inter alia: addressing the food and nutritional needs of the most vulnerable populations, ensuring that food assistance provided to them is appropriate, timely, effective, efficient, and also though facilitating information-sharing, cooperation, and coordination. What is particularly important – from the point of view of the analyses carried out here – the Convention alongside the concepts of "food security" and "food aid" also introduces the category of "food assistance", defining its general principles, effectiveness, procedures for it provision as well as accountability (Art. 2 of the Convention).

Indirectly, the presentation of the issues that draws on the above is reflected in the provisions of the already referenced Art. 11 of the Covenant, which in para. 2 addresses the production, conservation and distribution of food by making full use of technical and scientific knowledge, as well as the need to ensure equitable distribution of world food supplies in relation to need, taking into account the problems of food-importing and food-exporting countries. In this context, both the determination and implementation of the method of production, conservation and distribution of food, but also its equitable distribution, are elements ensuring *food security*. They will also be a justification for the creation and operation of food banks

(for this topic cf.: Booth, 2014, pp. 15-28; Rocha, 2014, pp. 28-41; Hendriks, McIntyre 2014, pp. 117-130; Pérez de Armino, 2014, pp. 131-145; Koc, 2014, pp. 146-159; Dowler, 2014, pp. 160-175), which "from a technical standpoint some may view (…) as an efficient and logical way of distributing food to charitable agencies that provide sustenance to food insecure people" (Booth, 2014, p. 15). They will also be a reason why one should address issues related to the broadly understood technology (and to „how to utilize technology so that the starving people can end their starvation" (Haugen, 2008, p. 240)) or to biofuels. As emphasized by H.M. Haugen „the expansion of biofuel plantations in developing countries, while contributing to agricultural diversification, represents considerable challenges for realizing the right to food" (Haugen, 2012, p. 422). While reviewing issues that may be related to food security one cannot overlook the issue of environmental protection[11], which will be inextricably linked to the implementation of the right to food in practice.

The third group of issues (not having, as the above, a material character but personal) is the group in which the main emphasis is placed on the circle of persons – recipients of the right to food. Here, the analysis of both legal acts and the position of the doctrine do not leave any doubt that just like in the case of human rights *in genere*, the personal scope of the right to food extends over *everyone*. It finds an additional confirmation in General Comment No. 12: The Right to Adequate Food (Art. 11) adopted on 12 May 1999 by the Committee on Economic, Social and Cultural Rights. According to those, „the right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement" (Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights – Contained in Document E/C.12/1999/5). It can be then said that the cited General Comment does not only *expressis verbis* indicate who was entitled to the right in question, but also determines the nature of the right to food, taking it as a category both individual and collective, which is part of the above analysis.

[11] These issues include the protection of tropical forests, the role of land use and land use change more broadly, as well as initiatives to promote biofuels as a source of renewable or low carbon energy. The carbon market established under Kyoto already contains mechanisms which allow parties to obtain carbon credits for projects that may impact on food production and food producers. See: K. Cook, The right to food and the environment, „Environmental Law Review" 2010, vol. 12, p. 10.

However, one needs to take note that apart from regulations applicable to *everyone*, particular role should be assigned to legislation that in order to extend extra protection grants it only to certain groups of society. We are dealing with such a situation – which is fully justified – inter alia, in the context of women (Van Esterik, 1999, pp. 225-232), and in an even wider scope – also children (Handsley, 2014, pp. 93-134; Feliciati, 2005, pp. 413-431). Here – only for exemplification – one can invoke the Convention on the Rights of the Child of 20 November 1989 (Journal of Laws of 1991, No. 120, item 526). The provisions of its Art. 24 para. 2 point c) treat the obligation to provide adequate nutritious foods as a form of combating disease and malnutrition among children. In contrast, pursuant to Art. 27 of the Convention, the right of every child to a standard of living adequate for their physical, mental, spiritual, moral and social development was recognized, whereby states have to support their parents (or others responsible for the child) to implement this right and provide, if necessary, material assistance and support programs, particularly in terms of food.

This confirms the thesis signalled above, according to which the realization of the right to food should be presented as an obligation of states. That finding cannot, however, be treated as exempting parents from fulfilling it. On the contrary, this reveals that only measures complementary to each other are able to ensure the implementation of the right to food in practice, which without them would be only illusory.

The last group of issues which may be singled out in the context of the right to food is confined to the so-called case study. Now only as an example one can indicate that within its framework analyses of the state of implementation (or lack thereof) of the right to food are carried out in, inter alia, North Korea (Howard-Hassmann, 2014, p. 35ff), Lesotho (Olowu, 2013, pp. 5378-5392), the Philippines (Salo, 2012, pp. 638-658), Uganda (Rukundo, Kikafunda, Oshaug, 2011, pp. 5493-5509), Brazil (Feliciati, 2005, pp. 413-431), or Mexico (Echols, 2007, pp. 1120-1125). The significance of the above mentioned considerations cannot be overstated. They bring the right under discussion to the ground of practice and are an answer to the question about the extent the rules of international law do (or do not) translate into national law. As indicated by M. Szkarłat, based on the research of L. Knuth and M. Vidar, there are few cases of countries that have introduced the right to adequate food to their constitutional orders. Among the 23 countries we can see South Africa (Art. 27.1), Brazil (Art. 6), Haiti (Art. 22), Bolivia (Art. 16), Ecuador (Art. 13), or Guyana (Art. 40) (Szkarłat, 2014, p. 70).

However, it needs to be stressed that among the actors of international law it is not only states that address (either in their internal legislations or by carrying out international cooperation) the right to food. International organizations also (sometimes even in a wider range than the former) fulfill the right in question through concrete actions, both of a factual and legal character.

Most certainly, the issues under discussion are most comprehensively regulated by the United Nations (hereinafter referred to as UN), both *solo nomine*, as well as through the Food and Agriculture Organization[12] (hereinafter referred to as FAO), in whose statutory activities the right to food is directly inscribed. In the first case, apart from the above mentioned legal acts adopted under the auspices of the United Nations, special attention is paid to the activities of the former Commission on Human Rights (now the Human Rights Council). It was this Commission that initiated on the 52nd meeting the inclusion of the right to food to the work of the UN and, by the power of Commission on Human Rights resolution 2000/10 of 17 April 2000 (E/CN.4/RES/2000/10), the appointment of a special rapporteur on the right to food[13]. On 4 September 2000 Jean Ziegler (Switzerland)[14] was appointed as such, who, in his reports, made a number of key findings from the point of view of this right. They concerned in particular:

1) definition and history of the right to food (report of 7 February 2001, E/CN.4/2001/53),
2) justiciability of the right to food and presenting it in the context of international humanitarian law (report of 10 January 2002, E/CN.4/2002/58),
3) combining the right to food with the right to water (report of 10 January 2003, E/CN.4/2003/54),

[12] The manifestation of FAO activities to implement the right to food are, among others, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th Session of the FAO Council – November 2004, Food and Agriculture Organization of the United Nations, Rome 2005, http://www.fao.org/3/a-y7937e.pdf. They defined the right in question not only in the context of human rights, but also against food security and international food aid, which is fully in line with the assumptions taken in this study.

[13] For the purpose of correctness it must be stressed, however, that this was not the first attempt to bring the issue under discussion directly onto the UN forum. Cf.: Asbjorn Eide, The right to adequate food and to be free from hunger. Updated study on the right to food, submitted by Asbjorn Eide in accordance with Sub-Commission decision 1998/106, E/CN.4/Sub.2/1999/12.

[14] See his website: http://www.righttofood.org/.

4) food sovereignty and the right to food, as well as the operation in this regard of transnational corporations (report of 9 February 2004, E/CN.4/2004/10),
5) extraterritorial obligations of states to the right to food (report of 24 January 2005, E/CN.4/2005/47),
6) defining the right to food in an era of globalization (report of 16 March 2006, E/CN.4/2006/44),
7) children and their human right to food (report of 19 January 2007, A/HRC/4/30),
8) the right to food in international law together with the outlining of main problems related to its implementation (report of 10 January 2008, A/HRC/7/5).

An analysis of individual work of first the Commission and then the Human Rights Council, but also of the Economic and Social Council or the UN General Assembly, on the right to food does not seem to be purposeful, and it would certainly exceed the scope of this study. However, it does show – beyond any doubt – that UN contribution to the promotion of this right is irrefutable. Not only that; one can even say that it was only the United Nations that undertook work in the context of the overall recognition of the right to food, addressing the individual components of this issue and presenting them in a broad context, which is reflected in the above-mentioned reports.

Despite the fact that it was signalled that it was the UN that definitely dominated (in the positive sense of the word) the issues of the right to food, they were also the subject of work of other international organizations. Only for signalling purposes one can point out that in the framework of the Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) was adopted on 17 November 1988, which in Art. 12 regulated the right to food. According to its provisions everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.

What is particularly important, the European Union has also taken up the issue of the right to food, although it is difficult to conclude that it has been done on a satisfactory level. Its position (unfortunately not in the form of provisions contained in a binding legal act) has been presented in the context of the need to solve the problem of food security. As noted, at present it is estimated that in developing countries 815 million people are suffering from "chronic" lack of food security, with a further 5-10% of the population at a *serious* risk of this lack due to natural disasters and crisis situations caused by human activity. The problem was noted in 2006 in the Communication

from the Commission to the Council and the European Parliament – A Thematic Strategy for Food Security (COM(2006) 21 final) and unfortunately failed to be transposed onto a binding legal act adopted under the auspices of this organization, not including the Food Aid Convention or the Food Assistance Convention.

Also the former Organization of African Unity, now the African Union, as another organization of a regional character addressed the issue of the right to food. An example in this regard is delivered by the provisions of the African Charter on the Rights and Welfare of the Child signed on 24 September 1990 which entered into force on 29 November 1999 (OAU Doc. CAB/LEG/24.9/49 (1990). According to its Art. 14 every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health, whereby this right is to be realized by states by, inter alia, guaranteeing adequate nutrition and safe drinking water, as well as combating disease and malnutrition.

3. The right to food and multicentricity of the legal system – conclusions

The above cited references to the acts of law of varying legal nature, adopted in individual international organizations, induce a few generalizations.

Firstly, despite the relatively widespread use of the term "right to food" (or its qualified form "the right to adequate food") and attempts on defining this term taken up in the doctrine of the subject as well as in numerous studies dealing with these issues (including reports and guidelines of international organizations), international legal acts do not contain a legal definition of the term. Neither do they use the term "right to food" at all times, often only constituting the need to ensure food, create a system of food security or provide food assistance as such.

Thus, one can question the unambiguous attribution of a normative character to the right to food or indicate (somewhat more mildly) that this character is being weakened by the lack of precise legal regulations. Shifting the burden of defining it onto the doctrine of the subject certainly enriches the latter. This does not, however, constitute – which is obvious – a legal basis for pursuing claims brought by those who suffer from hunger and the statistics evidencing this are relentless. Therefore, it may be appropriate – given the scale of the phenomenon – to glorify the right to food explicitly in legal acts, or to consider voicing it in a separate international agreement. As observed by R.E. Howard-Hassmann the right to food is a core human right: it deserves its own treaty, even if, like all other international human rights treaties, a treaty on the right to food is ultimately unenforceable (Howard-Hassmann, 2014, p. 50).

Secondly, referring to the above shown assertion of W. Lang (according to which public international law is a classic multicentric legal system (Lang, 2005, p. 95)) entitles one to present the right to food against multicentricity. The fact that international law norms emerge as a result of legislative activity "of various decision-making centres" (term after Kalisz, 2007, p. 36) may translate to the content of the right to food and ways of interpreting it out of a series of legal acts. If we were then to assume that international organizations, which alongside states address the issue in question, are these centres, it shows that this issue can be presented in different ways. The more so that relatively few countries regulate this issue in their internal legislations, which shifts this "burden" onto the international community.

And so, a reference to the right under discussion has been included to the fullest extent in acts of the United Nations. Both the provisions of the Universal Declaration of Human Rights (being aware of their non-binding nature), as well as of the Covenant on Social, Economic and Cultural Rights deal with provision of food. However, when carrying out an overall assessment of the activities of the United Nations it should be emphasized that it is the only organization that seeks to fully explore the essence of the right to food. This is done both by the activity of FAO and the various UN institutions, but also by the reports of Jean Ziegler, the Special Rapporteur on the right to rood. They should be considered as perfect foundations for regulating the right to food *expressis verbis.*

It is not only the UN that addresses the right to food in its activities. Some attempts (more or less successful) to equip that right with a normative character can also be found in regional human rights protection systems (European, American and African). However, when taking into account real problems associated with ensuring food security (for example in Africa), the legislation adopted in regional systems does not provide much scope for optimism. It is because it does not create an effective tool to protect this right.

And, finally, thirdly, analyses of the issues in question in the context multicentricity of the legal system – according to the prescribed scope of considerations – have shown that this multicentricity enriches the discourse devoted to the right to food by affecting its content somehow in a shaping way. As a result, the right under discussion is presented in various aspects and cross-referenced with issues varied in terms of subject-matter, allowing for the interpretation of its content out of existing laws. This in turn provides sufficient justification for invoking the right to food in the context of multicentricity of the legal system.

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2013 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data as an Example of Recent Trends in Personal Data Protection

Abstract
In 1980, concerned about the increasingly powerful data processing and sharing capability available to both public and private entities, the OECD issued a formal recommendation for the protection of privacy in transborder data flows. The OECD Privacy Guidelines aimed both to protect and promote the free flow of information. To achieve these goals, the OECD Guidelines set out eight principles for member countries that subsequently became the basis for national laws around the world. After more than 30 years it became pertinent to revise and rethink the original Guidelines by including solutions to immense change consisting in i. a. vast increase in online interactions and information sharing, relatively cheap data storage, outstanding facility of collecting and analyzing personal data.

This paper firstly presents the original OECD Guidelines from 1980, than, it reviews the new 2013 OECD Guidelines by presenting the changes to the essential principles for the protection of individuals' privacy in the 21st century, then, it will try to ascertain them in context of setting up an effective data protection system that will be capable of responding to new perils related to the age of "Big Data". According to the paper, the 2013 OECD Guidelines constitute a reliable and effective soft law instrument to promote and protect in efficient fashion the personal data of individuals.

Keywords:
OECD Privacy Guidelines, Personal Data Protection, Transborder Flows of Personal Data

1. Introduction

The Organization for Economic Co-operation and Development (OECD) is an international economic organization of 34 countries, founded in 1961 to stimulate

economic progress and world trade. It is a forum of countries committed to democracy and the market economy, providing a platform to compare policy experiences, seeking answers to common problems, identify good practices and coordinate domestic and international policies of its members. Since more than 50 years it has contributed to creating good global standards, international conventions, agreements and guidelines in various areas of public life i. a. good governance, countering crimes and corruption, development of investments, taxes and environment (http://www.oecd.org/about/). The works within the OECD are based on mutual cooperation, dialogue, consensus and reciprocal verification. The OECD aims at creating the vision of stronger, more ecological, safer and fairer global economy and society (OECD 360 Polska, 2015, p. 3).

The protection of privacy inscribes in the main activities of OECD, since, after World War II it became a pertinent problem for national legislators (Jammet, 2014, p. 5-6). The OECD points out that the 1970s can be viewed as a period of intensified investigative and legislative activities concerning the protection of privacy with respect to the collection and use of personal data (OECD, Guidelines, I. The General Background, The Problems). The remedies under discussion are principally safeguards for the individuals, which will prevent an invasion of privacy in the classical sense, i.e. abuse or disclosure of intimate personal data; but other, more or less closely related needs for protection have become apparent. It is argued that in the 1970s more than one – third of OECD Member countries enacted one or several laws, which were intended to protect individuals against abuse of data relating to them and to give them the right of access to data with a view to checking their accuracy and appropriateness (OECD, Guidlines, I. The General Background, The Problems). The approaches to protection of privacy and individual liberties adopted by the various countries had many common features. Thus, it was possible to identify certain basic interests or values, which were commonly considered to be elementary components of the area of protection. Some core principles of this type are: setting limits to the collection of personal data in accordance with the objectives of the data collector and similar criteria; restricting the usage of data to conform with openly specified purposes; creating facilities for individuals to learn of the existence and contents of data and have data corrected; and the identification of parties who are responsible for compliance with the relevant privacy protection rules and decisions (OECD, Guidelines, I. The General Background, Activities at national level).

At the same time in creating global standards in data protection the OECD took notice of international elaborations that had recognized the need to safeguard

personal rights of individuals at international level. These documents, such us the Universal Declaration of Human Rights, dated 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms, dated 1950, the International Covenant on Civil and Political Rights, dated 1966 contained general provisions placing data protection at stake and making it a protected human right (OECD, 2013a, p. 4; Horodyski, 2015, p. 669-670).

The work of OECD on relevant standards began in 1969, where OECD experts studied different aspects of the privacy issue for example in relation to digital information, public administration, transborder data flows, and policy implications in general. Subsequently, in order to expose the results of the researches to the wider forum the international symposium was organized in Vienna in 1977. As a result a number of guiding principles were elaborated, which constituted a basic outline of the Guidelines. In early 1978 a new ad hoc group of experts was established to develop guidelines on basic rules governing the transborder flow and the protection of personal data and privacy, in order to facilitate a harmonization of national legislations. The OECD group of experts cooperated with the Council of Europe (COE) to avoid unnecessary differences between the texts produced by the two organizations; therefore the OECD Guidelines are similar to documents elaborated by the COE but contain also some differences (OECD, Guidelines, I. The General Background, Activities of the OECD).

2. The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

On 23 September 1980 the OECD published the Recommendation of the Council concerning Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. This document argues that the Member countries have a common interest in protecting privacy and individual liberties and in reconciling fundamental but competing values such as privacy and the free flow of information; that automatic processing and transborder flows of personal data create new forms of relationships among countries and require the development of compatible rules and practices; that transborder flows of personal data contribute to economic and social development; that domestic legislation concerning privacy protection and transborder flows of personal data may hinder such transborder flows. Therefore, the OECD recommends its Members to take into account in their domestic regulations the principles concerning the protection of privacy and individual liberties set forth

in the Guidelines; endeavor to remove or avoid creating unjustified obstacles to transborder data flows of personal data; cooperate in the implementation of the Guidelines; agree on specific procedure of consultation and cooperation for the application of the Guidelines (OECD Guidelines, 1980, Preamble).

The main aim of the Guidelines was to protect privacy and promote free flow of information. To obtain these aims, the OECD Guidelines set out eight Principles for Member countries that subsequently became the basis for national laws around the world (Rotenberg, Jacobs, 2013, p. 647). These principles are:

- Collection Limitation Principle – There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject (par. 7);
- Data Quality Principle – Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date (par. 8);
- Purpose Specification Principle – The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose (par. 9);
- Use Limitation Principle – Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except: a) with the consent of the data subject; or b) by the authority of law (par. 10);
- Security Safeguards Principle – Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data (par. 11);
- Openness Principle – There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller (par. 12);
- Individual Participation Principle – Individuals should have following rights: to know about the collection of personal information, to access that information, to request correction, and to challenge the denial of these rights (par. 13);
- Accountability Principle – A data controller should be accountable for complying with measures which give effect to the principles stated above (par. 14) (GAO, 2008, p. 9)

The OECD Guidelines turned out to be very successful throughout the world and they helped national legislators to establish a uniform and complex regulation concerning the privacy protection. It is pointed out that OECD Principles described above refer to the Fair Information Practice Principles (FIPPs), which are the basis of privacy laws and related policies in many countries, including the United States, Canada, Germany, Sweden, Australia, and New Zealand, as well as the European Union (GAO, 2008, p. 9). The influence of these Principles is visible also in the Polish Act of August 29, 1997 on the Protection of Personal Data (unified text – Journal of Laws of 2014, item 1182, with amendments), which in the Chapter 3 contains the Principles of Data Processing that correspond with the content of OECD Principles.

3. Towards the Revised OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

The OECD Guidelines issued in 1980 have long served the purpose of providing recommendations and directions for national and international laws and regulations. They were successful in promoting and establishing a global framework for privacy protection, even though the Guidelines lacked a formal mechanisms of enforcement (Rotenberg, Jacobs, 2013, p. 647), mainly because they were created and endorsed by a group of renowned international experts representing many of the world's major economies. Over they years they became the foundation for most national laws governing data protection (Cate, Cullen, Mayer-Schonberger, 2014, p. 2).

The Guidelines issued in 1980 responded to the concerns of relatively simple data collection and use aimed at protection of individuals' rights to information privacy. This approach worked because only large organizations had the necessary resources to manage mainframe computers and most data relationships were binary involving the data user and the data subject (Cate, Cullen, Mayer-Schonberger, 2014, p. 2).

After more than 30 years it became necessary to revise the Guidelines and adjust them to current situation. It was pointed out that much has changed since the Guidelines were adopted in 1980: the interaction with computers has vastly expanded in terms of global scale and individual use; the domain name system was implemented and IPv4 address allocations was exhausted; at home computers were popularized as well as mobile technology has increased; many unknown in the past web sites have emerged such as World Wide Web, Google, Bing, Twitter and Facebook, which made the internet to become a global commercial and social

medium. At the same time the amount and variety of personal data generated and processed have increased revealing new perils and possibilities of abuses. In addition, business and governments have many more opportunities to collect and store personal data about individuals, which is easier due to inexpensive data storage (Cate, Cullen, Mayer-Schonberger, 2014, p. 5). S. Lohr argues that due to the massive and rich data collection that is used to advance progress in many fields such as public health, political science, law enforcement, personal relationship, consumer behavior, national security, sports, weather, manufacturing the present time might be called the Age of Big Data (Lohr, 2012).

Taking into consideration abovementioned factors the OECD identified the most important changes that should direct the prospective works on revising the Guidelines. It is observed that the individuals are overwhelmed with many long, complex online privacy polices that should be accepted before using the service. These polices are often scrolled down and clicked "I agree" without reading, which makes them useless tool and does not provide any relevant information for individuals. In addition, even if individuals wished to read the endless privacy policies they encounter it would be impossible because it will take too much time on one hand, and on the other it will require sophisticated level of knowledge how the data is used and processed (Cate, Cullen, Mayer-Schonberger, 2014, p. 7).

Hence, the revised approach to data protection should shift the responsibility away from individuals and towards data collectors and data users who should be held accountable for how they manage data rather than whether they obtain individual consent. Furthermore, the data protection of individuals should concentrate more on data use than on data collection because the context in which personal information will be used and the value it will hold are often unclear at the time of collection (Cate, Cullen, Mayer-Schonberger, 2014, p. 8).

4. The Revised OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

The review of the OECD Guidelines commenced out of the Seoul Declaration for the Future of the Internet Economy, which was adopted by Ministers in June 2008. The Seoul Declaration calls for the OECD to assess the application of certain instruments, including the Privacy Guidelines, in light of "changing technologies, markets and user behavior and the growing importance of digital identities" (OECD, Seoul Declaration, p. 4-10).

The OECD convened a multi stakeholder group of experts to assist in the review process. This expert group contained specialists from governments, privacy enforcement authorities, academics, business, civil society and Internet technical community (OECD, 2013a, p. 4).

The expert group prepared proposals to update the OECD Guidelines that include a number of new concepts:

- Privacy Management Programs - they serve as the core operational mechanism through which organizations implement privacy protection. The Revised Guidelines indicate a number of elements of such programs such as safeguards based on privacy risk assessments, an internal governance structure, oversight mechanisms and incident response plans. These plans should not only address the controller's own operations, but also cover his employees or agents and even the relationship with other data controllers. Examples for safeguards listed in the explanatory memorandum include contractual provisions, including for sub-contracting, employee training and education as well as an audit process (Kuschewsky, 2013, p. 2; OECD, 2013b, p.23-25);
- Security Breach Notification – these provisions cover both notice to an authority and notice to an individual affected by a security breach affecting personal data (Hunton & Williams, 2013; OECD, 2013b, p. 26-27);
- National Privacy Strategies – effective laws are essential, but the strategic importance of privacy today also requires a multifaceted national strategy coordinated at the highest levels of government (Hunton & Williams, 2013; OECD, 2013b, p. 32-32);
- Education and Awareness (OECD, 2013b, p. 32-32), and global interoperability (OECD, 2013b, p. 33-34);

Other proposed revisions expand or update portions of the 1980 Guidelines such as:

- Transborder Data Flows – the Revised Guidelines reaffirm the principle that countries should refrain from restricting transborder data flow among themselves where the other country substantially observes the Guidelines (Kuschewsky, 2013, p. 3; OECD, 2013b, p. 29-31);
- Accountability – this principle is strengthened in the context of transborder data flow by recognizing appropriate measures that controllers can implement and which, together with effective enforcement mechanisms, can qualify as sufficient safeguards (Kuschewsky, 2013, p. 2);
- Privacy Enforcement – A new provision in Part Five ("National Implementation") calls on Member countries to establish and maintain privacy enforcement

authorities with the governance, resources and technical expertise necessary to exercise their powers effectively and to make decisions on an "objective, impartial and consistent basis" (OECD, 2013b, p. 28-29).

The proposals by the expert group leave unchanged the eight basic privacy Principles considering them sound, as well as the definitions of key terms like "data controller" and "personal data". In addition the expert group prepared a new, supplemental explanatory memorandum, which includes an introduction that describes the context and process for the review. It then explains the rationale for the changes proposed to the Guidelines (OECDa, 2013, p. 6).

Additionally, certain issues were identified to further discussion. These issues include the role of consent, the role of the individual, the role of purpose specification and use limitation, the definition of personal data, the definition of data controller, the role of other actors, the principle of collection limitation, the need for time limits on the storage of personal data, the openness principle, he principle of individual participation (OECD, 2013a, p. 8-11).

On July 11, 2013, the OECD Council adopted a revised Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, which followed the recommendations of the expert group (OECD, 2013b, p. 3). It is pointed out that the Revised OCED Guidelines are concentrated on two main goals: the need for a practical, risk management-based approach to the implementation of privacy protection; and (2) the need to enhance privacy protection on a global level through improved interoperability (Hunton & Williams, 2013).

5. The assessment of Revised OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

However the Revised OECD Guidelines address many problems of privacy protection and propose solutions described above, some experts points out at additional changes that should be introduced. Basically, they postulate the update of the eight privacy principles to reflect 21st-century technologies and the challenge of balancing individual privacy with valuable uses of data today. To shift responsibility for data protection away from individuals, and to focus on data use rather than data collection, the revised principles make a significant distinction between principles that apply to data collection and those that apply to data use or other processing activities (Cate, Cullen, Mayer-Schonberger, 2014, p. 12-13).

Cate, Cullen and Mayer-Schonberger suggest that the principles should be updated accordingly:

- Collection Limitation Principle should be replaced by the Collection Principle, which reflects a deliberate effort to move the focus of data protection away from data collection and the attending disclosure and consent requirements (Cate, Cullen, Mayer-Schonberger, 2014, p. 16-17);
- Data Quality Principle – Personal data used for a decision affecting individuals should be relevant to the purposes for which they are used and, to the extent necessary for those purposes, should be accurate, complete, and up-to-date (Cate, Cullen, Mayer-Schonberger, 2014, p. 18);
- Use Limitation Principle – requires data stewards to make a careful assessment of the benefits, harms, and harm mitigation tools in place for each intended data use. The nature of that assessment and the determination of harms (and also perhaps of benefits) may differ from country to country, but the Use Principle encourages predictability and efficiency through the adoption of benchmarks, frameworks, or models and specific categories and/or definitions of harms and benefits. This principle also encourages national governments to cooperate in arriving at these definitions and in coordinating legal implementation (Cate, Cullen, Mayer-Schonberger, 2014, p. 17-18);
- Security Safeguards Principle – personal data should be protected by reasonable security safeguards against external and internal risks including unauthorised loss, access, destruction, use, modification, or disclosure (Cate, Cullen, Mayer-Schonberger, 2014, p. 20);
- Openness Principle – The revised Openness Principle is nearly identical in substance to the 1980 version but is presented differently to provide greater clarity (Cate, Cullen, Mayer-Schonberger, 2014, p. 20);
- Individual Participation Principle – The revised Individual Participation Principle is stronger than the 1980 version but is limited to situations in which personal data is being used "in any manner affecting the education, employment, physical or mental health, financial position, or legally protected rights of an individual." In these situations, individuals are entitled to: notice that personal data is being used and that the individual can readily obtain information about the intended use; access to the data; the opportunity to challenge the processing and the accuracy of the data; an explanation if either access or correction is not provided or the processing is not stopped; and an opportunity to legally challenge those reasons. These access rights are in addition to any other rights to access personal

data that might be provided in other laws, such as laws applicable to employment or consumer protection (Cate, Cullen, Mayer-Schonberger, 2014, p. 18-19);

- Accountability Principle – The Accountability Principle in the 1980 Guidelines is both brief and vague. The revised principle is broader and more demanding. Under it, data stewards are not only responsible for compliance, but also for being able to demonstrate to regulators that they have in place the tools to comply. Moreover, under the new Accountability Principle, data stewards must provide injured individuals with redress and must accept liability for "reasonably foreseeable harm" caused by the failure to act accountably. These changes are all consistent with the shifting of responsibility for data protection from individuals to data stewards (Cate, Cullen, Mayer-Schonberger, 2014, p. 20-21);
- Enforcement Principle – The 1980 Guidelines had no Enforcement Principle, but more than 30 years' experience has demonstrated the importance of ensuring that data protection laws are not merely adopted but also vigorously enforced. Under the new Enforcement Principle, governments are required to invest financial and human resources to enforce data protection laws and are reminded that, consistent with the 1980 Guidelines, the goal of enforcement is to "achieve effective compliance" while "minimizing the burden on individuals and on lawful information flows (Cate, Cullen, Mayer-Schonberger, 2014, p. 21).

5. Conclusions

The OECD Revised Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data is a modern instrument that recognizes the challenges for personal data protection. The Guidelines aim generally at fostering and enhancing safe transborder data flow between member countries to address legal impediments to effective cross – border privacy enforcement cooperation. As well as the cooperation at the international level remains a key element of working to improve privacy law enforcement cooperation (OECD, 2013b, p. 151-152). In this context the OECD Guidelines contribute significantly to the development of 21st century framework of privacy regulation.

On the other hand, in the view of other recent international instruments that will deal with the personal data protection, i. e. EU a General Data Protection Regulation (GDPR) and the revised 108 Convention, it may appear that the OECD Revised Guidelines' privacy principles grant lower protection than the standards proposed in these documents ((Kuschewsky, 2013, p. 3). However, the OECD

Guidelines together with GDPR and 108 Convention establish a perfect source for national legislators as to how the privacy regulation should be drafted and shaped.

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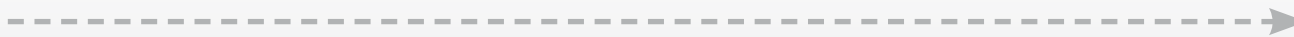
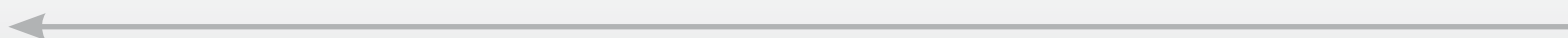
PART V

The right to clean environment





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Rights of a man towards animals

Abstract
Rights of a mam towards animals constitute an obvious and a legal fact. The possible source of this right may be religion, natural law or historical experience. It has as well the philosophical justification – the order of the world is based on a man point of view (anthropocentrism). Historically there was no distinction made between a living animal and an object.

The rights towards the animals belong to the third generation of a human rights, they are supposed to ensure the existence to community and appertain collectively to people as a community.

The most important rights the man has towards the animals are: the right to eat animals' meat and use parts of animals bodies to produce objects of utility, the right to hunt free-living animals, the right to experiment on animals, the right to captivate animals for pleasure, the right to keep wild animals in captivity, the right to create new species (hybrids) of animals, Some of these rights are connected with killing animals.
The recognition that an animal itself is a subject of law would clarify the issue of the rights of people towards animals.

Keywords:
human rights, animals, hunting, anthropocentrism, breeding

Rights of a man towards animals constitute an obvious fact and also a legal fact. Its most evident confirmation is the right of ownership of an animal. At first it is worth considering what is the source which these rights are derived from. Some find their source in the religious transmission, therefore in divine natural law (order) and point out this fragment of the Bible in which it is stated that *God blessed them and said to them: Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground!* (Genesis 1:28) (similarly, other great religious systems recognize domination of a man over the animals' world. See: Janik 2012). It is repeated by the Catechism of the Catholic Church in the following words: *God entrusted animals to the stewardship*

of those whom he created in his own image. Hence it is legitimate to use animals for food and clothing. They may be domesticated to help man in his work and leisure. Medical and scientific experimentation on animals is a morally acceptable practice if it remains within reasonable limits and contributes to caring for or saving human lives. And further it is stated therein that: *It is contrary to human dignity to cause animals to suffer or die needlessly. It is likewise unworthy to spend money on them that should as a priority go to the relief of human misery. One can love animals; one should not direct to them the affection due only to persons* (The Catechism, 2417-2418).

Others refer to the philosophical justification of the anthropocentric notion prevailing in philosophy until present. The world is to be perceived from a man's point of view and its order is to be based on people's interest. The whole philosophy of human rights is derived from this point of view although often in regard of the so-called fundamental rights it refers to the law of nature by means of a notion of inherent natural rights connected with the dignity of a human being. Apart from the fundamental rights there may be distinguished second-generation human rights which are a *sui generis* claim of a man towards the rulers, at least coming down to the non-disturbance in making use of those rights and often directly construing a claim for an act by the ruling authorities so that people could make use of those rights. Third-generation human rights comprise those rights which are supposed to ensure the existence to the community and constitute rights which appertain collectively to people as a community. This third generation sometimes also has a sense for the future because some of those rights are supposed to protect the existence or welfare of the future human generations (e.g. a right to the protected natural environment). This third group also contains issues connected with the protection of environment in a sense of a biological diversity as a heritage for the future human generations.

The reality of people's behaviors towards animals is based on the presumption that people are allowed everything. Until now such attitude seems most popular and arguably due to such attitude, legal regulations limiting man's rights in regard of animals are confronted with the reluctance of the majority of people. Also most often people try to interprete these limitations in such a way so that they limited them the least. It concerns even those who are professionally supposed to deal with the protection of the legal order and pursuing behaviours breaching the law (the practice of pursuing crimes and offences violating the well-being of an animal are still confronted with the difficulties, primarily resulting from misunderstanding by the police officers, prosecutors and even judges the essence and meaning of these rights) (Zaborowski, 2012).

Historically and actually contemporarily people proclaiming other attitude towards animals are often considered a bit crazy and their evaluation shifts from harmlessly crazy to positively crazy. Also the animal defence movements, particularly those more radical like e.g. Greenpeace, are treated suspiciously by the significant part of the society as the demolishers of social peace.

Even Catholics take Saint Franis of Assisi, the defender and friend of "Lesser Brothers" with a certain pinch of salt.

If one tried to wonder which rights people consider as appertaining to them towards animals, the following ones should certainly be mentioned:

- a right to eat animals'meat,
- a right to use parts of animals' bodies to produce objects of utility, more or less necessary for people,
- a right to hunt free-living animals,
- a right to experiment on animals for the interim research needs or for the development of the scientific disciplines which are supposed to serve people in order to ensure their health or to cure their diseases,
- a right to captivate animals for one's needs or pleasures,
- a right to keep wild animals in captivity in order to examine them, watch them and use them for undertakings serving entertaining objectives,
- a right to create new species (hybrids) of animals.

It is worth wondering whether maintaining all these rights is nowadays justified, what justification this is and whether limiting these rights is or would be just and up to what extent.

The realization of the rights mentioned in points 1 to 4 is connected with killing animals. Therefore, a man has a right to kill animals when it is connected with satisfying his needs or with the realization of the tasks undertaken by people.

The mentioned rights were formerly not limited in any way and their realization has never been confronted with any social ostracism. These rights were treated as not limited by anything. It also seems that unjustified (unnecessary) use of them was not evaluated in moral categories. Drastic historical examples may be given for that. In the second part of XIX century the fatuous white hunters, by shooting buffalos in the North America without any justified need, reduced their number within a short period of time from a dozen or so millions to the several dozen individuals. In 1876 the government of Canada legally tried to limit those huntings by introducing the prohibition of killing buffalos only in order to cut out their tongues (hunters cut out

tongues of the killed buffalos as a proof of the number of the killed individuals), the prohibition of killing calves and by establishing the protective period. Unfortunately, it did not save buffalos.

Wild animals were killed as unowned property while animals living with a man (domestic or accompanying) were killed within the use of a right of ownership. A fact that an animal, a feeling creature reacting to suffering was concerned, did not have any significance for the performance of the right. No distinction was made between a living animal and an object.

The distinction of this difference began a movement for the purpose of limiting rights of a man towards animals due to the subject of these rights, therefore due to the animals, without questioning the essence of human rights themselves. I will try to analyze these issues on the basis of the law binding in Poland.

Anyway, a man's right to eat animal is actually unlimited. Due to the cultural aspects in Europe it is only prohibited to trade dogs' and cats' meat, however, it does not directly mean the prohibition of eating this meat. On the other hand, neither a dog, nor a cat may be bred for meat or killed with a destination to be used for meat. Two great religions (Judaism and Islam) prohibit eating pigs' meat and establish specific requirements regarding slaughter of animals destined for meat. However, it has no relation to the acknowledgement of any rights appertaining to an animal.

An unlimited right to eat meat means in practice unlimited increasing of the sizes of breeding domestic animals destined for meat. The increase of the wealthiness of people in the regions where already today the demand for meat is big, causes increasing of the number of domestic animals while increasing this number usually deteriorate conditions in which breeding is conducted. Admittedly, within the past years the number of vegetarians voluntarily resigning from eating meat is clearly increasing but the increase of the number of those who can afford bigger amount of meat seems to be faster (Singer, 2004).

Legal limitations are introduced by determining conditions of breeding which is supposed to enforce the improvement of the conditions of life of the domestic animals before their slaughter (Directives of the European Union). Those interested try to circumvent in many various ways the more and more restrictive conditions of breeding and in broad circles of the society, especially the rural one, those restrictions are not met with the approval. Meat is today, in relation to the other kinds of aliment, not expensive and increasing the restrictions may lead to the clear increase of its prices. It seems that society may not be easily convinced to such a solution. The price of the meat of animals coming from the industrial breeding is even a dozen

or so times lower that the price of the meat of animals bred traditionally. High, restrictively controlled conditions of the industrial breeding already significantly raise the price of the meat which makes it less available for impecunious people.

Parts of the bodies of the animals bred in order to obtain meat are also used for other purposes (especially skin), primarily in order to produce objects of everyday utility, basically indispensable to people. It was like this since ages, however, nowadays items with similar utility features may be produced from other raw material than the animal one. It is also worth adding that certain species of animals are bred exclusively in order to obtain raw material to produce objects of utility, especially of furs. Although coats imitating those made of fur and sewn from the artificial raw materials have identical utility values, a man's right to use skins of animals bred specially for that purpose, has never been legally questioned so far. Arguably, it will happen some time considering the worldwide movement for the animals' protection and improvement of the conditions of their lives and the establishment of the prohibition of breeding them for the purpose of obtaining fur and also the prohibition of killing of all wild animals in order to obtain fur will be inevitable.

Centuries ago hunting wild free-living animals was a way of obtaining meat, arguably more relevant than breeding. Today, in the civilised world, hunting is not used for obtaining meat to eat, it is used exclusively for pleasure. All arguments of hunters referring to the economic utility of huntings need to be treated as arguments given to defend one's own right to pleasure. In Poland no action aiming at prohibiting hunting as unethical pleasure is conducted although legal limitations concerning huntings are more and more restrictive (protective periods, limitations of the ways of hunting, limits of culls, etc.) (Hunting Law Act, 1995). Even an action undertaken by the social organizations acting in the area of animals' rights protection for the prohibition of the participation of children in huntings failed (Petition, 2015). Hunting in Poland is considered as a noble entertainment, formerly constituting a privilege of the upper social classes which educates the body and spirit among young boys. In almost all memories from the youth in the XIX or the beginning of XXth century there appear memories of hunting conducted by teenage boys. Today, hunting is treated as a kind of sport and competition in killing game.

A right to conduct experiments on animals is also being more significantly limited in recent years (European Parliament and Council Directive, 2010), however, not as significantly as to result in questioning the law itself. A man in his own interest still has a right to conduct experiments on animals, with maintaining

legal limitations. An exception concerns anthropoid apes the breeding of which for conducting experiments is prohibited. Limitations – it is the necessity of undergoing the evaluation of an ethical commission, as well as a duty to abide by other specific limitations aiming at reducing the number of the animals undergoing experiments and at limiting the suffering of animals undergoing experiments, i.e. an order of abiding by trifold limitations: - non-admission to the experiments if similar results may be obtained without the participation of animals (*replacement*), limitation of the number of animals used for a specific examination (*reduction*), the requirement of searching greater procedures (*refinement*) (Protection Experimenral Animals Used for Scientific and Educational Purposes Act, 2015). People realize their interests of various importance with full conviction, at the cost of the suffering of animals. I use the term "interests of various importance" in order to indicate that the suffering of hundred thousands experimental animals are used not only for, and in regard of their number even not primarily for, solving an issue relevant for science and for the future of the humankind, but for the research used for obtaining academic degrees which are not worthy the irrationally caused suffering to the living creatures.

By captivating animals I understand their domesticating. Of course, certain species of animals are connected with people since thousands of years, serving them apart from the economic purposes as defensive or accompanying animals. The process of domesticating accompanying animals led to creating races of these animals only for people's fun, races not existing in nature, with features shaped by a man, hindering their lives. All of this a man has done for his own pleasure which the law tries to limit only in the recent years. Limit – without questioning the law itself. People still try to domesticate and keep for their pleasure geckos, ferrets, mice, weasels and various birds, deriving a right to such captivating from their inherent domination.

Legal limitations which occur in the area of captivating animals accompanying the man are connected with the species protection of animals (protected species) or with transferring species to other ecosystems (exotic species), while not questioning the right of a man to captivate animals for his pleasure itself.

Even the responsibility of a man for a fate of the captivated animal over which he undertook care, is not legally executed and the negligence or malevolence in this respect is not even followed by the significant moral contempt of the majority of the society.

Keeping animals in zoological gardens is on the one hand justified by maintaining the biodiversification, and on the other hand by the educational reasons which are supposed to consist in passing, primarily to the youth, knowledge regarding the species of animals and their lives in the environment similar to the natural one. The

exoticism kept and demonstrated in the zoological gardens today constitutes a relic of the past from the point of view of education. The educational function is much better fulfilled by the films showing lives of animals in their natural habitat.

A fact that zoological gardens do not fulfill the educational function assigned to them is generally known. It concerns a majority of gardens in Poland. Children do not get any knowledge regarding lives of animals in their natural habitat from their visit in a zoo. Often they become used to the view of wild animals, e.g. tigers or panthers kept in small cages, which blunts their sensitivity. The most highly developed vertebrates, such as anthropoid apes additionally suffer from the constant exposure to the public view, without a possibility of any intimacy. A zoological garden is usually a place of joy for children and adults looking at the imprisoned animals, without being aware of the harm being done to them and usually without any reflection. A trade between gardens considering animals born in them takes place, which is admittedly subject to the legal limitations but they are difficult to be executed.

The gardens are suppoosed to be used to keep dying or endangered species although the attempts of their reintroduction to their natural habitat takes place only exceptionally. This mission is fulfilled only by the gardens properly financed and properly conducted while the remaining ones only constitute places of entertainment.

Apart from the traditional zoological gardens there exist and are created new, "specialized" places for entertainment, e.g. dolphinaria used for organizing shows of tricks performed by dolphins. Keeping these animals of very high intelligence, developed social and family life separately from their parental school, in pools of an insufficient size, with artificially produced salt water, is a pure cruelty, which spectators coming to see the shows of tricks are not aware of.

These shows are usually accompanied by loud music constituting for animals, which have nowhere to run away, an additional torture. Nowadays, there exist in Europe 33 of such dolphinaria and more than 300 dolphins are kept in them. The biggest existing pools for dolphins are 100 m x 200 m big while in natural conditions dolphins swim up to 100 km daily ("Delfin też człowiek", 2015).

People also create without any limitations hybrids of the existing species of animals, in the conviction that they will satisfy human needs in a better way. These are crossbreeds of domestic animals, such as wisent/domestic cattle hybrid (hybrid bovine) being an offspring of a cow and a wisent, as well as many new races of cats and dogs, obtained in the process of breeding in order to satisfy the demand on a market for the original animals accompanying the man.

We should ask ourselves a question whether people are allowed to do so. If yes – where they derive such right from. If not – where the source of the prohbition is.

A fact that discretion in the attitude towards animals is, in principle, generally accepted, is arguably derived from the tradition, the primeval experience that a man may do whatever he wants with animals. The prospective limitations until recently existed only due to the interests of people, e.g. the limitations in the area of hunting were aimed either at the protection of a right of ownership of the forest and animals living in it or at the protection of a population of a wild game for the subsequent hunters (On historically existing limitations of hunting in Poland see: Krawczyński, 1947; Samsonowicz, 1991). A social movement against hunting as a form of entertainment is a matter of the recent years, therefore, many more years later than hunting stopped being justified economically as a menas of obtaining the indispensable aliment by a man.

From the second half of XX century on, the introduced limitations of various rights of a man towards animals also constitute a proof of a general recognition of the existence of these rights.

Anyway, admittedly it is still allowed to hunt for entertainment purposes but there exist limitations in all countries as to the period, species and ways of hunting. Huntings are regulated by the provisions of law, primarily aimed at the species protection of wild game animals, which requires limitation of a right to hunt. A justification may be found in a necessity to limit headage of certain animals harmful from a point of view of an agricultural economy (e.g. wolves or wild boars). However, it is only true that people want to satisfy their right to entertainment.

Not questioning the right of people do breed animals kept as accompanying animals itself, various limitations are introduced (Council Directive 1998, 1999, 2007, 2008a, 2008b) concerning non-improvement of their appearance by surgical treatments, the establishment of a duty not to abandon animals, many countries introduce an order to implant chips enabling determination of the owner and simultaneously the possibility of the elimination of homeless animals is introduced, that is, such animals which were abandoned by their guardian or which constitute a subsequent generation of animals included in the accompanying ones, deprived of a guardian.

This is the consequence of a human irresponsibility in this respect. As far as cats and dogs are concerned, this is the result of the cheapness of the meat these animals are fed with. In any case, nowadays they are not capable anymore of living free in the wild, instead their presence at home of a man sometimes satisfies the need of a

company of lonely people. Again, the justification lies in the conviction that we have such right towards animals.

The recognition that an animal itself is a subject of law would clarify the issue of the rights of people towards animals. We would say that the limit of a right of a man towards animals is a right of the animals themselves which is protected and inviolable without justified cause.

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Biodiversity – the common heritage of mankind

Abstract
The subject of research are changes in attitude to biological diversity in the context of aspirations for giving them the status of the common heritage of mankind. The reflection of several decades evolution may be several acts of international law accepted with a view to solving this urgent, but still not fully understood issue.

Presenting the problem is aimed at picturing the state of individual and social awareness of the role attributed by contemporaries to biological diversity. On the one hand it is mainly a resource constituting possibilities and economic development rate, and on the other hand it is the factor determining using so-called ecologic services and also a requirement necessary to perform various functions of environment, conditioning the existence of human being. In practice, on ideological ground provided with rich and suggestive argumentation, it is still regarded as common heritage of mankind. In the present reality, determined nearly exclusively by economic indicators, this picture starts to fade away. Undoubtedly it is still the heritage, but symmetry is unseen in using it. Therefore, where is it resulting from? Should we search for origins of this state in legal solutions?

Keywords:
biodiversity, international law, common heritage of mankind

1. Introduction

The developmental progress and meaningful wealth growth in many countries during the last decade with involvement of enormous measures and workforce has caused serious environmental losses. Some of them are irreparable. The problem does not concern only non-renewable energy resources, water, soil or air pollution. In this

case, when proper conditions had been assured, bringing back the previous state is extensively possible. It does not refer to biological diversity – losses are irreparable. Sometimes rising ecological gap is not noticed and not sensed by human being. In ecological system of complicated dependences and connections this situation not necessarily may happen. In the conditions of fast species extinction keeping homeostasis is more and more difficult or sometimes even impossible. Then the state and safety of habitat is becoming worse. Such awareness changes our attitude to surrounding nature, but it does not change our dependence on it.

These differently treated in the past creatures of nature, which are unique to provide people with biological existence, have become particularly important and the more they are diverse, primeval and peculiar, the more they are precious. Moreover, the new market value has been given to their subdivisions: plants, animals, microorganisms, fungi and others. In consequence, everything that creates so called biosphere gained the status of heritage. However, this statement often causes dilemma: Is it possible to entrust the heritage to individuals, specific nations, populations, states, generations or the whole mankind.

2. Right to the common heritage of mankind

The non-use value of some goods, which is natural environment in the aggregate or as subdivision, e.g. biological diversity, has been evaluated on the basis of the rate of its uniqueness and non-substituality. These criteria relate to components of biotic and abiotic natural resources. Therefore, they have mainly ecological character, but also social and economic. When they are put together with appropriate proportions, they comprise the concept of sustainable development.

Even though today's man often believes in independence on nature, he frequently (tired of civilisation – consciously or subconsciously) aims at contact with it. He gives it aesthetic, historical, cultural and religious values. This admiration for diversity of flora and fauna is arousing the respect and the sense of responsibility for future generations of this common heritage, from which he benefits (Kaczmarek 2007), changes and adapts according to his needs. A human being moving from place to place brought with himself wild and crop plants as food and medicines. In the Neolithic period he selected their seeds. Unknowingly he contributed to forming varieties which tolerated conditions in the place of living and reach expectations. Their quantity were continuously increasing, which resulted in the increase of chances for next successes.

All that time none of the community, state or authority never worked out effectively sustained legal system able to limit or prevent from using their own phytogenetic resources and moving them usually by farmers, merchants, colonizers or travellers. Normally people did not realize it, because gaining inconsiderable amount of useful plants or seeds did not have any negative ecological effects in the place of their natural occurrence. Probably they did not consider, that they might get the exclusive property rights to use these goods. However, it is obvious that due to natural reproductive abilities, living biological material contributed to considerable intensification of market and trade in importing state. It happened before our eyes with many economically significant species, which mainly came from tropical countries, particularly from the Central America[1]. Importing them to Europe completely transformed agriculture of the Old Continent. A similar process took place in totally different way. The history of the discovery of coffee plant cultivation is a good example (*Caffea arabica* L.). In this case, for a long time Europeans applied many procedures in order to gain reproduction material. Then they vainly tried to hamper access for others. Today these species in not numerous varieties is cultivated nearly everywhere, where the climate allows to do that. However, the difficulties occur in limited access to other genotypes originally appearing in the Central Africa, which might strengthen overdelicate monocultures[2].

Therefore, actions of states aiming at keeping monopoly of their production did not interfere with considerable spread of some crop plants[3]. All not numerous attempts in the past always finished with failure and it was not possible to hold back spreading of plants or put restrictions on freedom of crop selection.

It started to be more complicated in modern world, when states of the developed North started to feel the need of unrestricted access and use of living flora and fauna diversities, mainly disposed in postcolonial states of the South.[4] These states, in turn, felt abused and started to demand the right to self-governing deciding and administering (this time as subjects of international law). There was still kept the belief, that the right to genetic resources has the whole human community, not individual states in the territory of their occurrence. It became almost common law to make the material of

[1] It concerns mainly potatoes, corn, bean, zucchini, tomatoes and peanuts,

[2] However, this example indicates more the need of existence and the protection of biological diversity and later elaboration of just access rules and sharing profits.

[3] For example incidents concerning cultivation of nutmeg, carnation, saffron or rubber plants.

[4] First of all, these states are the richest, second of all, their flora and fauna is the least known in comparison to Europe.

their own living natural resources available for all (also foreign) scientific institutions for research purposes, often with the participation of local authorities and scientists[5]. In the 1950s and 1960s such practise resulted in special benefits for agriculture. Among others, a lot of new highly prolific crossbreeds and varieties were created. This fact went down in history as the Green Revolution. These successes inspired for developing more thoughtful laboratory research and bioprospecting[6] in the states being characterized by special richness of plant and animal species.

However, in the beginning of the 1980s some states started implementing the first legal restriction in the free access to plants and animals occurring in their territory, which unexpectedly, along with numerous research successes, gained cognitive and consequently economic significance. The International Undertaking on Plant Genetic Resources for Food and Agriculture[7] was a significant (with international range) attempt to keep the reached approach (and the reaction to the realignment of some states). It is a document on power of which the biodiversity of plants was recognized as the common heritage of mankind (cf. art. 1, B). However, there was not created any mechanism of the joint management and the control of used resources, the technology transfer and the division of benefits associated with it. This reference to the common heritage seems to be based rather on permissive principle of access than on acting for the common good of mankind. Therefore it concerned not jointly realised interest (for the common profit), but unlimited access to everything what was regarded (by some people) as *res communis omnium* and the consent to using biological resources according to subjective preferences of the state[8].

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[5] It lasted until the end of 1980s.

[6] Bioprospecting means searching for useful (mainly for medicine and pharmacology) organisms, substances or components in these organisms. Sometimes it is conducted with the local communities' knowledge about the usage and characteristics of plants (organisms). Information and/or material obtained in that way may be later used for commercial purposes. Often the natives or the states do not receive payment or compensation. Then we say about so-called biopiracy.

[7] According to this document (passed with the Resolution 6/83 on the 22nd session of the FAO Conference, 23.11.1983, access: http://www.fao.org/docrep/006/R3812F/R3812F19.htm (13 February 2015) genetic resources of plants are generative and vegetative reproductive material of species with (present or potential) economic and/or social value for agriculture. The document did not tie parties; it concerned only the possibility of free access to plant resources presenting value for agriculture for scientific and reproductive purposes.

[8] Agreed Interpretation of the International Undertaking, Resolution 4/89, Report of the Conference of FAO Conference, 25th Sess., Rome, 11–29 November 1989, C89/REP, http://www.fao.org/docrep/x5588E/x5588e06.htm#Resolution4 (14 February 2015).

The resolution of FAO No. 4/89 confirmed joint character of genetic resources, but also the principle of the free access and free exchange, similarly as the necessity to keep phytogenetic resources for the common good of present and future generations (cf. Art. 4, F). The new thing was the statement, that free access does not mean unrestricted, because states can apply for compensations for making their resources available for others. However, general and not binding character of the document proves aversion of technologically advanced states to any forms of financial liabilities towards states providing with this peculiar "raw material". Therefore again the individual interest of states outweighed the international solidarity.

3. The principle of sovereignty of states over natural resources

Factors of the political and social nature contributed to the collapse of the earlier elaborated concept of genetic resources as the common heritage of mankind. Its disadvantages were first felt and then noticed by the poor and undeveloped states, which were rich in the diverse biological material, so-called Third World Countries. More appropriate, from the point of view of protection of self-interests, seemed to them the principle of sovereignty over their own natural resources, just like in the case of mineral resources and fuels (D,E). It was confirmed later with the Resolution FAO No. 3/91, which after all turned out to be only seeming success. It was seeming due to the lack of determining and not enforcing any institutional regime able to supervise and make the distribution of benefits resulting from using genetic plant resources and obeying associated with them farmers' rights. However some changes did not take place. Insistent aspirations of some richer states to develop modern biotechnologies had to be preceded by the research on the diversity, learning about properties of organisms and collecting the data in this subject. Particularly the private sector, which was naturally more directed at economic aspects than purely cognitive one, showed initiative in this issue. In practise it resulted in devaluing biological resources as the general value and in gradual granting them commercial character. No wonder that in 1990s international community standing before the necessity of the choice between continuing the initiated path of just division and cooperation between all participating states and limiting the access to genetic resources for persons and private institutions, chose the second option. The effectiveness of multilateral international agreements was questioned. Therefore, states-exporters

of biodiversity placed their hopes on their own law and individually elaborated agreements and counted on easier incorporation to the group of beneficiaries using modern technologies and benefits from patents in exchange for making available the biological material located on their territories for the states-importers. It is also possible to find the shadow of these intentions in the Art. 1 of the Convention on Biological Diversity[9], but again there are no concrete regulations. This organizational-legal failure affected also a promising concept of "the common heritage of mankind", which was replaced by more euphemistic definition and not contributing much from the legal point of view – namely "a common concern of humankind (Paragraph 3 of the Preamble A).

Leading to the commercialization of biological riches, the Convention, after recognizing in Art. 15 the sovereign right of states to their own natural resources, also authorizes them to determine principles of access according to the domestic law (cf. Art. 15 pt 1, A) with the provision that they cannot implement any restrictions, which would be contrary to objectives of the Convention (cf. Art. 15 pt. 2, A). However, the access to genetic resources was dependent on obtaining the prior permission from contracting party providing with these resources, unless the parties decide differently (cf. Art. 15 pt. 5, A).

The Article 16 is probably sort of an echo of the earlier difference of standpoints in determining the principles of access and the transfer of modern technologies between developing and developed countries (cf. Art. 16 pt. 2, A). There was also provided for exceptional facilities in acquiring these technologies (even these protected with the patent law or other intellectual property rights), which are based on the resources coming from these states – particularly if it is related to the states technologically underdeveloped (cf. Art. 16 pt. 3 and 4, A). It also concerns such legal, administrative and political actions, which would not make it difficult for the weaker parties-exporters of the resources to use the licences for the foreign technologies on the basis of previously acquired samples.

Practice proves, that the Convention did not manage to lay duties in this regard for the economically leading countries. It only indicated sort of rules leaving the choice and the method of regulating mutual expectations for the states and the

[9] „The objectives of this Convention [...] are [...] the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding".

subjects of business activity, accordingly to their positions and contract abilities. These states in many cases, especially as "exporters of biodiversity" turn out to be really weak. In this perspective the success of the Third World Countries once again turned out to be seeming success.

In globalised world, where everything is taking place in the narrowed time and space, also legal institutions are liable to adaptation processes. In the second half of the last century many states, being guided by the politics of FAO, initiated and developed working of so-called gene banks mainly of crop plants coming from their region and from the world. While accepting the Convention on Biological Diversity , it had to be accepted, that the producing states are all these which possess resources in *in situ* conditions, populations of wild and domestic species, as well as "taken from *ex situ* sources, which may or may not have originated in that country" (Art.2, A). In reality it means, that it is possible to dispose previously obtained resources, usually without any knowledge and agreement (not to mention about compensation) with the states from which they originated, which were their owners or real creators[10]. Majority of these banks belonging to CGIAR[11] - international partnership engaged in research for a food secure future – which aims at legal protection of its resources with regard to signs of corrupt practices of some users.

There are many legal problems concerning biodiversity. The status of e.g. not examined resources from the territories remaining outside the jurisdiction of states is still uncertain, such as Antarctica and the depths of the ocean hiding organisms adapting to extreme living conditions, which is of great economic importance. Bioprospective research of these regions already has been conducted. In case of positive results (which are expected) there will certainly appear the need of totally new and innovative solutions satisfying all stakeholders.

Property rights are problematic not only due to endemic organisms (which occur in places of limited area), but also organisms in huge territories comprising two or more states. Who can strive for it and how large may be these "shares" in percentage?

Moreover, it is certain, that some of genes is common for many species, quite often phylogenetically distant. Who should be the owner of property rights resulting from patenting genes?

[10] It relates mainly to varieties and breeds produced and appearing "endemically", but also specific characteristics and features discovered, recognized and practised by local communities.

[11] Consultative Group of International Agricultural Research.

4. Beyond the principle of sovereign authority over genetic resources

The principle of sovereign authority of states over genetic resources available on the territories under their jurisdiction, as it has been proved, is unable to eliminate all the encountered problems connected with their exploitation. The great example is the Convention on Biological Diversity with regard to the high extent of generality of its norms, which causes impossibility of solving concrete difficulties in the property rights. In 2001 Food and Agriculture Organization of the United Nations (FAO) declared the will of changing original assumptions, guided by the need of food production for present and future generations, as it was emphasized in the Preamble. The International Treaty on Plant Genetic Resources for Food and Agriculture (C) clearly indicates it. Its main goal is to guarantee free access to the most important species[12], which are the bases of diet for nearly the whole human population. It was also emphasized, that subject of regulations is the common concern of all the states, because it is a starting material of genetic improvement of crop plants in biotechnological processes (cf. Par. 3 and 6 of the Preamble C). The Treaty established the Multilateral System of Access and Benefit-sharing (cf. Part IV C), which by recognizing "the sovereign rights of states over their own plant genetic resources for food and agriculture" has given them the right to determine their own rules and the rage of access (cf. Art. 10, C). The free access to resources within the framework of Multilateral System is supposed to be held due to partial waiving by the states the rights to dispose them in exchange for similar facilities in relation to resources under jurisdiction of the other parties of the Treaty. This access concerns the purpose of utilization and conservation for research, breeding and training for food and agriculture and also production connected with producing food and fodders (cf. Art. 12.3 letter (a) C). Access shall be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved (cf. Art. 12.3 letter (b) C). Furthermore, recipients of genetic resources for these purposes "shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System" (cf. Art. 12.3 letter (d) C). Beneficiaries of free genetic material obtained from the sources of the System, in case of its commercialisation

[12] From this list there were excluded some species (among others soya, sugar cane) with peculiar economic significance for some developing states..

pay according to the procedure (cf. Art 19.3 letter (f) C) equivalent part of profits from commercialisation of this product. When this product is available without any limits for other recipients for further research and farming, the recipient of genetic resources, who is commercializing the product, is encouraged to pay the charge. Facilitated access to genetic resources is possible under condition that they will serve research, farming and training targets.

Apart from positive changes introduced with the Treaty, it should be mentioned about its limited influence. Regulations included there do not refer to plant resources intended to use in chemical, pharmaceutical industry and/or in other industrial production unrelated to food and fodders production[13]. Another serious restriction is limited access to material protected by intellectual property rights or other property rights. Issues are presented similarly with the transfer of technology protected by the intellectual property rights to the developing states. As it has been established by the parties, it should take place in the just way and on possibly the most favourable terms and at the same time in accordance with the principles of appropriate and effective intellectual property protection (cf. Art. 13.2 letter (b), (iii) C)[14]. These payments may get changed after intervention of the Governing Body, which has the competences of establishing different ranges of payments for all sorts of categories of genetic resources recipients, who decided about commercialization of these products. The body can also decide on the need to exempt from such payments for small territory or low income farmers from the states economically retarded (cf. Art.13.2 letter (d), (ii) C). Furthermore, the Governing Body is supposed to decide about facilitated access to the resources from the Multilateral System or establishing other appropriate solutions (cf. Art. 11.4 C).in relation to natural and legal persons within their jurisdiction who hold plant genetic resources for food and agriculture (cf. Art. 11.3 C). It is hard to claim what "other appropriate solutions" can be accepted by the Governing Body in order to implement the Treaty (cf. Art. 19.3 C) [15].

[13] Cf. Art. 12.3 letter (a) ITPgrf. However, "in the case of multiple-use crops (food and non-food), their importance for food security should be the determinant for their inclusion in the Multilateral System and availability for facilitated access".

[14] Content of the Article basically corresponds with equally controversial Art. 16 sec. 1 of the Convention on Biological Diversity. Unreality (limited effectiveness) of this kind of resolutions was probably predictable from the beginning.

[15] It is possible, that it would consist in depriving of resources these persons and private institutions, which have intellectual property rights to plants with a peculiar significance for agriculture and food do not want to share and refuse access to them.

This offer is fully controversial mainly with regard to the fact, that (according to Art.19.2 C): "all decisions of the Governing Body shall be taken by consensus". It is hard to imagine, that some member state having its own representative in the Governing Body would protect rights of its citizens or institutions (obtained in accordance with their own regime of intellectual protection law) and at the same time it would stand out against them with approval of means, which would *de facto* make them resign from previously obtained rights. It also does not seem, that in some cases (also these mentioned above) the good solution would be "another method of arriving at a decision on certain measures"(cf. Art. 19.2 C).

5. Conclusion

The awareness of importance of biodiversity to life and men's business activity appeared relatively late. It was noticed only under influence of worryingly fast speed of extinction of plant and animal species, which coincided with working up innovative biotechnological solutions of improving the effectiveness in agriculture, which is supposed to protect the demand for food to rising number of people all over the world. Low effectiveness of protective actions was caused mainly by the lack of individual and social awareness. Further initiatives has been already determined with economic regards: protection of biological diversity but acting in one's own business, universal regards, the argument of wealth of future generations and care for keeping conditions, which enable any existence. This process is perfectly reflected in the analysis of international legal acts. On the one hand, there is a will of action, on the other hand, difficulties with realization of ambitious assumptions connected with the will of protection of rising economic needs (also particular). The last ones have started to predominate evidently. At the same time the biodiversity (this natural and agriculturally used) is the only one guarantor of the functionality of ecosystems, delivering a number of services connected with water and air purification, improvement of soil fertility, stabilization of the climate and food production. Environments distinguished by bigger genetic diversity are lees sensible for abiotic and biotic stresses e.g. epidemics, sudden weather changes or ecologic catastrophes. At least biodiversity, regardless of its value in use, plays important recreational role and has got (often not appreciated) culture-producing, spiritual, artistic, aesthetic, ethical, existential and sometime even religious value.

For these and earlier purposes, nevertheless there recurs a thought about the necessity of searching for legal and international solutions. In order to avoid serious conflicts, there might be the need to look again at previously dismissed (but not forgotten) conception of common heritage. It may occur correct while supported with new criteria and above all with the consistency of complex legal and organizational solutions of international community. This idea might seem a little unreal due to experiences from the past, various position and number of stakeholders, i.e. interested of potential and real benefits of the states, plurality of other different interests. Idealistic nature of this intention should not discourage, because without any common benchmark, we cannot dream about peaceful solution of the issue of legal property of resources, which value is continuously growing. Moreover, there is an expansion of awareness of the necessity of demanding and activating the mechanisms of social, political and economic impact. Susceptibility to conflicts of these resources is becoming more and more emphasized. Due to these (mainly incommensurable[16]) reasons, biological diversity, regarded as the biggest heritage of mankind, deserves broad protection. Its further reducing will cause not only the drop in quality of life and but also real danger.

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The human right to the environment and the sustainable access to natural resources: ethical-legal reflections in the literature and Greek philosophy

Abstract

In this analysis we are trying to find, on a historical- theoretical side, the Greek origin of the notion of nature and the concept of natural environment (and the very idea of an eco-sustainable system) as a part of the heritage of the western culture. And today, when we think about the authorities as of what is "by nature" or "in their nature" we make it as the idea that has been fixed by Aristotle.

The *physis* refers to the innate eternally stable law of the being and becoming, that may be caught by the *logos* in its eternal laws and that opens up to the possibility of searching and thus, with the foundations of the concept of *physis*, the Greek philosophers pave the way for the western science.

It is thanks to the Aristotelian concept of the nature as *basis* that it is opened up the possibility to the *art* and therefore to the science to be a part of the cognitively reality.

The philosophical thought , basically, also with the crucial contribution of the *Sophistry*, comes to the "awareness of the idea of culture"; according to the sophist Antiphon, in fact, *the most important thing in the human society is education* and the fragment that makes reference to it suggests an efficient simile between the growth of men due to culture and the growth of plants due to a good sowing: in both cases a well started action naturally ends the same way, so that, as the good seed gives good fruits, similarly the good behaviour lives and sprouts forever.

Builders of these philosophical ideas, the Greeks are not only the creators of the concept of nature, but also of the notion of natural landscape: the human *logos* shapes the spaces and changes the land in landscape, where the society and the human civilization gain importance and those poetical principles expressed in the Theocritus' and Virgil's discovery of the spiritual Arcadia, populated by nymphs and young shepherds , take shape. This poetic look on the natural environment dates back to the early Greek literature.

But it is thanks to the artistic creativity of a philosopher, Plato, who is also a poet intimately, that we have some of the most beautiful pages on the description of the charm of the nature coming from the ancient world, first of all in the myth of the description of the earth narrated in the *Phaedo.* Another famous environmental description is in the first pages of the *Phaedrus,* where it is described that space of uncontaminated nature at the gates of Athens, where the Ilisos river flows, and where the philosophical discussion of the Dialogues takes shape.

The Ilissos itself is the subject of the most ancient ecological decree we have ever got; it was issued in Athens around 430 B.C. to force artisans and businessmen to move their companies far from the river, that had been unacceptably contaminated by their dumps. The next platonic description of the pleasant landscape of the Ilisos, 20 years later, seems to be an indirect confirmation – as scholars have proved – of the validity of that decree.

It also proves the environmental sensibility of the classic Athens; its ability to become aware of that matter because of the misbehaviours of some specific men; its ability to take actions able to restore the environment and to enforce the rights of the whole community.

Indeed, the Greeks consider nature as a place to take shelter where the *amoenitas* of a beautiful landscape aids rest and reflection. Maybe, it is also the reason why the platonic Academy apparently was engulfed in a grove, close to Athens, and Cimon beautified the *Agorà* by planting trees, whose benefits and importance as landscape Plato is well aware.

The philosopher prays for their protection from an extreme deforestation due, for example, to the needs of naval builders, considering the devastating effects that destroying forests causes on the ecosystem, according to the well – known platonic statement, that marks a significant awareness of the risks of environmental degradation and soil erosion due to the woody felling and the exploiting of the resources of the land. About that, there were administrative and legislative actions to protect the environment and the agricultural resources, and to defend the waters necessary to farming and urban needs. In a passage of the VIIIth book of the Plato's *Laws,* concerning the irrigation regulation, it is possible to find the formulation of a real "ecological crime". It has been supposed that it might be not a rule conceived *ex novo* by the philosopher, but the eco of certain laws aimed to organise disputes about water pollution.

It is well clear that the western sensibility for environmental and ecological problems has been set and taught by Greeks. Among the examples, we can quote a scientific interest showed by Theophrastus, a philosopher especially curious about the botanical research.

A significant example of interest towards nature that goes further a mere utilitarian approach comes from the attention paid to a tree that has taken, for the Greek civilization, a symbolic value either within agriculture and botany or poetry and religion: the olive. It is a plant whose spread – with some other ones like vines and grains – has represented a productive and demographic turning point for Hellenic society.

The archaic lawmakers were already concerned to give legal protection to olives, and the Greeks have been the first ones to issue a law for the protection of secular olives. Demosthenes has brought us the text of the law; Aristotle and Lysias have spelt out some important particulars, from which we understand that the purpose of the law was also to defend everybody's right to protect the access to natural and agricultural resources of primary importance.

The goal of the research is to prove:

1. The basis within the classical culture of the concept of nature and eco- sustainable system as a primary human right;
2. TThe birth of an environmental legislation as a condition of the right to development;
3. TThe formation of an ecological sensibility not in an emotional way, but in a methodical-rational one, as a guarantee of the development of the social and political community.

The method of this study follows the criteria of research belonging to the science of antiquity, endorsing all the statements and the consideration on the original sources, together with quotes and translations in Greek; the modern critical literature is constantly taken in consideration.

Keywords:
environmental protection, right to development, water protection, deforestation, sacred olive

1. Plato: specific rules

The problem of the protection of the environment, aimed to the protection of the right to the social, economic and civil development, has been consciously questioned by Greeks in archaic-classic period. We owe them not only the very idea of the philosophical notion of "nature" (φύσις), but also the first rise of an environmentalist legislation, tended to remove the obstacles of the right of the *polis* to development. In this sense, we can say that there is the rise of an ecological sensibility not only in an aesthetic-emotional way, but a methodical-rational and legal-political one too, which has had the aware target of the right to the protection of a good quality of life of the social and civil community.

From this point of view it seems to be unfounded to claim that Greeks had a significant indifference for environmental and ecological problems [1], considering

[1] In this way, among many ones, M. P. J. Dillon, *The Ecology of the Greek Sanctuary*, aus: *Zeitschrift für Papyrologie und Epigraphik*, 118 (1997), p. 114, for who «in general the environment was not sympathetically managed but rather exploited»; also D. Del Corno, *Paesaggio ed ecologia nel mondo greco e romano*, in *Parametro* 245/2003, p. 34, O. Longo, *Ecologia antica. Il rapporto uomo/ambiente in Grecia*, on *Aufidus* VI/1988, pp. 3-30.

also the scientific interest showed, for example, by a philosopher intrigued by botanical research as Theophrastus[2].

Generally, it is said that according to Greek civilization the nature is the main law to make reference to human life[3], but also a place to take shelter where the *amoenitas* of a beautiful landscape[4] aids rest and reflection. Maybe, it is also the reason why the platonic Academy apparently was engulfed in a grove, close to Athens[5], and Cimon beautified the *Agorà* by planting trees[6], whose benefits and importance as landscape Plato is well aware.

The philosopher prays for their protection from an extreme deforestation due, for example, to the needs of naval builders[7], considering the devastating effects that destroying forests causes on the ecosystem, according to the well – known platonic statement, that marks a significant awareness of the risks of environmental degradation and soil erosion due to the woody felling and the exploiting of the resources of the land[8].

About that, there were administrative and legislative actions to protect the environment and the agricultural resources[9], to defend mostly the waters necessary to farming and urban needs.

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[2] About Theofrastus father of the ecology L. Repici Cambiano, *Natura e comunità umane nella riflessione antica*, in Aa.Vv., *Ambiente e paesaggio nella Magna Grecia*, Documents of the 42th conference of studies on Magna Graecia, Taranto 5-8 October 2002, ed. Istituto per la Storia e l'Archeologia della Magna Grecia, Napoli 2003, p. 55 e n. 41 with bibl.; J. D. Hughes, *Theophastus as Ecologist*, on W. W. Fortenbaugh & R. W. Sharples, *Theophrastus Studies III. On Natural Science, Physics and Metaphysics, Ethics, Religion, and Rhetoric*, New Brunswick 1988, p. 73.

[3] M. Pohlenz, *Der hellenische Mensch*, Vandenhoeck & Ruprecht, Göttingen 1947, it.transl. by Beniamino Proto, *L'uomo greco*, La Nuova Italia, Firenze, 1986 (1. ed. 1962), p. 551.

[4] Quint., III, VII, 27.

[5] Diog. Laert. III 7.

[6] Plut., *Cim.* 3.

[7] *Leg.* IV 705c; see too *Leg.* VIII 843e and Theophr., *Hist. Plant.* V, 8, 1; Tuc. VI, 90, 3. R. Meiggs, *Trees and Timber in the Ancient Mediterranean World*, Oxford University Press, Oxford-New York 1982, pp. 116-118; L. Gallo, *Ambiente e paesaggio in Magna Grecia: le fonti letterarie*, on Aa. Vv., *Ambiente e paesaggio in Magna Grecia*, cit., pp. 122-124; M. Corsaro, *Ambiente e paesaggio in Magna Grecia: le fonti epigrafiche*, on Aa. Vv., *Ambiente e paesaggio in Magna Grecia* , cit., p. 161; C. Bearzot, *L'uomo e l'ambiente nel mondo antico*, cit., p. 14.

[8] *Criti.* 111bc; cfr. B. Wagner-Hasel, *Entwaldung in der Antike? Der Muthos vom Goldenen Zeitalter*, on *Journal für Geschichte*, 4/1988, pp. 13 ss.; D. Del Corno, *L'uomo e la natura nel mondo greco*, cit., pp. 95-96; O. Rackham, *Trees, Wood and Timber in Greek History*, Leopard's Head Press, Oxford 2001, pp. 23-26

[9] M. Corsaro, *Ambiente e paesaggio in Magna Grecia*, pp. 149-150; about mutual relationships and influences between environment and agriculture R. Sallares, *The Ecology of the Ancient Greek World*, Cornell University Press, Ithaca 1991; O. Murray, *The Ecology and Agrarian History of Ancient Greece*, on *Opus* 11/1992, pp. 11-21.

Particularly, Plato explains that we can justify the defence of the water-heritage as water can be easier polluted (εὐδιάφθαρτον), than earth and air (in his days)[10]. Water, besides, not only can be easily spoiled using toxic substances (ῥᾴδιον φθεί ρειν φαρμακεύσεσιν), but it can be even redirected and stolen (ἢ ἀποτροπαῖς ἢ καὶ κλοπαῖς)[11]. Thus, it is necessary to take legal actions to prevent and repress these crimes that damage the water resources (βοηθοῦ νόμου)[12].

So, Plato takes care to dictate specific rules about that: those who contaminate one another's water (ἄν τις διαφθείρῃ κὼν ὕδωρ ἀλλότριον), redirect or steal it (φαρμακείας ἢ σκάμμασιν ἢ κλοπαῖς), can be reported to astymones by those who have been wronged; these last ones shall put in writing the damages assessment; those who have been proved guilty of pollution using toxic substances shall pay the penalty and purify the spring or the water reserve(πρὸς τῷ τιμήματι καθηράτω τὰς πηγὰς ἢ τἀγγεῖον τοῦ ὕδατος)[13].

It has been suggested that with the technical phrase mentioned above, ἄν τις διαφθείρῃ ὕδωρ ἀλλότριον we can call for a real ecological crime, which is the remnant of similar laws already existing in the Archaic period and that Plato mentions rather than creates "*ex novo*"[14]. In fact, we know from Plutarch that Solon articulated laws to regulate the distance among wells and the private consumption of water drown from other's tanks; this because water supply came from wells, built by the majority of the citizens of the country, as there were lack of rivers, springs and everlasting springs[15].

Indeed, the importance that Greeks gave to what we call today the right to sustainable access to water and natural resources seems to be clear with the Platonic legislation, which grants the legal defence of the technical equipment from deviations and thefts (σκάμμα and κλοπή), in order to grant everyone's right to benefit from clear and safe drinking water. First of all, the philosopher quotes the ἀστυνόμοι, ἀγορανόμοι and ἱερεῖς as the administrative and police authorities (different from the political, legal and military ones, quoted in VI 760a5-b2) (ἐπιμέλεια), given the task

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[10] *Leg.* VIII 845d3-4.

[11] *Leg.* VIII 845d4-5.

[12] *Leg.* VIII 845e1.

[13] *Leg.* VIII 845e2-8.

[14] L. Rossetti, *Il più antico decreto ecologico a noi noto e il suo contesto*, on T. M. Robinson-L. Westra (eds.), *Thinking about the Environment. Our Debt to the Classical and Medieval Past*, Lexington Books, Lanham MD 2002, p. 53.

[15] ῎Επεὶ δέ πρὸς ὕδορ οὔτε ποταμοῖς ἐστιν ἀενάοις οὔτε λίμνας τισὶν οὔτ᾽ ἀφθόνοις πεγαῖς ἡ χώρα διαρκής, ἀλλ᾽ οἱ πλεῖστοι φρέασι ποιητοῖς ἐχρῶντο, Plut., *Sol.* 23, 6.

to preserve and look after the fountains for the public water supply, as well as streets, houses, buildings, harbours, square, sacred places and temples within city boundaries (VI 758e). Particularly the astynomes, in number of three, everyone taking care of the side of the city assigned to them, watch over the water coming from the spring (πεγὴ) to the tanks (κρῆναι) of the urban centre (κρῆναι)[16], and the spring too is monitored by specially appointed guardians; (φρουράρχοι); thus, the waters reach the city in adequate quantities and hygienically healthy (ἱκανὰ κα καθαρὰ), so they can beautify the city and be useful too at the same time (κοσμῆὶτε ἅμα κα ὠφελῆ τὴν πόλιν)[17]. Likewise, the agoranomuses, who are in charge of maintaining the order within the square as guardians of the laws in the field, must take care of the temples and the fountains around the square (καὶἱερῶνὶκα κρηνῶν ἐπιμελεῖσθαι τῶν κατ᾽ ἀγοράν), so that nobody can damage them (ὅπως μηδέν ἀδικῇ μεδείς)[18].

The violation of the police laws enclosed in the generic formula of ἀδικεῖν seems to consist in the violation of laws[19], punished by agoranomuses and astymones, within their specific authority, in the very forms Plato pointed out[20]. It is, as Klingenberg asserts, about police laws of substantive right, that forbid everyone to damage public fountains and waters; the scholar proved that the Greek law, from the V to the I century B.C., had laws similar to Plato's dispositions. This is clear, for example, in Plutarch's writings, where the Attican right forbids and punishes the deviation of canals and the theft from public pipelines[21]; Klingenberg mentions also the significant dispositions about the fountain of Minoe in Delos (V-VI century), the regulation of the worship of the nymphs of the Asclepeion of Cos (IV century), the *Decretum Carthaeense* of Carthaea of Kea (III century), the paragraph κρηνῶν of the *lex de astymones* of Pergamon (II century), the dispositions of the *Lex de mysteriis* of Andania (I century)[22]. They are disposition that, basically, dictate norms on the supervision and the maintenance of the public fountains and that forbid and punish the defilement.

16 About the difference between πεγὴ and κρήνη E. Klingenberg, *La legge platonica sulle fontane pubbliche*, on H. J. Wolff, J. Modrzejewski, P. Dimakis, A. Biscardi (hrsg), *Symposion 1974*, Vorträge zur griechischen und hellenistichen Rechtsgeschichte (Gargnano am Gardasee, 5-8 Juni 1974), Köln-Wien, Böhlau Verlag 1979, pp. 289-290.

17 *Leg*. VI 763c5-d5.

18 *Leg*. VI 764b1-3.

19 In this way E. Klingenberg, *La legge platonica sulle fontane pubbliche*, cit. p. 293.

20 *Leg*. VI 764b3-c4.

21 Plut., *Them*. 31. 1.

22 E. Klingenberg, *La legge platonica sulle fontane pubbliche*, cit. p. 284.

2. Hygienic-sanitary sensibility

Considering this strong hygienic – sanitary sensibility (that is not stranger to the important and well-known influence of physicians and medicine within the Greek society and culture) and the existing legislation, the observation that the very definition of drinking water is a Greek heritage seems to be legitimate, and it is a further distinction among the West and the other civilizations[23]. About that, Livio Rossetti recalls the example of the inscription *IG I³* 1 257, deriving from a stele found in 1920 close to the Acropolis dated back to 430 B.C., that includes the text of a decree that imposes to the factory working leather, close to Ilisos river, to move elsewhere, as, with the scraps of their work, they had polluted the waters of the rivers flowing close to Athens, had poisoned the air with unpleasant scents and soiled the whole area. Rossetti, just like Hermann Lind had noticed[24], believes that it is possible to prove the certain effect of the decree thanks to the indirect testify of the famous platonic passage of the *Phaedrus* (230bc), written a few decades later, where the pureness of Ilisos' water and the pleasant harmony of the meadows and the grove have been described[25]. Socrates suggests to choose a very place where you can join the tranquillity (ἡσυχίᾳ) of the nature, along Ilisos river[26], before starting the long following discussion with Phaedrus and, because of the summer season and the late morning, the boy is happy to soak his feet in the water, that looks sweet, pure and clear[27].

Eventually, it is located a grove that, as for girls and votive statues being there, seems to be the landscape creation of a sacred park (ἱερὸν κορῶν)[28]dear to some nymphs and Acheloos, shaded by a huge sycamore[29]; to Socrates it is *a nice place*

23 L. Rossetti, *Il più antico decreto ecologico a noi noto e il suo contenuto*, cit., p. 56.

24 H. Lind, *Sokrates am Ilissos. IG I³ 1 257 und die Eingangsszene des platonisches "Phaidros"*, on *Zeitschrift für Papyrologie und Epigraphik*, 69/1987, pp. 15-19

25 L. Rossetti, *Il più antico decreto ecologico a noi noto e il suo contenuto*, cit., p. 50.

26 *Phaedr.* 229a2.

27 *Phaedr.* 229b7-8. About the allegory of the water, purifying spring, M. Treu, *Il passaggio del fiume. Echi simbolici e tecniche narrative nel Fedro*, on *Studi italiani di filologia classica*, I/2003, pp. 183-194.

28 *Phaedr.* 230b7; about the existence of arcaic sanctuaries close to springs , as proof of the ancient fertility of the ground, full of grazings, trees and rivers *Criti.* 111d; on the abundance of forests (Ûlhj) on the legendary age of Chronus, *Pol.* 272a.

29 ὑψηλοτάτην πλάτανον, *Phaedr.* 229a8; on πλάτανος-Πλάτων G. Reale, *Platone. Fedro*, by Giovanni Reale, Fondazione Lorenzo Valla-Arnoldo Mondadori, Milano 1998, p. XXVI and p. 180.

to take a break (καλή γε ἡ καταγωγή)[30], as there is a high chaste tree with a beautiful shadow (τοῦ τε ἄγνου τὸ ὓψος καιτὸ σύσκιον πάγκαλον), and being in full bloom (καιὼς ἀκμὴν □χει τῆς ἄνθης), makes the place very scented (ὡς ἂν εὐωδέστατον παρέχοι τὸν τόπον)[31]; Socrates notes that the atmosphere of graceful harmony is increased by the flowing of the fresh water of the river, the nice breeze, the song of cicadas[32], the nice meadow growing in a gently sloping that seems to be made to lie down and lay down your head[33].

The Socratic spirit seems to be completely enraptured by this enchanting environment[34], as if it were a stranger looking at that place for the first time; Socrates' statement about the fact that he never goes out of the city wall arouses Phaedrus' curiosity; the answer of the philosopher is well known: he says he is a man who loves to learn (φιλομαθὴς); but the country and the trees have nothing to teach him (τὰ μέν οὖν χωρία κα τὰ δένδρα οὐδέν μ᾽ ἐθέλει διδάσκειν), the men who live in the city (ἄστει ἄνθρωποι) just do[35]. This paraded lack of interest for nature[36] could be connected not with asserting insensibility towards the natural environment – denied indeed by the very previous passages – but with the main Socrates' interest, that is strictly theoretical: the pure thinking occurring by talking with other men and even living together[37].

30 *Phaedr.*230b2. the place described is close to the Homeric description of the place where Ulysses and Nausicaa met and thus made us realize it is a Plato's rhetorical-literary construction, G. R. F. Ferrari, *Listening to the Cicadas. A Study of Plato's Phaedrus*, Cambridge University Press, Cambridge 1987, p. 16; R. E. Wycherley, *The Scene of Plato's Phaedrus*, in *Phoenix* 17/1963, pp. 88-89; C. J. Rowe, *Plato. Phaedrus*, Aris & Philips, Warminster 1986, p. 135, indeed, are sure about the description of the landscape, in *Phaedrus,*is realistic.

31 *Phaedr.* 230b3-5.

32 About the cicades symbol of singing and poetry, *Phaedr*. 258e6-259d8; see A. Capra, *Il mito delle cicale e il motivo della bellezza sensibile nel Fedro*, on *Maia* 52/2000, pp.225-247.

33 *Phaedr.* 230c2-4.

34 D. Del Corno, *L'uomo e la natura nel mondo greco*, on R. Uglione (a cura di), *L'uomo antico e la natura*, documents of the national conference of studies Celid, Torino 1998, p. 96.

35 *Phaedr.* 230d3-5.

36 As O. Longo, *Ecologia antica*, pp. 29-30 has explained. This thesis seems to be denied by Plato's deep philosophical observations on the concept of nature; about a discussion by the literary criticism on this subject in XX-XXI century, A. Macé, *The new frontier: philosophy of nature in platonic studies at the beginning of the XXIth Century*, on *PLATO, The electonic Journal of the International Plato Society*, n. 9/2009, sito *http://gramata.univ-paris1.fr/Plato/article89.html.*

37 *Epist.* VII, 341c6-7.

3. Wild country and city

For Greeks it is the city and not the wild country the place to build justice, and thus the law, and the right[38], the place where men's humanity come true; according to justice the law is a human act, belonging to the mental field of the science and it is different from natural justice and laws: about natural justice it works the law of the jungle, different from the law of the *polis* where there is Solon's *isonomy* about geometrical equality[39]. To state these principles Plato makes Socrates say that he loves the city more than the country; indeed, he is different from common people[40] just like the two main characters of Aristophanes' *Birds*, who, tired of been overwhelmed, of the noise, of the urban corruption, prefer to take shelter in birds kingdom, symbol of aerial freedom, where there are no authority, no duties, no principles.[41]. But this is just the wild life where Cyclops lived, without *poleis*, laws and legislative assemblies[42] and in such a land without *poleis* and laws the sorceress Circe receives Ulysses and his fellows with fake hospitality[43].

For Greeks, instead, the organized city life, the law and the justice let the man to be more man, living in a social dimension[44]. Aristotle quotes Homer (*Il.* IX, 63) to state that if a man is a living citizen by nature (φύσει πολιτικὸν ζῷον), people who do not live in a city are inferior men (φαῦλός) or sublime ones (κρείττων)[45]. Beyond, he also says that those who are not part of a community (κοινωνεῖν) and do not need anything, being self-sufficient, are not part of a civilian context and they are beasts or gods (ἢ θηρίον ἢ θεός), since men, by nature, are meant to live together[46].

38 See M. Pohlenz, *L'uomo greco*, cit., p. 241.

39 G. Naddaf, *The Greek Concept of Nature*, cit., pp. 83 ss. To compare the principle of „sonom…a in Anaximander, F. Brahami, *Les Affections sociales*, Presses Universitaires de Franche-Comté, Besançon 2008, pp. 11-53, considers the platonic onstruction of the political philosophy as part of the science of the nature.

40 See M. Ianne, *A quali leggi Socrate ubbidisce? Profili giuridici nell'Apologia e nel Critone,* on *Annali della Facoltà di Giurisprudenza di Taranto,* V, Cacucci, Bari 2012, pp. 187-202.

41 Aristoph. *Aves*, vv. 755-768; D. Curiazi, *Note agli Uccelli di Aristofane*, on *MusCrit* 10-12/1975-1977 pp. 116ss.; about the fruitfulness Aristophanes sees in country life *Pax*, vv. 1159-1171.

42 Hom. *Od*. IX, vv. 112-115.

43 Hom. *Od*. IX, vv. 230 ss.

44 See Alc., fr. 130 Lobel-Page and B. Snell, *Dichtung und Gesellschaft*, Claassen Verlag, Hamburg 1963, it transl. by Fausto Codino *Poesia e società. L'influsso dei poeti sul pensiero e sul comportamento sociale della Grecia antica*, Laterza, Bari 1971, p. 58.

45 Arist., *Pol.* I 1253a2-18.

46 Arist., *Pol.* 1253a28-31; see also Sof. *Ant.*, vv. 332-375, with the hyman to mankind and its skills.

The very importance Greeks give to the social and city life makes them understand the importance, even on a normative side, of a sustainable access to the resources that the natural environment offers.

In fact, they were the first ones to make legislative and governmental acts defending waters and territory.

About that, Plato remembers the negative effects – about environmental impact and quality of life of resident people – absent legislative intervention (βοηθοῦ νόμου). It is just the case of wide deforestations of main mountainous and hill areas, mentioned in *Critias*, with a critical awareness of the problem[47], that have made the ground dried up, that cannot hold back the rain water, as today, when it flows quickly in the sea finding barren land (οὐχ ὡς νῦν ἀπολλῦσα ῥέον ἀπὸ ψιλῆς τῆς γῆς εἰς θάλατταν); before deforestation the water from the clayey soil of the forest went through underground cavities and fed the flow of springs and rivers (κρηνῶν καὶ ποταμῶν), near which sanctuaries were built (ἱερὰ) – Plato says – still existing (καὶ νῦν)[48]. This clarifies that in the Attican territory of nine thousand years before, mentioned in *Critias*, the natural conditions of the land (χώρας φύσει) were ecologically in balance not because it was remained wild. On the contrary, the country was anthropic, as the building of sanctuaries proved, and also the intense farming performed by real farmers (ὑπὸ γεωργῶν μέν ἀληθινῶν), who loved beauty and had good natural skills (φιλοκάλων δέ καί εὐφυῶν) and thus did their work properly (πραττόντων αὐτὸ τοῦτο), so that they had excellent land and abundant water (γῆν δέ ἀρίστην καί ὕδωρ ἀφθονώτατον ἐχόντων)[49]. The true message of Plato is that, the human activities taking place there, were deferential of the environmental sustainability of the land and the nature.

4. Specific forms of supervision of territory

Following these very principles the Platonic legislation, in the IVth book of the *Laws*, contemplates specific forms of supervision of the territory, committed to special police bodies, the αγρονόμοι (Athenian countryside's magistrates) and the

[47] R. Meiggs, *Trees*, cit., p. 377, asserts that Plato's awareness about permanently damaging the environment, with deforestation, remains an isolate case of the ancient literature; but, according to M. P. J. Dillon, *The Ecology*, cit., p. 127, «this neglects the epigraphic evidence pertaining to sacred groves».

[48] *Criti.* 111d1-7.

[49] *Criti.* 111e1-4.

φρουρο (guardians), supported by twelve young assistants (760e1-2). They shall fortify the territory and make it impregnable to enemies but, at the same time, easily accessible to inhabitants, friends, livestock, with proper and safe roads. A particular attention shall be dedicated to rain waters, organizing the territory so they do not damage anything, but instead they make themselves useful, flowing from uplands to valley; the making of root canal treatments, channels and small dams shall be useful (νάματα κα κρήνας ποιοῦσαι) before the water reaches the plain, so that the overhead lands absorb the water that, downstream, forms rivers and springs, making even the most barren territories full of abundant and clear water (πολυύδρους τε κα εὐὖδρους) (761b).

We can notice that Aristotle states similarly in the *Politics* (VII, 1330b1-7), talking about the excellent conditions the city must benefit of, either for political activity or for war; for military needs the land must be for inhabitants easy to walk through and inaccessible to enemies; it is also needed the existence of abundant water and streams inside the territory (ὑδάτων τε καὶ ναμάτων μάλιστα μέν ὑπάρχειν πλῆθος οἰκεῖον) and if there is lack of water (εἰ δέ μή) they must build many and ample ponds to gather the rain water (ὑποδοχὰς ὀμβρίοις ὕδασιν ἀφθόνους κα μεγάλας) , so that this precious element shall never miss even when the city is closed off after a war.

Coming back to the Book IV of the platonic *Laws*, all the care the philosopher saves for the protection of the territory and the hydric supplies is necessary not only for the resulting practical utility, but also as it grows the beauty and the pleasantness of the whole natural environment of the country, as already mentioned in the *Critias*. AgronÒmoi and frouro must thus worry about beautifying (κοσμοῦντες) the springs (πεγαῖα ὕδατα), being them rivers (ποταμὸς) or sources (κρήνη), with plants and buildings, that together are very likeable (εὐπρεπέστερα); a special attention shall be given to a possible existence of woods or sacred places: agronomists and frouro beautify them (κοσμῶι), granting irrigations on every season of the year (ὑδρείας τε καθ῀ κάστας τὰς ὥρας) with proper root canal treatments (761b8-c4). All this complicated effort to make fertile, productive but also pleasant the land – showing an aware concern (marked also on a linguistic field) for a sustainable access to natural resources – shall also have a social purpose. Everywhere there is such a place (πανтακῇ δέ ἐν τοῖς τοιούτοις), Plato says, young people shall build gyms for themselves and old men; in particular just to the old men shall be granted hot baths, stocked with a lot of dry wood (761c4-7).

Another important example of what we would call today an ecological sensibility and a sustainable access to the resources of the earth, comes from the Greek legislation concerning the sacred areas belonging to sanctuaries around temples. Inside these areas the trees were particularly well-guarded and farming and sheep-farming were supervised, so not to spoil the natural environment and the existing ecological balance[50].

5. Sacred olive

A significant example of interest towards nature, beyond a mere utilitarian perspective, comes from a tree that got, for the Greek culture, a symbolic value either in agriculture and botany or in politics and religion: the olive, a tree whose spread – with other particular ones, like grapevines and grain – have represented a productive and demographic turning point for the Hellenic society[51]. The legendary-literary sources assert that the Attic is the homeland of the olive, a very traditional Athenian tree[52].

Among the sources, Sophocles' hymn to the sacred solemnity of the olive and its original Athenian origin prevails the most; it is strongly and suggestively sung by the chorus of the *Oedipus at Colonus* that praises Athens and the Attic, called the land of the olive, of horses, and of ships[53]. The sacred olive of the Athenian acropolis is the symbol of Athena, the patron goddess. And the olive looks like Athena, for its invincible strength and its bright foliage: just like the goddess is γλαυκῶπις[54], also the leaves of the olive are γλαυκᾶς, meaning not only the simple coloration of the leaves, but mostly the divine splendour coming from them; else the poet might have pointed out, with Anacreon, just the verdant olive (χλωρῇ τ᾿ἐλαίῃ) that the wind shakes like the dark leaves of the bay tree (μελαμφύλλῳ δάφνῃ)[55], where, moreover it is significant, in Anacreon, this contrasting shade of the same foliage that exalts the brightness of the olive[56].

[50] M. P. J. Dillon, *The Ecology*, cit., p. 115; «the punishment for removal of wood, whether chopped off or having fallen naturally, was fifty lashes for a slave and a fine of fifty drachmas for a free man», p. 116.

[51] R. Sallares, *The Ecology of the Ancient Greek World*, cit., pp. 107 ss.

[52] Apollod., III, 14, 1 HDT, 8, 55; Paus., 1, 24, 5 e 1, 26, 5; Ov., *Metam.*, VI, 70 ss.

[53] Soph., *Oed. Col.*, vv. 694-706.

[54] In both the Homeric poems Athena is called glaukîpij.

[55] Anacr., fr. 76 Gentili.

[56] Plat., *Tim.* 60a.

Since the archaic legislation the olives have been protected by laws, in particular the centuries-old ones, as the detailed disposition of the Solonian laws prove[57]. They forbid to cut the olives, except for religious practices and compelling civilian needs but, anyway, no more than two cuts in a year; among the city farming products only the olive oil could be sold outside the country; the cultivation of olives, their alignment and the distance among the rows were also regulated in detail[58].

Demosthenes has given us the text of the law for the protection of olives, considered a wealth of the State[59]; the disposition forbids to cut more than two trees a year for private cutting wood, on pain of 200 drachmas fee per tree (100 to treasury and 100 to those who press charges)[60]. Aristotle points out that, in the past, (πρότερον) whoever uproot or cut the sacred olive (εἴ τις ἐξορύξειεν ἐλαίαν μορί.αν ἢ κατάξειεν), whose oil was needed for Panathenaic Games, was judged by the Aeropagus and, if condemned, punished by death; but the Stagirite notices that since the olive is offered by the owner of the land and not picked up by the State with contract, the judgment takes place no longer (ἡ δέ κρίσις καταλέλυται), even though the law is in force (ὁ μέν νόμος □στιν)[61].

[57] J. B. Bury, *A History of Greece to the death of Alexander the Great*, Macmillan & Co., London 1951, pp. 183 e 188; N. G. L. Hammond, *A History of Greece to 322 B.C.*, Clarendon Press, Oxford 1959, pp.157-159; A. R. Burn, *The Lyric Age of Greece*, Arnold, London 1960, p. 203; A. French, *The Growth of the Athenian Economy*, Barnes & Noble, New York 1964, the chapters. I e II; Id. *The economic Background to Solon's reforms*, on *Class. Quart.* 50/1956; French's interpretation is disapproved by G. Ferrara, *Su un'interpretazione delle riforme di Solone*, on *PdP* 15/1960, pp. 20 ss., as, according to him, the analysis of the' "economical background" is placed in a compressed and deformed perspective; R. Descat, *Le loi de Solon sur l'interdiction d'exporter les produits attiques*, on A. Bresson (ed.), *L'emporion*, Rouillard, Paris 1993.

[58] The collection of the fragments of Solonian laws on E. Ruschenbusch, *Solonos nomoi: Die Fragmente des solonischen Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte*, Franz Stenier Verlag GMBH, Wiesbaden 1966, in particular F 60a, F 60b, F 62, pp. 91-92; thel fr. 60b (from Plut., *Sol.*, 23, 7), states: ὥρισε δέ καὶ φυτειῶν μέτρα μαλ᾿ἐμπείρως, τοὺς μέν ἄλλο τι φυτεύοντας ἐν ἀγρῷ πέντε πόδας ἀπέχειν τοῦ γείτονος κελεύσας, τοὺς δέ συκῆν ἢ ἐλαίαν ἐννέα...βόθρους δέ καὶ τάφρους τὸν βουλόμενον ἐκέλευσεν ὀρύσσειν, ὅσον ἐμβάλλει βάθος ἀφιστάμενον μῆκος τἀλλοτρ….ου.

[59] Lys. VII, 19.

[60] Dem. XLIII, 71: ἐάν τις ἐλάαν ᾿Αθήνησιν ἐξορύττῃ, ἐὰν μὴ εἰς ἱερὸν ᾿Αθηναίων δημόσιον ἢ δημοστικόν, ἢ ἑαυτῷ χρῆσθαι μέχρι δυοῖν ἐλάαιν τοῦ ἐνιαντοῦ ἑκάστου ἢ ἐπὶ ἀποθανόντα δέῃ χρήσασθαι, ὀφείλειν ἑκατὸν δραχμὰς τῷ δημοσίῳ τῆς ἐλάας ἑκάστης, ὀφειλέτω δέ καὶ τῷ ἰδιώτῃ τῷ ἐπεξιόντι ἑκατὸν δραχμὰς καθ᾿ἑκάστην ἐλάαν.

[61] Arist., *Ath.,* LX, 2.

Lysias seems to mention that law in a fleeting and generic way[62], and he focuses more widely on the concrete possibility of losing goods and homeland [63] for those found guilty of cutting down the sacred olives (μορία) or even just eradicate the stump (σηκός) survived to the fires during the war of Peloponnese, that had left bare the lands where once the luxuriant olive tree groves lived (Lys. VII, 7). The owners of the lands where the sacred olives grew were required to keep an eye on them and on the stump of a cropped olive, too[64].

The law saving the σηκός had practical purposes, as the vitality of an olive and its peculiarities let the stump bloom quickly [65] and, so, the tree will be soon productive; that is the reason why the Athenian government decided to protect the stumps survived the wars with a fence σηκός, that later, for metonymy, represented the trunk itself[66]. The sacred olives, μορίαι ἐλάιαι„ (clearly centuries-old) – different from the olives of private property\, „δίαι ἐλάιαι – grew in private olive tree groves (Lys, VII, 24) and were protected by the Aeropagus itself (Lys. VII, 7) with monthly inspections, committed by ἐπιγνώμονεj, and annual supervisions committed by the ἐπιμελῆται (Lys. VII, 25); the crime of extirpation did not lapse (Lys. VII, 17).

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[62] Lys., VII, 15 (τῆς μεγίστης ζημίας), 26 (περὶ τοῦ σώματος κινδύνους); these unclear expressions hardly suggest they refer to capital punishment, E. Medda, *Lisia. Orazioni*, Rizzoli, Milano 1997 (5. ed.), p. 224; if this danger had been real, it would not have been mentioned but emphasized L. Gernet, *Notice*, on L. Gernet-M. Bizos, *Lysias. Discours*, Tome I, Les Belles Lettres, Paris 1955, p. 108, for which, at the time of Lysias'orations, there had to be a sosftening of the law ; according to N. Vianello, *Le orazioni di Lisia tradotte e commentate*, Fratelli Bocca, Torino 1914, p. 166, there had to be different punishment for knocking down a whole tree or uproot a stump.

[63] Lys., VII, 3, 25, 32, 41.

[64] M. P. J. Dillon, *The Ecology*, p. 120

[65] See the statements of Hdt. VIII, 55; Verg., *Georg.* II 31 e 181; Plin., *Nat. hist.*, XVII, 241.

[66] R. Rauchentestein-K. Fuhr, *Ausgewählte Reden des Lysias*, Weidmann, Berlin 1886, p. 32; U. Albini, *Lisia. I discorsi*, Sansoni, Firenze 1955, p. 46.

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The right to water in the light of international law

Abstract
Access to drinking water is a basic human need, and therefore a fundamental human right. The subject of the study was to determine the scope of the right to water in terms of its object and subjects. There are two aspects of the right to water: access to drinking water and access to dignified sanitary conditions. The right to water may not fully fulfilled due to: controlling access to water as a form of political struggle or a tool of repression, providing access to contaminated fresh water, and charging excessive tariffs for the maintenance of water and waste water infrastructure.

Water as an indispensable substance should be available to everybody regardless of his/her material status. The objective of the study was to determine favourable and unfavourable conditions and factors for the enforcement of this basic human right. One should note, that the right to water is interrelated with other rights that determine people's living conditions, such as right to clean environment, protection of health, healthcare, etc. All those rights should be duly regulated in the international law and national laws of individual countries and their enforcement should be subjected to international control. At the age of globalisation and growing disproportions in living conditions of people on different continents the rights could be an effective tool of struggle against poverty.

Keywords:
a human right, right to water, safe drinking water, sanitation as a human right, world's water challenges, access to proper water sanitation system.

1. Preliminary comments

This article aims at analysing the concept of the human right to water and discusses the evolution of the international legal regime for human rights directly related

to the right to water. Recognition by the world community of the seriousness of problems faced by the water resources sector occurred as late as in the 1970s.

Water is a substance which is crucial to life, that is why it should be available to anyone regardless of their material status. Denying the right to water translates into denying the right to life. It is impossible to live without water.

According to the United Nations World Water Development Report 2015 population is growing by about 80 million people per year. It is predicted to reach 9.1 billion by 2050, with 2.4 billion people living in Sub-Saharan Africa, the region with the most heterogeneously distributed water resources (The United Nations World Water Development Report 2015, UNESCO 2015, p. 11, http://unesdoc.unesco.org/images/0023/002318/231823E.pdf). Limited access to water is directly related to poverty of a given society. Water-related diseases, caused by unsafe drinking water and the absence of proper sanitation facilities, are the leading causes of death in the developing world. The linkages between water and sustainable development are numerous, complex and often subtle. The article only signalises the relationship between water and its social, economic and environmental dimensions and the role of water in the most pressing developmental challenges of our times, ranging from food and energy security to urbanization and climate change.

2. The evolution of the right to water

Organisations which have statutorily dealt with the protection of human rights for many years stressed that the creation of suitable and safe conditions to fulfil the basic human needs, which include drinking, eating and defecating, constitutes the obligation of a country within the provision of basic human rights.

Undoubtedly the right to water itself has not achieved any definition in a binding international document, which, however, does not meant that such a right does not exist. In a number of documents, both biding and not binding, this right is directly enumerated or related to the right to a proper standard of life.

Historically, the access to water has been a source of enduring conflict governed by force of arms and economic imperatives. Nowadays the access to safe water is not only recognised as a social good and a human need, but also as a commodity and an economic value.

Water and sanitation adequate for personal needs is widely available in developed countries and taken for granted despite the approaching depletion

and looming shortages. On the other hand, in most parts of the world and for vast numbers of people clean water is far from a given (D. Donoho, Some Critical Thinking about Human Right to Water, "ILSA Journal of International & Comparative Law " 2012, Vol. 19, Issue 1, p.92).

Worth-noticing is the fact that the national forum has opinions divided between the advocates who consider water as a basic human need on the one hand, and a right on the other. The dichotomy in the approach between characterizing water as a right and as a need was perpetuated during the World Water Forums (Salaman M. A. Salaman, Sibhán McInerney-Lankford, The Human Right to Water, Washington 2004, p. 4-5).

The hesitancy in declaring water as a basic human need or a human right was highlighted by the General Assembly of the United Nations in resolution on The Right to Development (A/RES/54/175 of December 17, 1999, 83rd Plenary Meeting). The Resolution in paragraph 12 reaffirmed that, in the realisation of the right to development 'the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community'. This statement links the right to water to the overall right to development but does not possess formal legal enforceability (Salaman M. A. Salaman, Sibhán McInerney-Lankford, op. cit., p. 12.). The first binding document which addressed the issue of water as a human need in a certain scope is The Convention on the Law of the Non-Navigational Uses of International Watercourses adopted by the United Nations General Assembly on May 21 1997, entered into force on 17 August 2014 (General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49) . However, the U.N. Watercourses Convention does not directly address the issue of the human right to water because its stipulations regard the issue of "vital human needs". It is worth stressing that the meaning and practical implications of this term are still difficult to articulate.

It should be also mentioned that The United Nations Millennium Declaration, issued on September 8, 2000, which addressed eight Millennium Development Goals, which were to be achieved by the year 2015. It should be stated that Goal no 1: Eradicate Extreme Hunger and Poverty in target no 2 assumed to halve, between 1990 and 2015, the proportion of people who suffer from hunger. This goal did not mention the access to minimal amount of water , which conditions survival. The access to safe water and sanitation jest directly pointed as one of indicators of official development assistance

serving to achieve goal 8 i.e. Develop a Global Partnership for Development (The United Nations General Assembly resolution on The United Nations Millennium Declaration, issued on September 8, 2000, A/RES/55/L.2.).

3. The origin of the right to water

Regardless the fact whether the issue of the access to water is treated as a basic need or as a right it should be underlined that none of these terms was defined. The term 'need' implies some sense of philanthropy, and represents recipients as passive beneficiaries, whereas 'right' is the feeling of entitlement by beneficiaries which is related to the corresponding obligation on the side of the obliged entity (Salaman M.A. Salaman, Sibhán McInerney-Lankford, p. 16.).

The right to water can be originated from the right to an adequate standard of living. This right is included in Article 25 of the Universal Declaration of Human Rights (The Universal Declaration of Human Rights (UDHR), Paris, 10 December 1948, http://www.un.org/en/documents/udhr/.

In light of this article everyone has the right to an adequate standard of living, including, among others, food, medical care, necessary social services, etc. Taking into consideration that the UN recognised the right to food it could be assumed that the right to drinking water seemed too obvious to life, in order to separately enumerate it. Nonetheless, the right to air or breathing was not enumerated as well.

Yet another document, in which the right to adequate standard of living was defined is The International Covenant on Economic, Social and Cultural Rights (The International Convenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx). Where apart from mentioning in Article 11 "adequate standard of living", the right to "the highest attainable standards of mental and psychical health" was also defined (art. 12 ICESCR).

Despite that in international documents there is no definition of what the term "adequate standard of living" should mean it should be noticed that CESCR Committee in its General Comment No. 12 has clarified the content of the right to adequate food. Moreover, it was precisely stated that this right should not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The CESCR Committee has also pointed that the food must be both available and accessible (Asbjørn Eide, The Right to an Adequate Standard of Living, [in:] A Commentary on the United

Nations Convention on the Right of the Child, A. Alen, J. Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde ed., Boston 2006, p. 15-16).

Recognition of the human right to water by the Committee on Economic, Social and Cultural Rights in its 2002 General Comment has heightened the debate on the issue of the human right to water. The General Comments are not binding per se because the Committee has no authority to establish new obligations for the State Parties to the ICESCR. Nonetheless, it should be recognised that if we assume that without the provision of the right to water it is not possible to realise other rights resulting from ICESCR certainly the role of General Comment will consist in extrapolating the nature of State Parties' existing obligations.

Article 27(1) of the Convention on the Right of the Child should be also mentioned which explicitly enumerated "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." (The Convention on the Right of the Child, New York, 20 November 1989, http://www.unicef.org/crc/files/Rights_overview.pdf .) In paragraph 3 of this Article States - Parties to this Convention were obliged to undertake any "appropriate measures to assist parents and others responsible for the child to implement this right (…)" especially with regard to nutrition, clothing and housing. The right to adequate nutrition undoubtedly incorporates the right to water.

However, the most significant of the references to water rights appear in Article 24 paragraph 2 letter c of the Child's Convention in relation to Article 24 paragraph 1 of this Convention:

"Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (…)
   (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution. (…)".

The right to adequate standard of living is also stipulated in many regional documents, e.g. the African Charter on Human and Peoples' Right, the European Social Charter, the San Salvador Protocol Additional to the American Convention on Human Rights.

Finally on July 28, 2010, the United Nations General Assembly adopted a resolution, which recognised that the right to safe, pure, drinking water and to sanitation facilities is the right indispensable to ensure exercising the life and human right to the full (A/RES/64/292 of 28 July 2010). The General Assembly stated that the human right to water has not been fully recognised despite repeated references to such a right in various United Nations and other international instruments.

The resolution 64/292 was adopted by 122 countries with abstention of forty-one countries. One of them was the United States, which found the text of the General Assembly Resolution problematic because there was "no right to water and sanitation in an international legal sense as described by the resolution", and resolution had not been drafted in a transparent manner (Sharmila L. Murthy, p. 103).

Following on the heels of the General Assembly's vote on September 30, 2010 the General Assembly of the United Nation's Human Rights Council adopted a resolution recognising the right to water and sanitations as a human right (A/HRC/RES/15.L.14). The Assembly's resolution recognised the fundamental right to clean water and sanitation but did not specify that the right entailed legally binding obligations. The Human Rights Council resolution bridged this gap.

The Human Rights Council resolution is much more specific than the General Assembly resolution. First and foremost it affirmed that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living. Moreover, the Human Rights Council resolution states that the right to water is inextricably related to the right to the highest attainable standard of living mental health, as well as the right to life and human dignity.

The then-Independent Expert on human rights obligations related to access to safe drinking water and sanitation – Catarina de Albuquerque said that "This means that for the U.N., the right to water and sanitation, is contained in existing human rights treaties and is therefore legally binding." She said also that "The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable ." (http://www.un.org/apps/news/story.asp?NewsID=36308#.UK4X3oc0WSo).

4. The contents of the right to water

In the broadest and the most desired understanding the right to water and sanitation entitles everyone to sufficient quantities of safe water and sanitation services that are affordable, accessible, culturally acceptable, and which are

delivered in a participatory, accountable and non-discriminatory manner (C. de Albuquerque, On the Right Track: Good Practices in Realising the Rights to Water and Sanitation, Lisbon 2012, p. 28.).

However, resolution A/HRC/12/24 relates to the right to safe water than the right to water. What is more, narrowing the right to water to the right to safe drinking water suggests that the resolution relates only to water designated for personal consumption. Meanwhile the term "drinking water" relates to water which is proper to drink, regardless the aim, in which it is used. It seems that the future resolutions of the UN should relate to the right to water or to the right to safe water, and not to the right to safe drinking water.

As far as the human right to drinking water is arguably recognised in international law, the legal status of independent right to sanitation is less clear. Is should be stressed that the debate over the scope of the human right to water and sanitation still exists (Sharmila L. Murthy, The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization, "Berkeley Journal of International Law, 2013, vol. 31 Issue 1, p. 90).

In light of international law there arises one open legal question about the status of the right to sanitation. This right is sometimes described as a right derived from water, sometimes as a co-right with water, and at other times as an independent right. It is worth-stressing that in the 2010 resolutions by the General Assembly and the Human Rights Council, the right to sanitation is treated as a co-right with the right to safe drinking water (Sharmila L. Murthy, p. 116).

The lack of clarity regarding the precise scope of the right to sanitation facilities cannot be treated as an excuse to reject the contents of this right. An independent expert described the right to water and sanitation facilities in the meaning of human right and proposed this definition to the Council in a form of the first annual report (A/HRC/12/24). The term sanitation facilities was detailed as a system aiming at collecting, transportation, processing and disposing or utilising human excrements and other impurities related to hygiene.

According to the World Health Organization and UNICEF more than one third of the global population –approx. 2.5 billion people do not use an improved sanitation facility, and of these 1 billion people still practise open defecation. J. Eliasson – Deputy Secretary-General of the United Nations stresses that since1990 a lot has been done. First of all, the silence was broken and the search for solutions to this problem was started. Between 1990 and 2012 open defecation decreased from 24 per cent to 14 per cent globally, whereas e.g. in Ethiopia open defecation decreased

from 92 per cent to 37 per cent. Progress on sanitation primarily benefited wealthier people. However, there are still noticeable significant disproportions between urban and rural areas and between the rich and the poor (J. Eliasson (Foreward), Progress on Drinking Water and Sanitation, Publication of the World Health Organization and UNICEF, Geneva 2014, p. 6). That is why the efforts of the international society should focus on bridging the gaps and providing basic rights and dignity to all regardless of the material and social status.

Resolution A/HRC/15/l.14 confirms the obligation of states to provide complete execution of all human rights. The assurance of the access to safe drinking water and/or sanitation facilities to third parties does not release any state from the obligation to obey human rights. The resolution calls the states to adopt and implement effective bases regulating service providers, which must be compliant with obligations within the scope of human rights and ensure active, free and significant participation of local communities and interested entities in the decision-making process. (http://amnesty.org.pl/no_cache/aktualnosci/strona/article/7113.html)

5. Discrimination and inequalities in the access to drinking water and sanitation services

Under the ICESCR the human right to safe drinking water and sanitation can be understood as an attempt to keep equity and equality of water services delivery, in the wake of an increasing emphasis on economic efficiency and environmental sustainability (Sharmila L. Murthy, p. 94).

About discrimination and inequalities within the scope of execution of widely-understood the right to water can be discussed at different angles. First of all, in a given situation, such as a state of war or occupation during which the execution of this right is impeded by specific groups of people or personalities such as prisoners of war or interned civilians. The Geneva Conventions for the protection of war victims (1949) in Article 89 obligate states-parties to provide access to water and sanitation for prisoners of war and civilian populations for health and survival in armed conflicts. The parties to the conflict usually are not interested in maintaining prisoners' of war camps and undertaking efforts related with full execution of the Geneva Conventions despite it is a document which binds almost all countries in the world. However, it should be noticed that the situation of prisoners of war not only at an angle of the access to water, but also within the scope of other rights included in the Geneva Conventions is incomparably better in international conflicts than in non-international armed conflicts.

Secondly, in relation to the situation of some states which due to their geographical location have small and insufficient resources of drinking water. This problem is especially visible in Africa where water is viewed as a fundamental component of development. A large number of socio-economically deprived people is still exposed to the disconnection of basic water services by the local governments for non-payment and pre-payment water meters installations which limit access to water. In many African States water policy is still not sufficient and people are resorting to polluted water sites for survival which means their ultimate health decline (J. Razzaque, E. S. Kleingeld, Integrated Water Resource Management, Public Participation and the 'Rainbow Nation', "African Journal of Legal Studies" 2013, No 6, p. 221).

Globalisation and economic liberalisation have led to privatization of public services such as water supply and sanitation services. Increasing population, agricultural and industrial development, climate change, glacial melt have all negatively impacted the availability of freshwater. There is an increased demand on water which led to treating water as economic good. In many states, the government has traditionally subsidised water delivery systems, but more often observed is the impact of the private sector on such issues as: building infrastructure, such as dams and aqueducts, conveying water from other areas and other services.

The participation of the private sector impacts the level of water charges and dependance on various factors, which in turn triggers the increase of political movement demanding recognition of human right to water and sanitation, as well as an objection of local communities to such practices of their governments. Struggles for water justice have been seen in many parts of the world, but predominantly in South America, Africa and Asia (Sharmila L. Murthy, p. 95-97).

Thirdly, in many countries, especially in the circle of Islamic culture the situation of women and children within the scope of execution of the right to water is incomparably worse than the situation of the population of men. As stressed by C. de Albuquergue – the United Nations Special Repporteur on the Human Right to Safe Drinking Water and Sanitation "Health is in jeopardy without adequate access to safe drinking water and sanitation. Children fail to attend or cannot pay attention in school when they are sick. Children, particularly girls, also miss school because they have to walk long distance to collect water. Adolescent girls are more likely to miss or drop out of schools that do not have separate and safe toilets for girls." (C. de Albuquerque, op. cit., p. 27).

Many states have been privatising their functions such as the distribution of essential services for livehood, including water. This often comes at the expense of

vulnerable groups, like people living in poverty, women, children and indigenous communities. Many multinational corporations such as Suez Environnement or Biwater are responsible before the state for human rights violations. In the doctrine more often there occurs the concept of corporate social responsibility. It is related to the fact that these private corporations, transnational companies and other businesses violate human rights norms because they do not have international human rights obligations. This is because human rights treaties create legal obligations only for States, not for private entities. That is why, some authors and civil society organisations using the concept of human rights abuses instead of human rights violations in relation to private companies (G. A. Cavallo, The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility, "Merkourios- Utrecht Journal of International and European Law" 2013, Vol. 29, Issue 76, p. 43).

It should be also underlined that the right to water is one of the most environmentally consequential human rights in international law because it involves human access to a resource that is vital not only to humans but to the whole global ecosystem. It is predicted that due to the increase in the consumption of water by the year 2025, two-thirds of the world population could be under stress conditions. The growing water use is due to increasing consumption of food and industrial goods produced using water and increasing demands for water. The result is that at least one fifth of all people do not have access to safe drinking water, and more than one half of humanity lacks adequate sanitation (A. Trigueros, The Human Right to Water: Will Its Fulfillment Contribute to Environmental Degradation?, "Indiana Journal of Global Legal Studies" 2012, Vol. 19, Issue 2, pp.600-601).

6. Final comments

The right to water may unfortunately become another empty international promise dressed up as an individual right. The reasons for this scepticism results from the assessment of practise of many states in the scope of conducting water policy.

The right to water do not exist in isolation from other human rights.

The inequalities in the access to water and sanitation should be not only morally unacceptable, but also prohibited in international law. To this end States should revisit legislation, policies and practice and examine how to ensure that all people enjoy their rights equally. To achieve it the following should be observed: water and sanitation

infrastructure and control of water supplies should not constitute in any case a tool for repressions or political fight. The access to polluted sources cannot be understood as the execution of the right to water. Water as a substance which is indispensable to life should be available to anyone regardless of the material status. It means that the price of water and maintaining the infrastructure should be low enough for anyone to afford sufficient amount of water for an individual and their family.

Moreover, the international community should take into account regulation of these issues in bilateral and multilateral cooperation programs, national developments strategies and polices and activities of international organizations.

Effective water governance requires inclusion of community at all levels of decision-making. In democratic countries the people should not be represented just by private sectors, especially in the scope of meeting the needs necessary to life.

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Tax tools of environmental protection

Abstract
To address the environmental emergency, the legislature has adopted several instruments, including taxation, to implement a policy of sustainable government territory: tributes with incentive function of deterring or revenue; direct subsidies to reduce pollution and to fund services or works of environmental remediation; deposits, consisting in surcharges from the sale of polluting products, which can be returned in case of collection and recycling; penalties and other deterrents, imposed on those who carry out activities harming the environment; forms of market intervention, functional put brakes to polluting productions or to encourage renewal of production processes; tradable permits and pollution rights, made available to big polluters, for predetermined amounts, subject to alienation.

In this perspective, the environmental tax is to discourage the polluting emissions, consumption of products or environmental weeds and limited resources or renewable, not through direct taxation instruments, aimed at hitting the income from non-retractable conduct environmentally, or encumbrances indirect techniques, which affect the consumption of polluting products.

Keywords:
environmental emergency; sustainable government policy of the territory; protection tools; tax and extras tax measures; environmental taxation.

1. The environmental emergency and sustainable government policies. Tax and extras tax tools and intervention: incentive and disincentive, taxation revenue; subsidies; security deposits; penalties and deterrents regulatory techniques; forms of market regulation; tradable permits and pollution rights

The environmental emergency[1] is one of the most experienced problems in today's society[2]: in recent decades, industrial development, as well as producing economic and social welfare, has inflicted many harmful consequences to the environment (rapid climate change[3], irreversible pollution of the seas, air, soil and subsoil, intensity of noise, destruction of forests, reduction of natural resources and excessive use of water resources, disruption of the balance of the biosphere, trafficking of

[1] On the subject, comp. A. Uricchio, *Emergenze ambientali e imposizione*, in *Massimario delle Commissioni Tributarie della Puglia*, n. 1/2-2010, Bari, 2010, p. 174 ff.; A. Uricchio, *Emergenze ambientali e imposizione; il traffico transfrontaliero dei rifiuti tra imposta sul valore aggiunto e tributi doganali*, in *http://www.giustizia-tributaria.it/documenti/seminari_corsi_formazione/SEMINARIO_TARANTO_30_31maggio2014/Relazioni/Relazione%20Uricchio.pdf*; A.F. Uricchio, *Emergenze ambientali nell'area di Taranto: le risposte del mondo scientifico, gli interventi della legislazione d'urgenza, i possibili incentivi fiscali per le bonifiche*, in *Annali del Dipartimento Jonico in "Sistemi Giuridici ed Economici del Mediterraneo: società, ambiente, culture" - Università degli Studi di Bari "Aldo Moro",* 2013 – Anno I, posted at *www.annalidipartimentojonico.org*, p. 731 ff.; M. Pennasilico (a cura di), *Manuale di diritto civile dell'ambiente*, Napoli, 2014; A. Uricchio (a cura di), *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"*, Bari, 2014.

[2] As A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, Bari, 2010, p. 180, nt. 3, «in the wake of the progressive affirmation of a culture of sustainable development, recent years have been characterized by the proliferation of transnational agreements geared to the pursuit of environmental objectives. Between them should be certainly reported the Declaration of Stockholm that cannot be considered an isolated event in the international scene, rather the beginning of a new mentality increasingly open to this type of problems as a result of the consequences on the ecosystem caused by technology progress in recent decades. It is a new phase of dialogue between countries with similar problems and gathered around common objectives, such as crystallized in the Rio Declaration on environment and development of 1992 that recovering and confirming the contents of the Stockholm Declaration of 1972, advocates the establishment of a new and equitable global partnership through international cooperation actions defined. The Declaration proclaims the 27 principles by implementing a compromise between the demands of developing countries, generally geared to promote growth, and those of developed countries, convinced that environmental protection is a priority requirement. Among the most important principles of the Declaration should be definitely included the wording according to which the right to development should be pursued "... to take equally into account the development needs and environmental ones of present and future generations". This principle, renamed with the emphatic phrase "sustainable development", it should be integrated with the question under which "environmental protection must be an integral part of the development process cannot be considered to be disjoint from it"».

[3] Comp. P.A. Moreno Valero, *Fattori economici scatenanti, fiscalità e politiche del cambiamento climatico*, in *Riv. dir. trib. internaz.*, n. 1/2010, p. 281 ff.

waste[4]) and deleterious effects on human health[5] (increase of tumors, headaches, irritability, teetotal, geopatic stress[6]), causing not a few critical insights about the effectiveness and the impact of government policies sustainable land[7].

The need to remedy this situation resulted in the spread of a particular sensitivity to environmental issues, which was followed by the birth of several environmental movements; however, if on the one hand, producers and consumers have persevered

[4] On the topic, comp. AA.VV., *Traffico transfrontaliero di rifiuti. Istituti, strumenti, spunti metodologici ed operativi*, Bari, 2008; F. Parente, *La «pirateria ambientale» da traffico illecito dei rifiuti: tecniche risarcitorie e sottosistemi normativi*, in A. Uricchio (a cura di), *Nuove piraterie e ordinamenti giuridici interni e internazionali*, Bari, 2011, p. 429 ff.; A. Bonomo, *Problematiche ambientali e gestione dei rifiuti in ambito portuale*, in A. Uricchio (a cura di), *Nuove piraterie e ordinamenti giuridici interni e internazionali*, cit., p. 449 ff.; V.F. Uricchio, *Il traffico illegale dei rifiuti e l'intensificazione dei controlli ambientali*, in A. Uricchio (a cura di), *Nuove piraterie e ordinamenti giuridici interni e internazionali*, cit., p. 459 ff.; C.M. Nanna, *La controversa nozione di rifiuto e la sua compatibilità con la normativa e la giurisprudenza comunitaria*, in *Annali della Facoltà di Giurisprudenza di Taranto*, Bari, 2009, p. 317 ff.; S.G. Simone, *La nozione di "rifiuto"*, in M. Pennasilico (a cura di), *Manuale di diritto civile dell'ambiente*, cit., p. 144 ff.

[5] On the topic, comp. A. Uricchio, *Valutazione economica degli effetti sanitari dell'inquinamento atmosferico: la metodologia dell'EEA. Inquadramento giuridico-normativo*, in *Annali della Facoltà di Giurisprudenza di Taranto,* Anno V, Bari, 2012, p. 696, where it says that «the link between the quality of the environment and protecting human health is very close. The environmental policy of the Union is also strongly characterised the warning for damage to health caused by air pollution as from other types of pollution (water, waste, etc.)». In addition, comp. A.F. Uricchio e G. Chironi, *Effetti dell'inquinamento atmosferico sulla salute: dalle metodologie europee alla legislazione nazionale e regionale in materia di valutazione del danno sanitario*, in A. Uricchio (a cura di), *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"*, cit., p. 349 ff.; A. Gratani, *L'inquinamento atmosferico dall'utilizzo di additivi metallici nei veicoli: tra dubbi e ricerca continua di dati scientifici attendibili*, in *Riv. giur. amb.*, n. 1/2011, p. 187 ff.; F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*, in *Rass. dir. civ.*, n. 2/2008, p. 397 ff.

[6] Comp. F. PARENTE, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*, cit., p. 404, nt. 13.

[7] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., pp. 179-180. In addition, on the topic, comp. C. Coco, *Fisco e ambiente: strumenti per un Governo sostenibile del territorio. Presentazione*, in *Riv. dir. trib. internaz.*, 2004, p. 369 ff.; G. Selicato, *Fisco e ambiente: strumenti per un Governo sostenibile del territorio. Profili teorici e lineamenti evolutivi degli strumenti agevolativi a carattere fiscale e non fiscale per la promozione dello sviluppo sostenibile*, in *Riv. dir. trib. internaz.*, 2004, p. 399 ff.; G. Selicato, *Incentivi fiscali e governo sostenibile del territorio,* in AA.VV., *Uomo e ambiente. Atti del II Incontro ionico-polacco svoltosi a Taranto dal 17 al 20 settembre 2007*, Taranto, 2008, p. 111; M. Villar Ezcurra, *Sviluppo sostenibile e fiscalità ambientale*, in *Riv. dir. trib. internaz.*, n. 1/2010, p. 343 ff.; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, in *Studi in onore di Lelio Barbiera*, a cura di M. Pennasilico, Napoli, 2012, p. 1487; A. Uricchio, *Il disastro ambientale di Taranto. Gli interventi finanziari e fiscali per fronteggiare il grave inquinamento*, in A. Uricchio (a cura di), *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"*, cit., p. 87 ff.

in detrimental to the environment, on the other, internally and have implemented community environmental policies aimed at regulating certain activities, in order to put a stop to the polluting pipelines[8].

To tackle environmental imbalances it was necessary to intervene with any type of tool[9], including tributary[10]: the OECD[11] has reputedly interventions aimed

[8] Comp. G. Stefani, *Finalità e limiti della tassazione ambientale*, in *Boll. trib.*, n. 20/1999, p. 1493.

[9] On the topic, comp. S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, in *Riv. dir. fin. e sc. fin.*, n. 4/2009, I, p. 570, which recognises the «need for an "instrument mix": environmental issues are different, so it is believed that the multifaceted approach is economically more efficient and effective tools singly considered». In addition, comp. Oecd, *Instrument Mixes for Environmental Policy*, 2007.

[10] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., p. 180; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., p. 1487. In addition, on the topic, comp. G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1493, according to the environmental protection policy might also substantiate «bans, and tolerances. Prohibitions regarding pollutions intolerable (totally or partially), which therefore should be regulated by law according to levels sustainable environmental quality». Instead, «environmental taxation cannot cover pollutions intolerable, be deleted, while may relate to those that do not exceed tolerable pollution levels». On international and community profiles of environmental tax, comp. L. Ago, *Aspetti internazionali e comunitari della fiscalità ambientale. La tassazione ambientale tra competenze comunitarie e nazionali*, in *Riv. dir. trib. internaz.*, 2004, p. 125 ff.; S. Crisafulli, *Aspetti internazionali e comunitari della fiscalità ambientale. I rapporti fra tassazione ambientale e occupazione (il c.d. doppio dividendo)*, in *Riv. dir. trib. internaz.*, 2004, p. 117 ff.; G. D'andrea, *Aspetti internazionali e comunitari della fiscalità ambientale. La nozione di tributo ambientale*, in *Riv. dir. trib. internaz.*, 2004, p. 105 ff.; M. Di Pace, *Aspetti internazionali e comunitari della fiscalità ambientale. La valutazione economica del danno ambientale*, in *Riv. dir. trib. internaz.*, 2004, p. 83 ff.; F. Giglioni, *Aspetti internazionali e comunitari della fiscalità ambientale. Gli interventi pubblici a tutela dell'ambiente*, in *Riv. dir. trib. internaz.*, 2004, p. 45 ff.; C. Lollio, *Aspetti internazionali e comunitari della fiscalità ambientale. I profili ambientali della fiscalità sul trasporto in Europa*, in *Riv. dir. trib. internaz.*, 2004, p. 185 ff.; N. Pennella, *Aspetti internazionali e comunitari della fiscalità ambientale. La tassazione sul trasporto transfrontaliero dei rifiuti*, in *Riv. dir. trib. internaz.*, 2004, p. 159 ff.; F. Principato, *Aspetti internazionali e comunitari della fiscalità ambientale. Le caratteristiche strutturali dei fenomeni inquinanti ed il loro tendenziale impatto globale*, in *Riv. dir. trib. internaz.*, 2004, p. 13 ff.; G. Puoti, *Aspetti internazionali e comunitari della fiscalità ambientale. Presentazione*, in *Riv. dir. trib. internaz.*, 2004, p. 3 ff.; F.C. Scotto, *Aspetti internazionali e comunitari della fiscalità ambientale. Gli interventi pubblici in materia di mobilità e tutela dell'ambiente*, in *Riv. dir. trib. internaz.*, 2004, p. 71 ff.; P. Selicato, *Aspetti internazionali e comunitari della fiscalità ambientale. La tassazione ambientale: nuovi indici di ricchezza, razionalità del prelievo e principi dell'ordinamento comunitario*, in *Riv. dir. trib. internaz.*, 2004, p. 257 ff.; R. Tarantelli, *Aspetti internazionali e comunitari della fiscalità ambientale. L'imposizione sulle fonti di energia*, in *Riv. dir. internaz.*, 2004, p. 215 ff.

[11] Comp. OCSE, *Instruments économiques pour la protection de l'environnement*, Paris, 1989. In addition, comp. Ministero dell'ambiente, *Spesa pubblica ambientale e incentivi economici*, in *Relazione sullo stato dell'ambiente*, Roma, 1997.

at environmental protection measures affecting «on choices between different technological alternatives or consumption, through the modification of convenience in terms of private benefits and costs»[12].

Within these coordinates, the environment is achieved by using a series of tax or extras tax tools: tributes with incentive function of deterring or proceeds[13], aimed at internalizing environmental "externalities"; subsidies to reduce pollution and to fund services[14] or works of environmental remediation[15]; deposits, consisting in surcharges from the sale of polluting products, which can be returned in case of collection and recycling; penalties and other deterrent tools (such as bonds), imposed on those who carry out activities harming the environment; forms of functional market intervention to put brakes on polluting productions or to encourage renewal, production processes through the adoption of environmentally friendly procedures; tradable permits and pollution rights, made available to big

[12] F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, in *Rass. trib.*, n. 1/1999, p. 115; S. Cipollina, *Fiscalità e tutela del paesaggio*, in *Riv. dir. fin. e sc. fin.*, n. 4/2008, I, pp. 558-559; S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 576.

[13] On the topic, comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 122, where stresses that in such cases «the environmental tax is specifically designed to contain emissions, consumption of polluting products, environmental goods, consumption of limited resources. It may be a tribute that hit these products or emissions so as to discourage the activities of pollutant emissions and consumption of products harmful to the environment; the same function, however, can be performed by targeted incentives, for example, encourage the renewal of industrial plants to reduce emissions».

[14] Comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 122, which point out that, in order to find resources to finance environmental services «tax tool is used, possibly in competition with non-tax instruments, to make the consideration of services rendered to the individual citizen in environmental matters. As a rule the fiscal instrument (tax) is more efficient than non-tax instruments (public price), for coercive character of tribute; Conversely, the public price has the advantage of greater flexibility with respect to tax and, therefore, better adapt to changes in the needs of environmental service».

[15] Comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 122-123, that the financing of environmental remediation is the «more obvious (but also more generic) application of the "polluter pays" principle, repeatedly stated by the European Union and finally expressly indicated in art. 130(r), paragraph 2, of the Treaty establishing the community, as amended by the single European Act. From a legal point of view, this is pursued through the establishment of so-called special purpose tax, whose revenue, i.e., is wholly or partly used to finance environmental rehabilitation works rather than general taxation. Of course this function can well be pursued even within disincentive tributes».

polluters, by central and local authorities, for predetermined amounts, with the effect that, if those owners to produce less polluting emissions to the amount allowed is allowed the alienation of "pollution rights"[16].

2. The environmental tax as a policy performance complex to prevent, eliminate or reduce certain polluting activities. Environmentally sustainable production

For environmental tax means, therefore, the taxes, fees, royalties, contributions and any other performance sets «due from manufacturer polluter or by the user in order to help to prevent, eliminate or reduce a specific pollutant activities»[17].

In terms of lawmaking of reality, environmental enforcement allows you to discourage polluting emissions, consumption of products or environmental weeds and limited resources or renewable, not through direct taxation instruments, aimed at hitting the income from non-retractable conduct environmentally, or encumbrances indirect techniques, which affect the consumption of polluting products[18]: it is

[16] In this sense, comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 115; S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., pp. 576-577; S. Cipollina, *Fiscalità e tutela del paesaggio*, cit., p. 559. On the topic, comp. P. BARABINO, *La "fiscalità" dei certificati verdi tra natura e forme di circolazione*, in *Riv. trim. dir. trib.*, n. 4/2013, p. 767 ff.; A.M. Princigalli, *Il mercato delle emissioni inquinanti*, in *Studi in onore di Lelio Barbiera*, a cura di M. Pennasilico, Napoli, 2012, p. 1171 ff.; V. Colcelli, *La natura giuridica dei certificati verdi*, in *Riv. giur. amb.*, n. 2/2012, p. 179 ff.; C. Coco, *I diritti di emissione tra ambiente e impresa in Italia*, in *Riv. dir. trib. internaz.*, n. 1/2010, p. 251 ff.; E. Cicigoi e P. Fabbri, *Mercato delle emissioni ed effetto serra*, Bologna, 2007; M. Lipari, *Il commercio delle emissioni*, in E. Bruti liberati e F. Donati (a cura di), *Il nuovo diritto dell'energia tra regolazione e concorrenza*, Torino, 2007, p. 183 ff.; F. Pernazza, *I certificati verdi: un nuovo "bene giuridico"?*, in *Rass. giur. ener. elettr.*, 2006, p. 180 ff.

[17] M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, in *Dir. e prat. trib.*, n. 5/2013, p. 1170. In addition, comp. S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 577, where it reiterates that «the environmental taxes include pollution removal costs in the prices of pollutants, acting mainly in the form of taxes on production or consumption».

[18] In the same words, comp. G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1498, that «environmental taxation has no punitive purpose, rather dissuasive. Those who pollute must pay a "forced price" for the use of materials and the elimination of polluting waste. This "price" must be of such amount that the polluters and reducing the use of materials and energy from polluting or mutate the production techniques (or discharge) to prevent pollutions».

imposed by purpose[19], whose revenue is intended for the rehabilitation of polluted industrial sites[20]. This form of taxation has a second function, where it serves as a resource to finance manifold works of environmental rehabilitation and operation of environmental services, through the use of fiscal instruments and lever not tributaries as a resource aimed at coping with the cost of services of which the citizen can qualify on the environment: waste disposal, incineration, recycling and regeneration[21].

Given that environmental taxation should not follow an increase in taxation, the legislator's task will be to make a different allocation of the tax burden, so as to compensate for the higher revenue from environmental taxes with the revenue from other forms of retractable[22].

In any case, the environmental toll must hit "eco-friendly" products: the manufacturer is required to the public body that gives the latter carries out what is necessary to avoid and prevent negative effects on the environment[23]. On the contrary, the fiscal tool does not conform to the productive activities to generate waste, discharges, noise or emissions of polluting gases, where the same are inhibited by law and punishable under administrative or criminal profile. Indeed, in such situations, the tribute cannot finance the environmental remediation service[24].

3. The forms of protection available to the legislature: the "command and control" policies and measures of green taxation. The relevance of the "polluter pays" principle and its ratio

Functionally, there are many forms of protection available to the legislator: command and control policies (so-called methods of "command and control"), aimed at

[19] Comp. M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., p. 1170, where it says that the burden of this tax measure «can reverberate on the prices of pollutants, and therefore affect the final consumer provided that, of course, he is willing to purchase goods and services on which the producer has" transferred "the amount of tribute».

[20] Comp. R. Succio, *La fiscalità "sarda" si misura con l'ordinamento costituzionale e comunitario: l'esito del primo round e alcune considerazioni comparatistiche*, in *Riv. dir. trib.*, II, 2009, pp. 307-308.

[21] Comp. R. Succio, *La fiscalità "sarda" si misura con l'ordinamento costituzionale e comunitario: l'esito del primo round e alcune considerazioni comparatistiche*, cit., pp. 307-308.

[22] Comp. G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1498.

[23] Comp. M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., p. 1168.

[24] Comp. M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., p. 1168.

establishing limits, prohibitions and controls[25]; measures of "green taxation", aimed to encourage non-polluting behaviors and discourage polluting pipelines[26];

[25] It is, in particular, of «legislative and regulatory mechanisms that establish administrative technical standards and legal requirements for limitation of emissions and environmental damage (phase of command), and with complementary systems of monitoring and sanctions to defaulters (phase of control)» (S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 570). In other words, as O. Esposito de Falco, *L'armonizzazione fiscale e le tasse ecologiche*, in *Riv. giur. amb.*, n. 5/2004, pp. 649-650, these legal instruments-regulatory, administrative placing of constraints and prohibitions on polluting activities, allow «affect operators directly. In particular, they establish limits of acceptability, i.e. "standard" uniform, calculated on the basis of a compromise between the needs of environmental protection and clean-up costs». Moreover, the same A., reprising the orientation of a part of the doctrine (R. Perrone capano, *L'imposizione e l'ambiente*, in *Trattato di diritto tributario*, diretto da A. Amatucci, Padova, 1994, p. 449 ff.), points out «that such standards are not very effective for the purposes of environmental protection. The critical question was argued with a series of observations on the rigidity of the system and its inefficiency, i.e. on excessive bureaucratization, control that they do not favour the search for less polluting processes, because the fixed costs of the activity non-polluting». In addition, «the direct regulation ends up minimizing the costs to be borne for the depollution extolling too, however, the environmental benefits that aims to achieve. Which means they are discernible external diseconomies, since harmful effects resulting from specific economic activities do not cause cost increases for those who put them in place, instead falling back on society. In essence, a third party, other than the producer and the consumer, is called to bear a cost that should fall on polluting emissions producer».

[26] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., pp. 181-182; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., pp. 1487-1488. In addition, on the topic, comp. M. Cecchetti, *La disciplina giuridica della tutela ambientale come "diritto dell'ambiente"*, in *www.federalismi.it*, 2009, p. 87, where it says that «the environmental taxation (both those with "environmental assumption" is those with simple "environmental function") are considered a type of instrument of internalization particularly advantageous and abstract, far preferable to the approach based on direct regulation. It is, in fact, instruments with a high flexibility, i.e. the ability to be modulated to take account of the different costs of reducing pollution that can characterize the different productive sectors, and this should allow you to achieve socially and economically better than would be possible through obligations or standards. Moreover, the imposition of a tax on pollution is a clear incentive for the polluter to progressively reduce the impact of its work on the environment, without ever being satisfied of the results already achieved; how is effectively observed, to underscore a difference with the regulatory system, in these cases the rule is: the less you pollute less you pay, and if you don't pollute you don't pay anything. The continuous research of the reduction or elimination of the adverse effects on the environment produces then, as secondary effect, a strong push towards technological innovation and the discovery of new production systems to lower environmental impact».

while the structural perspective, the legal regime of environmental protection[27], governed only mediated by the Constitution (arts. 9, 32, 117, paragraph 2, lett. s)[28], draws especially supranational sources, including community based array on the principles of precaution and preventive action, the principle of priority correction at source of damage caused to the environment and the "polluter pays" principle (art. 191 , paragraph 2, TFEU)[29].

From the fiscal point of view, the polluter pays principle becomes a source of legitimization of taxes placed on environmental protection and special relief measures aimed at pursuing the same objective: the policy allows you to perceive tax benefits where the environmental factor is included within the particular tax base, in addition to being canon of detection and determination by an independent taxpayer's economic strength , assumed to apply to a real "environmental tax", type of tribute in which the conduct detrimental to the environment finds as an index of wealth, as such liable to tax[30].

[27] On existing correlations between environmental protection and information, comp. A. Bonomo, *La tutela dell'ambiente attraverso l'informazione*, in *Annali della Facoltà di Giurisprudenza di Taranto,* Anno II, Bari, 2009, p. 37 ff.; A. SAU, *Profili giuridici dell'informazione ambientale e territoriale*, in *Dir. amm.*, 2009, p. 199; B. Di Giannatale, *L'informazione a servizio dell'ambiente*, in M. Ainis (a cura di), *Informazione, potere, libertà*, Torino 2005, p. 189; S. GRASSI, *Considerazioni introduttive su libertà di informazione e tutela dell'ambiente*, in *Studi in onore di Paolo Barile*, Padova, 1990, p. 307 ff.; S. Labriola, *Diritto di accesso all'informazione del cittadino e doveri della Pubblica Amministrazione nella legge istitutiva del Ministero dell'ambiente (art. 14 l. 14 luglio 1986, n. 349)*, in *Scritti in onore di M.S. Giannini,* Milano, 1988, p. 269 ff. On the topic, comp. A. Uricchio, *Valutazione economica degli effetti sanitari dell'inquinamento atmosferico: la metodologia dell'EEA. Inquadramento giuridico-normativo*, cit., p. 696, that «to avoid or reduce (recte: minimize) the environmental risk (likelihood has a damage upon exposure to an environmental hazard) and then to avoid or reduce environmental damage, it is necessary to acquire and analyze complex information in order to determine whether there is a causal relationship between contaminant and the adverse effects on the ecology and/or human health. Such investigations are taken based on regulations and policies sewerage».

[28] Comp. S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 569.

[29] On the topic, comp. V. Corriero, *Il principio "chi inquina paga"*, in M. Pennasilico (a cura di), *Manuale di diritto civile dell'ambiente*, cit., p. 269 ff.

[30] Comp. P. Selicato, *Imposizione fiscale e principio "chi inquina paga"*, cit., p. 1166, whereas it stresses that the broad wording of the principle, found in community law «might also justify the action of the Member States to any other type of fiscal instrument, including the adoption of an environmental tax whose basis is formed from the simple "power to pollute", i.e. the freedom to use a particular contaminant or a certain quantity of scarce environmental resources».

The environmental toll hits the imposed economic weight on the environment. Indeed, on the one hand, polluting activities produce a financially assessable cost of depletion suffered by society to remove or limit the harmful effects[31]; on the other hand, make the subject achieve an enriching agent, i.e. individual, immediate advantage and economically assessable, equal to the value of natural resources taken from endangered to common usage, that is a power to dispose of the necessary tools for free to meet their own needs[32].

This form of taxation is fundamental in a double row of reasons: under the condition that the "environment" plays well nature of externalities, being liable to affect positively or negatively affect the cost of production or the consumption of certain goods and rights; in the configuration of environmental values as public heritage or widespread.

The benefit obtained by the user of good environment, resulting in polluting activities entered into with injury to the public, is suitable for expressing, demonstrating ability to contribute in an actual wealth, as it affects the economic strength expressed by the taxpayer, the particular value of the good domain-environment, with its autonomy and measurability[33].

It is evident, then, in this context, the ratio taken by *de quo* principle: encumbering economic operators in the real cost of pollution produced, so as to lift the burden from the State order, avoiding the costs are addressed only by State organs, directly or mediated, namely through the granting of aid to encourage some and not others and they can create unjustified positions of competitive benefit, thus distorting the market[34].

[31] Comp. P. Selicato, *Imposizione fiscale e principio "chi inquina paga"*, cit., pp. 1167-1168, where it says that this withdrawal form «trace the typical pigouvian pattern according to the normal logic of redistributive type-making incentive on the subject of pollutant transfer cost investment aimed to restore the environment to an acceptable level of safety».

[32] Comp. P. Selicato, *Imposizione fiscale e principio "chi inquina paga"*, cit., pp. 1167-1168, which points out that, in this case, «the environment does not merely constitute a fundamental constitutional value extras-levy tax but, with an apparent reversal of perspective, becomes it (rectius, his individual use) in fact-that ability to pay index, since economically assessable, may (indeed, must) be taken also by the legislature as justification, and limit parameter a special tribute».

[33] Comp. P. Selicato, *Imposizione fiscale e principio "chi inquina paga"*, cit., p. 1168.

[34] Comp. M. Meli, *Le origini del principio "chi inquina paga" e il suo accoglimento da parte della Comunità Europea*, in *Riv. giur. amb.*, 1989, p. 218; G. Tarantini, *Il principio "chi inquina paga" tra fonti comunitarie e competenze regionali*, in *Riv. giur. amb.*, 1989, p. 732. In the same words, comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, in *Rass. trib.*, n. 5/2003, p. 1616.

In essence, who exercises activities or behaviors held at odds with environmental standards must bear the expenses necessary to remove or reduce, within acceptable limits, the effects of pollution and implement precautionary measures and of rectification at source: so intended, the polluter pays principle does not employ the likeness of «a license to pollute to a consideration, nor has the character of a sanction but represents a preventive policy of distributive efficiency, encoded in community law»[35].

4. The environmental taxation and incentive in eco-community and in national legislations. Extras tax objectives of environmental protection, health and landscape

Currently, despite the efforts made by the community institutions, there are still real community environmental taxation, while not lacking precise proposals in this direction[36]. The environmental taxation and government incentives are frequently used by the Member States, whose laws give more and more importance to "green taxation", inspired by the community principles[37]. For the future, can only hope a greater coordination of environmental taxation at Community level, through a change of heart, with a view to improving the European integration policies, to work out a uniform response to the current economic and financial crisis and to promote economic growth; thinking differently would produce the antinomian effect to expand the inequality of treatment, still in existence, through the establishment of national environmental taxation, in whole or in part by uncoordinated community context[38].

The peculiarity of the environmental toll is found in the fact that, in addition to being inspired by the purpose of procuring revenue to the Treasury[39], also

[35] P. Selicato, *Imposizione fiscale e principio "chi inquina paga"*, cit., p. 1166.

[36] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., p. 191; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., p. 1495.

[37] Comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, cit., p. 1618; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., p. 1495; A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., p. 191. On the recent discipline of "eco-crimes", in italian law, v. l. May 22, 2015, n. 68, laying down "provisions on crimes against the environment", published in G.U., May 28, 2015, n. 122.

[38] Comp. G. Melis e A. Persiani, *Trattato di Lisbona e sistemi fiscali*, in *Dir. e prat. trib.*, n. 2/2013, I, p. 331.

[39] Comp. G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1493, whereas it stresses that «general purpose environmental toll is to reduce the cause of pollution, without excluding the aim to achieve revenue, to be allocated preferably to interventions that they fix the pollution damage».

pursues objectives such as extras tax[40] environmental protection, health and landscape[41], by taxing the consumption of goods and services and developing environmentally[42] friendly production processes and pipelines: in doing so, are polluting productions and discouraged the use of scarce resources and took on polluters the costs necessary to eliminate the injury caused to the environment[43].

The end to political intent becomes environmental, social and cultural rights, claim objective outside its extras tax assumption[44], with the effect of having to qualify in terms of collection tribute by purpose with indemnty function, rather than as

[40] On the present case in which tax enforcement pursues extras tax, comp. R. Balladares Saballos, *Le imposte con fini extrafiscali. Profili costituzionali e di teoria generale*, in *Imposizione di scopo e federalismo fiscale*, a cura di A.F. Uricchio, Santarcangelo di Romagna (RN), 2013, p. 29 ff.; Y. Martul Ortega, *I fini extrafiscali dell'imposta*, in *Trattato di diritto tributario*, diretto da A. Amatucci, *Annuario,* Padova, 2001, p. 655 ff.; F. Fichera, *Imposizione ed extrafiscalità nel sistema costituzionale*, Napoli, 1973. In addition, on the topic, comp. F. Batistoni Ferrara, *I tributi ambientali nell'ordinamento italiano*, in *Riv. dir. trib.*, 2008, I, p. 1091, according to which, «at least for the Italian order, the aim pursued by the legislator extras tax if necessary, considered generally admissible, does not detect the qualifying purposes of the institute, which only depend on its connection to the contributory capacity depending on the competition to public expenditure. From the point of view of tax law, therefore, the qualification of a tribute as a false problem seems environmental, not susceptible to express a particular category of tribute».

[41] For the application of the tax tool to protect landscape, comp. M. ANGIULLI, *Tassazione delle aree verdi pertinenziali e tutela costituzionale del paesaggio*, in *Annali della Facoltà di Giurisprudenza di Taranto,* Anno V, Bari, 2012, p. 19 ff. On the topic, comp. S. Cipollina, *Fiscalità e tutela del paesaggio*, cit., p. 560, where stresses that in our «missing sort charges corresponding to Naturschutzausgleichabgaben and Waldabgaben, i.e. to equalisation taxes for the protection of the natural beauty of the Woods, and introduced in some German Länder on the basis of § 8, Bundesnaturschutzgesezt (BNatSchG). The assumption of these duties is "a speech on nature and landscape" ("Eingriffen in die Natur und Landschaft", for example § 12, Niedersächsische Naturschutzgesetz – NdsNatSchG, i.e. the law on nature protection, Lower Saxony): the tax levy compensates for the damage to the well protected». In addition, comp. L. Gleria, *Le imposte ambientali: profili costituzionali nell'ordinamento tedesco*, in *Riv. dir. trib.*, 2003, I, p. 625.

[42] Comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, cit., p. 1618.

[43] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., pp. 183-184; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., pp. 1489-1490; G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1493.

[44] Comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 116; S. CIPollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 577.

real environmental toll[45]. In fact, once you find a tribute «(be it a tax, an excise tax, a consumption tax, or otherwise) is attributed to it, acting environmental function or destination or on revenue measures (rate, mainly) toll»[46].

5. The tools of environmental taxation: taxes on production and consumption; taxes on emissions; tributes on the exploitation and utilization of resources

Proceeding to an analysis, multiple tax are purely the instruments to achieve environmental taxation[47]: taxes on production and consumption, which affect the

[45] Comp. V. Ficari, *Prime note sull'autonomia tributaria delle regioni a Statuto speciale (e della Sardegna in particolare)*, in *Rass. trib.*, 2001, p. 1307. In addition, on the topic, comp. M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., p. 1174.

[46] F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 116.

[47] On the topic, comp. C. Sciancalepore, *L'utilizzo della fiscalità ambientale multilivello come strumento di sviluppo locale*, in A. Uricchio (a cura di), *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"*, cit., p. 111 ff.; A. Daidone e R. Lupi, *I tributi ambientali come collegamento tra "esternalità negative" e manifestazioni di ricchezza*, in *Lo Stato civile italiano*, n. 2/2013, p. 132 ff.; R. Alfano, *Tributi ambientali. Profili interni ed europei*, Torino, 2012; C. Buzzacchi, *La solidarietà tributaria. Funzione fiscale e principi costituzionali*, Milano, 2011, p. 208 ff.; F. Tocchi, *Fiscalità ambientale: profili costituzionali e applicazioni interne*, in *Teoria e Storia del Diritto Privato*, n. 4/2011, p. 86; R. Pignatone, *Agevolazioni su imposte ambientali ed aiuti di Stato*, in M. Ingrosso (a cura di), *Agevolazioni fiscali e aiuto di Stato*, Napoli, 2009, p. 747 ff.; F. Batistoni Ferrara, *I tributi ambientali nell'ordinamento italiano*, cit., p. 1089 ff.; B. Cavalletti, *Gli strumenti per il controllo delle esternalità ambientali*, in *http://www.economia.unige.it/04/disefin/finanza/dispense/a4.pdf*; V. Cusseddu, *La legislazione fiscale come strumento di correzione di fallimenti di mercato nel settore finanziario. Condizioni teoriche e pratiche di applicazione: riflessioni a partire dalla legislazione fiscale in campo ambientale*, in *http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2012/05/Tesi-Cusseddu_rivista-21-maggio-2012.pdf*; R. Alfano, *L'applicazione di tributi ambientali nel nuovo contesto della finanza regionale*, in *Tributimpresa*, n. 3/2005, p. 17 ff.; A.E. La Scala, *I principi fondamentali in materia tributaria in seno alla costituzione dell'Unione Europea*, Milano, 2005, p. 319 ff.; C. Coco, *Presentazione del lavoro dell'unità di ricerca di Bari*, in *Riv. dir. trib. internaz.*, 2004, p. 389; P. Selicato, *Aspetti internazionali e comunitari della fiscalità ambientale. La tassazione ambientale: nuovi indici di ricchezza, razionalità del prelievo e principi dell'ordinamento comunitario*, cit., p. 257 ff.; M. Di pace, *La tassazione ambientale. Motivazioni, caratteristiche, vantaggi (e svantaggi), strumenti, utilizzo ed effetti*, in *Riv. dir. trib. internaz.*, n. 1/2002, p. 160 ff.; P. Laroma Jezzi, *I tributi ambientali*, in P. Russo, *Manuale di diritto tributario. Parte speciale*, Milano, 2002, p. 319 ff.; A. Majocchi, *Environmental Taxes and Border Tax Adjustment: an Economic Assessment*, in *Riv. dir. fin. e sc. fin.*, 2002, I, p. 584 ff.; N. D'amati, *Ambiente e fisco nella emersione progressiva*, in AA.VV., *L'emersione del lavoro irregolare*,

use, in the context of industrial processes, or the consumption of products harmful to the environment[48], particularly characterized by the peculiarity that «the tax base is not a unit of a specific pollutant emissions, but a physical drive to a resource, an asset or a product that has some relation to the deterioration or damage to the environment in the sense general»[49]; emission taxes, imposed on eligible assets to disperse pollutants in air, water and soil or to generate noise, modulated according to the quantity and quality of the contamination and injury caused to the environment, in which «the tax base is a physical unit of a specific pollutant (for example SO_2) calculated by measuring pollutant emissions or on the basis of an estimate of the potential contaminant»[50]; tributes on the exploitation and utilization of certain resources to cope with the costs of treatment, collection and disposal, as well as administrative expenditure[51].

In the current landscape, then, no shortage of qualified taxation assumptions "environmental" for the sole purpose of making more acceptable tax claim by the general taxpayer, while not presenting, in concrete terms, a precise connotation,

Bari, 2002, p. 127 ff.; G. Panella, *Economia e politiche dell'ambiente*, Roma, 2002; A. Majocchi, *Greening Tax Mixes in OECD Countries: a Preliminary Assessment*, in *Riv. dir. fin. e sc. fin.*, 2000, I, p. 361 ff.; F. MENTI, *Ambiente e imposizione tributaria: il tributo speciale sul deposito dei rifiuti*, Padova, 1999; I. MUSU, *Una nota sulla teoria delle riforme fiscali ambientali*, in *Riv. dir. fin. e sc. fin.*, 1999, p. 2 ff.; G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1493 ff.; G. D'alfonso, *La tassazione ecologica*, in *Il fisco*, n. 14/1997, p. 3940; F. MARCHETTI, *La tassazione ambientale*, Roma, 1995; E. Gerelli, *Società post industriale e ambiente*, Roma-Bari, 1995; R. Perrone Capano, *L'imposizione e l'ambiente*, cit., p. 449 ff.; F. Amatucci, *Le fondamenta costituzionali dell'imposizione ambientale*, Napoli, 1993; C. Fergola, *L'introduzione di "imposte ecologiche" nell'ordinamento italiano*, in *Dir. e prat. trib.*, 1992, I, p. 1435; E. Gerelli e G. Tremonti (a cura di), *Tassazione, consumo, ambiente*, Milano, 1991; E. Gerelli, *Ascesa e declino del business ambientale*, Bologna, 1990; M. Miscali, *Imposizione tributaria e territorio*, Padova, 1985; F. Osculati, *La tassazione ambientale*, Padova, 1979; J.P. Barde e E. Gerelli, *Èconomie et politique de l'environnement*, Paris, 1977; E. Gerelli, *Economia e tutela dell'ambiente. Possibilità e problemi di uno sviluppo "pulito"*, Bologna, 1974.

[48] With regard to excise duty taxes, comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, cit., p. 1621, where stresses that if «the discipline of the case reveals a justification environmental tax (relevant to the extent to characterize in terms legally tax report-significant contributor), the ratio will no longer levy that redistributive (which must be justified by the economic solidarity), but the compensation of an environmental cost; in such cases we have imposed on the allotment policy "polluter pays" principle».

[49] F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 118.

[50] F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 118.

[51] Comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, cit., p. 1619.

which indeed turns out to be foreign or marginal compared to the present case which is taken in a tax is not consistent[52].

For a tribute may be qualified as "the environment" is necessary, first, that the taxable amount, which is the base material on which the claim is levied, negatively affects the environment[53], according to an evaluation carried out by scientific method; secondly, requires a particular incentive action, having the taxation act as economic impulse for the improvement of the environment; finally, the purpose of the tribute is to be formed by the environmental improvement[54].

6. Structurally tributes tribute and environmental purposes. The different configuration of this case taxed. Other types of charges: the redistributive taxation; the incentive taxation and the taxation of natural resources exploitation

In the context of environmental tax, assume particular importance the tributes "in the strict sense", that meet environmental structurally to the community principle polluter pays (art. 191 TFEU), assumed the pollutant, namely the productive event of damage: the base case is given by physical unit, whose harmful effects to the environment when used or tested in a release[55].

There are several environmental taxation "broadly", also called "tributes environmental purposes", characterized by a traditional assumption, which the consumption, the assets or income, which is the purpose of environmental protection,

[52] Comp. C. Verrigni, *La rilevanza del principio "chi inquina paga" nei tributi ambientali*, cit., p. 1615.

[53] On the topic, comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 117, where he stresses that «negative impact on the environment should be understood deterioration of environmental assets so far, or a reduction of the supply of such goods».

[54] Comp. F. Gallo e F. Marchetti, *I presupposti della tassazione ambientale*, cit., p. 117.

[55] Comp. F. Gallo, *Profili critici della tassazione ambientale*, in *Rass. trib.*, n. 2/2010, p. 303; A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., p. 184; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., p. 1490; O. Esposito De Falco, *L'armonizzazione fiscale e le tasse ecologiche*, cit., p. 658; G. Stefani, *Finalità e limiti della tassazione ambientale*, cit., p. 1493; M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., pp. 1168-1169; S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 578; S. Cipollina, *Fiscalità e tutela del paesaggio*, cit., p. 560; V. Guido, *La Consulta frena i primi entusiasmi federalisti in materia di fiscalità ambientale; spunti per una riflessione in tema di fiscalità locale*, in *Riv. trim. dir. trib.*, n. 1/2013, p. 224.

implemented by the incentive or disincentive to certain activities or the use or production of goods relating to the environment[56].

Further relief takes the distinction between environmental "redistributive taxation" and "incentive taxation": the first tend to finance environmental protection and measures of depollution, blaming the costs of polluting authors, through the provision of appropriate tax environmental policies; the latter, instead, in addition to hitting those who pollute, are aimed at inducing to invest in innovation and technology in order to reduce the harmful activities, through the provision of facilitation environmental policies (so-called "fiscal green")[57].

There are, finally, tax or almost-tax tools, likely to affect positively on the environment: the case of tributes with adjustment effects, direct or indirect, of the degree of exploitation of natural resources, such as the regional tax on state concessions, concession fees and taxes applied to mining concessions and small branches of public waters[58].

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[56] Comp. F. Gallo, *Profili critici della tassazione ambientale*, cit., p. 303; S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 578; V. guido, *La Consulta frena i primi entusiasmi federalisti in materia di fiscalità ambientale; spunti per una riflessione in tema di fiscalità locale*, cit., p. 224. On the topic, comp. M. Procopio, *La natura non commutativa dei tributi ambientali e la loro compatibilità con il principio di capacità contributiva*, cit., pp. 1168-1169, which stresses that the tribute with mere environmental function «pursues a purpose extras tax, which is the internalisation of environmental costs, without this detect reconstruction purposes in terms of environmental taxation assumption».

[57] Comp. A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., p. 186; A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., p. 1491; S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 573. On the topic, comp. O. Esposito De Falco, *L'armonizzazione fiscale e le tasse ecologiche*, cit., pp. 650-651, where it points out that, since the 1980s, traditional regulatory instruments were joined live incentive tools, consisting of contributions to technological innovation, credit facilities and tax exemptions, which «have however had limited effects, depending on the absorption capacity of the environmental damage. This is because it has not been possible to achieve a more effective policy, transferring on the heads of the external diseconomies of the actual costs, however, have continued to demand payment on the community predominantly». It follows that, «in the environmental field, the term "economic financial tools" is used in a broad sense, encompassing both incentive tools, both incidents interventions directly on the prices of goods, like taxes. However, environmental policy has so far favoured the application of incentive purposes rather than the use of taxes, because to negative increase tax pressure already particularly high». In addition, comp. F. Gerelli, *Ascesa e declino del business ambientale*, Bologna, 1990; V. PATRIZI, *Strumenti economici per la tutela dell'ambiente. Il caso delle modificazioni irreversibili*, in *Riv. dir. fin. e sc. fin.*, 1990, I, p. 481 ff.

[58] Comp. S. Cipollina, *Osservazioni sulla fiscalità ambientale nella prospettiva del federalismo fiscale*, cit., p. 577; S. Cipollina, *Fiscalità e tutela del paesaggio*, cit., pp. 559-560.

In summary, the use of tax tools or tax special relief measures, in the context of environmental policies, has positive effects in relation to the system of values underlying them, «although scalable in terms of effectiveness»[59].

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[59] A. Uricchio, *Le frontiere dell'imposizione tra evoluzione tecnologica e nuovi assetti istituzionali*, cit., pp. 186-187. In addition, comp. A. Uricchio, *Prelievo fiscale e emergenze ambientali*, cit., pp. 1491-1492.

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The concept of sustainable development in the UN activity

Abstract
The concept of sustainable development affects every field of activity, not only of countries but also organizations. The United Nations for tens of years engages its activity and work of their agencies to promote the principles of sustainable development in international dialogue, and implement it in all spheres of activity of the Member States. This article provides a brief summary of the action taken by the UN in the area of environmental protection and the promotion of sustainable development, starting since 1968, when the report named *Problems of the Human Environment* was published, until 2015 when the report *The Millennium Development Goals Report 2015* summarized the implementation of the Millennium Goals set by the UN fifteen years earlier.

Keywords:
sustainable development, United Nations, Millennium Development Goals, Brundtland Report, Earth Summit, environmental protection.

1. Sustainable development – definition

In the literature we can find many definitions and explanations of the sustainable development concept, such as eco-development, green growth, the durable development, integrated development, sustainable growth. Those terms, however, does not always mean the same as sustainable development (M. Sitek, 1999, pp. 82-83). A good example is widely used in many Polish studies to formulate sustainable development word "eco-development", which, according to some authors does not exhaust the English notion "sustainable development". Eco-development narrows its scope to the important, but not the sole factor, which is developing with respect

to ecology (A. Niezgoda, 2008, p. 76). The origins of these two concepts should be sought in the 70s of the twentieth century, time known as the culmination of rapid economic growth. Despite the rapidly growing economies of many countries of the world, international community haven`t seen the need to preserve care for a quality of their life. Because of researches about political, economic and ecological aspects, awareness of environmental threats revealed to public (W.A. Godlewska-Lipowa, J.Y. Ostrowski, 2007, p.14). The history of the concept of sustainability dates back to 1987, when sustainable development was defined for the first time in the report „Our Common Future" published by the UN World Commission on Environment and Development (WCED), which deliberated under the chairmanship of Prime Minister of Norway – Gro Harleem Brundtland. From her surname derives the colloquial title of the report „Brundtland Report". It is however needed first of law have a look at previous dialogue on sustainability.

2. Problems of the Human Environment – Report of Sithu U Thant

Studies on the effects of human activity on the environment began nearly twenty years earlier. On 3 December 1968 during XXIII session of the UN General Assembly adopted Resolution no. 2398, *Problems of the Human Environment.* In the resolution General Assembly highlighted the impact of human activity on phenomenon such as water and air pollution, erosion and other forms of deterioration of the soil, as well as problems of growing and expanding population, waste and noise. The General Assembly expressed confidence in the relationship between the increasing problems of human environment, the development and proper functioning of economic and social development. Thus, in Resolution No. 2398 (XXIII) decided to organize in1972 UN Conference on the Human Environment (United Nations Conference on the Human Environment). In addition, the General Assembly instructed the Secretary-General of the UN to prepare for this XXIV session status report – document which contains the main problems, size and impact of human activity on the environment as well as methods and solutions for developed and developing countries, by which they can improve existing condition of things, over which the discussion will be taken during the conference. On 26 May 1969, then UN Secretary-General Sithu U Thant, communicated to the General Assembly through the Economic and Social Committee report entitled *Problems of human environment* (United Nations, E/4667). In the report U Thant provided information

on the most important threats to mankind. He also announced an advent of the first crisis of environmental degradation, which crisis in U Thant`s opinion could not be solved without international cooperation.

According to Sithu U Thant`s report, none of the three identified causes of environmental destruction, such as growing population, urbanization and modern technologies, as well as the associated demand for space, food and natural resources, have to cause destruction of the environment. The main reason for their negative impact on the human environment is poor management and lack of control. As a result of the irregularities while ensuring domicile for the population, implementing, and integrating new technologies into the environment, planning industrialization and urbanization, the world needs to confront the threats that in some areas take a very critical form. U Thant's report was the first document, which was published in a comprehensive manner, a threat to the environment on a global scale. Thus *Problems of human environment* report was the first important signal of the need to transform the concept of development, including economic development, in order to contain the impact of human activity on the environment (M. Durydiwa, A. Kowalczyk, S. Kulczyk, 2010, s.23).

3. The Limits to Growth: a report for the Club of Rome's project on the predicament of mankind

A significant role of the international dialogue on the impact of human activity on environment was brought to life in 1968, by the Club of Rome. This organization brought together representatives of different cultures, ideologies, professions, fields of knowledge, which share concerns about the situation of humanity (predicament of mankind). The fruit of the club's activity, focused on developing strategies to resolve conflicts between countries across the globe, there are reports, including known as the most important for the concept of sustainable development report – *The Limits to Growth: a report for the Club of Rome's project on the predicament of mankind*. The publication was produced by experts from the Massachusetts Institute of Technology, and dealt with the relationship between the growth rate of civilization and the consequences posed by the environment. Moreover report underlined the role of social relations, and strength domination of industrialized countries (W.A. Godlewska-Lipowa, J.Y. Ostrowski, op.cit., ss.14-15).

4. Declaration of the United Nations Conference on the Human Environment

The problems raised by Sithu U Thant reflected in the debate at the Conference in Stockholm, opened on 5th June 1972, the year which is nowadays celebrated every year as a World Environment Day (constituted by the Resolution 2994 (XXVII) of the General Assembly). At this conference for the first time was discussed the need to examine and solve environmental problems at transnational dimension. The result of the meeting during the Earth Summit, as otherwise called the United Nations Conference on the Human Environment, among others, was adoption of *the Declaration of the United Nations Conference on the Human Environment*. This act is one of the most important document of international environmental protection, which is considered as a milestone in the promotion of sustainable development (Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972), and known also as *the Stockholm Declaration.*

The Stockholm Declaration confirmed that environmental protection for both generations, living now and in the future, it is necessary to adopt by every person, community, enterprise or institution at every level. It should be considered as a part of shared responsibility for common efforts to protect the environment. The Declaration set out 26 principles that would provide a common implementation of these objectives and adopted an *Action Plan for the Human Environment*, called *the Stockholm Agenda for Action*. This plan, in contrast to the Declaration, was addressed only to countries and also for international bodies such as the UN and its agencies, or the World Bank. It presented an action program composed of 109 recommendations. In addition this document also launched United Nations Environment Programme. The mission of this agency is to extend the lead of the United Nations in the protection of the environment by: inspiring, informing, and enabling nations and people to improve quality of their life with simultaneous attentiveness towards future generations. That is, de facto, the definition of sustainable development, although officially this term was defined 15 years after Stockholm Declaration, in the Brundtland Report.

5. Our Common Future

In the report *Our Common Future,* adopted in 1987, was used a wide meaning of "sustainable development". In fact report created by World Commission on Environment and Development under supervision of Gro Harleem Brundtland

– rejected the narrow concept, which takes into account only economic development (A. Pawłowski, 2009, p.985). Sustainable development in the report is defined as a development that meets the needs of the present generation, without compromising the possibilities of future generations to meet their own needs. At the same time, the report points the need to adapt principles of sustainable development, with taking into account the limitations of the current state of technology, social organization, natural resources and the ability of the biosphere to absorb human activity. The main objective of sustainable development is to ensure everyone an equal chance to satisfy their aspirations in life. The Commission considers that the proper implementation of the principles of sustainable development can reduce the pervasive poverty and give everyone a chance for a better life. The report summarizes the areas that require immediate action for the protection of the environment, and thus the life of every human being. At this point World Commission on Environment and Development pointed out the directions of the activities undertaken in the areas of:

- population and human resources: reducing the excessive population growth in line with available resources,
- food security: primarily its proper distribution; delivery to places where it lacks and support in such areas agriculture, manufacturing. Commission underlined that hunger means inability to purchase food, not only lack of available food,
- species and ecosystem: the need to ensure the biodiversity of species, protection of endangered species,
- energy: ensuring the growth of the share of energy from renewable energy sources, the increase in energy efficiency,
- industry: a need to produce more products to meet the needs of a growing population. On the other hand boosted production needs to use fewer resources and make use of technologies that reduce negative impact on the environment,
- cities and urbanization: urban governance with proper decentralization of funds, political power, in order to adapt possessed surface, services and infrastructure to the number of people living in it. Building smaller towns in place of metropolises with multi-million population, which generate enormous costs and deteriorate the environment.

Although Brundtland Report defined the concept of sustainable development, this report was not as significant as organized in 1992 Earth Summit II – the UN Conference on Environment and Development and the adopted documents in its course like *Rio Declaration on Environment and Development*. This act has identified 27 principles which aims are „establishing a new and equitable global partnership

through the creation of new forms of new levels cooperation among States, key sectors of societies and people, working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system and recognizing the integral and interdependent nature of the Earth, our home" (A/CONF.151/26/Rev.1. Vol.1).

6. Earth Summit in Rio de Janeiro

During the Earth Summit in Rio de Janeiro also adopted a global program of action, which is *Agenda 21*, including 40 chapters within several hundred pages, created to implement the principles of sustainable development (Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I). The document highlighted the practical social, economic, institutional and environmental problems, which the concept of sustainable development concerns and within which it is necessary to develop specific rules of conduct (T. Borys, 1999, p.104). Both documents were adopted as annexes to the resolution during the conference.

7. United Nations Framework Convention on Climate Change

Another adopted during the Second Earth Summit document was *the United Nations Framework Convention on Climate Change* (UNFCC). Its main objective was to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (Dz.U 96.53.238). The Convention, which originally contained no specific orders or limits to reduce greenhouse gas emissions, primarily has been complemented by *the Kyoto Protocol* of 1997, which established the commitment of industrialized nations to reduce emissions (quantified in an annex to the Protocol). This protocol has become one of the main tools for reducing the release of environmentally harmful gases by setting quantitative targets for countries that are party of the Annex to the Convention. During the second Earth Summit also adopted *the Convention on Biological Diversity* and *Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests.*

The summit in Rio has exposed the weakness of the contemporary international community in formulating joint strategies and actions to improve the environment. Agenda 21 was designed to meet the full transformation of the world, the economy and human consciousness in harmony with sustainable development, international

support. Despite of it it was hard to take into force actions to realize this aims. Through appropriate funding mechanisms and projects that could enable the objectives set at the Second Earth Summit, the role of this document was weakening. As indicated by Magdalena Sitek, a political will existing at that time, had wide gap in thinking about long-term and strategic developmentBecause of that international community at that stage of development was not able to speak as one voice about the future of our planet (M.Sitek, op.cit., p.82). Evaluation of the implementation of the Summit in Rio provisions gave confirmation of the deterioration of the environment, which was a sign of helplessness of the international community, the governmental and non-governmental organizations (U.Świętochowska, 2001, pp.82-85). It is true that the idea of sustainable development was widely accepted, but the measures taken for its realization were far too weak (M. Sobolewski).

8. We the Peoples: The Role of the United Nations in the 21st Century

On 27 March 2000 the UN Secretary General, Kofi A. Annan published a report entitled *We the Peoples: The Role of the United Nations in the 21st Century* (ISBN: 92-1-100844-1). This report outlined the challenges of mankind on the threshold of the new 21st century. These challenges have been divided into following sections, which are at the same time the most important objectives in the new millennium for the international community:

- freedom from misery (creating opportunities for young people, health and the fight against HIV/AIDS, the tragedy of the slums, the problems of Africa located on the margins of the world, build digital bridges, the need for global solidarity)
- freedom from fear (preventing deadly conflicts, protecting the most vulnerable, strengthening peacekeeping operations and the further reduction of armaments),
- concern about the future conditions of life on Earth (responding to climate change, the crisis in access to drinking water, soil protection, protection of forests, fisheries, and biodiversity), to develop a new ethic of global environment management.

This division was not created by the accident. It was evidenced by the words of the Secretary-General "The challenges (…) are not exhaustive. I have focused on strategic priority areas where, in my view, we can and must make a real difference to

help people lead better lives. The challenges are clustered into three broad categories. Two are founding aims of the United Nations whose achievement eludes us still: freedom from want, and freedom from fear. No one dreamed, when the Charter was written, that the third—leaving to successor generations an environmentally sustainable future – would emerge as one of the most daunting challenges of all" (*We the Peoples : The Role of the United Nations in the 21st Century*¸ p.).

In the report, the Secretary-General also pointed out goals for sustainable development, the achievement of which were intrinsically linked to poverty reduction and a sustainable increase of general income. Kofi A. Annan stressed the need to increase the number of people who benefit from globalization. Therefore, it is necessary to place new investments in countries that are excluded from the growing interdependence of states. It is also needed to eliminate the wage gap effectively by limiting favor of qualified personnel. Necessary is also the creation of equal opportunities for gaining employment, education and property rights between women and men, as well as an overall improvement of poor`s lives (education, health, social policies). The report clearly showed the new approach to sustainable development: taking into account the ability of future generations, but more attention in the report was drawn to improve the quality of life, particularly socially excluded people, the poor and victims of natural disasters, armed conflicts.

9. United Nations Millennium Declaration and Millennium Development Goals

The report and challenges described in it became a foundation for the discussion during organized on 6-8 September 2000 Millennium Summit of the United Nations. The result of this meeting was the adoption of *United Nations Millennium Declaration* (55/2. http://www.un.org/millennium/declaration/ares552e.htm) and setting up Millennium Development Goals. These objectives largely coincided with those which were contained in the report of the Secretary-General. The United Nations committed themselves to:

1) eradicate extreme poverty (to reduce by half the proportion of people whose income is less than one dollar a day and halve the number of people suffering from the extreme poverty until 2015),
2) ensure universal primary education: until 2015 children everywhere, boys and girls alike, should be able to complete a full course of primary schooling and that girls and boys will have equal access to all levels of education,

3) promote gender equality and empower (eliminate unequal access to primary and secondary education preferably by 2005, and at all levels by 2015),
4) reduce by three-quarters the mortality of infants and children up to 5 years of age,
5) improve maternal health (reduce maternal mortality by three-quarters),
6) combat HIV / AIDS, malaria and other diseases, as well as limit the number of new infections,
7) apply sustainable methods of natural resource management (take into account the principles of sustainable development into country policies and programs; use methods of inhibiting the loss of environmental resources;
8) reduce by half the proportion of people without sustainable access to safe drinking water by 2020;
9) achieve a significant improvement in the lives of at least 100 million slum dwellers,
10) develop a global consensus on development.

On the thirtieth anniversary of the Stockholm Conference and the tenth anniversary of the Second Earth Summit in Rio de Janeiro, United Nations decided to organize the third meeting of the United Nations to discuss the relationship between economic social and environmental development – the World Summit on Sustainable Development in Johannesburg ("Rio+10"). The main goal of the 2002 conference was to continue the constructive discussion and criticize the achievements in the implementation of sustainable development. The mere participation of over a hundred heads of states around the world raised the significance of the event. Conference revived the discussion on the problem of development of today's generations, taking into account the fate of future generations. Discussions during the Summit took place within the five main problems, (humanity needs) identified by the UN Secretary General, Kofi A. Annan. These problems include: protection of water and access to sanitation, ensure of energy supplies with attentiveness on environment, health, agriculture, biodiversity conservation and ecosystem management (M. Sobolewski, p.1)

10. Johannesburg Declaration on Sustainable Development

Under the final document of the Rio+10 Conference – *Johannesburg Declaration on Sustainable Development* – countries participating in the conference committed themselves, inter alia, to promote dialogue among peoples and civilizations, international partnership to build human solidarity and meet the aforementioned needs of people around the world. The Declaration also raised the need to tackle

the main threats of the modern world, which included, among other: chronic hunger, malnutrition, foreign occupation and armed conflict, the problem of drug addiction, organized crime, corruption, natural disasters, illicit arms trafficking, human trafficking, terrorism, intolerance and incitement to racial, ethnic, religious and other hatred, xenophobia, and endemic diseases, infectious and chronic, in particular HIV / AIDS, malaria and tuberculosis.

Another important document of the Rio+10 Summit is a *Plan of implementation*. The document indicated obligations that are essential to achieving sustainable development. The main objectives guiding idea of sustainable development should be peace, security, stability, respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity. Summit participants pledged to reduce by 2015 the proportion of people whose income is less than one dollar a day, people suffering from hunger and lack of access to drinking water and to achieve by 2010 a significant slowdown of extinction of rare varieties of fauna and flora. In addition to the extensive, 65-year-pages *Plan of implementation* contained obligations of the parties, including commitment to reduce infant mortality and children under 5 years of age by two-thirds by 2015, improve health care, increase access of people to business and trade, as well as access to land for construction of houses (in order to reduce the number of people living in slums). The plan also included development and access to renewable energy sources and the creation of national energy policies in order to facilitate supplies of socially acceptable, environmentally friendly and affordable energy. The plan also wider range of obligations, especially financial, for developed countries. The document urged these countries to support development in poorer countries, including assistance to countries in Africa.

Despite the many activities and projects involving states and NGOs in achieving sustainable development, under the auspices of the United Nations, still many aspects made impossible the full implementation of its principles into practice. The study of Wu Hongbo, United Nations Under-Secretary-General for Economic and Social Affairs, on the implementation of the Millennium Development Goals (MDG), indicated targets that have already been achieved and those that required increased efforts and cooperation for their implementation (M. Kazimierczak, 2010, p.10).

11. Implementation of the Millennium Development Goals in 2010

The first objective that was achieved was to reduce the number of people living in extreme poverty by half. In 2010, the number of such persons decreased by 700

million. This objective, therefore, was achieved five years before the deadline. Another success was to allow an additional 2 billion people access to drinking water, reducing at the same time the percentage of people who do not have such access from 24% in 1990 to 11% in 2010. In the same year international community managed to improve the conditions of life for over 200 million people living in slums in metropolitan areas and cities in developing countries, despite the fact that the MDG assumed this improvement for only 100 million people. Success in 2010 was also estimated in reducing mortality from malaria and tuberculosis, as well as halving the number of hungry people (the rate was 23.2% in 1990-1992, while in 2010 – 2012 was 14.9%); deadline set by the Millennium Development Goal was 2015.

List of unrealized Millennium Development Goals until 2010, or those which implementation was highly improbable, however, is much longer. Despite the efforts, states have failed to reduce by two-thirds the mortality rate among children under five years of age (a decrease of 51%), although observed was a significant improvement of living and care for the youngest generation. The maternal mortality rate fell by 47%, which could be seen in terms of the success of the international community, but still 27% was missed to achieve the Millennium Development Goal. By 2010 also international community failed to provide universal access to antiretroviral therapy in order to reduce the level of HIV infections. Another failure, which is the responsibility of the developed countries, there was a reduction by 4% in 2012 and by 6% in 2011 compared to 2010 aid funds for developing countries. Finally, the complete failure was the UN MDG of multifaceted environmental protection. The environmental condition in 2010 was critical. There was no decline in the emissions of greenhouse gases. It was observed decrease overfishing of marine fish resources and biological diversity decline, with the ever-increasing number of endangered species of fauna and flora. In an alarming rate also decreases forest area. As rightly pointed out by Marcin Kazimierczak (2010, p.10) there was a kind of social schizophrenia. It consisted on the one hand creation of slogans and statements, including, without limitations related to sustainable development. On the other hand, we had self-centered thinking, rationality and selfishness, causing the gap between the amount of enacting directives, strategies and demands, and their practical implementation (Ibidem).

12. Implementation of the Millennium Development Goals in 2015

The Millennium Development Goals Report 2015 published on 6 July 2015, launched by United Nations Secretary-General Ban Ki-moon, confirms that goal-setting can

lift millions of people out of poverty, empower women and girls, improve health and well-being, and provide vast new opportunities for better lives. This report is an annual assessment of global and regional progress towards the Goals, reflects the most comprehensive, up-to-date data compiled by over 28 UN and international agencies. It is produced by the UN Department of Economic and Social Affairs. According to data included in it, Millennium Development Goals were achieved in areas:

- the number of people living in extreme poverty has declined by more than half, falling from 1.9 billion in 1990 to 836 million in 2015,
- more girls are in school, and women have gained ground in parliamentary representation over the past 20 years in nearly 90% of the 174 countries,
- the rate of children dying before their fifth birthday has declined by more than half, dropping from 90 to 43 deaths per 1,000 live births since 1990,
- the maternal mortality ratio decline of 45% worldwide,
- over 6.2 million malaria deaths were averted between 2000 and 2015, while tuberculosis prevention, diagnosis and treatment interventions saved an estimated 37 million lives between 2000 and 2013,
- 2.1 billion have gained access to improved sanitation and the proportion of people practicing open defecation has fallen almost by half since 1990,
- official development assistance from developed countries saw an increase of 66% in real terms from 2000 and 2014, reaching $135.2 billion.

Unfortunately in 2015 some of Millennium Development Goals are still not achieved:

- about 800 million people still live in extreme poverty and suffer from hunger.
- Children from the poorest 20% of households are more than twice as likely to be stunted as those from the wealthiest 20% and are also four times as likely to be out of school,
- in countries affected by conflict, the proportion of out-of-school children increased from 30% in 1999 to 36% in 2012,
- global emissions of carbon dioxide have increased by over 50% since 1990
- water scarcity now affects 40% of people in the world and is projected to increase

Summary

In conclusion, the idea of sustainable development is concentrated on man and improvement of the quality of his life, and therefore we call it anthropocentric.

Development that is sustainable should lead to improvement of human life in many aspects, like the sanitary, economic, social, health. At the same time, however, it contains an element of maintenance, focusing on the need to maintain respect for the environment, so we can both improve the lives of the present generation, and provide equal opportunities for the development of future generations (A. Niezgoda, 2008, p. 77).

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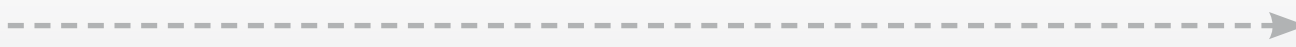
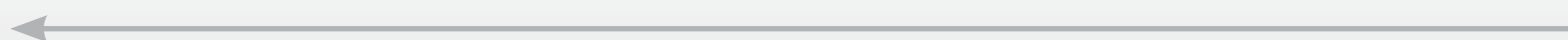
PART VI

The influence of religion on human rights





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Protection of cultural heritage as expression of religious identity in international legal framework

Abstract
The aim of this paper is to explore cultural heritage law most recent evolution, as a result of a new international conscience, rooted in the awareness that cultural heritage is strongly linked to people identity, in its individual and collective dimension. The importance of cultural heritage goes beyond tangible monumental and artistic expression, as well explained in UNESCO Declaration, with particular reference to the links with religious roots. International Law evolution offers an interesting explanation of how the approach to culture has changed from a sovereignty-based idea of cultural property to a perception which emphasizes human dimension of cultural identity. During the course of history, human groups, driven by commercial or economical reasons, or by the desire to spread their religious beliefs, extended their domain to different areas, kept in touch and matched with other groups, leaving material and spiritual marks of their passing: tangible and intangible results of this process are cultural heritage, whose knowledge and mutual respect could drive to the construction of common values and to a peaceful intercultural co-existence. For this reason we can affirm that the right to the preservation of cultural heritage is part of a more deep and wide right to have and to express a culture and a belief in all possible manifestations.

Keywords:
heritage, religions, identity, intercultural dialogue, religious freedom

1. Social function of cultural heritage and the peculiarity of juridical protection

The term "cultural heritage" expresses the evolution process that involved and interested local authorities, state administration, citizens, religious groups and third

sector. It is related to a particular conception of public-private property, and the strong relationship between cultural heritage and public interest is at the base of significant legislative reforms in the most recent years. The heritage is "culturally relevant" because of the meaning that it can represent and the values that it can express. According to the definition used in the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society (Faro, 2006)[1], cultural heritage is «a group of resources inherited from the past which people identify, independently from ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time». European co-operation actions in the last years were oriented to increase the awareness of the fundamental role of heritage, as key factor of the multiple identities that characterize Europe. Co-existence of these identities raises the question of intercultural dialogue and mutual understanding between communities. For this reason, cultural heritage can be considered a mean of "transnational reading of history", which can led to the construction of common values: collective identities, effectively, are created and reproduced by communities and are based on processes of experiences, mutual exchanges, memory and traditions[2]. Cultural heritage is deeply linked to identity, as well as to the connection between past and present, that clearly appears if we look at the etymology of the term heritage itself, whose root has its source in the Latin term heir. Heritages and cultures can be seen as ways of thinking of a community, that finds it practical application in shared behaviors, conventions and tradition. According to Venice Charter (1964), governments have the obligation to take care of cultural heritage. Cultural heritage is considered a fundamental resource for sustainable development, and a strategic resource to reach the goals of Europe 2020 strategy, in order to promote growth and intercultural dialogue in European Union. It can be considered a common good, that requires an evolved framework of multi-level governance, involving the participation of public and private actors, religious groups and private citizens groups. The Preamble to the Treaty on European Union states that the signatories draw "inspiration from the cultural, religious and humanist inheritance of Europe". Article 3.3 requires the EU to "ensure that Europe's cultural

[1] COUNCIL OF EUROPE, *Framework Convention on the Value of Cultural Heritage for Society,* Faro, 27 october 2005.

[2] See G. Rolla, *Beni culturali e funzione sociale*, in AA.VV. *Scritti in onore di M.S. Giannini*, vol. II, Giuffrè, Milano, 1988, p. 563 ss..

heritage is safeguarded and enhanced". Article 167 of the Treaty on the Functioning of the European Union (TFEU) says: "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing 'common cultural heritage to the fore". The Treaty on the Functioning of the European Union also recognizes the specificity of heritage for preserving cultural diversity, and the need to ensure its protection. Heritage, anyway, has many dimensions: cultural, religious, environmental, human and social, and for this reason it involves a "multilevel protection", starting from local communities to EU action[3]. Heritage is both a local and European matter, according to the subsidiarity principle, that ensures that all decisions must be taken as closely as possible to the citizen, and that actions at Union level are justified in light of the possibilities available at national, regional or local level. In Italian law, protection of cultural heritage is attributed to national Government, while measures of valorization and programs of integrated fruition are given to communities and regions. European Court of Human Rights recognized that «the pluralism is based on the recognition and enforcement of authentic diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, ideas and conceptions (…)»[4]. The harmonious interaction between individuals and groups with different identities is essential to social cohesion. Cultural heritage, in its anthropological, sociological and religious components, represents the synthesis of the tension between global and the local, and the need to become citizens of the world without losing the roots[5].

Cultural heritage, anyway, is not only composed of monuments and collections of objects. It also includes traditions or living expressions inherited from our ancestors, such as oral traditions, performing arts, social practices, rituals, festive events,

[3] M. Tedeschi, *La comunità come concetto giuridico*, in ID., (a cura di), *Comunità e soggettività,* Luigi Pellegrini editore, Cosenza, 2006.

[4] CEDU, Gorzelik and others/Poland , n. 44158/98, 17 february 2004.

[5] Globalization creates a sense of eradication and strengthens local communities desire for a recovery of historical and cultural roots. The consequences of this phenomenon are visible both in small villages, as in national policies for the restoration and enhancement of cultures, traditions, artistic and cultural heritage, which becomes a sort of "safe haven". About the globalization and its consequences on cultural heritage politics see L. Casini (ed. by), *La globalizzazione dei beni culturali*, Il Mulino, Bologna, 2010; M. Magatti- R. Bichi, *Soggettività e globalizzazione*, in V. Cesareo, *Globalizzazione e contesti locali,* Franco Angeli, Milano, 2008, p. 65 ss. More in general A. Baldassarre, *Globalizzazione contro democrazia*, Laterza, Roma-Bari, 2006; D. Zolo, *Globalizzazione: una mappa dei problemi*, Laterza, Bari, 2005.

knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts. This is the intangible heritage, that is very is fragile, but plays an important role in maintaining cultural diversity, especially during the growing globalization[6]. At international level, the most important instrument for protection of intangible heritage is UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003). The adoption of this convention is a milestone in the evolution of international policies for the promotion of cultural diversity, because for the first time international community recognized the need to support cultural manifestations and expressions that until then had not benefited from a legal and programmatic framework. Under Article 2 of the Convention (CSICH), 'intangible cultural heritage' includes: « … the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups, and in some cases, individuals recognize as part of their cultural heritage». In the convention is clearly stressed the importance and interrelation between tangible and intangible, movable and immovable elements of cultural heritage[7].

2. Fruition of cultural heritage as expression of the "right to culture and identity"

The right to the fruition of cultural heritage may be completely understood only if we consider it as a fundamental human right. Art. 27 of Universal Declaration of Human rights states that: «Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits». The same right is enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights and also the International Convention on the Protection of the Rights of all migrant workers and members of their families contains this right. In particular, art. 31 provides that «States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin (…), and art. 43, (g) that migrant workers

[6] L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, 2013.

[7] H. Charlesworth, *Human rights and UNESCO memory of the world programme*, in AA.VV., *Cultural diversity, heritage and human rights*, Routledge, New York, 2013, pp. 21-31.

shall enjoy equality of treatment with nationals of the State of employment in relation to access to and participation in cultural life»[8].

Other significant references to "right to culture" is also contained in article 13 of the convention on the elimination of all forms of discrimination against women, according to which «States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, (…) the right to participate in recreational activities, sports and all aspects of cultural life»[9]. Art. 22 of African Charter on Human and Peoples' Rights, states that all people have the right to cultural development, respecting their freedom and identity, and to an equal fruition of common human heritage, enlightening the close relationship between heritage and identity[10].

This concept is clearly stressed in the preamble of the Mexico City Declaration on Cultural Policies, of 6 August 1982, that defines culture as the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group, which includes modes of life, fundamental rights of the

[8] For a deeper analysis of the International Covenant on Economic, Social and Cultural Rights, see F. Capotorti, *Patti internazionali sui diritti dell'uomo*, CEDAM, Padova, 1967; U. Villani, *Studi sulla protezione internazionale dei diritti umani*, Luiss University Press, Rome, 2005. The International Convention on the protection of the rights of all migrant workers and members of their families is an United Nations multilateral treaty governing the protection of migrant workers and families. Signed on 18 December 1990, it entered into force on 1 July 2003 after the threshold of 20 ratifying States was reached in March 2003.

[9] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women.

[10] The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. It emerged under the aegis of the Organization of African Unity (since replaced by the African Union) which, at its 1979 Assembly of Heads of State and Government, adopted a resolution calling for the creation of a committee of experts to draft a continent-wide human rights instrument, similar to those that already existed in Europe (European Convention on Human Rights) and the Americas (American Convention on Human Rights). See G. M. Calmieri, *La Carta africana dei diritti dell'uomo e dei popoli e gli altri strumenti regionali di protezione dei diritti dell'uomo: profili comparatistici*, in *Rivista studi politici internazionali*, 1990, p. 61; M. PAPA, *La Carta africana dei diritti dell'uomo e dei popoli: un approccio ai diritti umani tra tradizione e modernità*, in *I diritti dell'uomo, cronache e battaglie*, 1998, p. 5 ss.

human being, value systems, traditions and beliefs.[11] Cultural rights have been recognized in a specific Convention for World Heritage (UNESCO, Paris, 1972), that introduced mechanisms of control, promotion and financing of culture[12]. An effective synthesis of these principles was formulated by ICOMOS (International Council on monuments and sites)[13]: during the ICOMOS Stockholm Conference (1998), was approved a «*Déclaration à l'occasion du 50e anniversaire de la Déclaration universelle des droits de l'homme*», in which is affirmed that «*le droit au patrimoine culturel fait partie intégrante des droits de l'homme considérant le caractère irremplaçable de cet héritage tangible et intangible et les menaces dont il est l'objet dans un monde en perpétuelle mutation. Ce droit engendre des responsabilités pour les individus et les sociétés comme pour les institutions et les états. Le protéger aujourd'hui, c'est préserver le droit des générations futures*»[14].

Expanding and developing the right to cultural heritage, ICOMOS stressed five basic rights in the cultural field: the right to the respect of the past heritage as expression of cultural identity as part of the great human family, the right of populations to a better understanding of their own heritage and respect for others, the right to use it, the right to participate in decisions concerning heritage and cultural values, the right to create associations for the defense and promotion of cultural heritage. This is a formulation strictly linked to the nature and the purposes of the NGO that produced the document, but if we consider the idea of heritage in its broader meaning, we can surely recognize in these principles a great value and originality.

All mentioned provisions constitute, even if a non- organic and fairly incomplete catalogue, the translation of the general principle of protection and respect of human cultural heritage, that goes far beyond the old idea of private or public property protection and material goods.

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[11] See UNESCO, *Declaration of Messico city, Final report*, World Conference on cultural politics, Mexico City, 1982, available on line at http://www.unesco.it/cni/index.php/documentazione-on-line.

[12] UNESCO, *Convention for World Heritage*, 1972. The most significant feature of the 1972 World Heritage Convention is that it links together in a single document the concepts of nature conservation and the preservation of cultural properties.

[13] The International Council on Monuments and Sites (ICOMOS) is a non-governmental international organization dedicated to the conservation of the world's monuments and sites. Was founded in 1965 in Warsaw as a result of the Venice Charter of 1964, and offers advice to UNESCO on World Heritage Sites. For more information see the web site www.icomos.org/

[14] E. Bertacchini, *Patrimonio Mondiale UNESCO: la tensione tra valore universale e interessi nazionali,* in *Tafter Journal. Esperienze e strumenti per cultura e territorio*, n. 37, july 2011.

The immunity principle of cultural property during armed conflict (The Hague Convention of 1954)[15] or, more correctly, the cultural heritage of humanity (the subject of the mentioned Paris UNESCO Convention of 1972), should be considered part of the category protection standard of fundamental human rights and not, as traditionally intended, rules of protection of material goods. Cultural heritage represents an expression of the deeper and noble human nature, of identity, history, cultural sensitivity, in a word of his "humanity", which over the centuries has been manifested in the form of art, historical documents, literary text, architectural structure or place of worship. The art and culture, so considered, can no longer represent, for the interpreter of the law, a mere aspiration aesthetic or intellectual, inevitably destined to yield to pressure of the economic crisis or the hegemony of the global market, but they are the representation most tangible of the human right to its own history, conscience, dignity and freedom.

Art and culture, so considered, can no longer represent, for law interpreters, a mere aesthetic or intellectual aspiration, inevitably destined to be sacrificed by economic crisis or hegemony of global market, but they represent most tangible signs of human right to history, conscience, dignity and freedom.

Cultural heritage is tangible sign of the past, and at the same time a material and immaterial resource for the present and the future. It translates the close link between culture and society, symbolizing the evolution of national communities and representing for the future generations the transmission of heritage and values proper of a particular group and of the humanity in general.

In Italian legislation there is not a provision that makes explicit reference to a "right to cultural heritage", but there is the recognition of the "freedom to create and disseminate the culture and knowledge" (art. 33 Const.) and the right to take advantage of culture and knowledge. This right makes necessary the intervention of public authorities aimed at responding to the need to acquire knowledge and culture through the system of national and local cultural services[16].

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[15] UNESCO, *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Adopted at The Hague, 14 May 1954. The Convention was adopted in the wake of massive destruction of cultural heritage during the Second World War. It is the first international treaty with a world-wide vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict.

[16] E. Spagna Musso, *Lo Stato di cultura nella costituzione italiana*, Napoli, 1961, p. 73 e ss; M. Ainis, *Cultura e politica*, Padova 1991, 29 ss. The guarantee of a "right to cultural education" as expression of democracy, however, was contested by S. Marini, *Lo statuto costituzionale dei beni culturali*, Giuffrè, Milano, 2002, p. 185 ss., who affirmed in this regard that electoral rights are not affected by cultural education and that in Italian Constitution there is no reference to the political function of cultural rights.

It may be noted that recognition of the right to cultural heritage (tangible and intangible) certainly contributes to ensure respect for cultural diversity in all its expressions, ethnic, linguistic and religious identity. Every human being is fully protected only if preserves the right to identity, in all components that can be manifested.

The close link between cultural rights and the right to identity gives dignity and value even to the "freedom of culture, in its artistic and scientific dimension", but above all the right to use (art, culture and scientific knowledge), as expression of a larger individual right to culture (defined as positive freedom).

In this way can be shared the opinion of those who argue that cultural rights, so defined, are intended to protect not only culture, art, science and cultural heritage and landscape, but also cultural pluralism, ensuring conscious participation in public sphere and allowing people the opportunity to acquire a solid knowledge, which is essential for the growth of society, as clearly expressed in articles 2 and 3 of Italian Constitution[17].

The recognition of the right to cultural heritage is directly linked to the broader interpretation of culture concept and the elimination of legal formalism in favor of "cultural sciences" (*Kulturwissenschaften*). People have many cultural needs that require conditions of social and political participation to be fulfilled. For these reasons, Italian Constitution recognizes the principle of cultural pluralism, a source of rights and cultural powers, that should be implemented by the constitutional law[18]. The right to culture, declined as the right to cultural heritage, means that the State has the duty to guarantee the free exercise of this right: this is also clear if we carefully read the legislative provisions about public cultural institutions and its fruition. As affirmed by Giannini, "usability means obligation to allow the use"[19].

[17] See M. Carcione, *Dal riconoscimento dei diritti culturali nell'ordinamento italiano alla fruizione del patrimonio culturale come diritto fondamentale*, in *Aedon*, n. 2/2013.

[18] The inclusion of culture in law is evident in many praxis, for example in cultural sources of law and in the institutions of the "legal culture", while the inclusion of the law in culture is evident especially in the ethical content of the Constitution which expresses ethical orientation of the community. See P. HABERLE, *Per una dottrina della Costituzione come scienza della cultura*, Carocci, Bologna, 2001, Carocci, Bologna, 2001.

[19] The connection between culture and community is often present in legal doctrine on the topic of cultural heritage. Essential is the reading of the historical essay written by M.S. GianninI, *I beni culturali*, in *Riv. trim. dir. publ.*, 1976, p. 32.

3. Religious heritage protection as tool of intercultural and interreligious dialogue

In identity construction processes, particular attention must be paid to religious heritage. There is a great variety o f religious and sacred sites, that are representative of the different cultures and traditions of the world.

Sacred places are tangible signs not only of different faith experiences, but also of culture, values, history and traditions. Their enhancement and protection is an essential requirement in the protection of religious freedom, cultural diversity and the promotion of social cohesion, given the great potential attractiveness of these places for millions of faithful and pilgrims in the world. Sacred sites offer the possibility of keeping in touch with the divinity and strengthen the faith.

Both spiritual and cultural importance, anyway, could lead to competition because sometimes religious groups try to exclude rivals from practicing their rituals in the hallowed space and want to assert their own claims, as happens in Holy Land, involved in Isreali-Palestinian conflicts[20]. Holy places, so, can be source of potential struggles not only between different religious groups, but also between religious fundamentalists and secular actors. The case, which gained great prominence, was the destruction of the Bamiyan Buddhas statues in Afghanistan by the Taliban in 2001, the clearest demonstration of the awareness that cultural heritage is more than just a neutral residue of the past: monuments are *semiofori*, they express, in their essence, history, memory, culture, religious and political values[21]. Recently, Islamic State of Iraq and the Levant (ISIS), is carrying on the destruction of cultural heritage. This destruction started in 2014 in Iraq, Syria, and Libya, in particular places of worship in Mosul, and ancient historical artifacts. In Iraq, between the fall of Mosul in June 2014 and February 2015, ISIS destroyed at least 28 historical religious buildings[22].

Cultural heritage, and in special way religious heritage, therefore, is the result of a process that has not always had peaceful character, but still today is origin of

[20] About the Holy Land particular geo-political situation and the role of sacred places see M.J. Breger, Y. Reiter, L. Hammer, *Holy places in Israeli-Palestinian conflicts. Confrontation and co-existence*, Routledge, New York, 2010.

[21] See M. Ricca, *Pantheon. Agenda della laicità interculturale*, Palermo, 2012; I. MAFFI, *Guerre, Stati, statue e musei: la gestione del patrimonio culturale in situazioni di conflitto*, in *Antropologia*, directed by U. Fabietti, 2006, n. 6, p. 5 ss.

[22] Y. Hafiz, *ISIS Destroys Shiite Mosques And Shrines In Iraq, Dangerously Fracturing Country*, in The Huffington Post, 7 July 2014.

conflicts and struggles between different interests. This happens because the base of heritage concept is a semantic interpretation according to which every cultural phenomenon is the result of a selection process open to any ideological and political manipulation. Therefore, to increase and valorize cultural heritage potential for the building of interreligious and intercultural dialogue, must be clearly understood that such heritage, even if is composed of material goods, is not fixed, nor neutral, but is rather the result of a dynamic and relational process[23].

For these reasons, it is absolutely necessary to adopt a specific policy for protection and management of religious heritage religious considering their function, that is primarily spiritual, in the activity of administration and the involvement of all actors, public and private.

Heidegger argued that art is "creative guardian of truth": the care of divine truth has for centuries been entrusted to religious communities, which have the responsibility to pass on heritage through a constant process of reformulation of doctrines, practices and rituals. In this process is fundamental the role of sacred sites: their valorization represents, at the present time characterized by a massive process of globalization, an essential step in the promotion of interreligious and intercultural dialogue[24].

This task is not just a duty of the faithful, but of the entire democratic community and therefore local authorities, States, international organizations, religious communities and civil society actors. In addition to its spiritual significance, cultural heritage of religious interest is a tangible manifestation of the plural cultural systems that characterize euro-Mediterranean area.[25] As recently affirmed by European Council, «Europe and Mediterranean region share historical and cultural roots, including religious traditions»[26].

European Union during last years addressed the issue of the construction of an area of peace and security in the Mediterranean, in particular promoting a joint

[23] "The heritage interprets the past in order to give it a contemporary meaning". D. LOWENTHAL, *The heritage crusade and the spoils of history*, Cambridge University Press, Cambridge, 1998, p. XI.

[24] M. Heidegger, *L' arte e lo spazio*, ed by G. Vattimo, ed. Melangolo, Genova, III ed., 2003.

[25] See S. Ferrari, *Introduction: the Legal Protection of the Sacred Places of the Mediterranean* in S. Ferrari, A. Benzo, (ed. by), *Between Cultural Diversity and Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean,* Ashgate, 2014, p. 8.

[26] EUROPEAN COUNCIL, *Council conclusions on Developments in the Southern Neighbourhood 3069th FOREIGN AFFAIRS Council meeting Brussels*, 21 february 2011, available on line it the website www.consiliumeuropa.eu/uedocs/ cms_Data/docs/pressdata/EN/foraff/119420.pdf

protection of cultural and religious values. In 2010 the President Manuel Barroso invited to cooperation in order to «*faire des grand sites religieux des espaces de paix et de culture*». Two years later, European Commission affirmed that «sacred places of the Mediterranean are an important part of European identity and can give a relevant 'contribution to intercultural dialogue (…)» The Mediterranean is the cradle of civilization, and along its shores can be found 20 countries and territories, more than 20 languages and all three monotheistic faiths. Mediterranean area has a deep cultural richness, but during the centuries also paid a high price for its privileged position. It is possible to draw a map to see the traces of the different civilization and religions that marked it, as a network of international pilgrimage centers, monumental temples, shrines, synagogues, churches and mosques[27].

The awareness of the variety of cultural expressions is one of the eight "key competences" identified by European Union in the elaboration of their plans for training and continuous education, with specific reference to the knowledge of different cultures as link between the past and the future and between culture and society. Cultural heritage is at the core of European culture and provides a significant contribution to the achievement of its objectives, including firstly the promotion of cultural and religious diversity and intercultural dialogue.

In 2013 EU Guidelines on the promotion and protection of freedom of religion or belief, Council of European Union (art. 43) encourages States to ensure the protection of religious heritage sites and places of worship[28], as the Joint declaration of UN experts on the "destruction of cultural and religious sites: a violation of human rights", adopted on 24 September 2012[29]. In recent years, UNESCO played a key role in drawing up a legislation aimed at protecting cultural heritage in all its forms. In particular, the importance of religious values was stressed during ICCROM

[27] A. Vassiliou, *Opening Remarks*, in A. Benzo (ed. by), *Proceedings of the Seminar "Protecting the Sacred places of the Mediterranean"*, Bruxelles, 6 march 2012, 2012, p. 8.

[28] COUNCIL OF EUROPEAN UNION, *EU Guidelines on the promotion and protection of freedom of religion or belief*, Foreign Affair council meeting, Luxembourg, 24 June 2013.

[29] UNITED NATIONS, Joint declaration on the "destruction of cultural and religious sites: a violation of human rights", 24 September 2012. United Nations experts have spoken out against the destruction of Sufi religious and historic sites in Libya and the intimidation and excessive use of force against unarmed protesters opposing the destruction. The destruction of Sufi sites started in October 2011 in Tripoli and continued in 2012 in other parts of Libya. See more at http://www.ohchr.org/

Forum 2003 on *Conservation of Living Religious Heritage*[30], and in the Resolution of the General Assembly of ICOMOS in 2005 dedicated to the "*establishment of an International Thematic Programme for Religious Heritage*"[31], as well as in General Assembly Resolution of ICOMOS in 2011 on the protection and conservation of sacred sites[32], and in the guidelines UNESCO / IUCN for the *Conservation and Management of Sacred Natural Sites*[33].

Many acts, directly or indirectly, concern the protection of the holiness of particular places and their cultural value: in particular the Declaration of Nara, adopted in the homonymous Conference in relation to the World Heritage Convention in 1994[34] and the Quebec Declaration[35] on the preservation of the spirit of the holy places, adopted within the sixteenth General Assembly of ICOMOS in 2008[36].

[30] ICCROM stands for International Centre for the Study of the Preservation and Restoration of Cultural Property. Is an intergovernmental organization which currently has 133 Member States, with the aim of protecting cultural heritage. About organization history and its fifty years of activity see J. JOKILEHTO, *ICCROM and the Conservation of Cultural Heritage. A history of the Organization's first 50 years, 1959-2009*, ICCROM Conservation Studies, Roma, 2011. About religious heritage see H. STOVEL, N. STANLEY-PRICE, R. KILLIC, *Conservation of Living Religious Heritage, Papers from the ICCROM 2003 forum on Living Religious Heritage: conserving the sacre,* Iccrom Conservation Studies, Rome, 2005.

[31] INTERNATIONAL COUNCIL OF MONUMENTS AND SITES (ICOSMOS), *15th General Assembly,* Xi'an, China, 17 – 21 october 2005, available on line, http://www.international.icomos.org/ xian2005/ resolutions15ga. pdf

[32] INTERNATIONAL COUNCIL OF MONUMENTS AND SITES (ICOMOS), *17th ICOMOS General Assembly and Scientific Symposium 'Heritage, driver of development'*, 27 novembre – 2 dicembre 2011, Parigi, Francia, http://www.icomos.org/en/home/157-articles-en-francais/ressources/publications/477-icomos-17th-general-assembly-scientific-symposium-proceedings?showall=&start=2

[33] UNESCO/IUCN (International Union for Conservation of Nature), R. WILD, C. MC LEOD (ed. by), *Guidelines for the Conservation and Management of Sacred Natural Sites*, Gland, Swiss, 2008. Online version is available in the website www.iucn.org/themes/wcpa/ pubs/guidelines.htm.

[34] UNESCO, *Convention concerning the protection of the world cultural and natural heritage*, 18th session, Phuket, Thailandia, 12-17 december 1994, http://whc.unesco.org/archive/nara94.htm

[35] ICOMOS, *Québec Declaration on the preservation of the spirit of place*, 4 october 2008, http://www.international.icomos.org/quebec2008/.

[36] ICOMOS, 16th General Assembly, *Finding the spirit of the place*, Québec, Canada, 29 september -5 october 2008. With the expression "spirit of place", should be intended" *(…) Tangible (buildings, sites, landscapes, routes, objects) and the intangible elements (memories, narratives, written documents, rituals, festivals, traditional knowledge, values, textures, colors, odors, etc.), that is to say the physical and the spiritual elements that give meaning, value, emotion and mystery to place".*

On November 5, 2010 was adopted the Kyiv Declaration on the protection of religious values, in the broader context of the Convention on World Heritage: in that statement, especially sub points 8) and 10), was recognized the importance of religious and cultural heritage for intercultural dialogue (...) and the need to develop an «action plan for the protection of religious heritage world-wide Aimed at enhancing the role of communities and the avoidance of misunderstandings, Tensions, or stereotypes».

This Declaration was implemented during the thirty-fifth session of the World Heritage Committee of UNESCO, in 2011, in which were adopted guidelines for the management of cultural and religious differences[37].

In conclusion, understanding spiritual and cultural heritage of religious groups, having the ability to protect and valorize the integrity without changing its particular spiritual significance, borrowing values and meanings that religion assumes in common history and identity, represent the three pillars necessary for the construction of a fruitful dialogue between different communities.

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[37] «*The World Heritage Committee took note of the recommendations of the International Seminar on the Role of Religious Communities in the Management of World Heritage properties, organized in Kiev, Ukraine, in November 2010, and requested the World Heritage Centre, in collaboration with the Advisory Bodies, to elaborate a thematic paper proposing to States Parties general guidance regarding the management of their cultural and natural heritage of religious interest, and in compliance with the national specificities, inviting States Parties to provide voluntary contributions to this end*». (paragrafo 7, Decisione 35 COM 5A). Complete text of the Decision, 35 COM 5A adopted by *World Heritage Committee* is available on line, awhc.unesco.org/en/sessions/ 35COM.

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Religious freedom in the new family models in Italy

Abstract
A legal frame of the family exists, but is difficult to submit it to the traditional classifications of public and private subjectivity even if family legal deed do not seem to produce a legally binding commitment. In fact, family law is the branch of private law in which mostly needs a kind of balancing of individual interest of the person with that one of the community.

After the reform of family law in 1975, has strengthened an academic view according to which to the family not based on marriage should be given legal force and, above all, it would be worthy of protection by the legal system as capable of undertaking the same functions of the legitimate family.

The emergence of several new models of family, often designed to solve some social problems, has already occurred in several foreign legal systems thanks to a metamorphosis of the traditional family coming from the free choices of the components. So the first aim of this paper is to understand how and if in Italy has been deleted a pre-established model of family and if it is being replaced by one more flexible and adaptable to the needs of society.

Religious freedom is a right that is up, without any discrimination, to each member of the family, while respecting the rights of others. Therefore, the right to act according to own conscience and religious view must be reconciled with the principle of moral and spiritual unity of the family and the associated principles of solidarity and responsibility that characterize family relationships. So the second aim is to analyze the link between the new family models and the religious factor and, in order to understand the role of religious freedom within the institution of the family, is necessary to analyze the Constitution which deals with the latter.

Keywords:
Marriage, Family, New family models, Religious freedom, Italian Constitution

1. Introduction

Family law seems to be quite reluctant to classification and to the rigour of the legal analysis, because it is a subject of "personal" nature and, therefore, hardly submitted to a legal investigation. This survey, however, would appear useful to detect the rules applicable to family relationships and their evolution, since because of the above relationships, continuous and obvious are the movements of transformation and evolution that affects every aspect of life considered by law.

The regulations concerning the family is not only governed by codes and special laws, but it is largely illustrated in the Constitution, so as to have a fundamental notion upheld by the legal system, helpful to interpret evenly all rules relating to family .

The family cannot be considered as an entity in its own right, as a center of charge of relationships that works with unilateral acts, as is the case of the so called private powers, but is worried to intervene in only a few relationships of its components; so the State does not classify the family as a subjective figure.

The situation becomes complicated when we start to deal with "the interest of the family", because the civil doctrine thinks that there are no collective family interests, but we can talk only of individual interests that correspond to the basic needs of the person and the *status* produce, still, positions object of absolute rights of the person. The public interest understood as the reasons of the community, which shows the intervention by the public power in the family relationships, reveals itself in many forms that have the purpose to meet the needs of various kinds.

Has been attempted to pull over the traditional family to the *de facto* family, in order to extend by analogy to the cohabitation relationships rules regulating the family based on marriage, but it is the prevailing opinion that one according to which you can not extend by analogy rights standards, obligations and powers that are provided to family situations, without considering the existence of certain conditions, it would end up deleting the entire legal system designed to join conditions and consequences of legal links[1]. In fact, in the interpretation of the Italian legal system, doctrine and jurisprudence act with extreme caution, so that the cohabitation *more uxorio* between people of different sexes is now accepted and considered legally relevant situation, subject to certain conditions.

The phenomenon of cohabitation seems to have a connection with the religious factor, in the sense that «higher is the degree of secularity in the state, that should provide the tools to implement at most the religious freedom of individuals during their choices, more is the space of autonomy granted to the phenomenon of cohabitatio»

In fact, the choice to live in cohabitation is often linked to reasons of a social nature, such as precisely the progressive secularization of the State and a consequent separation of the religious factor from the phenomenon of cohabitation and other reasons that are almost always closely linked to matters of conscience[2].

2. Religious freedom and family

Italian Constitution considers fundamental and irreplaceable role played by the family and adapted several provisions of the specific protection of the same.

In order to understand the role of religious freedom within the family it is necessary to revive the Constitution which deals with the latter.

article 29 of italian Constitution, on the second paragraph, states that marriage is based on the moral and legal equality of spouses; this means that even in the sphere of family relations has to be applied the principle of equality enshrined in article 3 of the Constitution and falls down any legal superiority of the husband towards his wife. Recognizing the moral and legal equality of the spouses is a choice that has effects on every aspect of their lives: from patrimonial relationships to those involving family decisions, till understand everything that involves respect for the personality and dignity of each person.

The principle of equality between spouses should be integrated with the value of family unity, so that is possible to create a model of family ruled by consensus. The unity of the family is considered, in a positive light, as a communion or at least shared values and aims: «the position of the individual is not diminished by external limitations, or artificially enhanced by an excessive consideration, contrasting or overwhelming that one of the other. The commitment of each one is considered an integral part of the good of all and unity is realized in the respect for individual rights»[3]. The birth of family law has made a profound change in the structure of the legal relations of family kind, giving a remarkable development to the regulation of marital and parent-child relationships and putting husband and wife on a equal level. The couple with the wedding take several reciprocal rights and duties, governed

[1] See Trabucchi A., *Death of the family or families without family?*, in *Riv. Dir. Civ.*, 1988, I.

[2] Riina P., *Succession profiles of coexistence and religious factor*, in Fuccillo A. (edited by), *De facto unions, cohabitation and religious factor,* Torino, 2007, p. 47.

[3] See Dente G., *Elements of ecclesiastic law in the family law*. Milano, 1984, p. 27.

by article 143 of italian Civil Code, such as the mutual obligation of fidelity, of moral and material assistance, of collaboration in the interest of the family and to cohabitation. Ie, husband and wife must work together in the development and growth of the family, keeping each their own autonomy and freedom.

At this point it should be laid down, and here we are at the crucial point where I wanted to come, how the right to religious freedom is in harmony with the principle of equality and with the good of the family unit. In the family should not be imposed roles and, therefore, a hierarchy between the spouses, but is important to identify the principles and forms to achieve a correct coordination of individual rights in respect of the family unit.

The principle of equality governed, with regard to the family, in abstract by article 3 of the Constitution and in concrete by article 29, allows us to understand that the fundamental rule is the moral and legal equality of the spouses, so that the same Constitution does not show in any point the superiority of the value of the unit on the equality between spouses. In this sense, the case law and doctrine appear respectively little uniforms and loaded with prejudices and reform of family law (1975), while innovating the field in exam, it is not always linear in protecting the interests of individual rather than the interest of the family (in spite of the legitimate family appears, in principle, favored). It becomes necessary, at this point, avoid that the individual could be coerced by family group or confessional and so the state system cannot assume rigid positions or prevaricate on the individual, but rather guarantee them an area of freedom, speaking only if required (or, maybe, requested by the parties), not overlooking the fact that every personal conflict cannot be separated from both the respect for the will of individuals and the interests of the same[4].

Religious freedom is a right that is up, without any discrimination, to each member of the family, which is why it can never be denied to a member a "religious attitude" such as to determine the membership of a particular belief, because it is on the personal sphere of the individual. It is not, however, permissible to implement behaviors that go to affect the rights of the others. Therefore, the right to act according to his conscience and religious view must be reconciled with the principle of moral and spiritual unity of the family and, even more, with related principles of solidarity and responsibility that characterize the life of society and, therefore, also the family relationships[5].

[4] See Tedeschi M., *Ecclesiastic law primer*, Torino, 2010, p. 340.

[5] See Pirone L., *Observations regarding religious freedom in the family reality*, in *Dir. Eccl.*, I, 1988, p. 666.

The religious option constitutes the exercise of a fundamental personal right of the individual, because expression of interior feeling, and is protected and guaranteed regardless of its contents. The Constitution analyzes in most articles the religious phenomenon and its manifestations establishing, to the article 3, that religious belief cannot be grounds for discrimination in front of the law and provides, in the art. 19, limited only by the exercise of freedom in question, that of morality (previously accompanied by limits of public order). Finally, with respect to the religious factor in a collective meaning, the Constitution, by article 8, guarantees equal treatment to all religions.

Full freedom of religious profession and faith of each member of the family, despite being protected by the Constitution, is limited by the violation of family obligations: anyone who neglects or ill-treat the spouse or children on account of their faith would fail in the fundamental duties suited to the achievement and preservation of the unity and stability of the family, as well as committing an illegal act subject to prosecution. In fact, the family unit, closely linked to respect for religious freedom of others, become a limit on the right of religious profession. In this sense, the Supreme Court argues that «imposing a religion implies unlawful conduct»[6], because respect for the religion of the other is a part of the duty to moral and material cooperation.

The legal significance of religious freedom also plays a key role in conflict situations that arise in cases where the same is going to collide with other values (such as life or health) and/or interests (for example, the interest of the child in the case of family crisis for religious reasons) that also is a part of recognition and legal protection.

The law has been repeatedly called upon to resolve issues and conflicts in the family and, until the late 90s, in many decisions has emerged as a common principle: marital crisis are based mostly on religious motivations[7].

The religious element plays an important role in the marriage when one spouse decides to change their religious choices. This situation is very real and frequent, as evidenced by the abundant case law existing, and able to create difficult moments in the couple, especially in cases where the change of views is addressed toward a confession profoundly different from those commonly known as traditional, or to

[6] *Corte di Cassazione*, sentence n. 64/2010.

[7] Are mentioned, among all: Tribunale di Velletri, n. 445/1986, in *Diritto di famiglia e delle persone,* 1987, p. 207 and *Cassazione civile*, n. 4498/1985, in *Diritto di famiglia*, 1985, p. 327.

emerging religious movements that impose drastic changes in habits and behaviors[8] and, not infrequently, can obstruct the continuation of cohabitation or due to charge separation. In this case, the principle that should be observed, in order to decide the resulting judicial claims, is only the respect for religious freedom.

3. Religious freedom and new family models

The theme of the family, understood as a social formation intermediate between the State and the individual, lends itself to a series of assessments due to the demands of secular pluralism, vote, more than anything else, to consider the social groups and between them the family community as protected against the State and other social groups thereby ignoring the positions of the individual within the group[9].

Stepping back, we meet to consider the choice of the constitutional legislator who, oriented in favor of a specific model of family, namely that founded on marriage, not necessarily aimed at discrediting, and then to deny protection to other forms of union between people, although at that time it seemed useful to all use a model of family relationships inspired by the moral and legal equality of the spouses, because prevailing in the italian culture and society of those years. And, despite the regulatory framework concerning the family does not show an explicit reference to alternative models of family, or simply different from that one based on marriage, this does not mean that our Constitution can offer ideas for the protection of alternative models, although the Constituent did not consider useful that those models were formally protected[10].

A sort of informal protection was granted by the Supreme Court of Appeal to the *de facto* family through some sentences[11], inspired by the exercise of the religious

[8] See Cardia C., *Principles of ecclesiastic law*, Torino, 2005, p. 154.

[9] See Rescigno P., *People and community*, II, CEDAM, Padova, 1988, p. 252.

[10] One of these alternative (social) models consists of the cohabitation *more uxorio*, which is also referred to when speaking generically of de facto family, and the same is taken into account both by the legislature is in the case-law, with the objective of protect certain individual positions. Basically, when appeared the possibility to protect some of the legally relevant effects of the "de facto family", this was only in order to safeguard individual subject positions and not a center of imputation of independent legal effects. See. Putti P.M., *New models of family relationships between opening prospects and needs of comparison*, in *Il diritto di famiglia e delle persone*, 2009, 2, p. 829-830.

[11] See *Corte di cassazione*, n. 3398/99, in *Dir. Pen.,* 2000, p. 238 and n. 55/2003 in *Dir. Pen. Proc*, 2003, p. 285.

freedom right, which have fixed principles applicable not only in the context of the legitimate family, but also in that of the *de facto* family; in the sense that the right to practice the own religion, to participate actively in the practice of the own religion and to convert the children to a faith different from the Catholic are the explication practice of freedom of religious choice and, therefore, they can be extended by analogy to *de facto* families, because they are exercise of a fundamental freedom guaranteed by the article 19 of the Constitution.

Complex is the position taken by the Constitutional Court which, while showing a certain openness toward a larger view of this cohabitation, has established a clear distinction between *de facto* family, as a social formation, and recognition of the rights recognized to the family based on marriage ex article 29 of the Constitution.

For the existence of the crime of abuse in the *de facto* family[12], the doctrine is not unanimous and creates many questions about the problem of cohabitation. The survey is quite varied and, on the one hand, some argue that cohabitation or at least a continuous habit of living is essential[13], the other there is who talks simply about habitual relationships between the passive and active subjects[14] and, still, those who support that is required a continuative relationship that should not consist exactly in the banquet[15]. Moreover, the situation is further complicated if we consider that the case-law, mentioned above, equates the cohabiting *more uxorio* partner and the separated spouse not cohabiting.

In addition, art. 572 of italian criminal Code equates, for the configuration of the crime of abuse in the family, the cohabitation *more uxorio* to the legitimate family (such assimilation is assured by the doctrine), but this does not require as the immediate effect the equalization of the above cohabitation to the family, nor grants legal recognition to the same cohabitation. Actually, the criminal legislator considers worthy of protection specific subjective and personal situations, that are not based on cohabitation, but are "occasioned" by the same[16].

Therefore, if cohabitation is not an essential requirement for the configuration of the crime of abuse in the family, is necessary to determine which is the real criterion

[12] See ,*Corte di Cassazione*, sentence n. 64/2010.

[13] See Coppi F., *Crime of abuse in the family*, Perugia, 1979, p. 255.

[14] See Pannain A., *The conduct in the crime of abuse*, Napoli, 1964, p. 53.

[15] See Manzini V., *Treatise of Italian criminal law*, vol. VII, Torino 1984, p. 863.

[16] See Giacobbe G., *Family or families: a problem still uncertain*, in *Il diritto di famiglia e delle persone*, I, 2009, p. 313-314.

by which, in the presence of all the other extreme, can take shape exactly the crime of abuse; all this because the spirit of the article 572 of italian criminal Code rules out that the mere fact of the exhaustive conduct is made by the existence of family relationship of consanguinity or affinity, being necessary the actual continuity of affection and interests.

The notion of "person of the family", therefore, must not only be linked to cohabitation or abstract situations such as regular relationships or continuity of feelings, but to something more concrete: the house, that is, the oppressive behavior should happen primarily «in the house of the passive person from a person living or not living together which is however allowed to enter into the house».

The social-legal case that has been talked about until now assumes, in Italy, a fairly complex position mainly in terms of the common mentality, since it belongs to the italian cultural tradition a configuration of the family based on the Catholic ethics and on a civil marriage configured on the model of canonical marriage[17].

The thought of the Catholic Church, in this sense, it is absolutely clear, because it refuses the institutional recognition of *de facto* unions and the equalization of the same to families originating in a marriage, so much so that in a document of 2000, the Pontifical Council for Family analyzes the phenomenon and highlights the dangers that might result from such recognition and equivalence to the identity of the matrimonial union and the remarkable «deterioration that would arise for both the family and the common good».

4. Marriage freedom and freedom in the marriage

With reference to marriage freedom is necessary first ask whether the italian legal system may be able to recognize and guarantee statuary autonomy in favor of any kind of couple or group of individuals that freely decide to build a social formation-family. In other words, is important to check if is possible say that, in Italy, the legitimate family is a legal model of "independent family", that is free of self-regulation within the legal system of the State.

If the answer to this question is negative, there are questions about how you justify (considered that the principle of equality of all citizens and equal liberty of all

[17] See A. Fuccillo, *De facto unions, religious pluralism and legal reaction*, in A. Fuccillo (edited by), *De facto unions, cohabitations and religious factor*, Giappichelli, Torino, 2007, p. 5.

faiths) the attitude of the italian State intended to recognize and guarantee statuary autonomy, even if limited, only to confessional families qualified as such[18].

Marriage and family are no more closely related to each other, in the sense that not all marriages lead naturally into a family, which is completed by children and not all families are based on marriage, because the number of "different" families is increasingly proliferating, or the *de facto* families, those "extended" and so on.

If we analyze the issue of marriage and family it shows an important aspect about the topic that we are facing: the freedom of marriage choose, more simply, the right both to choose the preferred marriage form and to decide whether to marry or not. Avoiding to dwell on the forms of marriage provided by italian law (civil marriage, marriage according to the Concordat, religious marriage), we cannot consider the spread of the phenomenon of cohabitation that are not founded on marriage, in fact, in today's society there are many family models and this variety involves obvious difficulties in the identification of a single natural model and, therefore, it becomes difficult to establish on what kind of marriage this family is based[19].

The claim of religious freedom in the marriage can be advanced either by marriages that can be defined "confessional qualified" is by other social groups with family characteristics, that have in common with the first the feature to be stored by our legal system and considered pure legal facts. In both cases what is required as right constitutionally due, is the willingness of the law to recognize and guarantee to the persons appointed not only freedom from any constraints in the exercise of *jus connubii*, but also the freedom of self-determination in marriage, participating in the legal regulation of a particular type of family civilly legitimate[20].

Therefore, the question to ask to the State is simply related to what kind of family law is applicable in today's society.

In theory there are those who try to support the close connection between marriage and filiation[21] and, therefore, to consider heterosexual marriage as the only form of marriage that makes possible the natural process of procreation.

But this argument appears socially and constitutionally outdated, which is why the marriage does not have the only or main purpose of having children, and perhaps

[18] See *Treatise of family law*, Zatti P. (edited by), *Family and marriage*, vol. I, Giuffrè, 2002, p. 212.

[19] See Consorti P., *Law and religion*, Editori Laterza, 2010, p. 96.

[20] See *Treatise of family law*, mentioned up.

[21] See Morozzo Della Rocca P., *The new rules about filiation*, Maggioli, 2014, p. 38.

even to create a family. In fact, the Constitution when provides that the Republic recognizes «the rights of the family as a natural society founded on marriage», does not mean that marriage is designed to build a family as «communities of solidarity and affection that goes beyond two people»[22].

Essential purpose of marriage is rather to set mutual rights and duties between two people that have clearly decided to undergo to the matrimonial regime, obliging themselves.

The traditional family model is beginning to set even because of a fundamental element that makes up the same: the woman. Her role is changing and with it changes the mentality of women, who can decide when to become a parent. So, the choice to have children becomes much more aware and responsible than in the past, exactly as claimed by Pope Francesco[23], who, despite dwell on the pillars of the doctrine and, therefore, on the importance of the traditional family in society, believes that openness to life and sexuality should be responsible.

Freedom of marriage, as a fundamental right of every human being, was also the subject of analysis by the Constitutional court, in sentence n. 245 of 25 July 2011.

The case is interesting for three main reasons. First because it is established that there are fundamental rights to be subject to limitations only for specific protection requirements; among these rights the Court[24] include that of marry. In addition, sentence n. 245 following the recent case-law that, with regard to the Security Package, affirms the belief that the protection of public order does not justify the restriction of individual rights, even more in the case of fundamental rights. Finally the Court, on the basis of the allegation made by certain law[25], stipulates that definitely citizenship

[22] Fusaro C., *Isn't the constitution to assume the heterosexual paradigm, in The "natural society" and its "enemies". The paradigm of heterosexual marriage*, Torino, Giappichelli, 2010, p. 165.

[23] Papa Francesco focuses on the figures which traditionally make up the family and says that «in a world often marked by selfishness, the large family is a school of solidarity and sharing », but this «does not mean that christians must have children in series». See *The family in the Papa Francesco's view. Short, polite and traditional*, in *www.ilgiornale.it.*

[24] *Tribunale di Treviso*, 15.04.1997.

[25] With sentence n. 105 of 2001, the Court ruled that the guarantees contained in the art. 13 Const. cannot undergo attenuation compared to foreigners, «for the protection of other constitutionally relevant goods. As public interests affecting by immigration are many and though they may be perceived as a serious security problems and of public policy related to uncontrolled migration flow, cannot be scratched by the universal character of personal liberty, which, like the other rights that the Constitution declares inviolable, it is up to the individual, not as participants in a given political community, but as human beings».

guarantees the enjoyment of many rights from which the stranger is excluded, but being a foreigner can not affect the exercise of fundamental rights that belong to «individuals, not as participants in political community, but as human beings».

The prohibition of marriage of irregular foreigner might be seen as an expression of «law that applies its requirements through a personal *status* of the person who is hit. As a label (...) where the person cannot escape»[26]. It becomes really discriminating for the foreigner-person, as well as adversely affecting human rights, a limitation for the realization of their own feelings, or the ability to establish an emotional relationship recognized by law.

It's just to this vision that the constitutional Court makes an end, preventing the legislator to limit the fundamental rights, among which is counted without doubt the right to marry. In this way has been discredited the notion that the irregular foreigner cannot enjoy certain rights and cannot, therefore, have the right to freely choose a partner of life.

The fundamental crux that the Court had to resolve regards the extension of the discretionary power of the legislator to limit the right to marry, against reasons of public safety: so emerge, on the one hand, the proportionality of the decision to limit, on the other the weight that the right to marriage assumes in the national and supranational legislation.

The limitation on the right of foreigners to marry in our country corresponds, in practice, to a compression of the corresponding right of an italian citizen and the imposition of a limit also for mixed couples who approach marriage with honesty and authenticity, with just one aim: the implementation of a common project of life.

The instrument of repression, then, can be defined "over-inclusive", in the sense that it affects all marriages in which one spouse is a foreigner, even those who do not have the characteristics of a marriage of convenience. Moreover, this measure appears to be disproportionate to the objective to be pursued, because even compresses the italian citizen's right to marry a foreigner, as highlighted by the Court, which considers that the legislator has failed to protect the interests of all involved in the marriages in exam, for which the same has used a means "under-inclusive" with respect to the end that is intended to obtain[27].

[26] Winkler M. M., *Irregular foreigners and marriage: anatomy of a fundamental right*, in *La nuova giurisprudenza commentate*, n. 12, dicembre 2011, p. 1246.

[27] See Winkler M. M., *Irregular foreigners*…, mentioned up, p. 1248.

Family autonomy and marriage freedom are the basic principles of the constitutional protection of the family, which moved to build the plot of the relationship between this and the public authorities. They show the need to take away the marriage from any form of conditioning, even indirect.

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Peace as a fundamental human right in the doctrine of the Popes Benedict XVI and Francis

Abstract
With its reflections and its concrete work in favor of peace, as the decisive issue of human history and contemporary history in particular, the Church stands as one of the most active subjects of today's world engaged in the construction of theoretical and practical scenarios of peaceful coexistence among peoples. This is particularly evident considering the topics which the last two Popes Benedict XVI and Francis cared and taught about.

Particularly, the central idea of the first message of Pope Francis for the International Day of Peace talks about the brotherhood that, as the essential dimension of man as rational being, is an essential dimension for the building of a just society and of a solid and long lasting peace. This observation leads to the contemporary and delicate matter of the relationships between North and South, to the raising occurrence of immigration, to the problem of the relationship and balance between cultures and different worlds. As in this field, and more widely in the one of the acceptance and solidarity, the work of the Church seems particularly intense, and the Pope's judgment is of a great importance. According to the Pope, the relational difficulties of men in a time of multiculturalism are born of a cultural matter and of a particular vision of the reality. The new ideologies – according to Francis – characterized by widespread individualism, egocentrism and materialistic consumerism, weaken the social bounds.

Francis considers the principle of brotherhood (that is the evangelical concept quite different from the most generic concept of solidarity) as a concrete articulation of the opportunity to build peaceful human relationships. The brotherhood is a condition for concrete and political human works to reach the social justice, to defeat poverty, to set economical systems based on new economical models and lifestyles, to check fears and wars, to defeat corruption and crime, to help preserving the natural resources. The way of peace today – according to Pope Francis' specific interpretation – is bound to the development of links of brotherly relations, mutuality and forgiveness: these concepts are not really moralistic but they are set out according to a precise way of growth of the contemporary society.

This vision of dignity of man as a condition of harmonic social development, based on mutuality and global peace, comprises an in-depth analysis of the topics of social doctrine already confronted by Benedict XVI, whose reflections on the topic of peace among men and Countries, have been widely dealt with.

Pope Ratzinger's approach cares about the human being with his vital – material and spiritual – needs thus explaining his particular persistence on economical and social topics linked to today's economical and financial crisis. The economical growth cannot be pursued by penalizing "the social functions of the State and the webs of solidarity of civil society", thus violating the social rights and duties, in particular the right to work.

For the peace operators a high, even political, profile, is expected: to act for the affirmation of a "new model of development and economy", that is, of a model of good global *governance*, bound to the binomial State of right/social State, the two faces of the same coin called humanly sustainable statehood. Thus, Pope Benedict makes his own a fundamental principle of the current international Law of human rights, the principle of interdependency and indivisibility of all person right's, which means that the right to work, the right to feed, the right to assistance in case of necessity, the right to health, the right to education, are as fundamental as the right to freedom of association. This principle has its root in the ontological, material and spiritual truth of human being.

This is the field of humanism that, according to Benedict XVI, must be "a humanism open to the transcendence", marked by "the ethic of communion and partake" and respectful of "the unavoidable natural moral law written by God in the conscience of each and every man".

The Pope states that the first education to peace is within family, that the article 16th of the Universal Declaration defines as "the fundamental and natural core of society that has the right to be protected from the society and the State".

On the same educational field the Pope assigns a special task to "the cultural, scholastic and academic institutions" to make them undertake, besides the formation of "new generations of leaders", "the renewal of public, national and international institutions" too.

In the multi-thematic vision of Benedict XVI the considerations on freedom of religion have great relevance, which the Pope means as dual freedom: freedom from (for example, from constriction about the choosing of its own religion) and freedom to (witness, teach, etc.). Strictly linked to this passage is the affirmation that "an important cooperation to peace is that judiciary and the administration of justice recognize the right to use the principle of freedom of conscience towards the laws and governmental measures that threaten the human dignity, as abortion and euthanasia".

The widest theological interpretation of the history proposed by Pope Ratzinger gives an overall view to world and time, so that it can set contemporary culture free, mostly the

Catholic one, from non-Christian lines of interpretation that have been dominant in the 20th century.

Keywords:
peace, brotherhood, human rights, culture of peace, humanism

1. The World Days of Peace

The ethical and legal concept of peace as a fundamental human right has been and still is the subject of a special reflection inside the Catholic Church. To the church the notion of peace is not only a human project and the goal of the social coexistence but, first of all, is a principle of divine nature and a specific subject of the theological reflection[1]. It is due to this motivation of biblical origin that the Church shows a special social and political attention to the theme of the human right to the peace.

In particular, the Messages of the Roman Popes in the occasion of the World Day of Peace are – for the various topics discussed and the depth of contents – a magisterial heritage of culture and Christian pedagogy that in recent years the Catholic Church has proposed to the world on the theme of peace[2] ("An enlightening doctrine from the Church for this fundamental human good"[3]). They are also a thermometer of the evolution of the issues and the sensibilities developed since 1968 when Pope Paul VI decided to establish this annual celebration on January 1st to express the wish, as he wrote, "that be the peace to rule the sequence of the upcoming history with its just and balanced beneficial".

The next Popes have confirmed these meeting, that has a thematic title, in which are developed specific topics that are, for the believers and the whole world, an indicator of the judgment that the Church suggests on the most relevant contemporary issues linked to the theme of peace. The Message of the Pope is worldwide sent to chancelleries and also marks the diplomatic line of the Holy See for the opening year.

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[1] Cfr. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, 2 April 2004, Vatican Publishing,Vatican City, 2004, nn. 488-493.

[2] *Compendium of the Social Doctrine of the Church,* n. 520

[3] Benedict XVI, Message for the 2008 World Day of Peace, *The human family, a community of peace*, 1 January 2008, n. 15.

Thus, it is interesting to resume the contests of most recent Days of peace at least, from Pope Benedict to Pope Francis, to understand through the enlightened issues, what concerns or worries the Catholic Church the most.

The general issues selected by Benedict XVI, since 2006, are the following: the Truth, the Human being, the Family, the Poverty, the Environment, the Religious freedom, the Education, the Peacemakers; the issues selected by Francis are: Brotherhood for 2014 and Slavery for 2015.

The general considerations recalled the most within the Messages of Pope Ratzinger have first concerned the theological and scriptural sides related to the peace theme, followed by: Globalization, Announcement, Ethics, religious Freedom, Relativism, Economy, Family, Justice, Persecution of Christians, Laity, Law, Politics, Ecology, Environment, religious Fanaticism. Pope Bergoglio too has focused on the Theology of peace, and also on: Globalization, Human Rights, Solidarity, Economy, Social Ethics, Resources of the Earth, Brotherhood.

2. Pope Francis and contemporary slavery

It is interesting to start from the Pope and the main theme of the 48th World Day of Peace of 2015, called "No more slaves but brothers". This theme may seem peculiar, as, commonly, slavery is considered as an heritage of the "dark centuries" of the past, that no longer belongs to the "fully-developed" and "emancipated" contemporary world.

If it is true that enslaving human beings disgusts the legal consciousness and the contemporary politics and is strictly forbidden by international laws, today the abominable faces of slavery are a lot: the trade of human beings, the trade of immigrants and prostitution, the "slave-work", the exploitation over men, the slave mentality towards women and children.

High lightening the theme of slavery as a tragedy of contemporary life represents a significant challenge to the contemporary mentality that, with a marked positivist self-importance, judges from above a historical past that has soiled its hands with deeds as severe as today's ones.

Francis identifies, among the many reasons of slavery, the poverty, the underdevelopment, the difficulty of the poor countries to reach the sources of the ground and the mass education; and again the armed fights, the violence, the criminality, the terrorism (n. 4). Basically, according to the Pope, the enslavement and the trade of human beings are strictly connected to wide-spread situations of conflict and to the lack of peace that, among the other things, favors the corruption,

the enslavement and the trade of human beings.It is on these very arguments that the Abstract of the social Doctrine of the Church is about the same and shows the way that favours the overcoming of the situations that threaten the peace, even on a political-legal point of view.(cfr. nn. 507-515). Even Pope Francis, in the Message of 2015, reveals a clear virtuous path to stop the phenomenon of the slave mistreatment of the human being, interesting for its legal involvements[4]. Indeed, as the Pope points out, we can fight modern slavery not only on the cultural side, through a new ontology of the very person, but also through clear legal actions that favour the prevention and the repression of the mistreatment of the human being.

Most generally, how can we try to overcome this tragedy of contemporaneity that is the «culture of enslavement» (n. 6), that reduces the ontology of a person to a mere object to take advantage of?

The theme is closely related to the 47th World Day "Brotherhood as foundation and way to peace".

In the Message for 2014 the issue had already been recalled as a grave injury of fundamental human rights and introduced to the theme of the right to life and freedom of religion: **"**The tragic phenomenon of human trafficking, in which the unscrupulous prey on the lives and the desperation of others, is but one unsettling example of this. Alongside overt armed conflicts are the less visible but no less cruel wars fought in the economic and financial sectors with means which are equally destructive of lives, families and businesses" (n. 1). The papal document identifies the root of the tragedy within the individual egoism, that grows socially: "In the many forms of corruption, so widespread today, or in the formation of criminal organizations, from small groups to those organized on a global scale.… I also

[4] «There is also need for a threefold commitment on the *institutional level*: to prevention, to victim protection and to the legal prosecution of perpetrators. Moreover, since criminal organizations employ global networks to achieve their goals, efforts to eliminate this phenomenon also demand a common and, indeed, a global effort on the part of various sectors of society. *States* must ensure that their own legislation truly respects the dignity of the human person in the areas of migration, employment, adoption, the movement of businesses offshore and the sale of items produced by slave labor. There is a need for just laws which are focused on the human person, uphold fundamental rights and restore those rights when they have been violated. Such laws should also provide for the rehabilitation of victims, ensure their personal safety, and include effective means of enforcement which leave no room for corruption or impunity. The role of women in society must also be recognized, not least through initiatives in the sectors of culture and social communications, FRANCIS", Message for the 2015 World Day of Peace*, No longer slaves, but brothers and sisters, ,* 1 January 2015, n. 5.

think of the heartbreaking drama of drug abuse, which reaps profits in contempt of the moral and civil laws. I think about the devastation of natural resources and ongoing pollution, and the tragedy of the exploitation of labor. I think too of illicit money trafficking and financial speculation, which often prove both predatory and harmful for entire economic and social systems, exposing millions of men and women to poverty. I think of prostitution, which every day reaps innocent victims, especially the young, robbing them of their future. I think of the abomination of human trafficking, crimes and abuses against minors, the horror of slavery still present in many parts of the world; the frequently overlooked tragedy of migrants, who are often victims of disgraceful and illegal manipulation" (n. 8).

The papal document finds, in the brotherhood, the way to overcome the injustice that often weights on today's man: "The many situations of inequality, poverty and injustice, are signs not only of a profound lack of fraternity, but also of the absence of a culture of solidarity. New ideologies, characterized by rampant individualism, egocentrism and materialistic consumerism, weaken social bonds, fuelling that "throw away" mentality which leads to contempt for, and the abandonment of, the weakest and those considered "useless". In this way human coexistence increasingly tends to resemble a mere *do ut des* which is both pragmatic and selfish" (n.1)[5].

Pope Francis suggests to the contemporary world to experience the way to brotherhood consecrated by Christ on the Cross so that it can become the way to a new solidarity among men and can lay the basis of a different model of development in economy: "The succession of economic crises should lead to a timely rethinking of our models of economic development and to a change in lifestyles. Today's crisis, even with its serious implications for people's lives, can also provide us with a fruitful opportunity to rediscover the virtues of prudence, temperance, justice and strength (n. 6).

For this reason, I appeal forcefully to all those who sow violence and death by force of arms (n. 7)and it is a truly pressing duty to use the earth's resources in such a way that all may be free from hunger (9), walking the demanding path of that love which knows how to give and spend itself freely for the good of all our brothers and sisters (n. 10).

Pope Francis has lingered over the theme of peace, besides many speeches, even in the Apostolic Exhortation *Evangelii gaudium* (nn. 238-258), where he focuses the contribution of the Church to the cause of peace within the dialogue the Church must speaks about to the States, the society, the other religions.

[5] Cfr. Francis, Apostolic Exhortation *Evangelii gaudium*, 24 November 2013, nn. 53-56.

In particular, as for this last occasion, the Pontiff précises that if the interfaith dialogue must always be "pleasant and cordial", at the same time we have to consider "In this dialogue, ever friendly and sincere, attention must always be paid to the essential bond between dialogue and proclamation, which leads the Church to maintain and intensify her relationship with non-Christians. A facile syncretism would ultimately be a totalitarian gesture on the part of those who would ignore greater values of which they are not the masters. True openness involves remaining steadfast in one's deepest convictions, clear and joyful in one's own identity, while at the same time being "open to understanding those of the other party" and "knowing that dialogue can enrich each side". What is not helpful is a diplomatic openness which says "yes" to everything in order to avoid problems, for this would be a way of deceiving others and denying them the good which we have been given to share generously with others"(n. 251).

From this point of view, the Pontiff does not allow, in this text, any kind of religious relativism, aiming instead to a precise affirmation of identity as sole condition that permits both the dialogue and the giving and asking for respect.

3. The problem of pacifism

Besides, the debate created by certain statements made by Pope Francis cannot be omitted, they have been interpreted by some editor as a surpassing of the traditional and consolidated "just war" point of view of the Church.[6]

In addition, an initial prolonged silence of the Holy See about the persecution of Christians in Iraq, presumably not to hurt the susceptibility of the Arab community and not to show a lack of respect in the "supreme" sign of dialogue, have been judged negatively by others,[7]also for the fact that the very patriarch of Baghdad, Louis Sako, has asked the armed intervention to defend the Christian community.[8]The following delaying of crimes acted by Islamic extremists against Christians the most, as it is known, made the Pope condemn them over and over again to defend the Christian communities of the Middle East and the North Africa.

[6] S. Fiori, "Cacciari: 'Le parole del Papa su guerra e pace? Una svolta radicale per la Chiesa cattolica", in *La Repubblica*, 20 August 2014, *http://www.repubblica.it*; S. Pergameno, "*Papa Francesco e la 'guerra giusta' al Califfato*", in *Nuova Agenzia Radicale*, *http://www.agenziaradicale.com.*

[7] Cfr. A. Socci, *Non è Francesco. La Chiesa nella grande tempesta*, Mondadori, Milano 2014; Id. "Francesco dimentica i cristiani", in *Libero*, 1/10/2014.

[8] I. Ingrao, "*Papa Francesco e la guerra giusta*", in *Panorama,*19 August 2014, *http://www.panorama.it.*

Historically, the Church has used the notion of "just war" to defend the rights of faith and the *libertas ecclesiae* when they have been threatened by an aggressive enemy like, for example, in the battles of Poitiers (732), Lepanto (1571) and Vienna (1683), without which the west would have had a very different destiny. Moreover, the Church must admit that the use of strength to protect the innocent people and to prevent crimes against humanity is necessary[9].

The concept of "just war" has been continued and conceptually deepened, with the usual sharpness of arguments, by the cardinal Ratzinger who, in his speech in Normandy, June 4th 2004, defined the war of the Allies "*bellum iustum*", because they acted "also for the wellbeing of those living in the enemy Country during the war".[10] In April 1st 2005, during a congress in Subiaco (the last one as cardinal), Ratzinger compared extreme pacifism to the "anarchy" in which the "principles of freedom have been lost". This pacifism can divert "towards a disruptive anarchism and towards terrorism"; therefore, peace cannot be considered as a mere absence of armed conflicts, but it is instead "inseparably connected" to right and justice.[11]

Those notions strongly clash against the mentality that is prevalent in the current days, defined by cardinal Ratzinger the "dictatorship of relativism",[12] a strong feature of the nihilism that dominated Europe from at least the last decades of the '900. That very mentality was the most rooted in the pacifist movements in the '80s, during the dramatic nuclear confrontation between NATO and the Pact of Warsaw, in the time when the principle of *Lieber rot als tot*, "better red than dead", a slogan that spread in the Western Europe from the Federal Germany, was most prevalent among the demonstrationists against the ballistic arrays.[13]

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9 Cfr. *Compendium of the Social Doctrine of the Church* ,nn. 504-505.

10 J. Ratzinger, Speech held for the 60th anniversary of the Allied landings in Normandy, 4 June 2004, *http://papabenedettoxvitesti.blogspot.it/*, the translation from the French, not revised by the author, was published in *Vita e Pensiero,* n. 5 (September-October) 2004.

11 J. Ratzinger, *L' Europa nella crisi delle culture*, Conference held on the evening of Friday, 1 April 2005 in Subiaco, the Monastery of St. Scholastica, upon delivery to the author of St. Benedict Award "for the promotion of life and the family in Europe", *http://papabenedettox-vitesti.blogspot.it/*, then in J. Ratzinger, *L' Europa di Benedetto nella crisi delle culture*, with introduction of Marcello Pera, trad. di Lorenzo Cappelletti e Silvia Kritzenberger, Cantagalli, Siena 2005.

12 J. Ratzinger, *Omelia alla Messa "Pro eligendo Romano Pontifice"*, 18 April 2005, in *L'Osservatore Romano*, 8 June 2005, p. 7;cfr. also J. Ratzinger, *L'Europa di Benedetto nella crisi delle culture*, cit., p. 49.

13 The intellectual premises of the defeatist mentality were well specified by V. Cesareo-I. Vaccarini, *L'era del narcisismo*, Franco Angeli, Milano 2012, pp. 117-118.

4. The defense of the Christians and their rights violated

If the defeatist pacifism is considered far removed from the interest considered central by the Church (the one for the defense of the right of faith), then the work of the military appears much more meaningful, especially the ones of those who work for the International Organizations and the international humanitarian right. Those very soldiers "engaged in delicate operations of conflicts contexture and restoring the necessary conditions for peace" were the subject of Benedict XVI thought in his first message as Pontiff for the XXXIX Day of Peace in which he recalls (at n.8) the *Gaudium et Spes* in n.79, that considers the soldiers serving the Homeland as "ministers of the security and the freedom of people". The fact that the Pope has expressly included the soldiers that defend security and freedom among peaceful men has its meaning, because it is included in the idea of "just war" and it is not an obvious point of view within the Church.[14]

The very notion of "just war" involves an appeal to law and justice, for which "As a means of limiting the devastating consequences of war as much as possible, especially for civilians, the international community has created an international humanitarian law"[15]. Instead the appeal to the international humanitarian law, developed in the "consciousness that there are inalienable human rights linked to the basic nature of men", requires also, "These are reassuring signs which need to be confirmed and consolidated by tireless cooperation and activity, above all on the part of the international community and its agencies charged with preventing conflicts and providing a peaceful solution to those in course"[16]. Even

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14 Cfr. M. De Leonardis, *"Guerra giusta" e "pacifismo": la dottrina della Chiesa*, *http://www.ilgiudiziocattolico.com/.*

15 Benedict XVI, Message for the 2006 World Day of Peace, *In Truth, Peace,* 1 January 2006, n.7; Id. *Message for the 2007 World Day of Peace*, *The human person, the heart of peace,* 1 January 2007, n. 13.

16 Benedict XVI, Message for the 2007 World Day of Peace, n. 14; the Pontiff adds: "Moreover, the scourge of terrorism demands a profound reflection on the ethical limits restricting the use of modern methods of guaranteeing internal security. Increasingly, wars are not declared, especially when they are initiated by terrorist groups determined to attain their ends by any means available. In the face of the disturbing events of recent years, States cannot fail to recognize the need to establish clearer rules to counter effectively the dramatic decline that we are witnessing. War always represents a failure for the international community and a grave loss for humanity. When, despite every effort, war does break out, at least the essential principles of humanity

in this case the Pope seems to confirm that, in some circumstances provided by the humanitarian law, it is good to move military to defend defenseless populations[17].

According to Pope Ratzinger it is pressing that in the world of Relativism – with the mentality of "do as you like", that becomes necessarily abused of the strong on the weak – catches even more on a Right as rule of justice, a Right which regulates the fields of rights and duties.[18] Indeed, justice, as Benedict noticed, is not bound to what is useful, but has transcendental roots: "Justice, indeed, is not simply a human convention, since what is just is ultimately determined not by positive law, but by the profound identity of the human being. It is the integral vision of man that saves us from falling into a contractual conception of justice and enables us to locate justice within the horizon of solidarity and love"[19].

If "a real and permanent peace implies the respect of the human rights" it is true that such rights are weakened by "a weak conception of human beings", from which it is easy to understand "Here we can see how profoundly insufficient is *a relativistic conception of the person* when it comes to justifying and defending his rights"[20],as in the case of "the silent deaths caused by hunger, abortion, experimentation on human embryos and euthanasia. How can we fail to see in all this an attack on peace?"[21]. But the attention of Pope Benedict focuses particularly on those conceptions of God that

and the basic values of all civil coexistence must be safeguarded; norms of conduct must be established that limit the damage as far as possible and help to alleviate the suffering of civilians and of all the victims of conflicts".

[17] "The family of peoples experiences many cases of arbitrary conduct, both within individual States and in the relations of States among themselves. In many situations the weak must bow not to the demands of justice, but to the naked power of those stronger than themselves. It bears repeating: power must always be disciplined by law, and this applies also to relations between sovereign States. The *legal norm*, which regulates relationships between individuals, disciplines external conduct and establishes penalties for offenders, has as its criterion the *moral norm* grounded in nature itself. …The moral norm must be the rule for decisions of conscience and the guide for all human behavior… *it is necessary to go back to the natural moral norm as the basis of the legal norm*; otherwise the latter constantly remains at the mercy of a fragile and provisional consensus", Benedict XVI, Message for the 2008 World Day of Peace, nn. 11-12.

[18] J. Ratzinger, Speech held for the 60th anniversary of the Allied landings in Normandy, cit.

[19] Benedict XVI, Message for the 2012 World Day of Peace, *Educating young people in justice and peace,*1 January 2012, n. 4.

[20] Benedict XVI, Message for the 2007 World Day of Peace, n. 12.

[21] *Ivi*, n. 5.

stimulate "Yet what cannot be admitted is the cultivation of *anthropological conceptions* that contain the seeds of hostility and violence. Equally unacceptable are *conceptions of God* that would encourage intolerance and recourse to violence against others.

This is a point which must be clearly reaffirmed: war *in God's name* is never acceptable! When a certain notion of God is at the origin of criminal acts, it is a sign that that notion has already become an ideology."[22].On this main point the Pontiff at that time expresses very precise evaluations on the terrorist threaten that "has carried out an "uncommon violence", for which ones, according to Benedict, it is necessary that "l the international community reaffirm international humanitarian law, and apply it to all present-day situations of armed conflict, including those not currently provided for by international law"[23].

Once again, in an implicit but clear way, there is the conception of the "just war" that must direct the intervention of the International Organizations and of the States towards an ethical and legal side, so that there can be an authentic peace, observant either to the right to life or "Speaking of Christians in particular, I must point out with pain that not only are they at times prevented from doing so; in some States they are actually persecuted, and even recently tragic cases of ferocious violence have been recorded. There are regimes that impose a single religion upon everyone, while secular regimes often lead not so much to violent persecution as to systematic cultural denigration of religious beliefs. In both instances, a fundamental human right is not being respected, with serious repercussions for peaceful coexistence. This can only promote *a mentality and culture that is not conducive to peace*"[24].

It is known that the defense of the violated rights of the Christians is a persistent concern inside Benedict's Pontificate that he bravely and truly showed in many occasions, and these very occasions are the Messages for the day of Peace, where we can find again the issue of the protection of religious freedom in the world. To this main theme it is specially dedicated the XLIV Day of Peace 2011, in which the whole first part (n.1) is given to the backgrounds of violence in Iraq, and are mentioned the sufferings of the Christian community and "I think of the recent sufferings of the Christian community, and in particular the reprehensible attack on the Syrian – Catholic Cathedral of Our Lady of Perpetual Help in Baghdad, where on 31 October two priests and over fifty faithful were killed as they gathered for the celebration of Holy Mass. In the days

[22] *Ivi,* n. 10.

[23] *Ivi*, n. 14.

[24] *Ivi*, n. 5.

that followed, other attacks ensued, even on private homes, spreading fear within the Christian community and a desire on the part of many to emigrate in search of a better life. I assure them of my own closeness and that of the entire Church".

In these words there is no granting on the fine diplomatic or interfaith distinctions, no hesitation on saying a simple and brave word and no kind of *ostpolitik* of the past; besides, the German Pope underlines a little later that, generally all around the world "Christians are now the religious group that is mostly persecuted for its faith. Many of them are daily offended and often live in fear because their search for the truth, because of their faith in Jesus Christ and of their sincere appeal to recognize the religious freedom. All this cannot be accepted because it is an offence to God and to human dignity; moreover, it is a threaten to security and peace and prevents the realization of a real complete human development". In the final part of the document Ratzinger speaks again to the point with strong words in the defense of the Christians persecuted by the Islamic fanaticism: "Finally I wish to say a word to the Christian communities suffering from persecution, discrimination, violence and intolerance, particularly in Asia, in Africa, in the Middle East and especially in the Holy Land, a place chosen and blessed by God. I assure them once more of my paternal affection and prayers, and I ask all those in authority to act promptly to end every injustice against the Christians living in those lands" (n. 14).

5. Freedom of religion and fanaticism

According to the Pope one of the most severe dangers that threat the religious freedom today is the ethic Relativism.[25] Once we noticed that the religious freedom is "also an acquisition of political and legal civilization", the papal document underlines that: "*The free expression of personal faith* is concerned, another disturbing symptom of lack of peace in the world is represented by the difficulties that both Christians and

[25] "Today, however, peace is not only threatened by the conflict between reductive visions of man, in other words, between ideologies. It is also threatened by *indifference as to what constitutes man's true nature*. Many of our contemporaries actually deny the existence of a specific human nature and thus open the door to the most extravagant interpretations of what essentially constitutes a human being. Here too clarity is necessary: a "weak" vision of the person, which would leave room for every conception, even the most bizarre, only apparently favors peace. In reality, it hinders authentic dialogue and opens the way to authoritarian impositions, ultimately leaving the person defenseless and, as a result, easy prey to oppression and violence", Benedict XVI, Message for the 2007 World Day of Peace, n. 11.

the followers of other religions frequently encounter in publicly and freely professing their religious convictions" (n. 5).From this point of view in Europe the relativist culture of an illuminist kind of tolerance has made even extreme sorts of intolerance and self-important rationalism,[26] that have not spared Benedict himself, as for the 2006 speech at the University of Ratisbone or the extremist protest that in 2007 has prevented the Pope from entering the University "La Sapienza" in Rome, for the opening academic year. Even from this point of view it is significant the auspice, expressed in the document, "affinché in Occidente, specie in Europa, cessino l'ostilità e i pregiudizi contro i cristiani per il fatto che essi intendono orientare la propria vita in modo coerente ai valori e ai principi espressi nel Vangelo. L'Europa, piuttosto, sappia riconciliarsi con le proprie radici cristiane, che sono fondamentali per comprendere il ruolo che ha avuto, che ha e che intende avere nella storia" (n. 14)[27].

The Pontiff argues that nihilism and religious fanaticism share the same condition to force their condition with violence about the truth, according to which even the very phenomenon of terrorism is easy to understand if you catch the cultural, religious and ideological reasons: "Looked at closely, nihilism and the fundamentalism of which we are speaking share an erroneous relationship to truth: the nihilist denies the very existence of truth, while the fundamentalist claims to be able to impose it by force. Despite their different origins and cultural backgrounds, both show a dangerous contempt for human beings and human life, and ultimately for God himself. Indeed, this shared tragic outcome results from a distortion of the full truth about God: nihilism denies God's existence and his provident presence in history, while fanatical fundamentalism disfigures his loving and merciful countenance, replacing him with idols made in its own image"[28].

[26] **"**Sadly, even in countries of long-standing Christian tradition, instances of religious intolerance are becoming more numerous, especially in relation to Christianity and those who simply wear identifying signs of their religion", Benedict XVI, Message for the 2013 World Day of Peace, *Blessed are the peacemakers*, 1 January 2007, n. 4.

[27] J. Ratzinger, *L'Europa nella crisi delle culture***,** cit., p. 25.

[28] Benedict XVI, Message for the 2006 World Day of Peace, n. 10. **"**Violence is incompatible with the nature of God and the nature of the soul… and not acting reasonably (συ νλόγω) is contrary to God's nature", Benedict XVI, *Faith, Reason and the University. Memories and Reflections,* speech held in Aula Magna of the University of Regensburg, Tuesday, 12 September 2006, *http://www.vatican.va*. "Peace is also endangered by those forms of fundamentalism and fanaticism which distort the true nature of religion, which is called to foster fellowship and reconciliation among people", Benedict XVI, Message for the 2013 World Day of Peace, n. 1.

That is the reason why since his first Message for the peace (39th one, 2006) Benedict XVI has set the respect of the truth as the basis of the life in common among people, as "Peace cannot be reduced to the simple absence of armed conflict" (n. 3); indeed, it takes "Any authentic search for peace must begin with the realization that the problem of truth and untruth is the concern of every man and woman; it is decisive for the peaceful future of our planet" (n. 5); thus, it takes "We need to regain an awareness that we share a common destiny which is ultimately transcendent, so as to maximize our historical and cultural differences, not in opposition to, but in cooperation with, people belonging to other cultures. These simple truths are what make peace possible; they are easily understood whenever we listen to our own hearts with pure intentions" (n. 6).

In this way, we can say that the real peace comes from the respect of the truth and, therefore, from the respect of everybody's rights; about that, Benedict XVI has never kept silent about the persecution of the Christians in some (and not few) Islamic regimes, giving a straight judgment.

6. The peace and the global economic order

Another theme of particular importance within the Messages of Pope Benedict is about a just worldwide economic order fighting against disparity and poverty and preventing the arise of conflicts caused by them. The argument, as we know, is fully discussed in the encyclical *Caritas in veritate* and is restarted and analyzed, with Pope Ratzinger's usual clearness of judgment without simulations. He starts from the phenomenon of the globalization, that holds positive and negative sides, for which it is necessary a "commitment in pursuit of the common good…It is alarming to see hotbeds of tension and conflict caused by growing instances of inequality between rich and poor, by the prevalence of a selfish and individualistic mindset which also finds expression in an unregulated financial capitalism"[29].

[29] Benedict XVI, Message for the 2013 World Day of Peace, n. 1. "In order to emerge from the present financial and economic crisis – which has engendered ever greater inequalities – we need people, groups and institut ions which will promote life by fostering human creativity, in order to draw from the crisis itself an opportunity for discernment and for a new economic model. The predominant model of recent decades called for seeking maximum profit and consumption, on the basis of an individualistic and selfish mindset, aimed at considering individuals solely in terms of their ability to meet the demands of competitiveness. Yet, from another standpoint, true and lasting success is

The Pope states that an effective struggle against poverty: "All of this would indicate that the fight against poverty requires cooperation both on the economic level and on the legal level, so as to allow the international community, and especially poorer countries, to identify and implement coordinated strategies to deal with the problems discussed above, thereby providing an effective legal framework for the economy"[30].

About the theme of family Benedict also marks that it "in addition to a foundation of shared values, an economy capable of responding effectively to the requirements of a common good which is now planetary in scope.… Efforts must also be made to ensure a *prudent use of resources* and an *equitable distribution of wealth*. In particular, the aid given to poor countries must be guided by sound economic principles, avoiding forms of waste associated principally with the maintenance of expensive bureaucracies. Due account must also be taken of the moral obligation to ensure that the economy is not governed solely by the ruthless laws of instant profit, which can prove inhumane"[31].

This view is worth even talking about the defense of natural resources, for which it takes to: "Prudence would thus dictate a *profound, long-term review of our model of development*, one which would take into consideration the meaning of the economy and its goals with an eye to correcting its malfunctions and misapplications. The ecological health of the planet calls for this, but it is also demanded by the cultural and moral crisis of humanity"[32].The environmental crisis rises when "I also observed that whenever nature, and human beings in particular, are seen merely as products of chance or an evolutionary determinism, our overall sense of responsibility wanes"[33]. Thus, even the Pope, besides far-sighted political projects from governments, asks

attained through the gift of ourselves, our intellectual abilities and our entrepreneurial skills, since a "livable" or truly human economic development requires the principle of gratuitousness as an expression of fraternity and the logic of gift". Cfr. Benedict XVI, Encyclical Letter *Caritas in Veritate,* 29 June 2009, nn. 34-36; L. Bruni-S. Zamagni, *Economia civile. Efficienza, equità, felicità pubblica*, il Mulino, Bologna 2004, pp. 146 ss.; Benedict XVI, Message for the 2009 World Day of Peace**,** *Fighting poverty to build peace*, 1 January 2009, n. 10.

[30] Benedict XVI, Message for the 2009 World Day of Peace, n. 11.

[31] Benedict XVI, Message for the 2008 World Day of Peace, n. 10.

[32] Benedict XVI, Message for the 2010 World Day of Peace, *If you want to cultivate peace, protect creation,*1 January 2010,n. 5.

[33] Benedict XVI, Message for the 2010 World Day of Peace, n. 2.

for “the respect of well-defined laws from an economic and legal point of view too,[34] as the environmental crisis “The ecological crisis offers an historic opportunity to develop a common plan of action aimed at orienting the model of global development towards greater respect for creation and for an integral human development inspired by the values proper to charity in truth”[35].

These are some of the essential conditions that, according to Pope Benedict XVI, can grant the world a future of peace and even if “Humanity today is unfortunately experiencing great division and sharp conflicts which *cast dark shadows on its future*”[36], remains true that “ Peace is not a dream or something utopian; it is possible”[37], The Church looks to young people with hope and confidence; she encourages them to seek truth, to defend the common good,[38], because “*authentic human development concerns the whole of the person in every single*”[39]. And, the Pope says: “The first step in education is learning to recognize the Creator’s image in man, and consequently learning to have a profound respect for every human being and helping others to live a life consonant with this supreme dignity. We must never forget that “authentic human development concerns the whole of the person in every single dimension”, including the transcendent dimension, and that the person cannot be sacrificed for the sake of attaining a particular good, whether this be economic or social, individual or collective.

Only in relation to God does man come to understand also the meaning of human freedom. It is the task of education to form people in authentic freedom. This is not the absence of constraint or the supremacy of free will, it is not the absolutism of the self. When man believes himself to be absolute, to depend on nothing and no one, to be able to do anything he wants, he ends up contradicting the truth of his own being and forfeiting his freedom. On the contrary, man is a relational being, who lives in relationship with others and especially with God. Authentic freedom can never be attained independently of God”[40].

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[34] Benedict XVI, Message for the 2010 World Day of Peace, n. 7.

[35] *Ibidem*, n. 9; similar concepts in the Message for the 2008 World Day of Peace, n. 7 and Message for the 2007 World Day of Peace, nn. 8 and 9.

[36] Benedict XVI, Message for the 2008 World Day of Peace, n. 14.

[37] Benedict XVI, Message for the 2013 World Day of Peace, n. 3.

[38] Benedict XVI, Message for the 2012 World Day of Peace, n. 1.

[39] Benedict XVI, Encyclical Letter *Caritas in Veritate*, n. 11.

[40] Benedict XVI, Message for the 2012 World Day of Peace, n. 3; Francis, Encyclical Letter *Lumen Fidei*, 29 June 2013, n. 25.

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The Christian concept of peace in terms of the Catholic Church teaching

Abstract
Peace is one of the fundamental human rights. It is a good desired by both the human individual and the whole society. It is also a subject of interest to many different subjects and institutions.

The right to peace is also of interest to the Catholic Church. The teaching of the Catholic Church, through the words of John Paul II in his Message for the XXXVIII World Day of Peace, says that "Peace is a good to be promoted with good: it is a good for individuals, for families, for nations and for all humanity; yet it is one which needs to be maintained and fostered by decisions and actions inspired by good". The reflections on this subject are very numerous and occupy a prominent place in the Church documents and papal speeches.
The subject of this study is to present the Christian concept of peace in the Catholic Church teaching's point of view. The sources of this teaching are contained in the Bible. The purpose of this research is to give the answer to the question of how the Catholic Church understands the concept of peace. The analysis of the Catholic Church documents and papal speeches will be the basic method used in this research.

Keywords:
human rights, peace, Christian concept of peace, the Catholic Church teaching, Catholic social teaching

1. Introduction

Peace is one of the fundamental human rights. It is a good desired by both the human individual and the whole society. It is also a subject of interest of many different subjects and institutions.

The right to peace is also of interest to the Catholic Church. The reflections on this subject are very numerous and occupy a prominent place in the Church documents and papal speeches. The teaching of the Catholic Church through the word of John Paul II in his Message for the XXXVIII World Day of Peace, says that: "Peace is a good to be promoted with good: it is a good for individuals, for families, for nations and for all humanity; yet it is one which needs to be maintained and fostered by decisions and actions inspired by good". (John Paul II, 2005, no 1).

The subject of this study is to present the Christian concept of peace in the Catholic Church teaching's point of view. The purpose of this research is to give the answer to the question of how the Catholic Church understands the concept of peace. The analysis of the Catholic Church documents and papal speeches will be the basic method used in this research.

In my research, I will analyse what is the Christian concept of peace presented in the teaching of the Catholic Church. I will show what about peace is said in:

- the Bible
- the documents of Catholic Church (the Second Vatican Council documents, papal encyclical letters, the Catechism of the Catholic Church and publications of Pontifical Council for Justice and Peace)
- the pastoral teaching of popes (limited to the papal Messages for World Days of Peace of popes: Paul VI, John Paul II, Benedict XVI and Francis)

According to the Catholic Church teaching, God, who introduces peace through his son Jesus Christ, is a source of peace. True peace is understood as a state of salvation, and it is only available in heaven. Earthly peace is real, but it is disturbed. A human being reaches a state of peace through union with God. In other words, peace is a harmony between man and God and being in communion with God allows people to take action to preserve peace.

2. "To fight for peace" or "to build peace"

Peace is one of the basic and most desired values. One of the most important tasks of every human being and also the whole society is making efforts to preserve peace. The United Nations Charter which is a multilateral international agreement defining the United Nation's system says that the first and primary objective and goal of this organization is to preserve peace in the world. The very first article of this document states that the purposes of the United Nations is: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (United Nations, 1945, art. 1).

Peace is connected with safety. Every man in order to be able to live and to develop must have a sense of security, which may be understood as: "as the ability to survive, independence, identity, and potentialities of development" (Pokruszyński, 2012a, p. 39). In order to realize this ability by the human being, it is necessary to life and to function in the state of peace.

Writing about the peace from the Christian approach, it must be said that this value is understood differently than by secular world. That different understanding of peace leads to the use of other tools to preserve peace. World, represented by politicians and the great powers, often speaks about the "fight for peace". The dictionary definition of this word is "to use weapons or physical force to try to hurt someone, to defeat an enemy, etc.: to struggle in battle or physical combat" (Merriam-Webster, 2015). The word "fight" is therefore associated with war, and it is itself contrary and antithesis to peace. The modern world's understanding of peace can be summarized by saying used by the ancient Romans – "Si vis pacem, para bellum". On the other hand, the Christian understanding of peace can be rather summed up by the citations from the Bible – "You shall love your neighbour as yourself" (Mark 12,31) or even in a more radical form – "When someone strikes you on your right cheek, turn the other one to him as well" (Matthew 5, 39).

The contemporary history shows that misunderstood caring for peace often led to the escalation of conflicts and brought many threats to peace. Professor Pokruszyński writes that: "The world, divided into two warring political, ideological and military systems, dominated by the superpowers, chose the wrong path to consolidate peace through arms race. This race, instead of reducing the risk of total war with the use of nuclear weapons, intensified that risk" (Pokruszyński, 2013, p. 87). This "commitment to peace" or rather "fight for peace" could lead to another world war. The amount of collected weapons in the world causes conflicts and there is not peace in the world in the present time. Therefore, as it is written by Pokruszyński, "In democratic states armed forces are the largest and best organized part of the state structure, which determines the durability, stability and strength of the country and ensuring national and international security" (Pokruszyński, 2012b, p. 162). Entitled is therefore the statement that the modern world sees in being "ready for war" the way of preserve peace.

In contrary, the Christian understanding of peace and caring for this value is different. The Christian teaching does not deprive human rights of the defence. It is also true that in previous centuries, the Church also spoke of "a just war", which aims to bring peace. Such statements can be found in Augustine of Hippo (see: Pokruszyński, 2013, pp. 34-36) or in the works of Thomas Aquinas (see: Pokruszyńki, 2013, pp. 37-41). It is also true that the Church not only talked about it but also supported and participated in such activities. However, in the understanding of Christian's teaching, the war was permissible only in exceptional cases. Apart from these exceptions, the teaching of Christianity indicates the more effective tools with which it is possible to preserve peace. It is not about strengthening the military capabilities which aim to deter opponents, but to build a social order arising from justice, love, tolerance, solidarity, respect for human rights and mutual concern people about themselves (see: Pokruszyński, 2012b, pp. 132-134).

3. Peace in the Bible

The right to peace is a very important issue of the social church's doctrine. Because of its nature, it is impossible to talk about Catholic teaching without reference to the basic and most important source of this teaching – to the Word of God contained in the Bible. Therefore, in order to analyse the catholic point of view on peace we will start from the Bible.

There are many citation about this topic in the Holy Scripture. According to the Bible, peace is a good coming from God and only God who sent his son can give peace to people. In this context, the peace is understand as a good brought to the world by Messiah – Jesus Christ. In the Old Testament, prophets announced Messiah's coming. Therefore, in the prophetical books of Bible, the understanding of peace can be found.

The vision of God's peace is presented by the prophet Isaiah who says: „He shall judge between the nations, and impose terms on many peoples. They shall beat their swords into plowshares and their spears into pruning hooks; One nation shall not raise the sword against another, nor shall they train for war again" (Isaiah 2,4).

In another place, the same prophet says: "Then the wolf shall be a guest of the lamb, and the leopard shall lie down with the kid; The calf and the young lion shall browse together, with a little child to guide them. The cow and the bear shall be neighbors, together their young shall rest; the lion shall eat hay like the ox. The baby shall play by the cobra's den, and the child lay his hand on the adder's lair" (Isaiah, 11, 6-9).

The prophet Isaiah connects peace with justice and says that one of the most important fruit of peace is feeling of safety. In thirty second chapter of his book Isaiah states: "Justice will bring about peace; right will produce calm and security" (Isaiah 32,17).

The prophet Isaiah also announced who will bring true peace to the nations: "For a child is born to us, a son is given us; upon his shoulder dominion rests. They name him Wonder-Counselor, God-Hero, Father-Forever, Prince of Peace" (Isaiah 9,5).

The New Testament confirms that peace is the union between man and God, and only God, not the world, is its source. God grants to people the gift of peace through his son Jesus Christ who came to earth to bring peace.

The Evangelist Luke in his Gospel points out that Christ showing after resurrection greets the disciples giving them peace. In this book we can read: "While they were still speaking about this, he stood in their midst and said to them, Peace be with you" (Luke 24,36). Also, another author of the Gospel – John says that only Jesus is a source of peace. He says: "Peace I leave with you; my peace I give to you. Not as the world gives do I give it to you. Do not let your hearts be troubled or afraid" (John 14,27).

Paul the Apostle in his letters also writes about peace as a gift of God. First of all, he shows that God gives to people order, reconciliation and justifying. All of those lead to the God's peace which is available to human being through the faith in Jesus Christ. In the letter do Corinthians, Paul says: "since he is not the God of disorder but of peace …" (1 Corinthians 14,33). Then, he adds: "And all this is from God, who has reconciled us to himself through Christ and given us the ministry of reconciliation" (2 Corinthians 5,18) and finally concludes: "Therefore, since we have been justified by faith, we have peace with God through our Lord Jesus Christ" (Romans 5,1).

In addition, The Bible not only defines the peace but also shows that people should take care of peace. Human being was created by God in his image and likeness. God gives peace to the world and people must do it too. Christ says that the mission of every human being is the concern for peace. In the Sermon on the Mount, presenting seven blessings, which are considered as a code of Christian morality, Jesus says: "Blessed are the peacemakers, for they will be called children of God" (Mathew 5,9).

4. Peace in the church's magisterium documents

The biblical message is reflected in the teaching of the Catholic Church, contained in different and numerous documents and publications. The Church's Magisterium gives the definition of peace. Also, there is said about some of the threats of peace

and about the necessity of avoiding war, which is called “the failure of peace” (see: The Second Vatican Council, 1966, no 79-82, p. 1102-1107). In this part of my research, some of the chosen church’s document will be analysed.

One of the most important and significant the Catholic Church’s documents dealing with the topic of peace is “Pacem in terries”. The encyclical letter of Pope John XXIII “On Establishing Universal Peace in Truth, Justice, Charity and Liberty – Pacem in terris” from 1963 was created during a very difficult period of history – the ongoing Cold War and in the context of the Cuban Missile Crisis. Pope calls for peace, talking about the conditions that must be met in order to be able to enjoy true peace. Pope John XXIII stated that peace between all nations must be based on truth, justice, love and freedom. There is no time and place to discuss the whole document, but it is worth presenting a very crucial quotation from this encyclical letter: “Peace on Earth – which man throughout the ages has so longed for and sought after – can never be established, never guaranteed, except by the diligent observance of the divinely established order” (John XXIII, 1963, no 1, p. 257).

Also, the Church talks about peace in other documents. Firstly, in the Pastoral Constitution on the Church in modern World – Gaudium et Spes, the negative definition of peace is given. There is said that: “Peace is not merely the absence of war; nor can it be reduced solely to the maintenance of a balance of power between enemies; nor is it brought about by dictatorship” (The Second Vatican Council, 1966, no 78, p. 1101). Secondly, there is stated about real and true nature of peace which is: “… it is rightly and appropriately called an enterprise of justice” (The Second Vatican Council, 1966, no 78, p. 1101).

The already mentioned and cited constitution also points that people should take care of peace. Gaudium et Spes, underlines that living in peaceful world is a gift but human being must take all necessary action in order to preserve this gift. The Constitution says that: “the common good of humanity finds its ultimate meaning in the eternal law. But since the concrete demands of this common good are constantly changing as time goes on, peace is never attained once and for all, but must be built up ceaselessly. Moreover, since the human will is unsteady and wounded by sin, the achievement of peace requires a constant mastering of passions and the vigilance of lawful authority” (The Second Vatican Council, 1966, no 78, p. 1101).

In addition, the conciliar document talked about the God’s peace and the earthly peace and connected peace with the value of interpersonal love: “That earthly peace which arises from love of neighbour symbolizes and results from the peace of Christ which radiates from God the Father” (The Second Vatican Council, 1966, no 78, p. 1101).

The main ideas from the Pastoral Constitution on the Church in modern World are repeated in other Church’s documents. In the encyclical letter from 1967 – “Populorum progressio”, pope Paul VI referees to the conciliar teaching and points out that injustice and inequality can be a threat to world peace (see: Paul VI, 1967a, no 76, pp. 294-295). Then, in the encyclical letter from 1979 – “Redempor Hominis”, pope John Paul II says that peace is connected with of justice and adds that it is based on respect for inviolable human rights (see: John Paul II, 1979, no 17, pp. 295-300). Finally, in encyclical letters from 1991 – “Centesimus annus”, pope John Paul II talks about the culture of peace and connects the proper understanding of peace with the right concept of the human person (see: John Paul II, 1991, no 51, pp. 856-857).

A summary of the Catholic teaching about peace is included in the Catechism of the Catholic Church (see: Catechism of the Catholic Church, 1993, no 2302-2317) and in the document of the Pontifical Council for Justice and Peace, called “Compendium of the social doctrine of the Church” (Pontifical Council for Justice and Peace, 2004, no. 428-520).

5. Peace in the papal messages for the World Day of Peace

Next to the Bible and the Magisterium documents, there is another huge area of Church’s teaching on peace. These are messages given by popes on the occasion of World Day of Peace. These special Days were introduced in 1967 by Pope Paul VI. The first World Day of Peace was celebrated on 1st January 1968. The World Day of Peace is the initiative of Catholic Church but it is addressed to all people of good will living all over the world.

The pope Paul VI, in his letter of December 8th 1967, initiating celebration of the World Day of Peace said: “It is Our desire that then, every year, this commemoration be repeated as a hope and as a promise, at the beginning of the calendar which measures and outlines the path of human life in time, that Peace with its just and beneficent equilibrium may dominate the development of events to come” (Paul VI, 1967b).

Every year, different topic for the World Day of Peace is chosen and the special message is published. Until this year, the World Day of Peace was celebrated forty eight times and there are forty eight messages. Each of them contains the Catholic Church understanding of peace and some of the very important indications what need to be done in order to preserve the peace. The motto of every year’s message is a kind of signpost showing the direction of activities whose purpose is to concern for world peace. Therefore, it is worthy at least point out those titles.

The pope Paul VI gave 11 messages for the World Day of Peace where he pointed out that the peace is possible if we care for human rights. Also, such values as brotherhood, and love for other is necessary in order to preserve the peace. Paul VI says that the peace will strengthened through reconciliation and opposing violence. During the Paul VI's pontificate there were the fallowing topics of the World Days of Peace (Paul VI, 1967-1977):

- World Day of Peace (1968): Day of peace,
- World Day of Peace (1969): The promotion of human rights, the way to peace,
- World Day of Peace (1970): To be reconciled with each other, to educate themselves for peace,
- World Day of Peace (1971): Every man is my brother,
- World Day of Peace (1972): If you want peace, work for justice,
- World Day of Peace (1973): Peace is possible!,
- World Day of Peace (1974): Peace depends on you too,
- World Day of Peace (1975): Reconciliation – the way to peace,
- World Day of Peace (1976): The real weapons of peace,
- World Day of Peace (1977): If you want peace, defend life,
- World Day of Peace (1978): No to violence, yes to peace.

The pope John Paul II underlined that peace is a gift from God and comes from the unity between God and human being. He stated that peace will be possible if a human being takes care of such values as justice, solidarity, dialog between people, development of each part of world and caring for the poor, solidarity and respect of every conscience. Also, the religious freedom and respect for minorities is necessary in the process of building the peace. Pope takes our attention also to the subject of education for peace and points out the role of family and women in this process. According to the teaching of Pope John Paul II, the very important is to overcome evil by good. The mottos of World Days of Peace given by John Paul II are (John Paul II, 1978-2004):

- World Day of Peace (1979): To reach peace, teach peace,
- World Day of Peace (1980): Truth, the power of peace,
- World Day of Peace (1981): To serve peace, respect freedom,
- World Day of Peace (1982): Peace: a gift of god entrusted to us!,
- World Day of Peace (1983): Dialogue for peace, a challenge for our time,
- World Day of Peace (1984): From a new heart, peace is born,
- World Day of Peace (1985): Peace and youth go forward together,
- World Day of Peace (1986): Peace is a value with no frontiers north-south, east-west: only one peace,

- World Day of Peace (1987): Development and solidarity: two keys to peace,
- World Day of Peace (1988): Religious freedom: condition for peace,
- World Day of Peace (1989): To build peace, respect minorities,
- World Day of Peace (1990): Peace with god the creator, peace with all of creation,
- World Day of Peace (1991): If you want peace, respect the conscience of every person,
- World Day of Peace (1992): Believers united in building peace,
- World Day of Peace (1993): If you want peace, reach out to the poor,
- World Day of Peace (1994): The family creates the peace of the human family,
- World Day of Peace (1995): Women: teachers of peace,
- World Day of Peace (1996): Let us give children a future of peace,
- World Day of Peace (1997): Offer forgiveness and receive peace,
- World Day of Peace (1998): From the justice of each comes peace for all,
- World Day of Peace (1999): Respect for human rights: the secret of true peace,
- World Day of Peace (2000): Peace on earth to those whom god loves!,
- World Day of Peace (2001): Dialogue between cultures for a civilization of love and peace,
- World Day of Peace (2002): No peace without justice no justice without forgiveness,
- World Day of Peace (2003): Pacem in terris: a permanent commitment,
- World Day of Peace (2004): An ever timely commitment: teaching peace,
- World Day of Peace (2005): Do not be overcome by evil but overcome evil with good.

The pope Benedict XVI says that peace is possible if we care for truth and taking care for the poor. Also, important is to take care of religious freedom and education to peace and justice. In the process of building the peace the huge role is played by families which are called the communities of peace. We must not also forget about caring for environment. Benedict XVI's messages are titled (Benedict VI, 2005-2012):

- World Day of Peace (2006): In truth, peace,
- World Day of Peace (2007): The human person, the heart of peace,
- World Day of Peace (2008): The human family, a community of peace,
- World Day of Peace (2009): Fighting poverty to build peace,
- World Day of Peace (2010): If you want to cultivate peace, protect creation,
- World Day of Peace (2011): Religious freedom, the path to peace,
- World Day of Peace (2012): Educating young people in justice and peace,
- World Day of Peace (2013): Blessed are the peacemakers.

The pope Francis has published so far two messages for World Day of peace. He states that peace needs to be built by brotherhood and true love between people. Solidarity and taking care of every human being is necessary too. According to pope, the peace is possible if people free themselves from sin and evil. That liberation (and thus peace building) is possible only with the support of divine grace. The topics for Pope Francis's letters for World Days of Peace are (Francis, 2013-2014):

- World Day of Peace (2014): Fraternity, the foundation and pathway to peace,
- World Day of Peace (2015): No longer slaves, but brothers and sisters.

The richness papal teaching on peace, contained in the messages written on particular celebrations is huge. The popes, from Paul VI to Francis, in his messages not only define the peace but also identify the specific attitudes that should be taken by every Christian and every person who cares about the peace. Also, the very specific dangers and threats to world's peace are presented in those statements. Papal Messages for World Days of Peace are therefore not only theoretical and theological reflections but most of all it is useful guidance for each person.

6. Conclusion

People, in order to exist and develop in proper way, must function in the secure world. The safety is possible if there is peace in the world. During wars or other kind of military conflicts, normal life is not possible. Therefore, the main task of human activities should be directed into preserving peace.

Peace and caring for it could be understood different by various subjects. The contemporary world takes big effort and do a lot in order to care for peace. It seems that the politicians and governments in their efforts adopted the wrong assumptions. The modern world is convinced that only gathering a huge arsenal of weapons, being stronger than the opponents and readiness for war can ensure peace and security. The history and current situation in the world shows that this belief is illusory. Every day, smaller or bigger wars happen into the world. Therefore, it is necessary, to change this approach to the preservation of peace and look for other, more effective tools.

The Christian's understanding of peace and Christian's way of caring for peace could be a good option here. The Catholic Church devotes a lot of attention to peace in the world. The Church is not only talking about peace, but also is doing a lot for peace. According to Catholic Church teaching, the peace is a gift from God and only in communion and unity with God, this gift can be preserved.

The peace is not given once for all, but all people must care of it and build it. The peace is possible if human being takes care for such values as: justice, love, truth, brotherhood, solidarity, religious freedom and reconciliation.

It is obvious that this paper only presents main ideas about the Christian concept of peace. This work is just a sort of general summary and does not pretend to be a detailed study. Cited documents of the Catholic Church's magisterium and the papal statements are only the examples of what we can find in the teaching of the Church on the peace. The limited nature of this paper does not allow for a detailed treatment of many topics. As a matter of fact, many of mentioned ideas and issues could be developed in more detailed manner – for examples – the understating of peace in the teaching of John XIII contained in the encyclical letter "Pacem in terries" or very extensive John Paul II's teaching on peace included in his written documents and pastoral speeches. In addition, there are many interesting thoughts about peace given by the Early Church Fathers and Doctor of the Church but limited form of this work forced the author to omit these area.

Talking about the peace and the Catholic Church, it also need to be said that there are many specific activities done by the Holy See aimed to preserved peace. The pope and Vatican administration are engaged in mediation, negotiations and the peace talks. But these matters were not a subject of this paper.

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PART VII

Human rights in civil law

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Restitution Claims Raised by Late Repatriates – Selected Problems

Abstract
The paper discusses the problem of restitution claims raised by late repatriates. The issues analysed in the study are crucial because of the increasing number of relevant lawsuits brought recently.

Due to the multi-faceted nature of the question and the limited scope of this study, the analysis has only covered selected issues that seem to be extremely important, and which still raise many doubts, both among scholars and in jurisprudence. There are also attempts to solve them. First, the discussion focuses on the issue of the legality of the loss of Polish citizenship by late repatriates and its impact on the reasonableness of the restitution claims being raised. Then, the question of the subjective scope of Article 38 paragraph 3 of u.g.t.m.o. is analysed. The possibility of the effective defence of the interests of the State Treasury by applying the institution of usucaption is also discussed.

Keywords:
restitution claims, late repatriates, loss of Polish citizenship, usucaption, heir

1. Introduction

The paper discusses the problem of restitution claims raised by so-called late repatriates. The terminology used in the title hereof – "late repatriates" will refer to owners of real estate located in the Recovered Territories, who left Poland in the years 1956-1984, giving up Polish citizenship for German ethnic status (Opinion expressed by A. Nowicka in the article by M. Domagalski, Rzeczpospolita 13.07.2010, *http://prawo.rp.pl/artykul/793984, 507825-Nie-chca-oddawac--majatkow-na-Mazurach.*

html?referer=redpol). The number of su ch repatriates on average is usually reported within the range of 500-600 thousand people (D. Frey, Rzeczpospolita 18.03.2014, *http://prawo.rp.pl/artykul/1094584.html?p=1).* These peop le renounced Polish citizenship and lost ownership of their real estate in exchange for permission to travel abroad (I. Arent, 2008, p. 9).

The issues being analysed in the study are crucial because of the increasing number of relevant lawsuits brought recently. It would seem that the present situation resulted to a large extent from neglecting in the past the duty of the registration of property rights to real estate belonging to the State Treasury and units of local government (Cf. R. Krupa-Dąbrowska, Rzeczpospolita15.05.2013, *http://prawo.rp.pl/artykul/ 1009314.html.*). But the case of Agnes Trawny, who as a result of her lawsuit managed to take the place of the State Treasury as the owner in the land and mortgage register, suggests that this is a fallacious argument (L. Obara, Sz. Topa, Rzeczpospolita, 05.03.2014, issue 53, p. 17).

In the region of Warmia and Mazury, which is one of the most affected by the "wave" of these claims, it was assumed that some governmental decisions to take over the property abandoned by repatriates were promulgated unlawfully (Deputy Director of the Property Management Division of the Poviat Office in Olsztyn Katarzyna Grzybowska in the article *Byli przesiedleńcy…,* PAP 03.03.2012*,* text available at *http://www.lex.pl/czytaj/-/artykul/byl i-przesiedlency-sadza-sie-o-rekompensaty-za-pozostawione-nieruchomosci*). It was explained that the correct acquisition should have looked as follows. First, a decision should have been issued on depriving the repatriates of Polish citizenship. Then, the municipalities should have applied for entering property ownership rights into the land register (*Ibid.*)

The tardiness of the government in this matter entails negative consequences, mainly for the interests of the State Treasury and Polish citizens. So far, the activities of the state to block German claims have focused on the adoption of the Act of 7 September 2007 on registering property rights exercised by the State Treasury and local government units in land and mortgage registers (Act of 7 September 2007, Journal of Laws No. 191, item 1365).

Did these measures manage to achieve the desired outcomes? No, it seems they failed. In the event the State Treasury or a local government unit is registered with the land register as the owner of the property, a person who claims to be the owner may, by invoking Art. 10 of the Act on land and mortgage registers (Act of 6 July 1982 on land and mortgage registers (consolidated text Journal of Laws of 2001, No. 124, item 1361, as amended), demand removal of inconsistencies between the

legal status of the real estate disclosed in the land register and the actual legal status (Likewise, L. Obara, P. Tychek, [in:] Rzeczpospolita 13.05.2008, *http://prawo.rp.pl/artykul/133422.html?p=1*).

Late repatriates, and consequently in most cases their heirs, are currently filing lawsuits with two types of claims: property restitution or compensation claims. Claims for restitution of property are raised, and have a chance of being recognized in a situation where the State Treasury or late repatriate is entered into the land and mortgage register as the owner. On the other hand, where the State Treasury sold the ownership of the property to a third party, and this person is listed in the register as the owner, then due to the principle of the public credibility of land and mortgage registers, a late repatriate can benefit only from compensatory claims.

Due to the multi-faceted nature of the question and the limited scope of this study, the analysis has only covered selected issues that seem to be extremely important, and which still raise many doubts, both among scholars and in jurisprudence. First, the discussion focuses on the issue of the legality of loss of Polish citizenship by late repatriates and its impact on the reasonableness of the restitution claims being raised. Then, the issue of loss of property ownership by repatriates, pursuant to Article 38 paragraph 3 of the Act on management of land in urban areas and settlements (u.g.t.m.o.), (Act of 14 July 1961 on management of land in urban areas and settlements, Journal of Laws 1961, No. 32, item 159), is analysed, considering the controversy with regard to the application of that provision also to heirs of the repatriates. The consecutive part of the study discusses the possibility of effective defence of interests of the State Treasury by applying the institution of usucaption.

2. Problem of legality of the loss of Polish citizenship by late repatriates and its influence on the validity of claims being raised

The literature of reference provides arguments that "claims of so-called late repatriates (...) are associated not so much with the effects of World War II as with the violation of rules of national or international law in relation to the loss of their Polish citizenship (automatism), followed by subsequent confiscation of their property for the benefit of the Government" (R. Grzeszczak, 2009, p. 164).

The issue of the loss of Polish citizenship by repatriates has long been debatable, both among scholars (More on the issue of citizenship: M. Muszyński,

Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2005, No. 2, pp. 33-49; *idem*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2005, No. 3, pp. 77-90) and in jurisprudence.

Departures of Polish citizens to the German states were carried out under documents, the legality of which is being challenged more and more often (Cf. R. Grzeszczak, 2009, pp. 164-165). The most commonly applied of these documents is the unpublished Resolution by the State Council of 16 May 1956 (No. 37/56) on the authorization for change of Polish citizenship by German repatriates. According to the resolution: "Pursuant to Art. 13 paragraphs 1 and 2 of the Act of 8 January 1951 on Polish citizenship (Journal of Laws No. 4, item. 25), the State Council has decided as follows:

1. Polish citizens who have left or are going to leave the Polish People's Republic and went or are going to go as repatriates to the German Democratic Republic or the Federal Republic of Germany are hereby allowed to change citizenship from Polish to German.
2. The permission extends to children remaining under the parental authority of the individuals referred to in paragraph 1, who have left or are going to leave the Polish People's Republic together with their parents.
3. The individuals listed in paragraphs 1 and 2 shall lose their citizenship upon crossing the border of the Polish People's Republic" (Resolution of the State Council No. 37/56, citation from M. Muszyński, Ruch Prawniczy, Ekonomiczny i Socjologicz ny, 2005, No. 2, p. 47).

Based on the above-mentioned resolution it should be noted that the loss of Polish citizenship was dependent on the fulfilment of two conditions cumulatively: obtaining permission from the Polish government to change citizenship, and the acquisition of foreign citizenship (J. Barcz, 2005, p. 119).

In practice, it proceeded in such a way that, pursuant to the above resolution, travel documents were issued which entitled the holders to cross the border of the Polish state. However, to obtain such a document, the circumstances giving reasons for the departure were to be investigated quite carefully (S. Jankowiak, M. Sora, 2005, p. 63). In most cases, the reasons for emigration were justified on grounds of family relations – the so-called action of family reunification. However, the resettlement was usually associated in fact with improvement in economic standing (*Ibidem,* p. 51).

The resolution in question was criticised in the early eighties for its inconsistency with the provisions of the Act of 15 February 1962 on Polish citizenship (*Ibidem,* p. 79).

To this day the resolution in question raises a lot of doubts. On the one hand, one can find positions negating the resolution, and even challenging its legality. On the other hand, there are more and more opinions approving this document.

In one of its judgements that caused far-reaching effects in practice, the Supreme Court ruled that granting general permission to change Polish citizenship pursuant to the resolution of the State Council was in conflict with the grammatical and linguistic interpretation of provisions of Article 13 paragraph 1 in conjunction with Article 16 paragraphs 1 and 2 of the Act on Polish citizenship of 1962 (Grounds for the Supreme Court's judgement of 17 September 2001, III RN 56/01, LEX 53807; similarly, judgement of the Regional Administrative Court in Warsaw of 31 May 2005, IV SA/Wa 521/2005, LEX 168060; see also judgement of the Regional Administrative Court in Warsaw of 1 July 2008, IV SA/Wa 781/08, LEX 512656). Based on this interpretation, it was necessary to obtain individual permission to change citizenship (Grounds for the Supreme Court's judgement of 17 September 2001, III RN 56/01, LEX 53807; similarly, judgement of the Regional Administrative Court in Warsaw of 3 November 2004, V SA 2127/2003, LEX 164685; cf. judgement of the Regional Administrative Court in Warsaw of 6 October 2004, V SA 3946/2003, LEX 160767). Moreover, it was found that the resolution had no grounds in the provisions of the Constitution of the Polish People's Republic of 1952 (Grounds for the Supreme Court's judgement of 17 September 2001, III RN 56/01, LEX 53807). Such a position of jurisprudence has largely contributed to the opening of the way for late repatriates to bring restitution claims.

A completely different view was expressed by the Regional Administrative Court in Warsaw in its judgement of 21 July 2005 (IV SA/Wa 560/05, LEX 190580). This judicial body concluded that the decision of the State Council No. 37/56 of 16 May 1956 was the general permission to change Polish citizenship in accordance with Article 13 paragraph 1 of the Act of 15 February 1962 on Polish citizenship (Journal of Laws of 2000, No. 28, item 353, as amended); the obtaining of the travel document by a particular person was closely associated with obtaining the consent to change citizenship. According to the court, the permission to change citizenship did not have to be expressed in an individual act; it could just as well be expressed in an act of a general nature. Moreover, it was raised that the resolution of the State Council was a particular "act of applying the law", which did not constitute secondary legislation to the Act of 1951 on Polish citizenship. Thus, according to the court, the arguments that this resolution was repealed with the entry into force of the new act on Polish citizenship of 1962 are unfounded (Grounds for the above-mentioned judgement).

The Supreme Court was of a similar opinion when it ruled, in its judgement of 15 July 2010 (IV CSK 90/10, LEX 603427), stating that it was not reasonable to undermine "the legal significance of the resolution of the State Council of 16 May 1956 (No. 37/56, unpublished) on general permission for German repatriates to change Polish citizenship, and judgements of the Regional Administrative Court in Warsaw dated 21 July 2005 (IV SA/Wa 560/05, LEX 190580), dated 11 January 2006 (IV SA/Wa 1567/05, LEX 196324), 27 October 2006 r. (IV SA/Wa 1519/06, LEX 283563), 23 January 2007 (IV SA/Wa 2106/06, LEX 322413) and of 24 January 2007 (IV SA/Wa 2241/06, LEX 322411), ruling in favour of the legal significance and effectiveness of this resolution".

As far as I am concerned, one should agree with the above-mentioned position of the Regional Administrative Court. The fact is that the provisions of the Act on Polish citizenship did not define the form of the right to issue permission to change Polish citizenship. Thus, it must be held that such permissions may have been granted by the competent authority – the State Council in any form, both in acts of an individual and general nature, like the resolution of the State Council No. 37/56 of 16 May 1956 (Similar arguments were presented by the Head of the Office for Repatriation and Foreigners on factual grounds for the Regional Administrative Court in Warsaw of 1 July 2005, IV SA/Wa 571/05, LEX 190578 regarding emigration from Poland to Israel under the resolution of the State Council of 23 January 1958, No. 5/58; cf. J. Barcz, 2005, p. 152-153).

Moreover, it must be held that challenging the effectiveness of this resolution in relation to those who question it now would be contrary to "the contemporary standards of rule of law countries". This may have far-reaching consequences in the form of doubts about the certainty of the law (Judgement of the Regional Administrative Court in Warsaw of 21 July 2005, IV SA/Wa 560/05, LEX 190580).

The literature of reference rightly points out that "the procedure for individual permission to change citizenship could not apply to the hundreds of thousands of repatriated Germans, as it would simply have been impossible to execute (M. Muszyński, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2005, No. 2, p. 48).

According to W. Ramus, "the granting of general permission to acquire citizenship of a State by certain categories of persons may have occurred and may have been intentional, when the change of citizenship was broader because it concerned more people" (W. Ramus, 1968, p. 272, citation from J. Barcz, 2005, p. 120, footnote 16). Therefore, it should be concluded that in the case of late repatriates, whose number was significant, the granting of general permission to change citizenship was indeed reasonable and appropriate.

It seems, however, that the discussion over the legality of the resolution is pointless. Firstly, it is so due to the fact of the signing, on 12 November 1975, of the Berlin Convention between the Polish People's Republic and the GDR on the regulation of cases of dual citizenship of persons residing in both countries and third countries. In the light of Article 7 of this Convention, "A person of full age, who, on the day the Convention came into force, had citizenship in one of the states on the basis of domestic legislation, could choose between the citizenship he or she wished to retain". They were allowed time to make a choice – one year after the Convention became effective. If they failed to make such a choice, then in accordance with Article 8 of the Convention they would retain citizenship of the state in whose territory their permanent residence took place on the day of the deadline to make the statement (Cited from M. Muszyński, 2005, p. 106).

Secondly, late repatriates leaving for Germany could have expected that their German citizenship from before 1945 would be "renewed" based on local law. According to German law this citizenship had never expired (Grounds for the Supreme Court's judgement of 15 July 2010, IV CSK 90/10, LEX 603427).

3. Article 38 paragraph 3 of u.g.t.m.o. – the legal basis for judgements that are favourable to late repatriates

Numerous resettlements to the GDR and FRG, largely associated with the so-called family reunion action, entailed the need for legal regulation concerning the fate of properties left by the repatriates (More in A. Nowicka, 2008, p. 27. et seq.) In accordance with paragraph 3 of Article 38 of u.g.t.m.o.: "real estate that is, in accordance with Article 2 paragraph 1 subparagraph b) of the Decree of 8 March 1946 on abandoned and former German real estate (Journal of Laws No. 13, item 87, as amended), owned by persons who, due to acquisition of Polish ethnic status, were entitled to Polish citizenship, becomes the property of the Polish State by virtue of law, if those persons have lost or will lose their Polish citizenship due to the fact of leaving Poland. These individuals lose their right to dispose of the property on the date on which they submitted their Polish ID document to competent authorities which made and issued a document entitling them to go abroad ".

However, as the Supreme Court put it in its decision of 15 January 1966, the transfer of ownership to the State took place upon departure of the property owner from the country, and not upon the loss of his/her Polish citizenship related to this departure (II CR 9/66, LEX 377).

The wording of the above-cited provision of Article 38 paragraph 3 u.g.t.m.o. also raises much controversy.

On the one hand, it is raised that "(...) the legal solution adopted then for the problem of "late repatriates" and involving their deprivation of property in connection with the loss of citizenship is not sufficiently decent. (…) Real estate ownership was the price we had to pay for a passport, and finally – for freedom, for the opportunity to leave a communist state. (…) With some exaggeration, we can compare – in the light of those regulations – the citizens of communist Poland to hostages, of whom few were given the opportunity to pay the ransom" (M. Dybowski, 2008, p. 93. et seq.)

On the other hand, "given the large scale of the resettlement", the decision of the legislature expressed in this provision "can hardly be regarded as arbitrary or unreasonable in the then existing constitutional/political and socio-economic conditions: one of its key goals was to eliminate a situation where after many years since the end of World War II, there would be estate left (or abandoned) in Poland again" (A. Nowicka, 2008, p. 45-46).

Far more controversial is the issue of the application of Article 38 paragraph 3 of u.g.t.m.o., also to legal successors of the persons mentioned therein. Initially, there was no uniform position of jurisprudence in this matter. In the grounds for the decision of 11 January 1965 (II CR 523/64, LEX 232), the Supreme Court stated that Article 38 paragraph 3 of u.g.t.m.o. also applies to heirs of the repatriates. On the other hand, the Supreme Court in its decision of 20 June 2002 (II CR 782/00, LEX 55504) expressed a different view.

The second position was confirmed in the next judgement of the Supreme Court dated 13 December 2005 (IV CK 304/05, LEX 176365). This time, the court strongly advocated the lack of applicability of Article 38 paragraph 3 of u.g.t.m.o. to heirs of the late repatriates. This position caused far-reaching effects in practice. This resulted in the possibility for heirs of the repatriates to raise claims against the State Treasury. In support of this judgement, the Supreme Court held that since the provision in question is unique and therefore provides for a very severe sanction, namely loss of real estate ownership, it may not be broadly construed. Moreover, it was emphasized that the provision of Article 38 paragraph 3 of u.g.t.m.o. has a particular addressee specified, namely only the people who, once their Polish ethnic status was confirmed and Polish citizenship was obtained, retained ownership of the property belonging to them before 1 January 1945., and after that lost their Polish citizenship due to the loss of their Polish citizenship (Grounds for the above-mentioned judgement).

However, one can find in the literature certain positions that question the decision of the Supreme Court issued on 13 December 2005.The opinion by A. Nowicka may serve as an example, as follows:

- article 38 paragraph 3 of u.g.t.m.o. has no clear addressee,
- when assessing Article 38 paragraph 3 of u.g.t.m.o. one should take into account the systemic context of the provision,
- adopting a different interpretation than that applied by the Supreme Court would not constitute a broader interpretation,
- it is hard to assume that the legislature, when drafting the Act in 1961, associated the effect defined in Article 38 paragraph 3 of u.g.t.m.o. only with the original owners.
- the wording of Article 38 paragraph 3 of u.g.t.m.o. does not suggest that it makes any distinction between the owners and their heirs (A. Nowicka, 2008, p. 51-54).

Despite criticisms raised among representatives of scholarly opinion about the position of the Supreme Court expressed in its judgment of 13 December 2005, in the resolution of 7 judges of the Supreme Court dated 29 June 2012 (III CZP 88/11, LEX 1167420) it was eventually accepted that Article 38 paragraph 3 of u.g.t.m.o. did not apply to the heirs of the persons listed in that provision. The court held that if the legislature had wanted Article 38 paragraph 3 of u.g.t.m.o. to also include the legal successors of the persons mentioned therein within its scope, it would have made it explicitly in the Act.

The court also pointed out that the application of Article 38 paragraph 3 of u.g.t.m.o., also to the property acquired by inheritance, would have been incompatible with the linguistic and grammatical interpretation of that provision and unacceptable from the point of view of systemic interpretation as well (Grounds for the above-mentioned resolution).

This position of the Supreme Court is convincing, especially in that it should be noted that after Polish accession to the EU, we must be guided by the Community rules on the application of law (More M. Rzewuski, 2014, p. 232). Based on these rules, the dominant role is attributed to linguistic interpretation (M. Herdegen, 2004, pp. 128-129). Moreover, one should have in mind the fact that the interpretation of regulations must not lead to "supplementing the work of the legislature" (M. Rzewuski, 2014, p. 233, and judgements referred to therein) and it seems that in the case being studied, when we resolve that Article 38 paragraph 3 of u.g.t.m.o. also applies to heirs of the late repatriates, such a "complement" takes place.

4. Attempt to defend against restitution claims – usucaption

Seemingly, it would seem that the simplest mechanism that will effectively counter the restitution claims raised by late repatriates will be the institution of usucaption (acquisitive prescription). However, as practice shows, there are a number of doubts in this respect.

Let us remember that the acquisition of ownership by usucaption may occur if the conditions set by the legislator are cumulatively fulfilled. According to Article 172 of the Civil Code, real estate may be subject to usucaption by an owner-like possessor who demonstrates continuity of possession for a period of time specified in law. For continuous actual good faith possession of the property like an owner, the period is 20 years, while in bad faith it is a period of 30 years.

Positions expressed in case law that question the possibility of usucaption by the State Treasury were motivated primarily by the inability to recognize as owner-like possession the control over the property generated in the fulfilment of public tasks by the government (Resolution by 7 judges of the Supreme Court of 21 September 1993, III CZP 72/93, LEX 3972). This reasoning was based on the assumption that the type of control exercised over the property is important for the course of usucaption. The case law also pointed to the need to distinguish between the control in a sovereign or proprietary capacity, recognizing that the former rules out the possibility of usucaption (Grounds for the above-mentioned resolution)

In its resolution of 18 November 1992 (III CZP 133/92, LEX 5367), the Supreme Court expressed the view, according to which "the State Treasury cannot include into the possession, as defined in Article 172 of the Civil Code, the period of holding the property like an owner on the basis of an administrative decision which was subsequently declared invalid because of its unlawfulness". The grounds for this resolution may be surprising – they point out that the manner of acquiring possession over the property is irrelevant for the course of usucaption, but after that it is stated – "but applying this rule in a situation where the State Treasury acquired the property following the issue of an unlawful administrative decision would lead to abuse of the law". Such a categorical position can lead to erroneous conclusions that usucaption of real estate by the State Treasury in bad faith is unacceptable.

This stringent position of jurisprudence, expressed in the above-cited resolution of the Supreme Court of 21 September 1993, prevailed in the 1990s, but afterwards gradually began to change and become less strict (T. Patryk, 2015, LEX 249427).

In the decision of 9 May 2003 the Supreme Court stated that: "the fact that getting control over property within the limits of ownership is a consequence of the exercise of powers of the state as an entity governed by public law, does not change the nature of this control and thus cannot prevent qualifying that control as owner-like possession" (V CK 24/03, LEX 157310). According to the court, it is characteristic that the governmental authorities carry out their functions generally by taking sovereign acts that can lead to the acquisition of property possession within the limits of ownership right (Grounds for the above-mentioned decision).

One must agree with the position expressed in the Supreme Court decision of 16 July 2004, according to which the assumption that every possession of property by the State in the public interest excludes the admissibility of usucaption by the State Treasury would lead to a complete deprivation of the possibility of acquisition of ownership of real estate by the State Treasury by usucaption, because the exercise of control over the real estate by the State Treasury should always be in the public interest (I CK 116/04, LEX 1125260).

Moreover, it is pointed out that: "when governing real estate acquired in the exercise of sovereign authority (imperium), the state exercises its proprietary governance (dominium) at the same time" (Position by the Prosecutor General expressed in the factual grounds for the Resolution of the Supreme Court of 26 October 2007, III CZP 30/07, LEX 309705).

Undoubtedly, when interpreting the provisions of Article 172 of the Civil Code, it is impossible to make the possibility of usucaption by the State Treasury dependent on the type of ownership exercised by it – sovereign or proprietary (Decision of the Supreme Court of 12 March 2010, III CSK 1999/09, LEX 577693; Decision of the Supreme Court of 4 November 2011, I CSK 126/11, LEX 1129068). The legislature did not assign normative significance to the circumstances of acquiring control over a property that qualifies it as owner-like possession (Grounds for the Supreme Court's resolution of 26 October 2007, III RN 30/07, LEX 309705). The only important thing is that the holder of the property acts as an independent holder, that is exercises control over the property as an owner (*cum animo domini*), (Decision of the Supreme Court, 21 November 2008, III RN 269/08, LEX 484725). One should also bear in mind that under the provisions of the Civil Code there is a presumption of independent ownership (Article 339 of the Civil Code). which is additionally in favour of the State Treasury.

The current shape of the case-law essentially allows for usucaption by the State Treasury of a property governed by it within the exercise of sovereign authority. In light of the above, it would seem that the problem of restitution claims raised by late repatriates has been resolved. But unfortunately this is not the case, because the

courts, when allowing the State Treasury to apply usucaption, seek to find conditions for suspending the course of usucaption.

As an example, one can cite the Supreme Court resolution of 26 October 2007 (III CZP 30/07, LEX 309705), resolving that although "control over another's property by the State Treasury obtained as a result of the exercise of sovereign authority could be owner-like possession leading to usucaption", "the period for usucaption (...) is suspended if the owner cannot effectively enforce the release of the property (Article 121 point 4 in conjunction with Article 175 of the Civil Code)" (similarly, the Supreme Court's decision of 9 May 2003, V CK 24/03, LEX 157310; Supreme Court's decision of 13 October 2005, I CK 162/05, LEX 187002; resolution of the Supreme Court of 26 October 2007, III CZP 30/07, LEX 309705).

The fact that late repatriates could not effectively seek redress was associated with the so-called state of suspension of the judiciary, which essentially lasted, if not until the end of the 1980s, at least until 31 August 1980 – that is until the entry into force of the Act of 31 January 1980 on the Supreme Administrative Court, and amending the Act – Code of Administrative Procedure (Journal of Laws No. 4, item 8), (Decision of the Supreme Court of 9 May 2003, V CK 24/03, LEX 157310). This state of suspension having universal impact, caused by political circumstances, was compared to a state of necessity, considering that it generates the same effect as *vis maior* (force majeure), i.e. causes suspension of the period for usucaption (see the Supreme Court's decision of 9 May 2003, V CK 24/03, LEX 157310; Supreme Court's decision of 13 October 2005, I CK 162/05, LEX 187002; resolution of the Supreme Court of 26 October 2007, III CZP 30/07, LEX 309705). The concept of suspension of the judiciary should be understood as the inactivity of courts of law (E. Gniewek, *Glosa do postanowienia SN z dnia 13 października 2005 r., I CK 162/05,* OSP 2006/9/107).

However, it seems reasonable to assume that only the objective state of the inactivity of the judiciary, which today fits within the meaning of force majeure, may be a prerequisite for the suspension of the period for usucaption (*Ibid*.) It would be false to claim that during communist rule the justice system was not working at all (Decision of the Supreme Court of 25 November 2009, II CSK 246/09, LEX 560545; E. Gniewek, *Glosa…,* OSP 2006/9/107). On the other hand, a subjective lack of confidence in the judiciary, as well as the erroneousness of the previous legal system, does not decide about the occurrence of *force majeure* (E. Gniewek, *Glosa…,* OSP 2006/9/107).

Recognition that it was *vis maior* that constituted the obstacle preventing the recovery of property through lawsuits is not convincing either, when the passivity of late repatriates lasted for several decades, often even after 1989 (Cf. grounds for the Supreme

Court's resolution of 30 October 2008, III RN 241/08, LEX 528222). Furthermore, as was rightly pointed by M.A. Zacharasiewicz – in a situation when the repatriates, deciding to leave the country, were aware of the resulting consequences in the form of loss of ownership of the property left in Poland, it seems unjustified to talk about the fulfilment of all the conditions for *vis maior* (M. A. Zachariasiewicz, 2005, p. 329).

Jurisprudence emphasizes that in assessing the impossibility to effectively seek redress by late repatriates, resulting from unlawful – in their opinion, actions of the government in the communist period, one must examine all the circumstances of each case and take into account the individual situation of each repatriate (Cf. grounds for the Supreme Court's resolution of 30 October 2008, III RN 241/08, LEX 528222).

A significant position in the issue concerned, favourable for the State Treasury, was taken by the Supreme Court in its decision dated 10 April 2014, indicating that the "political situation" or the introduction of legal solutions that are adverse for particular individuals cannot be regarded as synonymous with *vis maior* that suspends the usucaption period (Decision of the Supreme Court IV CSK 519/13, LEX 1477458).

Moreover, it was recognized that "the introduction of nationalization rules itself, even if those provisions are later repealed, does not justify treating the possibility to take over properties according to those provisions as illegal actions, the occurrence of which should be deemed equal to the state of the suspension of the judiciary" (Decision of the Supreme Court of 18 January 2012, II CSK 144/11, LEX 1131116).

In view of the above, the arguments for protection, involving the suspension of the usucaption period, of property owners who, having lost control over the property, did not try to enforce their rights before courts due to "fear of the inefficiency of lawsuits" (E. Gniewek, *Glosa…,* OSP 2006/9/107) should be assessed negatively. Providing such protection may eventually lead to a paradoxical situation where most people who wrongfully lost their titles, and who for years have shown inaction in seeking redress before the court of their rights, begin to invoke the suspension of usucaption period, giving the "fear of the inefficiency of lawsuit" as the reason. Anyone who appears before a court may feel concerns about whether the lawsuit will bring the desired results or not.

5. Attempts to counter the claims of late repatriates

Due to the growing number of cases in this respect, one should think about how the claims put forward by late repatriates could be effectively "blocked". It is worth quoting the proposals worked out by scholars of law. Most of the postulates that were raised so far are listed below:

- adoption of a clear and uniform authentic interpretation to be made by the legislature itself – this would be the content of the draft legislation proposed by the Senate expressed in its Article 1 – "for real estate located in areas that are incorporated into the territory of the Republic of Poland under international law after World War II – existing property rights expired by operation of law once their possession was taken on behalf of the Polish state or local government bodies under the written laws of the Republic of Poland" (cited after P. Ł. Andrzejewski, 2008, p. 101. et seq.)
- deletion of the principle of public credibility of land and mortgage registers in relation to the rights that have expired *ex lege* (P. Ł. Andrzejewski, 2008, pp. 101-103)
- application of the usucaption provisions, while reducing the period of usucaption in bad faith to 20 years (B. Rogalski, 2008, p. 127. et seq.)
- hold diplomatic talks with the German State to make it fulfil the claims of its citizens, as Poland has done with the claimants for property left beyond the Bug River (in Polish: Zabużanie), (*Ibid.*)
- renegotiation of the Treaty on Mutual friendship and Cooperation of 1991 by introducing a provision of the German Government taking over these claims (D. Arciszewska-Mielewczyk, 2008, p. 139. et seq.)
- *mutatis mutandis* application of Article 363 §1 of the Civil Code, according to which damage should be remedied, at the option of the claimant, either through restitution or by paying the appropriate amount of money. Based on this legal concept, it is proposed to recognize that the restitution claims put forward by late repatriates are unfounded, due to the fact that they obtain compensatory benefits in Germany (L. Obara, J. Sadłowska, 2008, p. 150. et seq.)

None of those proposals have been implemented so far.

In my opinion, it is worth raising a postulate that all matters that relate to the restitution claims of late repatriates be examined by regional courts with a judicial panel of three professional judges for the sake of their importance and complexity.

In view of the foregoing considerations, it must be held that at the moment the only mechanism that can effectively counter the claims concerned is the institution of usucaption (acquisitive prescription).

It seems at the same time that it is reasonable to assume that the State Treasury, when taking the property left by repatriates into its possession, acted in good faith (Cf. L. Obara, J. Sadłowska, 2008, p. 148. The authors point out that for the individuals who took possession of farms left by their German owners, the period of owner-like possession leading to usucaption should be reduced to 20 years, since these individuals were acting in good faith), because when acting in compliance with applicable legal provisions it was convinced of its title to the property (Cf. judgement of the Supreme Court of 25 June 1968, III CRN 159/63, LEX 1671378). This view is confirmed by the position of the Supreme Court, expressed in its decision of 28 November 2014 (I CSK 658/13, LEX 1621304), according to which "the acquisition of real estate by the State Treasury on the basis of an administrative decision, which was declared invalid at a later time in the supervisory procedure, was owner-like possession in good faith". In addition, it is worth bearing in mind that when acquiring property by usucaption, the condition of the *bona fides* of the owner-like possessor relates only to the moment of taking the property into its possession. Any change in the knowledge of the possessor at a later date does not affect the extension of the period required for usucaption (See, inter alia, the decision of the Supreme Court of 25 June 2003, III CZP 35/03, LEX 83981; the decision of the Supreme Court of 29 May 2008, II CSK 58/08, LEX 794005).

In conclusion, it is worth dispelling doubts that arise as to whether the State Treasury may invoke usucaption in a situation where it is disclosed as owner in the land and mortgage register and its title is being effectively challenged. The Supreme Court, in its decision of 20 January 2009, ruled that legal title to the property by the State Treasury does not exclude the possibility of invoking usucaption by it in case of a successful challenge to the title (Grounds for the decision of the Supreme Court of 20 January 2009, II CSK 412/08, LEX 527194).

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The human right to the safe deposit-credit institutions

Abstracts
Year 2015 in Poland is a time of political elections and persistent social impatience. The social impatience is a result of little noticeable improvement in the living conditions of Poles. In conjunction with the promises given during the election campaigns, the dangerous phenomena of acceptance by the citizens the ant systemic postulate, also to banks, can be observed.

The subject of the study is to organize the relation of man (citizen) with the bank. The Poles have the right to use the deposit and credit institution which is characterized by the public confidence

The aim of the research work is to analyze the stability and security of Polish banks and credit unions (SKOK) with regard to publicly proposed by politicians changes to the banking system. In this context, the main question is: who and to what extent may constitute about the content of the legal relationship between the bank and the citizen. In addition, it is worth trying to answer another question – if the awaken social populism could be dangerous for economic security of Polish banks.

The diagnostic studies were carried out on the basis of the Polish National Bank reports and analysis of political programs presented to citizens in 2015. Basically, the legal-dogmatic method, analysis and synthesis were used in this research.

Keywords:
banking system, evaluation of the bank stability, citizen, banking union, the profit of the bank.

1. Introduction

Each Member State as an international entity can be defined from different points of view. Certainly, some of the necessary components of the state definition is

the territory, the population and the law. In the next step, we can take into the consideration such category as: territorial division of the country, the division of administration etc. However, on each of these stages, we must not forget about the servitude role of the state to every citizen. It is rightly assumed that human being is the highest value protected by the state through the application of the law.

The essence of this analysis is the relationship that occurs between human beings (citizens) and the bank. It should be stressed that every citizen is a consumer and therefore he or she deserves the special protection of the state in sensitive areas. On the other hand, the bank as an institution of public trust, is a professional commercial operators conducting deposit and credit activities. In this relationship, the state plays an important role as the legislator of the banking law.

Every person, during his or her life, especially adulthood, uses banking services, fulfilling their deposit or credit needs. In fact, the man going to the deposit-credit institutions, is guided by criterion of the lowest prices for a loan and the highest interest rate for a deposit. The average person does not have adequate knowledge to make in-depth analysis of the financial condition of the bank or credit union. Therefore, the state, in particular the National Bank of Poland and the Polish Financial Supervision Authority, must play a very important role. In addition, the Polish membership in the European Union and our close cooperation with the banking union based on the euro area is very important (Sitek P. 2015, pp 413-420).

All of these relationships and financial instruments operate on the basis of the national and the European Union law regulations. However, the experiences of changes in the banking system of Hungary and other countries indicate that as a result of coming to power the populist individuals, there are changes in national legislation that lower long-term stability of the banking system.

In the context of two election campaigns in 2015, we could observed in Poland a dangerous phenomenon. The excessive political promises, in the search for sources of funding, are headed towards the banking sector. Citizen respond positively to excessive political promises, not being able to see that, ultimately, new potential cost imposed on the banking system finally will touch each citizen.

In the democratic system, the power authorities are chosen by citizens. The authority works to the citizen. Citizen guided by his or immediate goal participates in the democratic system. This raises the strategic question of what happens when a citizen agrees to the new authority postulating changes in the banking system resulting in a reduction in its stability. Who is then responsible for this changes – is it the responsibility of a citizen or power that such changes proposed? These

are questions without clear answer. The state system must have guarantees for the individual subsystems that should not be exposed to arbitrariness of people (citizens) in a referendum or democratic elections.

2. Evaluation of the current stability of banks in Poland

The National Bank of Poland's report of January 2015 on the stability of the financial system shows good capital equipment and low level of the financial leverage. This information indicates a high resistance to shocks of the banking sector that may arise in connection with the movement of the macroeconomic business cycle. Changes in the structure of banks' capital since 2008 are shown in Chart no 1. This result needs to be seen connected with the noticeable increase in lending, which also contributed to the growth of the capital (see. Chart no 2).

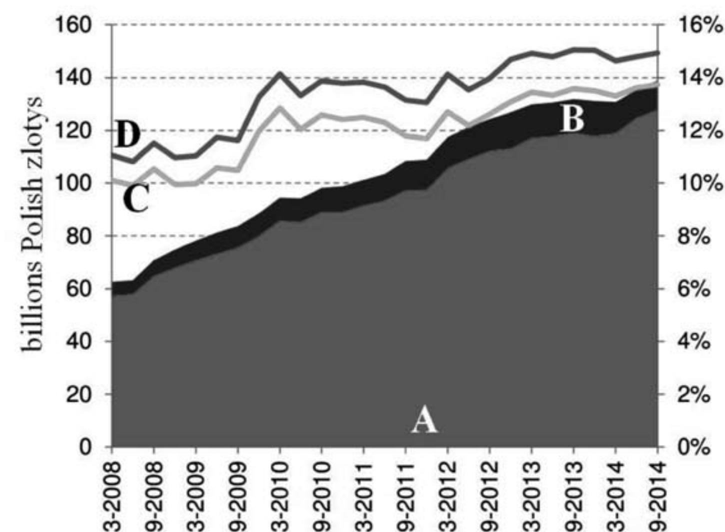

Chart no 1: The main components of own funds and selected capital ratios in the domestic banking sector

A – Tier I capital
B – Tier II capital
C – Capital ratio Tier I
D – Cumulative capital ratio
Source:(Narodowy Bank Polski, 2015, p. 62)

The chart below summarizes the capital requirements in the domestic banking sector in the period from December 2009 to September 2014.

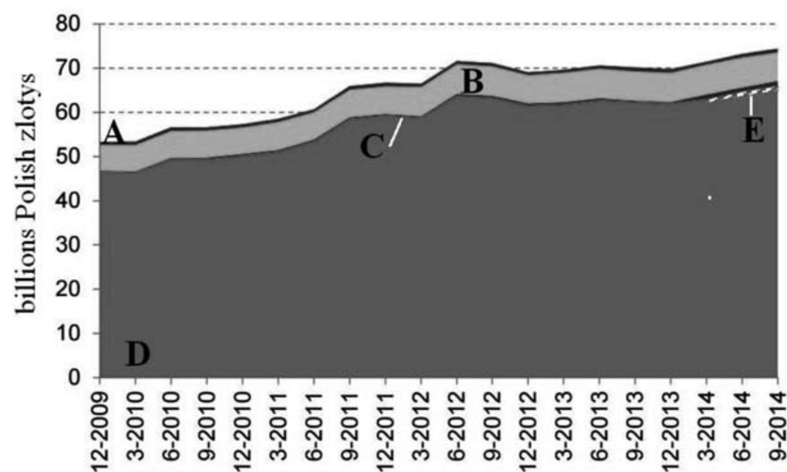

Chart no 2: The capital requirements in the domestic banking sector

A – Capital requirements for other risks
B – Capital requirements for operational risk
C – Capital requirements for market risk
D – Capital requirements for credit risk
E – including contractors credit
Source:(Narodowy Bank Polski, 2015, p. 63)

The implementation of the banking union in particular CRD IV / CRR package showed that changes in the level of own funds, capital requirements and capital ratios are insignificant.

Therefore, the legal rigors of package CRDIV / CRR proved to be achieved by the Polish sector before the introduction of the banking union. All banks in Poland have met the capital adequacy standards without having to raise the capital of the highest quality. This applies to Common Equity Tier 1, Tier 1 capital ratio and the total capital ratio. Importantly, the Polish banking sector has a high ratio of assets weighted by risk to assets. The source of this situation is located in a long-standing policy of the Polish National Bank and the Polish Financial Supervision Authority, focused on consistent and stable „Polish school of banking". Most banks on the basis of the relevant national regulations and responsible human factor, used a simple method of determining capital requirements, resulting in severe counting capital requirements.

Table no 1: Changes of the selected parameters and indicators of capital adequacy in the domestic banking sector resulting from the entry into force the regulation of CRDIV / CRR package, at the end of March 2014.

Parameters and indicators	Domestic regulation	CRD IV / CRR	Difference in %
Own funds	132,82	130,73	–1,6
Tier I capital	119,58	118,86	–0,6
Tier II capital	13,25	11,87	–10,4
The total capital ratio	15,0%	14,6%	–0,4 pp
Tier I capital ratio	13,5%	13,3%	–0,2 pp
Core capital ratio	–	13,3%	–
The total capital requirements, including:	70,93	71,47	0,8
– capital requirement for credit risk (including credit risk of contractor)	63,07	62,98	–0,1
– capital requirement for operational risk	6,77	6,76	0,0
– capital requirement for maket risk	0,34	1,11	226,5
– capital requirements for other risks	0,17	0,61	–19,1

Source:(Narodowy Bank Polski, 2015, p. 63)

The domestic banking sector is characterized by the low financial leverage. Namely, at the end of June 2014, the traditional financial leverage ratio was 9,5 when the average leverage ratio for the European Union's banking sector was 17,5.[1] Currently, the banking union is undergoing a period of observation reports prepared by banks and financial leverage ratio yet to be determined. [2]

The European Union learning lessons from the recent crisis prepared and implemented the banking union in euro zone. Among other things, the result of the banking union is a change in the approach to the study reactions of the

[1] The financial leverage is traditionally calculated as the ratio of bank assets to basic capital.

[2] The minimum financial leverage ratio for bank is given by the Basel Committee at the level of 3%.

banking sector to shocks arising from cyclical nature of economy. There are two new models for the resilience examination. The first is simulation and the second is the macroeconomic stress-tests. The simulation method is the study of the impact of standardized shocks comparable over time. On the other hand, the stress-tests is considering concrete (practical) shock macroeconomic scenario and examines the banks' resilience to its real occurrence.

Finally, during the resistance examinations of the banking sector in Poland, the obtained results of stress tests and simulations of the ability to loss absorption, confirmed a high resistance to shocks. In practice, this means that banks will operate safely despite the impact of a critical scenario. It is important that banks which have suitable capital buffers, not lowered their value in the coming time. Furthermore, in the context of the mistakes made in the European and global banking system, it should be strict conditions of the financial leverage used by banks. The growth of lending cannot cause an excessive increase in the financial leverage. It is necessary to maintain surpluses of capital adequacy, for example by keeping the dividend policy focused on increasing its core capital (allocate part of profits to increase reserve capital).

The election campaign for the office of President of the Republic of Poland reveals populist promises estimated at around 300 billion zlotys. The political leaders after the announcement of „repolonization" banks several years ago, today, they announce that the new state budget revenues will be looked mainly in the profits earned by a bank operating in the Polish banking system. The conclusions of the recent crisis are completely abandoned in order to achieve short-term political objectives (Nowakowski and Orechwo, 2015, pp. 258-259). This results in a real danger to waste extensive efforts to prepare banks for anti-cyclicality of the economy.

2. Evaluation of the current stability of credit unions (skoks) in Poland

Contrary to the banking sector, the financial situation of the credit union (the cooperative savings and credit unions called in Polish: SKOK) sector is still unstable, even critical.

The report of the Financial Supervision Commission called "The Information on the situation of credit unions in the third quarter of 2014" indicates that the situation of the credit unions is still difficult. The restructuring and reorganization proceedings are carried out in relation to the great majority of operators in this sector (81%). By the end of September 2014, there were fifty three credit unions operating out of which

forty three were subject of repair proceedings done by the Polish Financial Supervision Authority. In December 2014, only one credit union continued itself the deposit and lending activities. This situation is the best example to show what is the level of security and stability achieved in the sector created by the Polish capital, outside the contemporary banking sector, in the context of the proud patriotic slogans.

It should be emphasized that the sector of credit unions probably played an important role for certain political groups, but has little importance in the financial sector. The assets of credit unions in relation to the banking sector assets account for 1 percent. The face value of loans and deposits in comparison to the banking sector obtained the similar values.

It is worth noting that the entire credit unions sector showed a notable concentration of capital on three entities, whose assets exceed 1 billion, which is 2/3 of the whole credit union sector.

Referring to the condition of the capital of credit unions, it must be said that according to the statistical data from the end of September 2014, the capital adequacy was 2.1%. After taking the necessary post-inspection adjustments, the adequacy ratio decreased to – 1.6%. A detailed analysis of the credit unions sector shows that the financial results of the whole credit union sector collapsed after the changes in legislation and make this sector the subject to the supervision of the Polish Financial Supervision Authority. Basically, this is due to creative accountancy done by credit unions for which The National Association of Credit Unions[3] was responsible, before the amendment putting credit unions under the banking supervision of the Polish Financial Supervision Authority. The value of own funds and the solvency ratio of credit unions in the period from December 2012 to September 2014 are contained a chart no 3.

It should be also point out that the restructuration of the credit union sector has wider implications. Taking the credit unions' activities under the supervision of the Polish Financial Supervision Authority, on the one hand revealed irregularities and inadequate level of safety of funds invested by depositors and on the other hand, it forces resources commitment by the Bank Guarantee Fund. The reserve fund accumulated by the Bank Guarantee Fund comes from the deposits of banks. In view of the diagnosed inefficient liquidity of credit unions, it was necessary to use these funds for the guaranteed payment of credit unions' customers. In practice, credit unions that have not participated in the Bank Guarantee Fund, cause

[3] The National Association of Credit Unions – a body performing until 2012 supervisory and lustration functions over credit unions.

a reduction in the resources of the Bank Guarantee Fund available in the event of possible problems in major systemic cases. Another consequence is a reduced level of the financial reserve at Bank Guarantee Fund. Therefore, it must be replenished mainly by higher payments done by banks to the Bank Guarantee Fund. And this leads to reducing the possibility of increasing banks' capital buffers, which can be a particular challenge in the case of the cooperative banks.

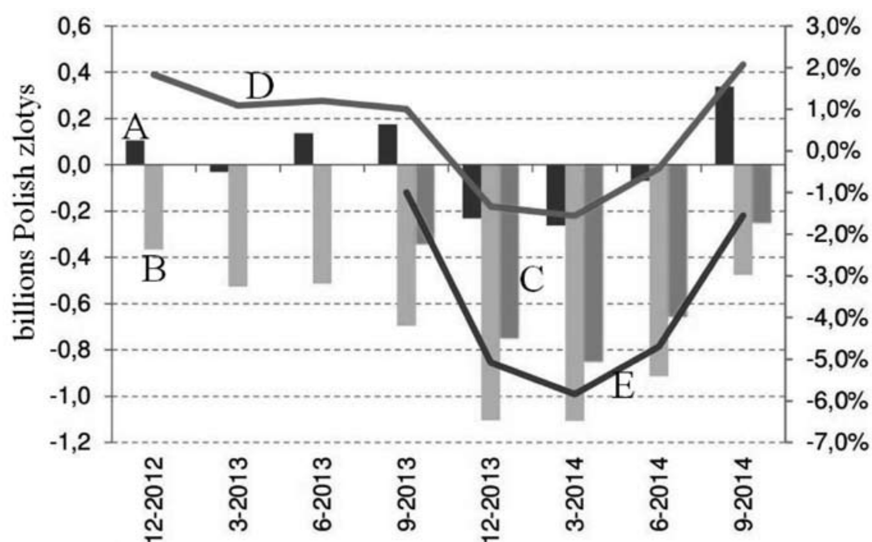

Chart no 3: The own funds and adequacy ratio

A – Own funds
B – The current shortage of own funds
C – Estimated own funds after adjustments for inspection
D – The capital adequacy ratio (right axis)
E – The capital adequacy ratio after adjustments inspection (right axis)
Source:(Narodowy Bank Polski, 2015, p. 82)

At present time, in Poland, there is an opportunity to observe two parallel experiences with two different systems. In this case, the key problem of this analysis is returning – the assumption that human being has a right to a safe deposit-lending institutions. The stability of a financial institution with all its consequences has such result that funds deposited in the institution are safe and in accordance with an individual agreement with the customer, the real to be paid back to the client. The public trust institution accepting repayable funds, manages them in the most professional way

and with the extreme diligence. Similarly, a borrower expects that set out credit ratio will be implemented according to the agreed terms and deadlines. The restructuring and repair programs of the credit unions could enforce unexpected changes, due to the need of additional safeguards, other terms etc. In the most critical scenario, the official receiver in bankruptcy may occur and the loans and credits may be put in the immediate enforceability. It could be the most shocking to the customer and it could devastate client's confidence in the banking system.

3. An attempt to define the content of the human right to safe bank

It is assumed that a bank is responsible for the content and the performance of this right, under the condition the legislator which is the state, properly fulfils its role. The biggest challenges to ensure citizen has this right guaranteed are:

1) increasing of the capacity of deposit and credit institutions forming the financial safety net for the early identification of systemic risks,
2) counteract these threats in the future,
3) further strengthening the resilience of the Polish financial system through the establishment of macro-prudential supervisory authority required by the provisions of the banking union,
4) the establishment of an effective system of orderly liquidation of banks,
5) preventing excessive growth of the financial leverage in banks,
6) fuller consideration of the risks of the interest rates' increase when granting long-term loans by banks,
7) tighter integration and cooperative of the banking sector,
8) further successful restructuring of the credit unions.

The stability of the financial system implies that the whole system fulfils its basic functions properly. This means that the stability of the operation, regardless of the problems of single bodies, or even all its segments. We also have to remember about the objectives of the banking union, which tends to separate the responsibility of the taxpayer (public finance sector) for the operations of the banking sector and its potential disturbances in the continuity of the provision of financial services (Sitek, 2014, pp 125-139).

In the context of political postulates, it is worth noting that the situation of the banking sector (the largest segment of the financial system) remains good and stable. Banks are resistant even to considerable deterioration in their business conditions,

as it is indicated by the high level of capital ratios, significantly exceeding the minimum requirements and by low financial leverage. High resistance of Polish banks is confirmed by the stress-tests carried out periodically by the National Bank of Poland. Even with the execution of a very pessimistic scenario, the capital needs of the sector as a whole would be negligible (it would be around 1.4% of the current value of the capital of banks). The foreign-currency loans remains a structural challenge for banks. According to the National Bank of Poland, the factor limiting risk of a significant increase in the proportion of non-performing loans in this portfolio is a significant increase in wages from the time of granting the majority of these loans (since 2008, average gross wage in the economy increased nominally by 27%), which enhances the ability of borrowers to liabilities.

In addition, the financial results of banks, which are the primary source of growth capital buffers, improved mainly due to an increase in interest margin and lower the relation of operating expenses to the scale of operations of banks. The liquidity position of banks is good as well as the structure of their financing. The sector as a whole is characterized by a low level of funding gap, which was further reduced. In tests, the vast majority of banks showed resilience even under very strong liquidity shock. Sector exposure to market risk remains limited. It also must be kept in mind that both – the simulation of solvency and the simulation of liquidity of banks are carried out by highly restrictive assumptions and are used only to assess the resilience to hypothetical shocks. The possibility of appearance of those shocks is possible but very unlikely. The results of these simulations cannot be treated a forecast of the situation in the banking sector.

On the other hand, the situation of the cooperative savings and credit unions (SKOK) remains difficult. The amount of own funds of many entities is inadequate for their business. The credit unions do not directly generate systemic risk due to the fact that the credit unions operating scale remains small. Prospects for financial stability depend to a large extent on the conditions in the economic environment. There are still imbalances in the global economy (strong diversity of tendencies in the major global economies and emerging markets, as well as the possibility of deviations of asset prices from the fundamentally justified value). The expected, in the previous edition of the report, improvement in the direct environment of the Polish economy has not occurred yet. The current projections indicate that the recovery will be slower than previously expected and it is subject to greater uncertainty.

The report on the stability of financial system includes – besides the results of analyses of risk in the financial system – also recommendations whose

implementation would contribute directly or indirectly to reduce the risk of both financial regulation and financial safety nets, as well as the situation of individual segments of the system.

4. The methods of evaluation of impacts in the banking sector

Undertaken problems may suggest helplessness to a closed circle of risk: the citizen – a populist slogan – new power – populist banking regulations. In practice of the European Union legislation, the relatively large amount of space is devoted to an impact assessment. In a situation where the assessment would be done by experts, it can be an alternative safeguard against vicious circle.

There are different approaches to the evaluation of the effects of regulation depending on the scope of the adoption of the regulation (narrow-limiting normative acts regulating or the broad approach covering all activities of the government), the type of industry or the degree of universality methods (for example: the methodology and partial method). On the basis of the criterion of methods universality, two best-known methods of impact assessment can be distinguished: the Benefit – Cost Analysis (BCA) and the Regulatory Impact Assessment (RIA).

There are numerous similarities and differences between these two methodologies. The Benefit – Cost Analysis has a very developed areas for carrying out the quantification of social costs and benefits in the long term, while the Regulatory Impact Assessment focuses on the rules and procedures of regulatory impact assessments and the quality of prepared and implemented regulation.

The methodical part of prepared and implemented regulations to the banking sector in Poland is the weakest link in the legislative process. Such evaluation is justified by many important facts. First of all, the regulations were not a subject to comprehensive assessment according to the Regulatory Impact Assessment or the Benefit – Cost Analysis methodology. The available reports or presented justifications are quite laconic, there are not the effects expressed in value, and sometimes only benefits are presented. Usually, the administrative burden and costs of banks' adjustment to new regulations is omitted. Definitely, the range of stakeholders which is limited only to the banking sector, is narrowed and the effects of impacts on other industries or markets (for example: entire financial sector) are ignored.

To a small extent the overall impact on the economy, investment, labour market, and often also on a budget is assessed. Ratings regulations are fragmented and prepared under time pressure. Often, only those aspects that speak in favour

of regulations are emphasized. It is not specified what was the objections to the regulation and why such solutions, no other, were adopted. The factor that strongly affects the quality assessment of the effectiveness of regulation is static nature of the study of the impact on individuals or entities regulated. Normative character of these regulations makes that those entities will be in the starting or slightly amended form function for many years. It is difficult to accept without reservation the assumption that the system of economic, financial and market situation of banks, attitudes of individual and corporate clients will be the same as it was assumed in the period in which a given regulation were prepared. More importantly, there is no information that the annual, systematic, ex-post regulatory impact assessment, done in a methodical way, was carried out. This practice in the process of rulemaking causes that regulators are constantly exposed to commit the same mistakes. This raises the natural and wide field to treat legal acts, even of strategic importance, as tools that can be altered at any time or adapted to current conditions and changing expectations of the regulators or lobbying pressure groups, regardless of the consequences that causes their implementation.

5. Conclusion

In summary, it can be stated that the implemented in practice regulations do not have a strong and substantive reasons that those regulations will generate social benefits exceeding the social costs and the intended objectives of regulations will be possible to achieve. The implementation of those regulation is often an expression of an invalid conviction of legislators that belief in the need for their introduction, trust their experience as well as the mode of preparation of the adopted regulations, are maybe not optimal, but enough reasonable solution. This is similar to inserting a key into the lock with eyes closed. The consequence of methodological weaknesses is that we apply regulations that generate high risks for the banking system and at the same time we are not able to present a strong counter-arguments, especially the figures, that the socio-economic consequences of these regulations will be detrimental to the security (stability) of deposit and credit institutions as well as for the citizen.

Meanwhile, it can be said that during the adoption of the Law on Credit Unions, the proper evaluation of effects of new regulations was not done. Such important issues as the stability of designed entities and the right of citizens to the safe deposit-credit institution were not taken into account.

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Joint dispositions *mortis causa*

Abstract
This paper discusses joint dispositions *mortis causa* whose significance continues to increase in the face of rapid economic development and growing levels of social prosperity. Social and legal awareness is on the rise. The elderly are beginning to show greater concern for the fate of property they have accumulated during their lifetime. This problem is faced not only by individuals, but also by groups of people, in particular spouses.

In addition to joint wills, the article also discusses alternative legal instruments such as contracts of inheritance and donations *mortis causa*. The author reviews the relevant literature as well as the jurisdiction of the Supreme Court. Selected examples of foreign laws dealing with the discussed topic were analyzed in search for the best solutions.

The article relies on dogmatic and comparative methods. The presented arguments and opinions do not exhaust the subject of donations *mortis causa*, but they make a valuable contribution to the discussion about new succession laws in Poland and Europe.

Keywords:
disposition mortis causa, joint will, joint donation mortis causa, decedent, heir, testator, donor, donee, spouse

1. Introduction

In the face of rapid economic growth, global migration and the threat of military conflict in the Middle East, many people, in particular the elderly, are beginning to show greater concern for the fate of the property they have accumulated during their lifetime. This problem is also faced by spouses who would like to make joint

decisions concerning the disposition of their property at death. Unfortunately, they are prevented from doing so under the Polish law which prohibits spouses from drawing up a single joint will.

In this article, Polish legal regulations relating to joint disposition of property are compared with the solutions adopted in selected European countries. In view of Poland's plans to recodify the civil law as well as extensive efforts to develop a common frame of reference, the moment seems ripe to discuss selected issues and voice certain postulates *de lege ferenda*.

This article discusses joint dispositions *mortis causa*. The field of research was intentionally broadly formulated to present various options of bequeathing joint property *post mortem*. The article analyzes joint wills as well as joint contracts of inheritance. Due to the wording of the relevant legal regulations in European countries, the latter category was limited to donations *mortis causa*.

The strengths and weaknesses of joint dispositions *mortis causa* were discussed on the example of legal regulations implemented in Germany, Austria and the Netherlands. Attempts were made to define the analyzed concept with reference to Polish legislative solutions addressing joint testation and joint contracts of inheritance. The discussed issues were analyzed in reference to the predominant views in legal doctrine and the rulings of the Supreme Court.

The final remarks express the author's opinions concerning the future civil code and the common frame of reference regarding succession law or, more precisely, the law of wills. The presented discussion does not exhaustively cover the problem. Due to space constraints, this manuscript overviews critical issues and highlights the most important points. It makes a valuable contribution to the discourse concerning property disposition *mortis causa* by comparing the solutions adopted in various countries and formulating specific postulates *de lege ferenda*.

2. Definitions

The Polish civil code does not support joint dispositions *mortis causa* and introduces a statutory ban on joint wills. A discussion on the matter should begin by defining the concept of joint disposition.

According to the literature, a joint will is a document that contains detailed instructions about disposition of property upon death of more than one testator. In this approach, legal regulations concerning joint wills do not apply to wills that are made separately by individuals. The proposed definition eliminates doubt that a joint

will must be unconditionally drawn up in the form of a written document (J. Biernat, 2015, p. 375). However, for reasons that will be discussed in successive parts of this manuscript, the concept of a joint will should not be limited to written dispositions only.

With regard to the definition of a joint donation *mortis causa*, it should be noted that pursuant to the provisions of the Act of 1 June 2009 amending the Civil Code and other legal acts (Publication of the Polish Parliament, No. 2116), the issue of donations *mortis causa* was to be regulated by Book Three of the Civil Code concerning donation contracts. The above proposal was dismissed, but the discussed instrument was defined as follows in the above act: "a legal title to real estate or other rights which constitute the subject matter of a donation *mortis causa* pass to the donee upon the donor's death and are not a part of the estate". The proposed definition did not decide the legal nature of a donation contract, nor did it prescribe its vital elements. There are no arguments to justify the placement of donations *mortis causa* in Book Three of the Civil Code, especially since the proponents of the proposed solution did not explain why this concept should fall subject to the law of contract (The proposal was reviewed in detail by J. Górecki, 2010, pp. 194-201. See also: Ł. Mleko, KPP 2010, No. 4, pp. 1045-; P. Sobolewski, Zeszyty Prawnicze BAS 2010, No. 4, pp. 109-). In my opinion, a donation contract, in particular a joint donation, is an act of instituting an heir which should be regulated in the part of the Civil Code dedicated to succession law, especially dispositions *mortis causa*. This solution would support the creation of a comprehensive list of legally admissible dispositions *mortis causa* based on the provisions of a contract, a will or a legal act.

The above indicates that a joint disposition *mortis causa* should be regarded as an act of instituting an heir which contains detailed instructions regarding disposition of property upon the death of more than one testator. Such a broad definition would cover wills as well as contracts of inheritance, in particular donations *mortis causa*. The proposed definition does not differentiate between oral and written dispositions, and it satisfies the codified principles of freedom of testation and freedom of contract. The discussed solution would strengthen the constitutional right to inherit and the legal obligation to respect the last will of testators who decided to jointly dispose of their common property upon death.

3. Strengths and weaknesses of joint dispositions *mortis causa*

Before we move to various types of joint dispositions *mortis causa*, let us first look at their characteristic features. As a strong advocate of joint dispositions *mortis causa*,

I will begin this analysis by discussing the weaknesses of the discussed instrument.

The greatest disadvantage of joint dispositions *mortis causa* is that they limit the freedom to revoke legal transactions of the type, which could undermine the very nature of the discussed dispositions, in particular wills that are regarded as unilaterally binding legal transactions. This argument is difficult to refute. Nonetheless, it should be noted that any exceptions to the above seem fully admissible already *in abstracto*, and according to some authors, they should not be evaluated as positive or negative (J. Biernat, 2015, p. 370. Cf. F. Zoll, 2013, pp. 553-). Any exceptions to the above would not influence the general principle of revocation of a will. Successive parts of this article will discuss the ways in which this problem was addressed in countries where joint testation and joint contracts of inheritance are legally allowed.

The opponents of joint dispositions *mortis causa* also argue that one of the testators could influence the dispositions made by the other decedent. It should be noted, however, that the risk of third party intervention into the contents of a disposition *mortis causa* is similar in the case of both individual wills (donations made by one person) and joint wills (donations made by more than one person). Therefore, the differences are not significant enough to justify the exclusion of joint dispositions *mortis causa* from the Polish legal system (J. Biernat, 2015, p. 371).

The argument that joint dispositions *mortis causa* are jurisdictionally and procedurally complex is also easy to refute. The introduction of the discussed instrument in the form of a legal act would undoubtedly create numerous practical and substantive problems, but the associated difficulties are not grave enough to prevent joint dispositions *mortis causa* from being included in the Polish civil code (Cf. K. Przybyłowski, Studia Cywilistyczne 1963, vol. IV, pp. 8-).

The final argument against donations *mortis causa* is that contracts of the type have to be notarized. This requirement implies that any formal defects of the contract cannot be remedied during its execution. Some opponents of the discussed instrument argue that dispositions *mortis causa* allow litigants to circumvent legal obligations for inherited debts and deprive creditors of the right to satisfy their claims by disposing of the donor's assets (See: J. Górecki, Rejent 2006, No. 2, pp. 40 and 42).

In my opinion, the benefits that follow from joint dispositions *mortis causa* significantly outweigh the discussed weaknesses which can be eliminated by suitable legislative provisions. Donations *mortis causa* fully embody the principle of freedom of testation and freedom of contract. The legal status of the donee becomes obvious as of the moment inheritance proceedings are opened, and it does not require any declarative or constitutive decisions. The subject matter of a donation *mortis*

causa can be any item of the decedent's estate, without exception. The discussed instrument is more effective in protecting the donees' interests than an absolute legacy is in protecting the interests of the legatees (K. Osajda, 2013, pp. 612-613; M. Pawełczyk, W. Ulanowski, Radca Prawny 2012, No. 1, p. 7D).

There are two key strengths of joint dispositions *mortis causa*. The first is the already mentioned principle of freedom of testation, in the case of joint wills, and freedom of contract, in the case of joint donations *mortis causa*. The discussed instrument would substantially simplify the principles on which property is bequeathed by more than one testator. If testators can freely manage their property during their lifetime, there are no justified legal or axiological arguments that would prohibit them from performing legal transactions that would take effect after their death.

The second advantage is related to the principles of matrimonial law, in particular in community property systems which involve joint ownership of property between the spouses. The legal option of jointly disposing property on death of a married couple seems to be a natural consequence or the anticipated fulfillment of a community property system (J. Biernat, 2015, pp. 372-373). The introduction of such a legal instrument would also cater to growing social demand for joint wills (See: A. Szpunar, KPP 1995, No. 4, pp. 605- ; S. Wójcik, 2005, pp. 1491-).

4. Types of joint dispositions *mortis causa* in selected countries

4.1. Joint wills

The legal admissibility of joint wills stirred numerous doubts already in Roman times. Since such dispositions cannot be regarded as *unitas actus*, joint wills were not included in the Code of Justinian (K. Przybyłowski, Studia Cywilistyczne 1963, t. IV, p. 6).

Joint wills do not enjoy universal approval in European legal systems. This legal instrument has been adopted by, among others, Germany, Austria, Denmark, Georgia and Malta. Most European countries, including France, Portugal, Italy, the Czech Republic, Slovakia, Hungary, Russia, Belgium, the Netherlands and Luxembourg, remain skeptical towards the legal admissibility of joint wills (W. Klyta, Rejent 2006, No. 2, pp. 98-101).

Germany is one of the few European legal systems which allows for joint wills and where this legal instrument is actually quite popular. The list of subjects entitled to make joint wills was initially limited to spouses (§ 2265 of the German civil code), but after the enforcement of the Law of 16 February 2001 on Ending Discrimination

Against Same-Sex Communities: Life Partnerships, its scope was expanded to include persons who remain in same-sex partnerships (Ibid., pp. 101-103).

The concept of a joint will has not been directly defined by the German legislator. There are three different interpretations of the specific nature of joint dispositions. The first theory, referred to as the objective theory, places special emphasis on the external form of the will as a document, rather than the testators' true intent. In this concept, a joint will is a will that has been drawn up in writing in a single document (*Einheitliche Urkunde*). In the second, subjective approach, joint wills are allowed under circumstances that extend beyond the will (See: M. Rzewuski, PS 2015, No. 1, pp. 106-119). According to the third, intermediate theory, the communal aspect of a joint will should clearly follow from the contents of a written disposition *mortis causa (*H. J. Musielak, 2003, pp. 1619-). Each of the three concepts has its advocates and opponents. The first theory dominates in judicature, in particular in the decisions of the German *Reichsgericht* (The difference between the formal aspects of a joint testament (one document containing dispositions *mortis causa* of at least two people) and its material form ("mirror" wills – wills that are nearly identical) is also clearly discernible. See also: K. Osajda, 2005, p. 17).

The formal requirements that have to be met by joint wills are quite liberal in German law. Pursuant to the provisions of § 2267 section 1 of the German civil code, a joint will can be drawn up by one spouse, but has to be signed by both spouses. Any changes to the contents of a will have to be approved by both testators, and upon the death of one spouse, the surviving testator is generally unable to modify the provisions of the will (W. Klyta, Rejent 2006, No. 2, p. 102).

Three types of joint wills are identified in German legal doctrine. The first is the simultaneous, formal will (*Gleichzeitig*) where the dispositions made by two individuals are combined into a single will, but their contents do not have to be merged. The second is the mutual will (*Reziprok*) under which the couple agree to leave their estate to the surviving spouse or make donations on behalf of one another. The validity of testamentary dispositions made by one party does not affect the validity of the spouse's dispositions. The third type of a joint will is the co-respective or co-dependent will that establishes joint property – *Nachlassgemeinschaft* (Ibid., p. 104).

Whereas the simultaneous will is rather archaic, and the second type of a joint will does not stir much controversy, the co-respective will evokes much interpretive and procedural doubt. In general, the legal character of a co-respective will is determined by the following principles:

- the validity of testamentary dispositions made by one party is dependent on the validity of the dispositions made by the spouse (and when the dispositions made by one party lose their validity, the spouse's dispositions also cease to take legal effect), where the causes of invalidity are not taken into consideration (§ 2270 section 1 of the German civil code),
- only testamentary dispositions made by one of the testators are covered by a co-dependency relationship,
- only testamentary dispositions pertaining to the appointment of heirs, formulation of bequests or instructions are regarded as co-dependent dispositions (in the absence of co-dependence, the remaining dispositions, including dispositions pertaining to the appointment of the executor of the will or disinheritance, will be valid),
- joint wills fall subject to presumption of law, in the light of which, mutual gifts that are made by spouses (under a will or bequest) or dispositions that lead to increment in the property of the other spouse and the property of a third party related to the first spouse, should be regarded as co-respective wills in the event of doubt (§ 2270 section 2 of the German civil code),
- in most cases, co-dependent (co-related) dispositions can be revoked only by both spouses – § 2271 of the German civil code (H. J. Musielak, 2003, pp. 1664-1681. The only exception would be a situation in which a third party that was to be endowed by the surviving spouse (who accepted the inheritance after the death of the first spouse) would be disinherited on legal grounds).

Pursuant to the provisions of § 2265 of the German civil code, only spouses and same-sex life partners can make joint wills. A joint will made by parties who do not fulfill the above definition is automatically rendered invalid. However, an invalid joint will can be converted into two separate and valid dispositions *mortis causa* (See: M. Rzewuski, *Konwersja testamentu*, 2015, pp. 401-415). Under extraordinary circumstances, an invalid joint will can also be transformed into a binding contract of inheritance. Dissolution of marriage (life partnership) or determination of its non-existence generally leads to the invalidation of a joint will (§ 2268 in connection with § 2077 section 1 of the German civil code). The only exception is stipulated in § 2268 section 2 of the German civil code which states that if marriage (life partnership) was dissolved before the death of one of the spouses (partners), and it was both spouses' (partners') intention to make a joint disposition *mortis causa*, such a will remains legally binding (H. J. Musielak, 2003, pp. 1625-1637. The admissibility of joint wills is also analyzed in art. 1347 of the Georgian civil code which states that a will can contain dispositions of one testator, and joint wills made

by two or more persons are prohibited. A joint will can only be made by spouses who are mutual heirs, and it can be revoked during their lifetime by either spouse or both spouses. See: I. Gabriadze, 2001, p. 332).

Joint wills are also allowed in Austria. Unlike in Germany, where joint wills can only be made by spouses and life partners, in Austria, this legal instrument is also available to engaged couples. In this case, however, a joint will remains binding only if the betrothed enter into matrimony. In Austria, a joint will has to be drawn up in handwriting and signed by both testators. The legal ineffectiveness of dispositions made by one testator does not automatically invalidate the dispositions made by the other party, unless expressly stated by both testators. Under a joint will, spouses (engaged couple) can appoint the other spouse or a third party as their legal heir. In the event of interpretive doubt as to whether the document constitutes a joint will or a contract of inheritance, the matter is settled in favor of the former. If a contract of inheritance is drawn up together with a joint will by the spouses (partners), then under the joint will, each spouse (partner) will inherit only ¼ of the other spouse's (partner's) estate which, in this case, cannot constitute the subject matter of the inheritance contract – § 1253 of the Austrian civil code (W. Klyta, Rejent 2006, No. 2, pp. 112-113. Cf. F. Petrasch, Wien 1992, pp. 121-123; B. Koch, 2005, 2007, pp. 1399-1400).

In conclusion, it should be noted that there is no common legal framework regarding joint wills in European jurisdiction. In countries where this legal instrument has been implemented, the relevant concepts and interpretations often vary. Legal solutions pertaining to joint donations *mortis causa* which have been adopted in foreign legal systems will be analyzed in detail in successive sections of this paper.

4.2. Joint donations *mortis causa*

In many countries, a will is not the only legal instrument enabling the testator to dispose of his estate *mortis causa*. European legislators have developed alternative instruments for appointing heirs. One of them are donations *mortis causa*.

Donations *mortis causa* date back to Medieval Italian law. In the Middle Ages, this legal instrument denoted a gift which was made by a donor on behalf of a donee, and which became effective only when it became certain that the donor would not survive the done (See: E. Volterr, 1961, pp. 826. Cf. W. Litewski, 1990, pp. 37-). A donation *mortis causa* could take one of the two forms: a gift that is subject to a condition precedent (the donor remains the legal owner of donated property during his lifetime, and the property is transferred to the donee upon the donor's death) or a gift that is subject to a condition subsequent (the donee assumes ownership of

donated property as of the moment the bequest is made, but only for as long as the donor remains in imminent danger) (I. Malinowska, 1966, pp. 29-30).

Some Roman lawyers regarded *donatio mortis causa* as a standard legal transaction *inter vivos*. This view stemmed from the fact that the discussed instrument was listed in the Code of Justinian in the section dedicated to donations rather than legacies. Yet in most cases, the differences between *donatio mortis causa* and *donatio inter vivos* were recognized. The most obvious differences included the donor's right to claim the return of the gift if the risk of death was no longer imminent (generally not admissible in donations *inter vivos*), the limited character of *animus donandi* where the donor made a donation on behalf of the donee because he was no longer able to use that property item, and the similarities between *donatio mortis causa* and a legacy, e.g. the gift had to be released to the donee, and the legacy had to be released to the legatee; similar formal requirements where both the donor and the heir had to make declarations of will in the presence of five witnesses (Ibid., pp. 30, 32 and 33).

The provision allowing for donations *mortis causa* in legal transactions has been repealed in contemporary Italian law. According to article 458 of the Italian civil code, which introduces a general ban on contracts of inheritance, donations *mortis causa* are not legally admissible (G.P. Cirillo, V. Cufaro, F. Roselli, 2006, pp. 615- ; L. Ferroni, 2006, pp. 602-).

In successive sections of this article, contracts of inheritance will be analyzed in view of legal regulations adopted by Germany and the Netherlands. Those two legal systems have been chosen because German donations *mortis causa* constitute a prime example of succession laws, whereas Dutch instruments represent the law of contract. Let us begin the analysis with the Dutch example.

The institution of *donatio mortis causa* was introduced to the new Dutch succession law in 2003. It rests on the fundamental principle of the donor's freedom to revoke a donation *mortis causa* (W. Eule, 2010, p. 220. Cf. A.L.G.A. Stille, 2006, pp. 597-). The following requirements have to be met for a donation *mortis causa* to be valid: the legal transaction has to be made in person and without the involvement of an authorized representative; the gift has to be accepted during the lifetime of both the donor and the donee; the donee has to survive the donor. Despite the previously cited principle, such a donation cannot be revoked. A donation may not constitute the donor's estate, in whole or in part, but only a specific entitlement (P. Zakrzewski, 2015, p. 744).

Although donations *mortis causa* are generally non-revocable, the right to revoke a donation can be reserved in certain circumstances. This can be done in two ways:

by submitting a declaration of will to the donee or by including a relevant provision in the last will (A. Oleszko, 1990, p. 270).

In the Netherlands, a donation *mortis causa* can be executed only after the donor's death, and it does not take legal effect during the donor's lifetime. In other words, the donee does not acquire any rights to the gift before inheritance proceedings are opened (P. Zakrzewski, 2015, p. 744). The donation is thus a legal transaction *mortis causa* which has been regulated in the part of the Dutch civil code pertaining to the law of contract, rather than succession law. The subject matter is not an item of the decedent's estate, and the donee becomes entitled to the gift under a contract which becomes effective upon the donor's death (A. Oleszko, 1990, p. 271. Cf. W. *Schlüter*, *2000, pp. 457-)*.

Unlike in Dutch law, in the German legal system, donations *mortis causa* are regulated in the part of the civil code dedicated to succession law. In line with § 2301 of the German civil code, a gift that is to be released to the donee upon the donor's death falls subject to legal provisions applicable to dispositions *mortis causa*. In the German literature, the criterion that distinguishes between a donation *mortis causa* and a donation *inter vivos* is the fact that the donee has to survive the donor. This legal condition does not have to be clearly stipulated in a contract, and it can be expressed by way of a declaration of will pursuant to the provisions of § 133 of the German civil code (*W. Edenhofer,* 2010, pp. 2422-).

In Germany, donations *mortis causa* fall subject to the provisions of succession law, and they have to comply with the formal requirements imposed on contracts of inheritance and last wills. The legal consequences of such a contract are determined by the type of the bequeathed gift. If the donation consists of a single object, the legal effect of the contract will be identical to that of a disposition. If the subject matter of the donation is the donor's estate, in whole or in part, the procedure of appointing an heir has to be initiated (W. *Schlüter*, 2000, *p. 465. Cf. H. Brox, W.D. Walker, 2010, p. 421)*. German donations *mortis causa* are generally irrevocable. The donation contract can be revoked on the same principles that apply to contracts of inheritance, for example, when such a reservation was made explicitly in the contract. The donation cannot be revoked unilaterally, but the donor's right to control the subject matter of the donation during his lifetime is not limited (See: P. Zakrzewski, 2015, p. 748. Cf. J. Górecki, Rejent 2006, No. 2, pp. 30-).

Despite an absence of clear regulations, it seems that in both Dutch and German legal systems, donations can be made by more than one donor. This conclusion follows from the principle of *lege non distinquente* and the absence of the relevant bans. It should also be noted that in the Dutch civil code, donations *mortis causa* are regulated in the chapter relating to the law of contract, which implies that contracts of the type are free of any subjective limitations. The only requirement is that the rights to the donated item are exercised jointly by several donors.

5. Joint dispositions *mortis causa* in Poland

5.1. Remarks *de lege lata*

Article 942 of the Polish civil code states that a will may contain dispositions of only one testator. Based on this provision, legal practitioners argue that joint wills have been eliminated from the Polish law (E. Niezbecka, 2008, Nb 1). They define joint wills as wills that contain strictly interconnected dispositions (mutual wills) as well as dispositions made individually by each testator (E. Skowrońska-Bocian, 2005, p. 74).

In the cited article, the term "will" is highly ambiguous, and the legislator does not specify whether a will consists of a legal transaction, a document or a specific declaration of will (Cf. K. Osajda, 2005, p. 68). The vast majority of legal practitioners define a will as a document that is a unilateral transaction performed by the testator (See: A. Mączyński, OSPiKA 1972, No. 2, p. 59). This definition implies that declarations of will made by several testators may not be combined into a single document. The subjective scope of the document is thus limited to testamentary dispositions that have to be made in writing, namely holographic wills, allographic wills, notarized wills and wills made during a sea voyage (K. Przybyłowski, Studia Cywilistyczne 1963, vol. IV, p. 19. See also: S. Wójcik, [in:] *System prawa cywilnego*, vol. IV, p. 190).

The above position has been approved by the Supreme Court which ruled that a document which constitutes the last will may not, on pain of invalidity, contain dispositions of more than one testator (This view was expressed by the Supreme Court in decision No. 2 CR 539/60 of 31 May 1960, OSPiKA 1961, No. 10, item 276, p. 578. It should also be noted that evasion of responsibility for errors in law has two interpretations in Polish legal doctrine. Pursuant to legal provisions relating to statements for accepting or declining an inheritance, evasion of responsibility is ruled out by E. Skowrońska-Bocian, 2005, p. 197, but such a possibility is allowed by J. Pietrzykowski, 1972, p. 1935. The second view seems to be more adequate in view of the principle of *lege non distinquente*). The statutory provision that a will can be hand-written by the testator points to his or her personal involvement in the

process. In a hand-written will, the testator declares his or her will in own writing, which rules out the involvement of an authorized representative in the process of registering the testator's dispositions *mortis causa* (Decision of the Supreme Court No. IV CR 20/56 of 13 January 1956, OSNCK 1957, No. 3, item 75). In this case, both a hand-written will and a notarized will, drawn up and signed by at least two persons, will be regarded as absolutely void (E. Niezbecka, 2008, Nb 5).

Personally, I do not subscribe to the opinion, which has become firmly rooted in jurisprudence, that the definition of a will provided by art. 942 of the civil code is limited to a document containing a declaration of the testator's will (See also: J. Gwiazdomorski, NP 1974, No. 6, p. 832). I am not convinced by the Supreme Court's argument that if it were the legislator's intention to define a will as a legal transaction, such a definition would be clearly included in the cited article (Refer to the justification for the decision of the Supreme Court No. III CZP 91/70 (7) of 22 March 1971 r, OSPiKA 1972, No. 2, p. 56). The Supreme Court's position is undermined by linguistic interpretation of the term and the principle of *lege non distinquente* which enforce the colloquial definition of the word and prohibit the introduction of any interpretational limitations without formal amendment. Arguments in favor of the criticized view are difficult to find. Gwiazdomorski rightly remarked that if it were the legislator's intention to limit the scope of art. 942 of the civil code to written dispositions, the cited article would read as follows: "a written will may contain dispositions of only one testator" (J. Gwiazdomorski, NP 1974, No. 6, p. 833). The absence of such a definition in the analyzed article of the civil code indicates that a distinction between oral and written wills should not be made and that a common solution that benefits all forms of wills should be found (M. Rzewuski, Radca Prawny 2012 No. 121, pp. 8D-9D).

Many decisions of the Supreme Court (See: Decision of the Supreme Court No. IV CR 20/56 of 13 January 1956, OSNC 1957, No. 3, item 75; decision of the Supreme Court No. II CR 539/60 of 31 May 1960, OSNC 1961, No. 1, item 55; decision of the Supreme Court No. III CZP 91/70 of 22 March 1971, OSPiKA 1972, No. 2, item 26; decision of the Supreme Court No. III CZP 88/72 of 12 December 1972, Lex No. 7196; decision of the Supreme Court No. I CKU 6/98 of 24 March 1998, Prokuratura i Prawo 1998, No. 9, p. 27) clearly depart from the principle indicated in art. 942 of the civil code, and most of them have been made in favor of oral wills. The above points to the Supreme Court's attempts to interpret the provisions of the above article in a more liberal manner, which is justified by the codified principle of *favor testamenti* and the need to execute the testator's actual

intent. In my opinion, the admissibility of joint wills should not be restricted to oral dispositions *mortis causa*. This approach is detrimental to the interests of testators who chose to make a written will, in particular a hand-written will which is the most readily available legal instrument for expressing a testator's intent.

The admissibility of joint donations *mortis causa* in Polish law has stirred much controversy since the enforcement of the new civil code, mainly due to the absence of clear legal regulations concerning the above. Two opposing positions can be identified in the literature. The first, more rigorous approach questions the legal validity of donations *mortis causa*, whereas the second, more liberal approach represents a contrary view (K. Osajda, 2013, p. 257; M. Niedośpiał, PiP 1987, vol. 11, p. 57; E. Drozd, Rejent 1992, No. 1, pp. 80- ; M. Pazdan, 2009, p. 1181; A. Kubas, NP 1974, No. 10, p. 1370; A. Oleszko, 1990, pp. 421- . Cf. L. Stecki, 1974, p. 44, ibid., 2004, p. 286). The proponents of the first view argue that pursuant to the provisions of art. 941 of the civil code, which states that no disposition *mortis causa* can be made otherwise than by a will, the list of legal transactions *mortis causa* is finite, that contracts for succession of a living person are banned (art. 1047 of the civil code), and that donations *mortis causa* that are contrary to law or circumvent the law are invalid – art. 58 §1 of the civil code (E. Rott-Pietrzyk, Rejent 2006, No. 2, p. 167).

According to some authors, the provisions of art. 1047 of the civil code apply only to succession of a living person and not bilateral transactions concerning specific items of the testator's estate. Inheritance contracts can thus differ in their subject matter. The number of legal transactions *mortis causa* is governed by the principle of *numerus clausus*, but it should be noted that the concept of such a transaction has not been defined in any Polish normative act. Therefore, the postulated number of transactions *mortis causa* is rather abstract, and it is not finite (See: J. Górecki, Rejent 2006, No. 2, p. 35, K. Osajda, 2013, p. 256). The argument that donations *mortis causa* enable testators to circumvent the law since donees, unlike heirs, do not inherit the donor's debts, is also doubtful. The legal admissibility of donation contracts seems to be approved by the Supreme Court which stated in decision No. III CZP 79/13 of 13 December 2013 that contracts for donations *mortis causa* are legally admissible if the subject matter of the donation are specific objects and rights, and the contract does not violate the principles of community life (Lex No. 1400579).

The Supreme Court justified its position by arguing that since donations *mortis causa* take effect only after the donor's death, they could be regarded as contracts for succession of a living person because the subject matter of the donation is not a part of the donor's estate, and it is released directly to the donee. This postulate is valid

only in reference to donations *mortis causa* which cover the donor's estate in whole or in part. If a donation consists of a specific object or right, it does not constitute a contract of inheritance even if such objects or rights exhaust the donor's entire or nearly entire estate. Article 1047 of the civil code prohibits contracts that transfer ownership of the testator's entire estate as part of universal succession, whereas a donation contract always involves singular succession, and when the donation is composed of numerous items, the transfer of rights to every item has to be analyzed individually. Unlike art. 941 of the civil code, art. 1047 applies to legal transaction *inter vivos* that generate certain effects *mortis causa*, including donations *mortis causa*; nevertheless, it does not cover donations *mortis causa* (See: justification for the decision of the Supreme Court No. III CZP 79/13 of 13 December 2013). The admissibility of donations *mortis causa* follows from the principle of freedom of contract (art. 353^1 of the civil code) which, similarly to the principle of freedom of testation, is a manifestation of the basic premise of civil law, namely the autonomous nature of parties to a legal transaction. The principle of freedom of contract indicates that legal provisions should be interpreted *pro libertatem* in the event of any doubt. This principle undoubtedly applies to donation contracts, therefore it supports the admissibility of the relevant caveat, namely the moment of death of one party to the contract, which is not precluded by any other legal regulations (Ibid).

The view expressed by the Supreme Court in decision No. III CZP 79/13 of 13 December 2013 was not lauded by legal practitioners. Most authors opposed the argument that contracts relating to donations *mortis causa* are admissible on the same principles that apply to donations *inter vivos*, with the exception that they take legal effect only after the donor's death. According to Wolak, contracts relating to donations *mortis causa* contain provisions that enable the donor to revoke the donation at any time and prevent the donor from being bound by the contract as of the moment its is concluded. In this case, the donation constitutes a legal transaction *mortis causa*, and such transactions are admissible only under the circumstances prescribed in the Supreme Court's decision (G. Wolak, Rejent 2014, No. 7, pp. 117-).

Legal transactions *mortis causa* take effect upon the death of the person performing the transaction (A. Wolter, J. Ignatowicz, K. Stefaniuk, 2000, p. 264), but the list of such transactions should not be limited to wills only. Important civil law transactions, such as *pactum in favorem tertii*, dispositions *mortis causa* concerning assets accumulated in bank accounts and open pension funds, life insurance contracts and other legal transactions that are subject to conditions precedent and subsequent, cannot be omitted (See: J. Górecki, Rejent 2006, No. 2, p. 39).

In view of the above, I am more inclined to agree with the argument that donations *mortis causa* are admissible pursuant to the provisions of Polish succession law. In contracts concerning donations *mortis causa*, conditions subsequent (donor's death) or conditions precedent (donee survives the donor) would have to be elevated to the rank of *essentialia negotii* whose absence would invalidate the legal transaction (M. Rzewuski, *Darowizna na wypadek śmierci*, 2015, p. 632). Since donations *mortis causa* are not directly regulated by Polish law, such contracts should also be admissible if made jointly, i.e. by more than one donor. This view corresponds with the principle of freedom of contract and the need to respect the donor's (testator's) intent.

The revocability of legal transactions in question could pose a problem. In the European legal framework, dispositions *mortis causa* have to be revocable, but this requirement is not met by dispositions *inter vivos* that are subject to conditions precedent or subsequent (See also: E. Drozd, Rejent 1992, No. 1, pp. 76-. Cf. K. Osajda, 2013, p. 257). If such contracts fall subject to the general provisions applicable to donations, the same principles should apply to revocation. When the right to revoke a contract is limited to the circumstances indicated in art. 896 and art. 898 of the civil code, one of the key features of donations *mortis causa*, namely the donor's unlimited right to revoke the transaction at any time, cannot be executed. For this reason alone, separate regulations concerning donations *mortis causa* should be introduced in the part of the civil code dealing with succession (M. Rzewuski, *Darowizna na wypadek śmierci*, 2015, pp. 633-).

5.2. Remarks *de lege ferenda*

Before moving to the final remarks, let me clarify that I strongly support the introduction of new categories of donations *mortis causa*, including joint wills and joint donations *mortis causa*, to the Polish legal system. What the Polish civil code needs are effective mechanisms that would enable individuals, in particular spouses, to dispose of jointly accumulated property after their death. The testators' intentions are generally focused on the subject matter and the recipients of inheritance. The choice of legal transaction that would guarantee the achievement of that goal is of secondary, if any, importance for the testators. The greater the number of legal mechanisms that effectively fulfill the testators' instructions, the greater the probability that their intentions will be fully satisfied. The introduction of joint dispositions *mortis causa,* in the form of wills and contracts, to the Polish legal system could contribute to the achievement of those goals.

I will not attempt to propose specific regulations concerning joint dispositions mortis causa. I believe that the relevant provisions should be modeled on tested foreign solutions, in particular German laws, concerning joint wills and inheritance contracts which have been part of the German legal system for more than a century.

Excluding the provisions of art. 942 of the civil code, there are no other normative acts or arguments that disqualify the admissibility of joint testaments in the Polish legal system. Joint wills would undoubtedly embody the principles of freedom of testation and *favor testamenti*. The admissibility of all joint wills, in particular those made orally, is still debated in Polish law. In my opinion, a set of dedicated, exhaustive and unambiguous laws enabling joint dispositions *mortis causa* and laying down the formal requirements for joint testation should be introduced to disperse all doubts.

In theory, this goal could be achieved simply by repealing art. 942 from the Polish civil code without the need for any other legislative modifications. This solution seems fairly easy, especially since the provisions of art. 942 seem largely outdated from the point of view of current social needs. The elimination of this article from the civil law is unlikely to generate a legal gap because the general principle of *favor testamenti* would apply (See: K. Osajda, 2005, pp. 118-122). Nonetheless, comprehensive laws regulating joint testation should be formulated *de novo* to disperse any practical and substantive doubts.

Similar conclusions can be formulated in respect of joint contracts of inheritance. Donations *mortis causa* should be made on the following conditions: the donor has full capacity to enter into legal transactions (§ 2275 of the German civil code), the contract may not be concluded by an authorized representative (§ 2274 of the German civil code), the donor should make the donation by way of a notarized deed (§ 2276 section 1 of the German civil code) (Cf. A. Duda, Rejent 2004, No. 3-4, pp. 122-126; O. Palandt, 2009, pp. 2420-.; H.G. Bamberger, H. Roth, 2008, pp. 2248-), the donor's estate, in whole or in part, could constitute the subject matter of a donation *mortis causa*; a donation contract cannot be unilaterally revoked, but it can be dissolved (§ 2294 of the German civil code) or terminated by both parties (§ 2290 of the German civil code). A donation *mortis causa* should not limit the donor's ability to freely manage the subject matter of the donation. Polish regulations should also emulate the provisions of § 2289 of the German civil code which make donation *mortis causa* the most powerful instrument of succession that overrides the provisions of any subsequent wills or contracts to the detriment of the done (Cf. E. Rott-Pietrzyk, Rejent 2006, No. 2, pp. 175-176).

In my opinion, donations *mortis causa* should be regulated by succession law and take legal effect only after the donor's death. A donation contract would not be binding for the donor during his or her lifetime, therefore, the donor would retain the sole right to manage his property. The donee would be protected against the donor's dishonesty by being able to claim the release of the subject matter of the donation (O. Palandt, 2009, pp. 2414-2417; H.G. Bamberger, H. Roth, 2008, pp. 2233-2241), requesting the annulment of the donor's transactions *inter vivos* that violate the principles of community life, entering into a contract that prevents the donor from performing specific transactions *inter vivos*, claiming damages *ex contractu*, and instituting a formal complaint that the subject matter of the donation was not effectively released to the donee (See: A. Duda, Rejent 2004, No. 3-4, pp. 143, 148; K. Osajda, 2013, p. 612).

In conclusion, the Polish succession law would be most effectively amended by introducing new, comprehensive regulations concerning joint dispositions *mortis causa*, in the form of a will or a contract of inheritance. The institution of joint disposition *mortis causa* would thus complement the list of legally admissible instruments of succession. The proposed solution reflects the spouses' right to make dispositions *mortis causa* relating to property that was accumulated jointly during their lifetime. The option of awarding mutual rights to other parties who remain in a co-dependent relationship should also be considered with the aim of fulfilling their joint intentions and desires.

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Consumer rights in the light of the Act on Consumer Rights of 30 May 2014. Selected problems

Abstract

The paper analyses the impact of the Act on Consumer Rights of 30 May 2014 on the operation of online stores. The act outlines the duties of owners of stores involved in distance selling as well as duties of entities offering off-premises sales. The paper also discusses selected consumer rights standardised and regulated in more detail by the act. Previously these regulations were included in a number of separate laws.

The legislator's intention behind the above regulations was to provide consumers with safe *online* shopping performed in accordance with clearly defined terms. A claim may be made at this point that the above goal has been partially achieved. The provisions of individual articles of the act are coherent, complement one another and in this sense they constitute a nearly comprehensive regulation of issues connected with the protection of consumer rights.

It should be pointed out, however, that the above regulations are additionally complemented by the Act on the Provision of Services by Electronic Means, by the Civil Code and by the Act on the Protection of Personal Data. The need for the act on consumer rights resulted from Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

The paper discusses in detail the changes resulting from the above directive, including in particular the consumer's right of withdrawal. In the summary it is concluded that although the enacted law regulates consumer rights in detail, it is not capable of protecting buyers from inappropriate operation of online stores.

The above is due to the fact that the legislator gave online traders considerable freedom in defining the scope of their duties towards customers and in drafting online store terms.

In the conclusions to the paper the need was suggested for changes including a uniform template of terms of online sales. The introduction of such a template would undoubtedly help eliminate the use of prohibited contractual clauses in the terms of sale of online stores. The goal is to propose legal solutions to help achieve this objective.

Keywords:
online sales, consumer rights, directive of the European Parliament, withdrawal, personal data protection

1. Introduction

These days, much importance is attached to the right to development which involves the use of the achievements of civilisation, including the growing information systems and the internet.

The availability of the above systems to every person and the general access to the WWW is an achievement that implies the development of *e-commerce*. The above changes result in increased opportunities for consumers to use the network of online stores and to make distance purchases of goods and services. Another important issue is to determine the manner of protection of the personal data of consumers using online stores, as these data identify individuals and their place of residence, thus having potential impact on their security. The databases maintained by online traders must be properly protected against unauthorised access as well as against using the information contrary to the intention of the data provider.

So far, in the Polish law, regulations relating to consumer rights could be found in the Civil Code ("the CC")[1], in the Act on the Protection of Certain Consumer Rights and on Liability for Damage Caused by Dangerous Products of 2 March 2000[2], and in the Act on Specific Terms and Conditions of Consumer Sale and on the Amendments to the Civil Code of 27 July 2002[3]. The Civil Code regulated the protection of consumer rights and the duties of traders, including those relating to legal guarantee and commercial guarantee (referred to in the Polish Civil Code as implied warranty for defects and [quality] warranty). As regards the protection of personal data, the Act on the Provision of Services by Electronic Means of 18 July 2002[4] has not lost its significance.

On 30 May 2014 the Act on Consumer Rights was enacted ("the act", "ACR")[5]. The adoption of the legal regulations included in the act followed from the transposition of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. Assuming that the legislator's intention in introducing the new legal solutions was to provide the consumers with a framework ensuring safe *online* shopping governed by clearly defined rules, it must be stated that the goal has been largely achieved. The provisions of individual articles of the act are coherent, complement one another and in this sense they constitute a nearly comprehensive regulation of issues connected with the protection of consumer rights. It should be pointed out, however, that the enacted law does not guarantee one hundred percent protection of the purchaser against inappropriate operation of online stores. Certain issues have remained that require additional or more detailed regulation.

This paper presents in detail the duties of online traders towards consumers and discusses the rights of consumers of online stores, including in particular the right of withdrawal under the act of 30 May 2014 which came into effect in Poland on 25 December 2014. Given the fact that online sales of goods and services has recently become much more popular and that such form of trade concerns many aspects of human activity, there arose a need to provide a legal framework for the operation of online traders. This paper analyses the provisions of the act in the context of their practical application as well as their impact on the strengthening and standardisation of the consumer's right to withdraw from the contract without giving any reason, within a time limit set in the act. Another issue discussed in the paper is the manner in which consumers are informed by online traders about their rights, as well as legal consequences of the trader's failure to present the information to the consumer. The conclusions include a proposal for a uniform regulation of the wording of online store terms and for introducing provisions that traders would have to include in such terms.

2. Main objectives of the act

The main idea behind the enactment of the Act on Consumer Rights was to implement Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights ("the Directive")[6]. Pursuant to Article 28(1)

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[1] Act of 23 April 1964 – Civil Code (consolidated text Dz.U. [*Journal of Laws*] 2014, item 121 as amended).

[2] Consolidated text Dz.U. 2012, item 1225.

[3] Original text Dz.U. 2002 Nr 141, item 1176 as amended

[4] Consolidated text Dz.U. 2014, poz. 1182 as amended

[5] Consolidated text Dz.U. 2014, item 827.

[6] Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/WE of the European Parliament and of the Council (OJ of the EU L 304/64 of 22 November 2011).

of the above Directive, by 13 December 2013, Member States were obliged to adopt and publish laws and regulations, as well as administrative provisions necessary to comply with the Directive, and to apply such measures no later than on 13 June 2014[7]..

In Poland, the above application date was postponed. The Act on Consumer Rights of 30 May 2014 was signed by the President on 17 June 2014 and published on 24 June 2014. In connection with the six-month *vacatio legis,* the act came into force on 25 December 2014[8].The postponement of the date of the act's coming into force was justified by the need to implement subordinate legislation and to amend the Civil Code.

In accordance with the communiqué of the Government Information Centre of 24 December 2013, "incorporation of the Consumer Rights Directive into the Civil Code will require traders to use uniform regulations defining their liability for the quality of the things sold. As a consequence, following the amendments, consumers will be able to use only two complaint procedures: under a legal guarantee and under the commercial guarantee"[9]. The goals behind the transposition of the Directive[10] were defined in the reasons for the bill on consumer rights.

From item 1 of the reasons it follows that the transposition "of the Consumer Rights Directive will standardise and add more detail to the regulations relating to consumer contracts concluded under typical circumstances (at the trader's premises) as regards information requirements and consumer contracts concluded under atypical circumstances (away from the trader's premises and at a distance)", for instance via the internet[11]. In connection with the above objective it should be pointed out that the act achieves its goal by providing a comprehensive regulation of the issues relating

[7] OJ of the EU L 304/82 of 22 November 2011.

[8] Sejm of the Republic of Poland, *Przebieg procesu legislacyjnego dotyczący rządowego projektu ustawy o prawach konsumenta (druk nr 2076)*, http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=2076 [accessed: 03.05.2015]; Internetowy System Aktów Prawnych (Online Legal Database), Act on Consumer Rights of 30 May 2014 (Dz.U. 2014, item 827), http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827 [accessed: 03.05.2015].

[9] The Chancellery of the Prime Minister, *Projekt ustawy o prawach konsumenta, przedłożony przez ministra sprawiedliwości*, https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/projekt-ustawy-o-prawach-konsumentow-przedlozony-przez-ministra.html [accessed: 03.05.2015].

[10] OJ of the EU L304/64 of 22 November 2011.

[11] Sejm of the Republic of Poland, VII kadencja, Druk nr 2076, *Uzasadnienie do rządowego projektu ustawy o prawach konsumenta z dnia 17 stycznia 2014 roku*, s. 1–2, http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2076 [accessed: 03.05.2015].

to the conclusion of consumer contracts. The act specifies the contracts its provisions are applicable to as well as the cases where its provisions do not apply (Articles 3 and 4 ACR). The above facilitates the definition of the substance of the regulation. As far as the exercise of the right to development and the right to information is concerned, the act partially defines the rights of the consumer, including the duties of the trader concluding a contract with the consumer, the principles and procedures for entering into distance and off-premises contracts, the principles and procedure for the exercise of the consumer's right of withdrawal from a distance or off-premises contract, as well as principles and procedure for concluding with the consumer of a distance contract of financial services (Article 1 ACR). What is missing is the coherence between individual wordings that can be used by traders in their online store terms.

The concept of consumer can be found in article 22[1] of the Civil Code and currently a consumer is understood as any natural person performing a legal act which is not directly related to his business or professional activity. Interestingly, the above definition was amended by Article 44(1) of the Act on Consumer Rights which followed from the preamble of the Directive (Recital 17) in accordance with which the definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession[12].

3. Scope of implemented changes

The right to information has become the overriding goal of the changes introduced by the act. Some of the rights have not been regulated at all and therefore comprehensive regulation of the consumers' rights and obligations should be evaluated positively, as well as the rights and duties of traders in the scope discussed in this paper. A claim may be made at this point that the Act on Consumer Rights of 30 May 2014 (in force since 25 December 2014) has contributed to the development of guarantees available to consumers and has a considerable impact on the entire body of civil law regulations concerning *e-commerce*. Economic development leads to increased popularity of online stores which have become a widely used way of shopping. What needs to be improved is the manner in which traders

[12] OJ of the EU L 304/66 of 22 November 2011, Preamble, Recital 17. "The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

fulfil their duties included in individual online store terms, also including the correctness of individual provisions.

It should be said that the act provides a lot of details concerning the rights and duties of the trader. What is new is a widely understood regulation concerning off-premises and distance sales of goods. Additionally, the new legislation introduced unification regarding the definition of product parameters as well as references to the legislation regulating legal and commercial guarantees. Among other important issues are the definition of the principles of communication with the consumer applicable to online stores and well as to off-premises contracts. In this context the consumer's right to information about individual rights under the act is of special significance.

The need for standardisation of the subject matter of the Act on Consumer Rights was dictated by the fact that the same acts relating to the conclusion of contracts were regulated using different wording in various pieces of legislation. The above caused incoherence in the provisions of the terms of online sales used for example by online traders. It should be stated that particularly unclear were the principles regarding the right of withdrawal from off-premises or distance contracts. The gathering of all the above issues into a single act of law as well as references to the provisions of the Civil Code (as regards legal and commercial guarantee) will have an undoubtedly positive impact on the procedures aimed at standardisation of both online sales and the structure of off-premises contracts. Additionally, the act made the exercise of consumer rights easier. The outlining in the act of the duties of online traders and of entities offering off-premises sales constitutes a coherent and uniform regulation regarding EU Member States which have been required to transpose the Directive into their national legislation[13].

4. Off-premises or distance contracts. Duties of online store owners regarding informing the consumers about their rights

Pursuant to the transposed Directive[14], chapter 3 of the Act on Consumer Rights[15] includes the duties of the trader regarding the requirements for off-premises or distance contracts. Owners of online stores have a duty to clearly and in an understandable manner:

- inform the consumer about the key properties of goods or services;

[13] OJ of the EU L304/64 of 22 November 2011

[14] OJ of the EU L304/64 of 22 November 2011

[15] Dz.U. 2014, item 827.

- provide the identification details of the trader (for instance the trader's business name), full address under which the trader carries out its business, as well as the registration number of this business and the registration authority;
- provide the price of the goods including taxes and how they were calculated;
- inform about the terms and due date for payment; and about the manner and date of making the performance;
- inform about the manner and time period for the exercise of the right of withdrawal pursuant to Article 27 of the act and attach a form for such withdrawal;
- inform about the costs of returning the thing in the case of withdrawal, with such costs being paid by the consumer;
- inform about key provisions regarding legal and commercial guarantee.

In several places, the act provides that the information is to be formulated in a clear and understandable manner; the aim being to stress that no other form will be accepted or binding on the consumer (Kudła, 2015, pp. 13–14).

It is also stressed that a store owner's duty is to avoid unclear phrases or legalese which may be incomprehensible for an average consumer. If such unclear phrases are used, any negative consequences are for the trader and not for the consumer (Kudła, 2015, pp. 13–14).

From the above list of duties specified in the act it follows that it is the trader offering distance sales who is responsible for making sure that the consumer understands individual provisions and is able to clearly express his/her intention to enter with the online trader into the contract on the specified terms. The above information must be clear to the consumer, whether or not such consumer will finally purchase the product, because the terms are to apply *de facto* to any potential consumer. This is how the right to information is exercised.

What is important with reference to the above-discussed issue is Article 16 of the Act on the Provision of Services by Electronic Means which regulates the manner of processing personal data within the meaning of the Act on the Protection of Personal Data of 29 August 1997[16]. Among important consumer rights is the right to access his personal details, the right to request removal of the data and the right to demand processing of the data exclusively to the extent necessary to make the purchase. What is significant here is the fact that no later than upon the consumer's expressing his intention to enter into a distance contract the trader has a duty to inform the consumer in a clear and understandable manner about the consumer's rights, including among

[16] Dz.U. 2002 No. 101, item 926.

others the right to withdraw and about the functionality of the digital content and about the technical means of its protection (Article 12(19)(1) of the act). Another important issue is the duty to inform the consumer about the content of the guarantee and the manner of exercise of rights under the guarantee.

Among other duties of online traders is the duty to formulate the contract in such a manner and to include the relevant information on the store's website (in online store terms), so that to ensure that at the time of ordering a paid service or paid goods the consumer can clearly confirm that he/she is aware of the duty to make the payment (Mandel, 2015, p. 21). Thus, the consumer is protected even before taking the purchase decision. The above constitutes a very broad protection of consumer rights, with the relevant duties being imposed on the trader. If the consumer is not sufficiently informed about his rights the contract does not come into effect. In the case of distance and off-premises (online stores) sales, the information required by law must be provided on paper, or, with the consumer's consent, on another permanent medium. The same duty relates to the delivery of the relevant contract (Article 14(1) ACR). Traders who fail to meet their information requirements are liable to a fine (Article 139b of the Code of Petty Offences)[17].The aim of the extensive information requirement is to make it easier for consumers to make an informed decision regarding the choice of contracting party and purchase of a product. There is no doubt that standardisation of the terms of online sales would be a way to eliminate the use of abusive clauses. Such standardised terms of online sales would be a reference point for consumer rights from which the trader would not have any possibility to evade. The use of abusive clauses in online store terms is an infringement of consumer rights[18].

5. Legal and commercial guarantee

The Directive also led to modifications in the relationship between the consumer and the trader as regards legal and commercial guarantee. The above regulation can be found in the Civil Code (Article 556 et seq. CC)[19].

[17] Act of 20 May 1971 – Code of Petty Offences (consolidated text Dz.U. 2013, item 482, as amended)

[18] The list of prohibited contractual clauses is maintained by the Consumer and Competition Protection Office, http://uokik.gov.pl/rejestr/ [accessed: 03.05.2015].

[19] Dz.U. 2014, item 121 as amended

A consumer who has bought a defective product will have a choice between repair, replacement, price reduction or withdrawal from the contract. Under the act, if the consumer decides to withdraw from a distance or off-premises contract, he must bear the costs of returning the goods, provided that he has been informed about such duty earlier. So far the above issue has not been precisely regulated by law, which was a source of many doubts among consumers and traders regarding who and when bears the costs of returning the goods and how goods replacements or repairs should be made.

Additionally, the act brings back the application of the Civil Code to commercial guarantee. It means that if a trader who offers a guarantee does not provide details of its content, the consumer will have the right to invoke his rights under the guarantee set forth in the Civil Code. The act extends the guarantee period to two years if the guarantor has not specified it otherwise.

6. Consumer rights

6.1. Concept of consumer

The content of Article 22^1 CC was amended by Article 44(1) of the Act on Consumer Rights of 30 May 2014 and currently a consumer is defined as any natural person performing a legal act which is not directly related to his business or professional activity. In accordance with the preamble to the Directive (Recital 17) the definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession[20]. The above regulation was behind adding more detail to the current definition of consumer.

6.2. Right of withdrawal

The consumer's right of withdrawal is an important element of the act. It also used to be the source of the biggest number of practical problems. Oftentimes, consumers were faced with refusal on the part of online stores to accept returned goods and additionally they had to give reasons for the return (withdrawal from the contract).

[20] OJ of the EU L 304/66 of 22 November 2011, Preamble, Recital 17. "The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

The traders' decisions in the above respect were often discretionary, which often infringed upon the consumers' rights. Under the Act on Consumer Rights currently in force, the procedure and time limits for withdrawal from the contract and for reimbursement of the price are precisely stipulated in Articles 27 and 28 of the act. Consumers who have concluded a distance or off-premises contract may withdraw from such contract within 14 without giving any reasons and without paying any costs. The start of the time period for withdrawal depends on the type of contract and may begin on the date of concluding the contract or on the date of receipt of the goods. The legislator has specified the traders' duty to inform the consumers about their right of withdrawal as well as the consequences of non-compliance with this duty. Where the consumer has not been informed about his right of withdrawal, he may withdraw from the contract even within 12 months from the expiry of the 14 day period (Article 29(1) in conjunction with Article 27 ACR)[21], with the start of the relevant time period depending on the type of contract (Article 28 ACR). It is clear that the trader bears all the negative consequences of his failure to provide the consumer with full information about the consumer's rights by failing to present such information sufficiently clearly on the store's website or by failing to provide the information to the customer in another form at the time of concluding the off-premises contract (Kudła, 2015, pp. 13–14). The trader may convalidate an act non-compliant with the above duty by sending to the consumer, within 12 months from the expiry of the period referred to in Article 27 of the act, information about the consumer's right to withdraw from the contract within 14 days from its receipt (Article 29(1)-29(2) ACR). The trader has a duty to reimburse the consumer for all the payments made by him, including the costs of delivery of the goods (Article 32 ACR).

The act also specifies the duties of the consumer in connection with the return of the goods following withdrawal. Among them are the duty to meet the deadline for the return of the thing, the risk of losing the thing or the risk of diminishing of the thing's value (Articles 34 and 35 ACR) as well as the duty to pay the costs (costs of shipment of the returned goods) (Mandel, 2015, pp. 22–23).

All the above principles have to be implemented in accordance with the provisions of the act, and the situation of the consumer set forth in the contract or online store terms may not be less favourable than the one provided for by the act. In the above respect, the right to development vested in individuals and in the society at large is

[21] This right expires upon expiry of 12 months following the end of the 14 days for withdrawal from the contract.

certainly exercised. This right gives every individual an option to choose the act such individual intends to perform.

The regulation included in Article 38 of the act is important as it excludes the consumer's right of withdrawal in certain cases. The above article lists a total of 13 cases where the right of withdrawal does not apply. Among others, exclusions apply in situations in which the trader has informed the consumer about the loss of the right of withdrawal in connection with a service rendered with the consumer's express consent and situations in which the price or fee depend on market fluctuations. The above provision also lists contracts in which the object of performance is: (1) manufactured to the consumer's specification; (2) is liable to deteriorate or expire rapidly; (3) is delivered sealed and is not suitable for return after unsealing; (4) is inseparably mixed with other items; and (5) alcoholic beverages (in specified circumstances); (6) sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery. The exclusion of the right of withdrawal also applies in respect of contracts for the supply of specified things such as a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications as well as in respect of contracts for the supply of digital content (in specified circumstances). The remaining cases relate to contracts concluded at a public auction, contracts for the provision of accommodation, transport of goods, car rental services, catering or services related to leisure activities as well as to contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance.

6.3. Right of return of goods

The transposition of the Directive of the European Parliament and of the Council leads to harmonisation of national laws of Member States as regards the single form for the return of goods, which constitutes a significant change. When returning the goods, the consumer attaches a completed form delivered to him at the time of purchase or fills out the form via the trader's website. Obviously the goods must be returned.

6.4. Right to refuse acceptance of an unsolicited supply

The act clearly provides that the "unsolicited supplies referred to in Article 9(6) of the Act on Counteracting Unfair Commercial Practices of 23 August 2007[22] are made at the trader's risk and do not impose any obligations on the consumer (Article

[22] Dz.U. 2007 No. 171, item 1206 as amended.

5(1) ACR)[23].What is important here is the rule that the consumer does not have to act in any way if he does not wish to enter into such a contract. The lack of the consumer's response cannot be regarded as his consent to entering into the contract and does not produce any legal consequences.

7. Provision of financial services away from the traders premises

The act includes separate regulations for distance contracts for financial services (Chapter 5 ACR). The broad range of such financial services often offered by agents operating through "home visits" required the regulation of the area and the introduction of a uniform system of supervision over the relevant contracts. Unification was required as regards interpretation of the declarations made by representatives of financial institutions operating away from the trader's premises.

Therefore, it became necessary to introduce precise statutory provisions preventing ambiguity as to the terms of the contract concluded, and in particular regulating the right of withdrawal. A provision was introduced according to which in the case of withdrawal the contract does not produce any legal consequences for the consumer, despite the consumer's earlier consent to its conclusion and despite acceptance of its terms (Article 39 ACR).

Obviously, the consumer has a duty to return the performance received; with such duty aimed to protect the trader. The situation where the performance has been made in full is an exception (Article 40(3) - 40(4) and Article 40(6)(1) ACR).

8. Summary

The provisions of the Act on Consumer Rights of 30 May 2014 clearly define the rights of consumers and significantly improve the consumer's legal situation, both as regards distance and off-premises contracts. Currently the sales process is uniform and is clearly regulated in the law. The law imposes duties on sellers (traders) as well as negative consequences for non-compliance. The above gives additional legal protection for the consumers in each concluded contract. It is worth noting that in some situations contracts of sale may turn out to be void, and if the consumer withdraws from the contract the trader has a duty to reimburse the customer also for the cost of returning the goods.

[23] Dz.U. 2014, item 827.

In summary it should be said that the entry into force on 25 December 2014 of the Act on Consumer Rights was a milestone from the point of view of consumers making online purchases of goods or entering into off-premises contracts. Before the above date, the status of the parties to the transactions concluded in the above manner was not equal and there were tendencies to limit the rights of consumers as a result of insufficient information about their rights supplied to them by traders. Also, it was difficult for an average consumer to access the relevant regulations, as the provisions regarding consumer rights were scattered in various pieces of legislation. Currently the problem has been resolved because all the rights and obligations have been included in a single act of law, i.e. the Act on Consumer Rights of 30 May 2014. The issues relating to the manner of exercise of rights under legal and commercial guarantee have also been comprehensively included in Sections I–IV of Title XI of the Civil Code (Articles 535–582 CC)[24].Unquestionably, a downside of the new regulation is the fact that *e-commerce* traders still have a lot of discretion in defining their duties towards the consumer and in drafting the terms of online sales. Therefore, a standardised form of online sales terms should be introduced. The adoption of a uniform template would certainly contribute to eliminating the use of abusive clauses in online store sales terms.

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[24] The Act on the Provision of Services by Electronic Means of 18 July 2002 (consolidated text Dz.U. 2013, item 1422) applies exclusively to service providers (traders) and as such does not include any direct regulations concerning consumer rights.

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Employment standards on the minimum wage in Poland in the light of the human right to respectful remuneration

Abstract
The article is an analysis of the Polish regulations on remuneration for work in the context of human rights, in particular the right to fair remuneration for work. Considerations under Polish law are preceded by an analysis of the concept of remuneration for work in selected political and legal doctrines, as well as under international law, especially in the documents of the International Labour Organisation, as well as under European law. Current regulations on remuneration for work move away from the simple relationship between wages and work. They relate more to the socialist concept, referring to the moral value of work. Catholic social teaching has also had a significant influence on the concept of remuneration for work, giving clear priority to protecting work and its dignity over property protection, and postulating fixing a fair wage, taking into account not only the criterion of the price of work, based on the market mechanism of a job's supply and demand, but also the need to ensure for the worker and his family a decent living. Also, international and European human rights mechanisms such as the Universal Declaration of Human Rights, the International Covenant on Social and Economic Affairs, the documents of the International Labour Organisation and the European Social Charter, respect for the rights of the worker and members of his family to live in dignity. On this basis, the Author builds a model of fair wages and analyses how Polish regulations could be adjusted to this model, paying particular attention to the provisions of the Polish Constitution of 1952, the Labour Code enacted in 1974, heavily amended in 1996, as well as the Polish Constitution of 1997. In the Polish legal system it is impossible to find a legal definition of 'wage'. Despite this, there are no significant differences in the understanding of the term. As a rule, it is assumed that a salary is a cash benefit given to the employee from the employer in exchange for work performed, which is paid within the specified time, usually in cash. However, an evolution in terms of wage equivalence can be seen. In this context, the Polish legal regulation of wages for work seems to be moving

away from the simple correlation of remuneration and quantity, quality of work and the qualifications of the employee towards the concept of a family wage, taking into account the requirement to provide the minimum conditions for a dignified existence for the employee and his family, which is implemented by the convention of the minimum wage. Analysis of the overall changes in the Polish legal system and their axiological justification allows us to see a positive value trend of the wider concept of salary towards the concept of family-wage, as part of an international trend to protect remuneration for work.

Keywords:
minimum wage, labour standards, equal pay, decent wage, respectful remuneration

1. Introduction

Legal regulations related to the remuneration of work reflect the views of political and legal doctrines regarding ownership and work and the possible priority to the protection of one of these values. Nowadays, the liberal(neo-liberal) views according to which these values deserve equal protection are not reflected in international or national legislations (Wagner 1996, p.10). Moreover, even in the liberal concept(social liberalism),the need to link the remuneration for work with non-market criteria shaping wages, such as the degree of burden of work, its capacity, as well as non-economic factors like the quality of life of employees, is perceived (Góral 2011, p. 167).

Today's regulations of remuneration for working relation to the value of work are moving away from the simple relationship between wages and work. They relate more to the socialist concept referring to the moral value of work and leaving behind its nature as a commodity (Góral 2011, p. 167).. Also, Catholic social teaching has a significant influence on the concept of remuneration for work, giving clear priority to protecting work and its dignity over the protection of property, and it suggests fixing a fair wage taking into account not only the criterion of the price of work determined by the market mechanism of demand and supply of work, but also the need to ensure a decent life for the worker and his family (Strzeszewski 1978, p. 286). The employee's right to respectful remuneration was confirmed and raised to the status of a human right in the encyclical *Pacem in Terris* by Pope John XXIII. It was also expressed in the teachings of John Paul II, especially in his encyclical *Laborem excercens*, which talked about wages meeting the basic needs of the worker and his family as well as

those which cover cultural needs, and providing the realization of social justice in employment relationships (Góral 2011, p. 169). From this point of view, the views of Catholic social teaching on the moral value of work do not differ substantially from socialist statements (Sanetra 1983, p. 82-83), and in this sense the influence of both cited political and legal doctrines on the international regulation of remuneration for work is not in doubt.

2. The concept of remuneration for work in international and European law

The right to remuneration for work has been elevated in international documents to the status of a human right in the Universal Declaration of Human Rights of 1948, which first envisaged the right of the worker to "just and favourable remuneration", ensuring for himself and his family a respectful existence. (Art. 23 para.3). This provision should be interpreted in conjunction with other regulations of the Declaration, guaranteeing to every person the right to a standard of living adequate for the health and well-being of himself and members of his family (Art. 25) and the right to equal pay for equal work (art. 23, para. 2). Although it is not normative in nature, the provisions of the Declaration are the undisputed guidelines for further regulation in the field of human rights. The confirmation of these principles are included in the International Covenant on Economic, Social and Cultural Rights of 1966, which in Art. 7 refers to the right of all workers to remuneration that reflects fair wages and ensures a decent living for themselves and their families. It justified the separation of salary fairness from the principle of simple equivalence between work and pay and its adoption as a decisive criterion for payment of work, providing the necessities of life of the employee and members of his family (Skoczyński 1997, p.12).

International law was supplemented in the documents of the International Labour Organisation, which paid particular attention to this topic. Although none of the regulations of the ILO expressly provide for a decent wage, many of the mare devoted to specific aspects e.g. minimum wage and the criteria for determining minimum wage (Skoczyński 1994, p. 3). The matter of a minimum wage was placed on the agenda of the 1927 session of the International Labour Conference, which resulted in the Adoption of the Minimum Wage-Fixing Machinery Convention No. 26 in 1928 and Recommendation No.30 in 1928. According to Article 1 of Convention No. 26, state parties undertake "to create

or Maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of trades (and Particular in home-working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low." Under Article 2 of the Convention, states kept the freedom to decide, after consultation with workers' and Employers' Organizations, the trades or parts of trades in which the minimum wage fixing machinery shall be applied (ILO 2014, p. 3). Moreover, in accordance with Article 3 of the Convention, once fixed, minimum wage rates shall not be the subject of abatement by individual agreement nor, except with general or particular authorization of the competent authority, of collective bargaining (ILO 2014, p. 3).

Convention No. 28 is supplemented by Recommendation No. 30, which provides that the minimum wage fixing body should take into account the necessity of enabling workers to maintain suitable standards of living with regard to "the rates of wages being paid for similar work in trades where the workers are adequately organised and have concluded effective collective agreements, or, if no such standard of reference is available in circumstances, to the general level of wages prevailing in the country or in the particular locality" (Recommendation No.30, part III).The Recommendation also stipulates detailed provisions describing how to establish and review the rate of a minimum wage. It obliged states to take measures to ensure that wages are not paid at less than minimum rates as well as ensuring the effectiveness of wage protection to guard the interests of workers so as to avoid the possibility of unfair competition between employers.

The ILO specified its goals and purposes in the 1944 Declaration, known as the Declaration of Philadelphia, where the ILO reaffirmed that "poverty anywhere constitutes a danger to prosperity everywhere." With regard to this principle, the ILO recognized the necessity to develop "policies in regard to wages and earnings (...) calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection." In its resolution adopted in 1945, the International Labour Organization recommended "the establishment of appropriate minimum wage standards, adequate for satisfying reasonable human needs" in order to "assist the progressive raising of the standard of living of all workers" (the ILO Resolution 1945). However, for the first time, the ILO set a specific amount for the minimum wage in 1946 under the Wages, Hours of Work and Mining (Sea) Convention No. 76 for seafarers, making the effort to include previously excluded categories of workers to the international framework of

minimum wage protection. Furthermore the matter of minimum wage guarantees was included in several ILO documents related to specific spheres of employment and the procedure of fixing minimum wage levels at the national level, i.e. the Social Policy (Non-Metropolitan Territories) Convention No. 82 in 1947 adopted to guarantee special protection to workers in these territories, the Minimum Wage Fixing Machinery (Agriculture) Convention No. 99 in 1951 and the Minimum Wage Fixing Machinery (Agriculture) Recommendation No. 89 in 1951 adopted the regulation of wages in agriculture, Convention No. 131 and Recommendation No. 135 (Bomba 2015, p. 4).

Under European law, the European Social Charter of 1960 should be noted. It states the right of all workers to "equitable remuneration" giving them and members of their families a decent standard of life (Art. 4) and imposes obligations on the state to ensure that this right is exercised effectively. Initially, the general criterion of "salary fairness" was defined as being not less than 68% of the national gross average, but since the 1990s, this figures was revised to 60%.A similar adjustment of remuneration, detached from equivalence wages and working conditions, the Community Charter of Social Rights of Workers of 1989 includes and states the obligation of the state to guarantee to employees the right to equitable remuneration which guarantees life at the appropriate level. In addition, the Charter of Fundamental Rights states in Article. 31 the "fair conditions of work".

In summary, on the basis of international law, the concept of remuneration for work is widely understood to include the scope of protection of the cash benefits which are the source of livelihood not only for the employee, but also for members of his family. As a result of supranational regulation, the basic wage relationship was broken, and reference to remuneration with a wide spectrum of socio-economic factors that affect the well-being of the employee and his family members. Moreover, at the supranational level, regulation of remuneration for work includes income received from all types of work regardless of its legal basis. Therefore, it goes far beyond the employment relationship, apart from the working conditions, including the worker's subordination as the criterion of the protection of alimentary and social functions which need to be performed by the income derived from work. In this way, on the basis of international national law, the employer has become a guarantor of the social well-being of the worker and his family, regardless of the legal nature of the relationship(an employment-based relationship or a non-employment based relationship) connecting employers with workers.

3.The evolution of the concept of wages under Polish law

Polish legal regulations in terms of remuneration of work are influenced by socio-economic changes, however, they do not fully reflect the patterns rooted in supranational law.

With regard to the subjective scope of the wage, attention needs to be paid to the evolution of the regulation of remuneration for work from the concept of wage for work reflecting the simple relationship wage and work to the concept wage for work reflecting the needs of employee and his family, adopted in supranational law.

The Polish Constitution of 22 July 1952 lacked an explicit worker's right to remuneration that would provide the worker and his family with a decent standard of living. The Polish legislation does not deviate from the regulations of the right to remuneration in other Central and Eastern Europe socialist countries (Nowak 2002, p. 15). Remuneration equivalence was measured instead of the category of the needs of the worker and his family, by category of quantity and quality of work, with particular emphasis on the requirement of "equal pay for equal work". This rule was reflected in Art. 14 section 3 of the Constitution of 1952, according to which the state implements the principle:"from each according to his ability, to each according to his work". Art. 78 of the Labour Code of 1974 confirmed this principle. It included the postulate for state authorities and authorized institutions to determine wages with regard to the type of work and employee qualifications required for its performance (Bieniek 1977, p. 281).

After 1989, the impact of international rules and Catholic social teaching determined the changes in the perception of remuneration and it underlined the criterion emphasizing the needs of the worker and his family as the primary factor affecting the amount of remuneration for work. Despite this, as a result of differences of opinion at the process of preparing the Polish Constitution of 1997 about the role of the state in shaping wages (Nowak 2002, p. 15), the constitutional regulation adopted to guarantee a just and fair wage is quite modest. The Constitution adopted on March 22, 1997 regulates in Art. 33 the right of men and women to equal pay for work of equal value and guarantees in Art. 65 para. 4 the minimum wage or adopting the criteria for its determining by a separate Parliamentary Act. The constitutional regulation is therefore limited to the imposition of the legislator's obligation to establish by law the minimum wage, or criteria to determine it, leaving him free to decide on their formation. At the same time, contrary to Art. 14 para. 3 of the Constitution of 1952, it does not

specify principles for determining remuneration for work. In view of the narrow constitutional regulation of remuneration for work, to indicate the constitutional guidelines for determining remuneration for work, some authors refer to Art. 2 of the Constitution, according to which work is protected by the Republic of Poland. Under the provision, it is the duty of the state to establish a minimum wage which at least ensures the minimum resources necessary for existence (Zieliński 2000, p. 48). However, the general nature of the provision of art. 65 para. 4 of the Constitution of 1997 allows that criteria for minimum wage adopted by the legislator do not necessarily have to take into account the needs of the worker and his family, and even if they do not meet with these criteria, it would be difficult to see a violation of Art. 65 para. 4 of the Constitution. Consequently, under the Constitution, the adjustment of remuneration for work evolves from indicating the criteria for determining the amount referring to the quality and quantity of work in the Constitution of 1952 to the general rule in the Constitution of 1997, containing the delegation for the ordinary legislator to determine the minimum wage or criteria for its determination.

However, the general nature of the constitutional regulation does not mean that the legislator is completely free in the development of criteria for determining the remuneration for work. In fact he is bound by the criteria for determining the remuneration for work resulting from international law. In accordance with Art. 9 of the Constitution of 1997, Poland shall respect binding international law. Additionally, under Art. 87 of the Constitution it recognizes ratified international treaties as a source of universally binding law in Poland. Moreover, if the ratification of international agreements required prior consent granted by statute, regulation of international law takes precedence over national laws if the latter are opposed to it (Art. 91 para. 2 of the Constitution of 1997).

International regulations imply an obligation for Poland to ensure that workers and their families have the right to equitable remuneration, which is reflected in the right of the worker to the minimum wage which is an amount that should ensure for him and his family an adequate(fair) standard of living (Wratny 1997, p. 37). However, the impact of international law on the legal regulation of remuneration for work faces problems associated with the only partial ratification by Poland of international acts regulating national duties in the sphere of the protection of wages. Among the international regulations binding Poland are Art. 23 para. 3 of the Universal Declaration of Human Rights as well as Art. 7 of the Covenant on Economic, Social and Cultural Rights. The employee's right

to adequate (fair) the remuneration is also confirmed by the documents of the International Labour Organisation, including the ILO Constitution, where in the preface we read about the need to provide an income which guarantees decent living conditions. Among the ILO documents devoted to the remuneration for work, Poland has ratified only ILO Convention No. 99 of July 28 1952 on minimum wage fixing in agriculture, including the processing industry, which does not contain criteria for determining the minimum wage (Sobczyk 2013, Legalis). Among the international sources of law relating to remuneration for work ratified by Poland the partially ratified European Social Charter should also be remembered. Despite the omission by Poland of Art. 4 para. 1 of the European Social Charter in the ratification process, which fixes the level of the minimum wage, Poland should pursue policies aiming to ratify the above regulations in the future. Also Art.2 (Vol. II) the Covenant on Economic, Social and Cultural Rights obliges states to take all possible measures, in particular legislative, in order to realize the rights included therein. The generality of the provisions of the Covenant excludes its direct applicability, but as an international agreement ratified upon prior consent granted by statute and the source of universally binding law in Poland (Art. 87 of the Constitution), it enforces consistency with its provisions of the statutory regulations (Florek 2001, p. 56).

As a result, a significant change in adapting the concept of remuneration for work to international standards shall not take place under the Constitution, but at the level of statutory regulation, which extends from a simple correlation between remuneration and the quality and quantity of work performed, to take into account the criterion of the needs of workers and their families. This is reflected in particular in the amendment of Art.13of the Labour Code in 1996, resulting in an extension of the catalogue of basic principles of labour law to the employee's right to fair remuneration provided under the recommendation on minimum wage given by the Minister of Labour and Social Policy under the delegation contained inArt.77(4) of Labour Code.

The current minimum wage regulation exercises the constitutional obligation of Art. 65 para. 4 to create criteria for determining the minimum wage at the statutory level. Despite frequent changes in the amount of the minimum wage, so far the legislator has decided to regulate it through giving a fixed amount through the Act of 10.10.2002 on minimum wage, amended each time the amount of the minimum wage is changed, instead of taking criteria for fixing the minimum wage. However problematic, such a solution at the statutory level takes into account the

international legal requirements to ensure that the needs of the employee and his family members are met and for this reason it should be regarded as lawful from the perspective of international concept of a decent wage.

4. Summary

Analysis of the concept of remuneration for work allows me to give the opinion that the remuneration for work is not only for work actually performed, and for non-working periods if the law so states(e.g. Art. 81 of the Labour Code - work stoppage), but above all the wage is reflected by the needs of the workers and their families, defined by a decent standard of living whose level is determined by the minimum wage (art. 13 of the Labour Code, Art. 6 of the Act on the minimum wage). As a result, remuneration for work is separated from the market value of the work and it becomes remuneration enjoyed for the very reason of being employment. In addition, within the subjective aspect of remuneration for work, it is correctly pointed out that international or national standards (Art. 2, 24 and 65 para. 4 of the Constitution) do not limit the regulation of remuneration for work to the employment relationship (based on labour law contracts), and the interpretation of the terms contained therein as "employee" and "work" through the prism of subordinated work is methodologically flawed (Sobczyk 2013, Legalis). As a result, several authors have pointed out the need toexpand the interpretation of the concept of remuneration for work not necessarily subordinated.The postulated change is reflected in the problem of the scope of labour law being too narrowly shaped, which instead of protecting the job as a source of livelihood, it protects the employee remaining in the employment relationship. Successful attempts to overcome the narrow interpretation of the regulations protecting wages are found in parliamentary draft amendments to the law on the minimum wage, by extending it to workers who perform work under civil contracts. It should be seen as an expression of the need to adapt a substantive law to social needs resulting from the defective replacement of employment contracts (labour law contracts) by non-employment-based contracts (civil law contracts). Because of the same functions of remuneration for personal work in the field of protection against the social exclusion of the worker and his family members, and the *ratio legis* of the protective regulation of wages, trends in the field of expanding the concept of remuneration for work towards the concept of 'family wages' related to any kind of employment, if it is the source of livelihood, should be viewed positively in the light of the international trends to protect wages.

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The right to property in the ECHR – requirements of contemporary trade

Abstarct
This present thesis concerns the protection of proprietorship right in the European Convention on Human Rights, ratified as of September 1953 by the Member States of the Council of Europe (hereinafter referred to as "ECHR"). The central purpose of the presented paper is to analyze the provisions of ECHR to appraise if they are still in compliance with the requirements of a contemporary democratic state, especially due to requirements of economy and trade. The second aim of this study will be to set out postulates de lege ferenda on this basis. The ECHR determines a number of criteria which legal systems of particular countries should respect in order to be considered democratic. On the other hand, the development of the idea of human rights is treated as a measure of civilizational progress, as in countries with the highest level of economic growth the level of protection of human rights is also the highest . The right to protection of property is a prerequisite for the existence and development of free market democracy and the level of its protection also influences the economic growth of a given country. Therefore, the subject of the presentation will combine the two issues: protection of property and requirements imposed within this scope by contemporary economic exchange.

Keywords:
protection of property, contemporary trade, ECHR, proprietorship, human rights

1. Introduction

This present thesis concerns protection of proprietorship right in European Convention on Human Rights ratified as of September 1953 by the Member States of the Council of Europe (hereinafter referred to: "**ECHR**"), analyzed in a rather

untypical context, that is one of requirements imposed by contemporary trade and economic exchange. The central purpose of presented lecture is to analyse the provisions of European Convention on Human Rights to appraise if the are still in compliance with the requirements of contemporary trade.

The ECHR determines a number of criteria which legal systems of particular countries should respect in order to be considered democratic. On the other hand, the development of the idea of human rights is treated as a measure of civilizational progress, as in countries with the highest level of economic growth the level of protection of human rights is also the highest (A. Leszczyńska-Rydlewska, *Granice dopuszczalnej ingerencji państwa w prawo własności podatnika w świetle standardów europejskiej konwencji praw człowieka*, Toruński Rocznik Podatkowy 2010, p. 138). The right to protection of property is a prerequisite for the existence and development of free market democracy and the level of its protection also influences the economic growth of a given country. Therefore, the subject of the presentation will combine the two issues: protection of property and requirements imposed within this scope by contemporary economic exchange.

ECHR for decades has set out the substantial standards of protection of human rights in the European continent, especially in the area of protection of proprietorship. This issue is not regulated in the main part of the convention, but in Article 1 of the Convention's Additional Protocol (AP). In accordance to this provision: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

To begin with, one should take into consideration the fact that the right to protection of property is one of the few rights in the ECHR which are given not only to natural persons but also legal persons, e.g. companies. However, the subjective scope of the convention does not encompass state-owned companies.

The structure of above mentioned Article 1 of Protocol No. 1 to the Convention sets out that convention guarantees the right to property but this protection is established in three different rules[1]. The first, which is expressed in the first sentence

[1] This point of view is still actual in latest jurisdictions, for example: case of Iwaszkiewicz v. Poland, 30614/06, 26.06.2011. Case of Albergas and Arlauskas v. Lithuania, 17978/05, 27.05.2014.

of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (See Case of Pressos Compania Naviera S.A. and others v. Belgium, 17849/91, 20.11.1995).

In jurisdiction of ECHR it is pointed out, that the second and third rule must be interpreted in the light of the general principle laid down in the first rule, but in the situation in which non of this two rules may be applicable it is possible to resolve the dispute only on the grounds of the firs rule – the most general one.

Hereunder I will try to answer the question set out in the title of my lecture separately for each rule.

2. Rule number one principle of peaceful enjoyment of property

Peaceful enjoyment of possessions I the right to: have, to use, to repair, to dispose of, to pledge, to lend, and to destroy (H. O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Oxford 2014, p. 868).

The European Court of Human Rights has interpreted "possessions" to include not only tangible property, but also economic interests (goodwill «Case of Van Marle and others v. Holand, 8543/79, 26.06.1986», clientele, ability to run a specify business activity «W. Hermeliński, *Ochrona własności w orzecznictwie Europejskiego Trybunału Paw Człowieka w Strasburgu,* Palestra 2004 nr 5-6, p. 107»), contractual agreements with economic value (specify claim), Intellectual property, compensation claims against the state and public law related claims such as pensions (See C.Mik, *Prawo własności w europejskiej konwencji praw człowieka*, Państwo i Prawo 1993 nr 5), company shares (H. O'Boyle & Warbrick, Oxford 2014, p. 863; See case of Branelid v. Ukriane, 8588/79), wrongly paid tax (H. O'Boyle & Warbrick, Oxford 2014, p. 863; See case of Iovioni and Others v. Romania, 57873.), permission to occupy a dwelling (H. O'Boyle & Warbrick, Oxford 2014,p. 863; See case of Saghinadze and others v. Georigia). A. Wróbel points out, that this should be legitimate expectations, not only a mere hope (A. Wróbel [in:] Konwencja o ochronie praw człowieka i podstawowych wolności – Tom II, L. Garlicki red.,Warszawa 2011, p. 476.). There must be a sufficient basis for the interest on national law, for example where there is a settled case law of domestic courts confirming the existence

(H. O'Boyle & Warbrick, Oxford 2014,p. 863; See case of Ramaer and Van Willigen v Netherlands, 34880/12).

In other words, as for the objective scope of protection of property, it is very broad and comprises not only property but all ownership rights and, in some specific situations, also non-ownership rights. The essential characteristic of a possession is the acquired economic value of the individual intrest (H. O'Boyle & Warbrick, Oxford 2014,p. 863).

Examples from jurisdiction:

a) economic interests:

"The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case. The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions"(Case of Van Marle vs Holandias, 73049/01, 26.06.1968).

b) compensation claims against the state and public law

"The financial considerations cited by the Government and their concern to bring Belgian law into line with the law of neighbouring countries could warrant prospective legislation in this area to derogate from the general law of tort. Such considerations could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for compensation. Such a fundamental interference with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake"(Case of Pressos Compania Naviera S.A. and others v. Belgium, 17849/91, 20.11.1995).

c) contractual agreements with economic value (specify claim)

"It was established that the local authorities had not been entitled to transfer the disputed property to the first applicant before the question of restoration of the rights of the former owners had been resolved. The procedures for the sale of

the land were conducted by official bodies exercising the authority of the State (see paragraphs 6-7 above) and the land sale contract was signed between the first applicant and the Vilnius Region Administration under the standard conditions.To that end, the legislation should make it possible to take into account the particular circumstances of each case, so that individuals who have acquired their possessions in good faith are not made to bear the burden of responsibility, which is rightfully that of the State which confiscated those possessions. In other words, the risk of any mistake made by the State authority must be borne by the State, and errors must not be remedied at the expense of the individual concerned"(Case of Albergas and Arlauskas v. Lithuania,17978/05), 27.05.2014; See: case of Gladysheva v. Russia, 7097/10; 6.12.2011.).

Due to the ECHR jurisdiction, the scope of protection does not include:

a) systematic indexation of bank savings or money deposited in other financial institutions due to inflation (A. Leszczyńska-Rydlewska, Toruński Rocznik Podatkowy 2010, p. 144);
b) the right to acquire property (A. Leszczyńska-Rydlewska, Toruński Rocznik Podatkowy 2010, p. 144) – convection protects existing possessions against interference, it does not provide a right to be put into the possession of things he does not already have (H. O'Boyle & Warbrick, Oxford 2014,p.867).

A lawful interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions (A. Leszczyńska-Rydlewska, Toruński Rocznik Podatkowy 2010, p. 146), for example: land planning, agricultural policy.

As an interference in peaceful possession can by classified, as follows:

a) long delay between an initial decision of expropriation and its execution;
b) environmental qualities of possession – value of property as a result of noise, pollution resulting from industrial development (H. O'Boyle & Warbrick, Oxford 2014,pp. 868-869).

Set out here above examples of understanding term possession means that the scope of protection of ECHR is wide, and as so is in compliance with requirements of contemporary trade. The only objections concerns systematic indexation of bank

savings or money deposited in other financial institutions due to inflation, but as far as I am concerned this interference maintain the fair balance between competing interests of the individual the community as a whole. The State is not obliged to act to prevent loss of value as a result of market factors. The scope of state's positive obligations has not extend to protecting anyone from economic loss that has been caused by the state in reform of the economic sector (H. O'Boyle & Warbrick, Oxford 2014,p. 872) .

3. Rule number two – deprivation of possessions

The European Court of Human Rights has held that the right to property is not absolute and states have a wide degree of discretion to limit the rights. As such the right to property is regarded as a more flexible right than other human rights.

One of the basic means of deprivation of proprietorship is expropriation, which is understood by the European Court of Human Rights (ECHR) as "taking over the property by a public authority or a third party for implementation of a public purpose" (A. Wróbel, p. 500). The objective scope of Article 1 encompasses proprietorship whose meaning is autonomous under the said provision. The subjective scope of the protection embraces, in turn, the property or possessions of natural and legal persons that are not an emanation of the State and do not exercise supervisory authority which otherwise is part of the competence of public authorities (J. Parchomiuk, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej*, Warszawa 2007, p. 91).

In light of Article 1, the institution of expropriation is admissible wherever its three primary premises have been met, that is: the condition of purpose – i.e.: the measure has been undertaken in public interest; legality; and proportionality.

The first said premise for deprivation of property indicates that expropriation would be carried out in view of a specific purpose, defined as public interest. ECHR's jurisprudence clearly implies that the notion of 'public interest' is perceived broadly on the grounds of the Convention. In particular, the decision to introduce regulations enabling expropriation is usually associated with the need to take into account the political, economic and social considerations, the opinions on which may be quite diverse in a democratic society (M.A.Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, p. 390; See case of S.A. Pressos Compania Naviera v. Belgia, 17849/91, 20.11.1995). A presumption is even made that a domestic measure is undertaken for implementation of a public interest (A. Wróbel, p. 504). Thus, the

Court acknowledged a broad margin of the legislator's freedom which is only limited where there clearly appear no reasonable grounds for expropriation whatsoever.

Another indispensable prerequisite of admitted deprivation of property is legality of expropriation. The premise for legality is to be considered in two aspects, i.e.: the intervention must be undertaken pursuant to the terms-and-conditions laid down in the relevant Law and in accordance with the general rules of international law. As Parchomiuk aptly points out, "the provisions whereupon deprivation of proprietorship has been effectuated must be sufficiently precise and accessible in an appropriate scope" (J. Parchomiuk, Warszawa 2007,p. 94). The national regulation should also provide for legal protection against arbitrariness of the State's actions in the form of adequate procedural guarantees. The notion of 'Law' used in Art. 1 of AP should thus be understood not as merely a direct reference to the national (domestic) legislature but also as a clear reference to the quality of such law. ECHR's jurisprudence clearly has it that expropriation in breach of the national law stands for infringement of Article 1 AP (A. Wróbel, p. 504).

In general, the requirement of the intervention's alignment with the international law rules boils down to protection of property (possessions) of non-nationals (i.e. third-country citizens) and to situations of intervention affecting economic (business) supranational corporations. The aforesaid regulation protects these entities gainst arbitrary expropriation, and in case of property deprivation in compliance with the domestic law, ensures them indemnity. It needs being emphasised that, in line with ECHR's current jurisprudence, "the general rules of international law are not applicable with instances of taking property away by the State from its citizens"(See case of James and others v. Wielka Brytania, 8793/79, 22.2.1986.).

The last premise for admissibility of expropriation, termed proportionality of intervention, is understood by ECHR in two aspects. First, it indicates that in a given specific situation, it should be examined whether an upright balance has been preserved between public interest and the requirements of protection of the individual's rights. On the other hand, there ought to appear a reliable relation between the intended purpose and undertaken measures (A. Wróbel, p. 506). Based upon analysis of the jurisprudence, it has to be stated that in evaluating the measure's proportionality, the Court takes into consideration, inter alia, the occurrence of procedural guarantees, indemnification, or the circumstance whether the authorities have acted in an arbitrary fashion(A. Wróbel, p. 507).

Article 1 of AP does not expressly impose upon a country the obligation to indemnify for expropriation. The doctrine (C.Mik, p. 30. and J. Parchomiuk,

p. 96. and S. Jarosz-Żukowska, *Słuszne odszkodowanie jako konstytucyjna przesłanka dopuszczalności wywłaszczenia*, Przegląd prawa i administracji LXVIII/2004, p. 114.) instead emphasises that the compensation obligation with respect to citizens is anchored in the proportionality requirement. It is therefore inadmissible that any excessive burden might be superimposed upon an entity. Indemnity is the instrument reinstating the balance having been upset by property deprivation. With respect to aliens, the obligation to indemnify is rooted in the "general principles of the international law" (See F. Zoll, *Prawo własności w Europejskiej Konwencji Praw człowieka, Przegląd sądowy* 1998, nr 5, p. 33. and S. Jarosz-Żukowska, p. 115).

It has also to be emphasised that without the identified compensation system, protection of property under the Convention would be illusory (Case of James i inni v. Wielka Brytania, 8793/79, 22.2.1986).

The ECHR jurisprudence devotes much attention to the issue of indemnity/damages for expropriation. One of the essential verdicts touching upon the issues in question was passed in the James et al. Case (Case of James i inni v. Wielka Brytania, 8793/79, 22.2.1986), where the Court resolved that the actual amount of indemnity is to be reasonably proportioned against the value of property expropriated. The damages may be reduced in view of the purposes of an economic reform or social justice requirements, whilst a complete lack of indemnity is only admitted in exceptional cases. What it means is that the Convention, instead of ensuring full indemnity, requires in each case that its amount be reasonable (See: C.Mik, p. 30. and J. Parchomiuk, p. 97. and S. Jarosz-Żukowska, p. 115). It is worth pointing out, quoting S. Jarosz-Żukowska, that "a general claim for compensation ensues from Article 1 in case of expropriation, which however does not concern indemnification at a defined amount" (S. Jarosz-Żukowska, p. 115). In the sole case that indemnification is unsatisfactory (insufficient) and infringes the essence of claim for compensation, the compensation requirement is effectively breached. Hence, "those matters where no indemnity was afforded whatsoever are evaluated with severer criticism than those where its very amount was called into question" (I. Nakielska, *Ochrona własności, [w.:] Ochrona praw jednostki*, Z. Brodecki red., Warszawa 2004, p. 167.).

The issue of indemnification amount is considered in a different manner with regards to aliens, with whom the "general principles" of international law are applicable (See J. Parchomiuk, p. 97. and S. Jarosz-Żukowska, p. 116; and C.Mik, p. 30). In practice, it renders payment of complete indemnity absolutely obligatory. EHRT upholds the position that such a differentiation is not discriminatory

(M.A. Nowicki, pp. 1311-1315), as otherwise widely criticised in the doctrine worldwide (C. Mik, p. 31).

The basis for determining the amount of damages is the actual detriment in the property (possessions) of the entity subject to expropriation. The valuation does not have to be based upon the condition and value as of the transfer date, but is cannot lead to a radical reduction in such property's value either (J. Parchomiuk, p. 98). The State has a wide margin of freedom also for the rules of valuation applied; however, EHRC has deemed unacceptable a rigid system of indemnity determination (See A. Wróbel, p. 509. and M.A.Nowicki, *p.* 389). The damages should each time be established taking into account the circumstances of the specific case.

The jurisprudence also emphasises that damages ought to be paid out within a reasonable timeframe (See case of R. Guillemin vs. Francja, 19632/92, 21.2.1997), since "excessive delay in payment of damages for expropriation results in increased financial losses of individuals whose lands are subject to expropriation, thus putting them under uncertainty, particularly whenever inflation is considerable" (A. Wróbel, p. 509).

Set out here above problems concerning the procedure of expropriation and the compensation for it, shows that this protection dose not meet the requirements posed of trade. As far as I am concerned the most substantive arguments defending presented thesis are: different rules for granting compensation for citizens and for entities from third countries, lack of obligation to grant a compensation covering all incurred damages. Nowadays the guarantee of property protection is significant for entrepreneurs, because of their investments. Expropriation of property may destroy conducted bossiness, and lack of sufficient compensations will by just unfair.

4. Rule number three – control the use of property in accordance with the general interest

Article 1 states that control concerns the use of property – the entity still has property rights, although the use of the property is limited. Interference with property rights must be prescribed by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, the Court must determine whether a fair balance was struck between the demands of the general interest and the interest of the individuals concerned. The requisite balance will not be found if the person or persons concerned have had to bear an individual and

excessive burden (See case of Schirmer v. Poland, 68880/01, 21.08.2004; case of Wieczorek v. Poland, 18176/05,8.12,2009; case of Ian Edgar (Liverpool) Limited v. the United Kingdom 37683/97, 25.01.2000).

The possibility of introducing control of the use of property must be lawful and serve the general interest, while a foreclosure must be conducted to serve the public interest. The idea of public interest is broader than the one of general interest.

In practice institution of control use of property is used by public authorities is areas such as: secure of payment of taxes or other contributions or penalties, like a measure involving exercise by the state of its executive powers and confiscation.

Examples of lawful control of the use of property rights are as follows :

a) plane foreclosure (Case of Air Canada v. Great Britan, 18465/91, 5.5.1995);
b) limitations in the production and delivery of milk resulting from the common agricultural policy of the EU(A. Leszczyńska-Rydlewska, p. 147. See also: case of Procola and others v. Luksemburg, 1470/89, 1.07.1993).

The Court has usually held in its case-law that a confiscation measure given in the context of criminal proceedings, although it involves deprivation of possessions, nevertheless constitutes a control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1(See case of Riela and Others v. Italy, 52439/99, 4.08.2001; case of Arcuri and Others v. Italy, 52024/99, 5.07.2001; case of Sun v. Russia, 31004/02, 5.02.2009):

The following have been considered concordant with the ECHR (A. Leszczyńska Rydlewska, pp. 146-170):

a) double penalization in the form of an obligation to pay the tax and the forfeiture (See case of X v. Austrii, 7287/75, 3.3.78);
b) changes in tax law regulations applied retroactively (See case of A,B,C,D v. Great Britan, 8531-79, 10.03.1981.);
c) improper publication of the tax act (See case of Spacek v. Czech republic, 26449/95, 9.11.1999);
d) burdening a small group of entrepreneurs with a tax in spite of the fact that the selection of those entities is arbitrary and discriminative (e.g. charging a one-off tax on insurance companies; the aim of the regulation was to improve the financial situation of Sweden) (See case of Wasa Liv Omseidigt v. Sweden, 13013/87, 14.12.1988);
e) deferring the effective date of a verdict by the Constitutional Court declaring specific tax regulations against the act (See case of Nikolay Dmitryevich v. Russia, 63343/00).

Analyzing presented issue it must be also mentioned that Countries have the freedom to shape their tax policies, where the margin of this freedom is much wider than in case of any other interference in property rights (A. Leszczyńska Rydlewska, p. 148). Criteria limiting the freedom to impose taxes by countries are as follows ((A. Leszczyńska Rydlewska, p. 150): the existence of a legal basis for taxation; taxation must serve the general interest; taxation should not constitute an excessive burden (e.g. confiscation of property) and proportionality. It means that, every tax is charged to serve the general interest and thus all taxes can be considered concordant with the ECHR, regardless of their amounts. The ECHR does not determine the maximum amount of the tax.

The following have been considered in discord with the ECHR:

a) excessive security for a debt, e.g. mortgaging nine properties although the amount of unpaid tax is lower than the value of half of the properties (A. Leszczyńska Rydlewska, p. 164. See Case of Lemoine v. France, 26242/95, 1.7.1998).
b) leaving tax authorities with too much freedom of decision by the act (A. Leszczyńska Rydlewska, p. 165);
c) limiting the possibility of asserting claims for damages against the country.

Analysing this rule I noticed some unacceptable dangers for entrepreneurs, especially due to the taxation law. It must be also pointed out that securing debts could incur some damages, especially when later the judgment rules that there is no debt, but we should be aware that asking for such secure is impossible without fulfilling a number of prerequisites, like for example pleasing a debt. What is more, in the event of unlawful judgment concerning security, we are entitled to demand compensation for illegal acts of public authorities.

5. Summary

In the protection of human rights, constructing the catalogue of rights and freedoms is not the only important matter; of the most significance is ensuring efficient mechanisms of control of the preservation of granted freedoms and rights within a given system. The protection of the rights of the individual must be effective. That is why there are also some positive obligations of State to protect this property. The state must ensure that property rights are sufficiently protected by law and adequate remedies are available to injured party when they are violated (H. O'Boyle & Warbrick, p. 871).

As far as I am concerned, the European Convention still does not provide an adequate level of protection of private property, form reason set out previously.

Trying to find reasons for such state of matter, we should be aware that the right to property is not in a main text of convention. Member states had difficulties in establishing an accepted level of protection, that is why the presented one is a compromise H. O'Boyle & Warbrick, p. 862. But on the other hand an evolution of scope of the protection of property could be observed during the existence of ECHR. This evolution and progress is caused by the jurisdiction of tribunal, so that the standards of protection are higher that a 10 or 20 years ago. The main threats for contemporary trade are related – in general – to certainty of property and investments incurred for this property.

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