Edited by Magdalena Sitek & Antonio Felice Uricchio & Iwona Florek

HUMAN RIGHTS

between needs and possibilities

Józefów 2017

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Alcide De Gasperi University
of Euroregional Economy in Józefów

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Introduction

Many scientific, political, and social groups call for the human rights system to become a global collection of moral norms similar to the biblical Decalogue. However, the dysfunction of this system may be noticed, in which can be included among others: the variability of the content of individual rights, even fundamental rights or the use of those rights for political or economical purposes. For those reasons, in many cultural circles, not only Asian or African, but also European, this system is not always accepted. Individual rights are negated, and especially their interpretation in areas such as: equality of people before the law, the right to the court, freedom of conscience and religion, the right to human integrity, or tolerance.

Contemporary reality is characterized by multiculturalism, often reaching its roots in centuries-old tradition, also based on religious values. Meanwhile, the concept of human rights is primarily based in the circle of the Enlightenment culture, mainly in the French Revolution values. The systematization of human rights according to K. Vasak, for which the basis of systematization are three revolutionary values – the freedom, the equality and the brotherhood is a proof of this. This causes the human rights to be perceived as an instrument of Europeanization of other continents and cultures. In addition, there is a lack of honest and open dialogue and understanding of the need to look at man from the perspective of his being, which in turn causes dissonance within the meaning of individual human rights.

The authors of this work were guided by the idea of seeking a new basis for the discussion on human rights in isolation from existing cultural conception and conditions, including political or economic ones. It was assumed that the basis for such a discussion could be the needs of human being, which are common to all people and independent of the particular culture. In addition, the considerations on human rights have been linked to the new challenges inherent in modern technology and new social problems.

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Strengthening of victims' human rights in case of forced displacement through research on resilience in the post-conflict situation in Colombia

Mónica García-Renedo. In memoriam
(† 13 March 2017)
The waves mark the way (Jorge Bucay)

The research subject: corresponds to Panel I: Security as a basic human need in the postmodern era.

ABSTRACT
The aim of this paper is to explain and analyse the research relationship between the University Jaume I from Castellón, Spain, and the University of Antioquia, Colombia. Several research activities have been carried out, of which the project aimed at empowering psychosocial intervention with the most vulnerable Colombian population should be highlighted. This research action has contributed to the implementation in Colombia of the model that promotes resilience as an innovative methodology for cases of forced displacement of population and its consequences, which has, in turn, contributed to the construction of peace.
The research therefore identifies itself with what is called the "Human Rights-based Approach" method, as the promotion of resilience focuses on

human development and, as a consequence, on strengthening the affected population's human rights which were affected for years by the armed conflict in Colombia. This particularly concerns situations suffered by the child and youth population, which is the most vulnerable to the consequences of forced displacement.
To summarize, the research aims to offer promotion, dissemination and training in Human Rights, which means contributing to the improvement and optimization of the quality of life and mental health of the population and its environment.

Keywords: human rights, promoting resilience, post-conflict in Colombia, peace-building.

1. Introduction

Childhood is part of the primary process of structuring the personal and social identity of human beings. It shapes a particular form of future relationship with their surroundings and makes children active subjects in the transformation of societies.

In their development processes, children are socialized through the discourses of the subjects around them. For them, society is a mirror: it is the symbolic and active reference framework of their culture. The situation in which children interact represents, for them, their sole reality and they imitate what they receive from their environment.

This means interventions in response to the demands of children in contexts of generalized violence, like that in Colombia, cannot be delayed, because young people can either become subjects propitiating social change to achieve peace or perpetuators of the chains of terror, hate, revenge and war perceived in the continuing contexts.

In contexts of war, children are deprived of dreams, spaces for play and hope. Bombs, shootings, disappearances and displacement unexpectedly invade their everyday lives, forcing them to experience adult situations, such as survival in a generalized situation of instability. As Bello points out (2007):

> When the socialization processes of boys, girls and young people take place in contexts of internal armed conflict, as in Colombia, death, fear and terror become established as everyday references moulding their relationships

> with their families, neighbours and communities. When war is established in the historical reality shaping boys, girls and young people, the imprint and the situations generated by this process have a particular impact on the way they conceive and relate to their environment. They therefore organize a way of being and acting that considerably influences the projections of the future found in children and young people, who are undergoing a process of construction and consolidation and forming dynamic bonds with the present and the future forged by society. (p.1).

The everyday references in childhood plans for life in contexts of war, as in Colombia, are death, fear and terror and, with these, children consolidate their future. The armed conflict in Colombia has existed for six decades. It is now hoped to move into a post-war scenario which will bring with it many conflicts that must be dealt with so that the right to peace can be restored.

In this scenario of multiple forms of violence, various kinds of anti-social and criminal conduct arise. This type of action is among the behaviours with the greatest effect on human beings, particularly if such conduct is demonstrated by teenagers and children. It results in negative consequences for children and for the surroundings in which they develop.

Without ignoring the deficit approach predominant in psychology until the nineties, it is also important to point out that even people surrounded by a situation as traumatic as violence, and despite their experience of the pain it brings, are capable of making a meaningful life for themselves if they are surrounded by people who have supported them, believed in their possibilities and encouraged them.

However, if the psychological damage caused by the prolonged violence in the country is not dealt with, peace will not have a solid structure to make it sustainable. Studies are therefore required to identify the psychosocial risks associated with problematic behavior, making it possible to intervene and generate processes that can be replicated.

2. Background to the project

In the current context in Colombia, urgent actions are required to prevent all kinds of violence. The country is moving towards a post-conflict scenario following the signing of the peace between the FARC

and the government. This does not mean social conflict in the country will disappear, but rather that the confrontations between two agents will be reduced, probably bringing countless social conflicts that could eventually destabilize the peace process. The country's social agenda and the peace agenda appear to be particularly important issues, but their scope and limits must be recognized.

The imprint of war has generated behavioural change in people and the future expectations of children are marked by violence. Alongside the points being negotiated in the peace agreement process, mental health must therefore be made a priority in the country. Along these lines, Bello (2002) suggests that:

> Boys and girls have tremendous capacity for transforming social realities when they are allowed to act as people and subjects. The imprint they leave on society is shown, above all, in spaces, music, art and language. Although the complex, intense situation of violence and degradation suffered by the country offers little hope for the proper development of children, families, communities and institutions need to deploy all resources available to them to radically change the direction of these events (p. 62).

The construction of meaning in life, the search for happiness, the acceptance of certain adverse situations and demands for rights to be respected become the starting points for promoting the personal and group development of children who have been born in a country at war.

In this way, although resilience is not a new concept in social and health care, it takes on a new, important connotation in contemporary contexts marked by inequity, the violation of human rights, interpersonal violence and social exclusion. The resilient approach demonstrates that the damage or risks to which a child or a person is subjected do not necessarily have permanent or damaging consequences. By contrast, it considers and describes the existence of real protective shields that prevent these forces – risk, damage – acting linearly, attenuating their negative effects, overcoming adversity and even transforming them into something positive (Pan American Health Organization, 2008). Among concepts that have been related with resilience and the welfare of young people are positive development, self-sufficiency, planning and decision-making.

In Antioquia, and particularly in Medellín, this type of action has been strengthened based on positive approaches to understanding mental health situations and intervening in them. For example, the National Faculty of Public Health (FNSP) has been working for some decades on actions based on research, teaching and outreach to provide a response to these psychosocial and health problems. The Programme for the Prevention of Life-Threatening Conduct (PREVIVA), attached to the faculty, has been developing knowledge and practice in the management of public policy and evidence-based projects for the prevention of violence and the promotion of coexistence in the Aburrá Valley (Duque, Montoya and Restrepo, 2007)

International cooperation and NGOs have also played an important role in the development of mental health promotion strategies. The specific case of "Strengthening an integrated system for promoting resilience in the Colombian post-conflict at the University of Antioch", which is the focus of interest of this study, is part of the cooperation between the Universitat Jaume I in Spain and the Universidad de Antioquia based on the establishment of the Psychosocial Observatory of Resources in Disaster Situations – OPDIDE-UdeA. This initiative is technically and financially supported by the Spanish university and the aim is to generate an Ibero-American psychosocial study network for disaster prevention in accordance with the priorities shown in each region. This type of project therefore benefits the commitment to peace being made by Colombia.

3. Resilience promotion project

To carry out the project, a resilience promotion model is used based on upholding rights, seeking to reduce the risk factors found to be associated with the antisocial and criminal behaviour of the child and teenage population as a commitment to sustainable peace with social justice.

General objective

The general objective of the project is: To assess the effectiveness of the human-rights-based resilience promotion model in order to prevent risk behaviour in boys and girls aged between seven and 12 in the rural area of the municipality of Santo Domingo Antioquia.

Specific objectives

1. To psychologically assess the recognition of emotions in boys and girls using a cognitive device.
2. To implement a resilience promotion model to improve emotion management, frustration tolerance, self-esteem, aggression reduction, coping skills and positive stress management.
3. To assess the intervention based on identifying the effects caused by the psychosocial intervention model based on resilience promotion.
4. To publish the results to refute or validate the resilience promotion model.

Methodology

Longitudinal-observational study with children going to school in the rural area of the municipality of Santo Domingo Antioquia. The universe for the study will consist of two primary schools in the rural area. The study will be carried out with a total of 60 boys and girls (aged between seven and 12). 30 of them will be a control group, who, after the procedure, will also benefit from the intervention process for 2017. The children are from the Santa Gertrudis and El Rayo districts.

Sample

The sample will consist of 60 children at school in the municipality of Santo Domingo: 32 females and 28 males. They are aged between seven and 12 and are invited to take part in this study with the authorization of their respective legal guardians. The participants will be divided into two groups: group 1 will consist of the cases and group 2 of the controls.

Initial assessment

All the participants will be initially assessed using the following series of psychological tests.

a) BASC-TSR-C (García-Barrera et al, 2011)

Based on the version of the Behavior Assessment System for Children (BASC) in Spanish for Colombia, a scale of 24 items was derived to measure four executive functions: problem-solving, control of attention, behavioural control and emotional control. This questionnaire will be applied to the teacher in charge of each child.

b) Coping scale for children (EAN) (Morales-Rodríguez et al, 2012)

This scale consists of 35 items assessing coping strategies for problems related to the family context, health, schoolwork and social relationships. Differentiating between problem-focused coping: active solutions – communicating the problem to others, seeking information and guidance and a positive attitude – and non-productive coping: indifference, aggressive behaviour, bottling the problem up, cognitive avoidance and behavioural avoidance.

c) Computerized task (emotional Go-NoGo)

Go-NoGo tasks involve the execution or inhibition of the motor response: the demand to respond rapidly creates an overbearing tone of response which must be inhibited when the NoGo stimulus appears. Although behavioural performance is apparently simple, the task involves many sub-processes, which include discriminating between stimuli, response selection, motor preparation, response inhibition and error monitoring (Goldstein et al, 2007). The Go-NoGo emotional task allows the performance analysis of responses to signals with different emotional valences (for example threatening as against neutral). The task therefore not only provides a measure of the inhibition of behaviour, but also the emotional modulation of that inhibition (Schultz et al, 2007).

4. Application of the resilience promotion model

Resilience in the area of public health could be seen as a set of social and endopsychic processes making it possible to have a healthy life. People and communities therefore need support to develop their capability to create or possess resources (personal, inter-relational, institutional, etc.) that lead to wellbeing.

With this idea in mind, this project applies following resilience promotion model put forward focusing on the human rights of the child, taking into account the models of Grotberg (1995), Vanistendael (2005), and Wolin and Wolin (1993).

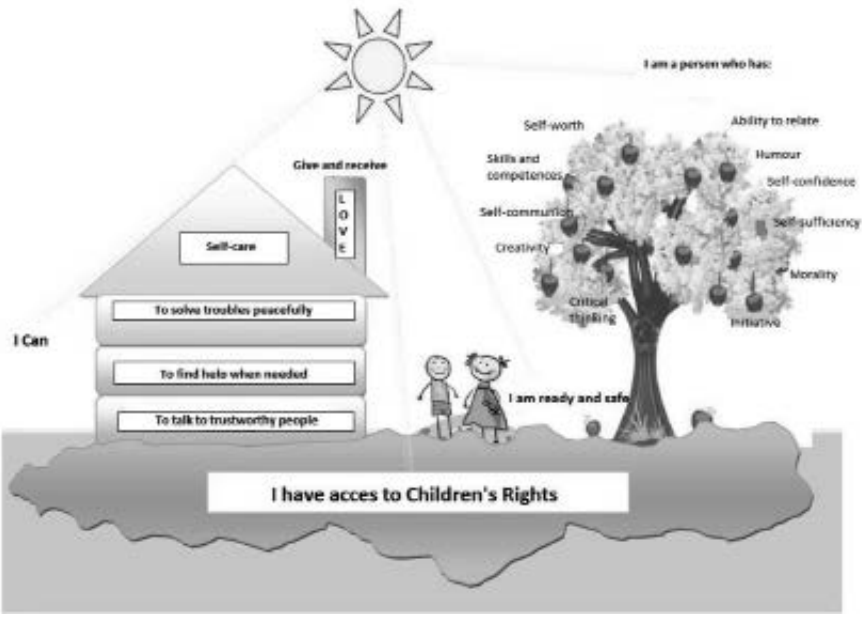

Figure 1. Proposed resilience model based on a human rights approach. Alvarán-López, Gil-Beltrán, García-Renedo, Caballer-Miedes and Flores-Builds. (2012)

It is based on recognizing that human rights stake claims for primary goods considered to be vitally important for all human beings, taking the form of demands for liberty and dignity in each historical period.

In this sense, the proposed resilience model for the prevention of problematic conduct in the rural surroundings of the municipality of Santo Domingo Antioquia, Colombia, 2016-7, is based on the enforceability of human rights as a basis for promoting resilience conceived as a process in which subjects overcome the damaging effects of adversity, helped by having their rights guaranteed. We present all the proposed points below:

a) I have access to the rights of the child and I enjoy them

Many definitions of what human rights mean have been constructed throughout history. However, for the proposal that will be developed in the intervention process, the definition of human rights put forward by Vanistendael (2010) will be used:

A right, ultimately, which is the expression of society's loyalty to the dignity of each of its members. Society recognizes that some of human needs are so important that chance, in the sense of whether or not the goodwill of others is present, cannot be relied upon in order to meet them. To put it another way, people may demand what is acknowledged as a right for them (p. 15).

These rights are recognized based on declarations of principle, such as the Convention on the Rights of the Child. According to the United Nations Children's Fund (UNICEF), this is the most widely ratified human rights treaty (with legal force) of all time. The Convention states that all children aged under 18, regardless of their gender, origin, religion or any disabilities they may have, need special care and protection.

Children must enjoy minimum development guarantees so they can overcome adverse situations they have had to experience due to war. Along these lines, Figure 2 develops the set of rights that must accompany the resilience process with children.

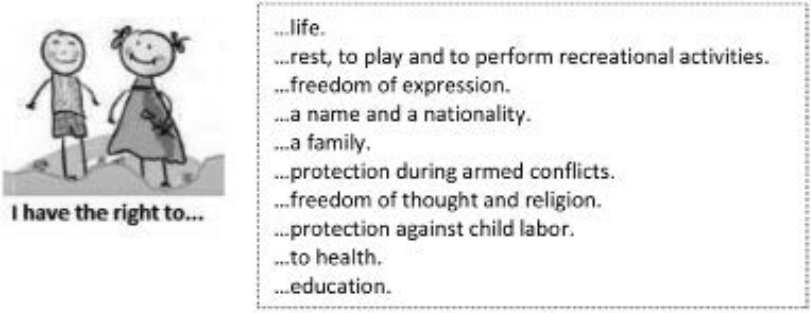

Figure 2. Rights of the Child. Proposed resilience model based on a human rights approach. Alvarán-López, Gil-Beltrán, García-Renedo, Caballer-Miedes and Flores-Builes (2012)

It is important to point out that responsibility for guaranteeing the rights of the child largely falls on States. However, in the resilience process, professionals must oversee that these rights are respected based on actions aimed ensuring the rights of the child are known and can be enforced.

b) I can (capabilities acquired in a protective environment)

This point corresponds to the individual capabilities that will be acquired in the protective environment surrounding the children. For

example, the promotion of resilience with children must focus on creating links of trust, contact networks, training in peaceful conflict resolution, self-care techniques and surroundings in which children can give and receive love. These capabilities will be acquired by children through the continuous, specialized training of mental health professionals. Figure 3 describes the capabilities forming part of the resilience process with children.

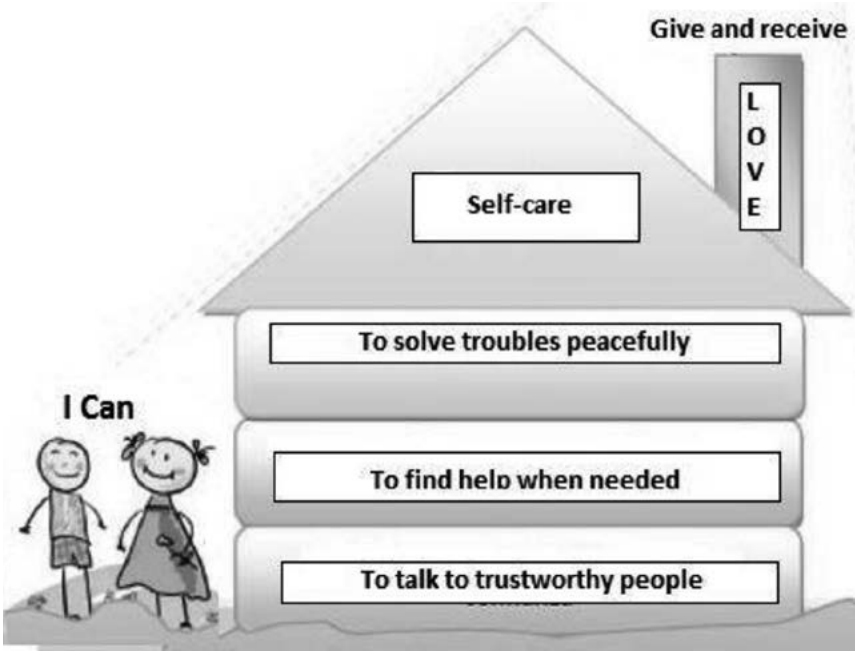

Figure 3. Resilience process capabilities. Proposed resilience model based on a human rights approach. Alvarán-López, Gil-Beltrán, García-Renedo, Caballer-Miedes and Flores-Builds (2012)

c) I am a person with resilient qualities

This point focuses the qualities of a resilient person; individual qualities that will protect children from the adversities they face every day. Figure 4 describes these qualities that can be acquired as part of a resilience process.

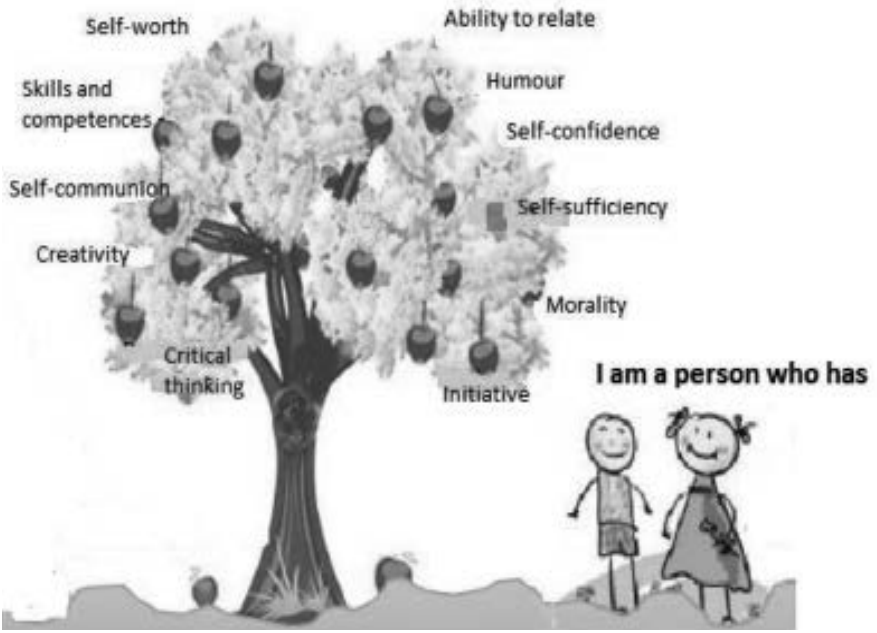

Figure 4. Resilience process qualities. Proposed resilience model based on a human rights approach. Alvarán-López, Gil-Beltrán, García-Renedo, Caballer-Miedes and Flores-Builes (2012)

These qualities will be developed, encouraged and practised based on teaching exercises making it possible to take the resilience process forward.

d) I am ready

The aim of this point lies in getting children to be ready to take responsibility for their actions during the process and to participate actively in it. Although this point could be considered as a personal quality of the child, it is important to stress that the methods and activities used during the resilience promotion process must be approached in pedagogical, creative and attractive terms so that the children remain motivated throughout.

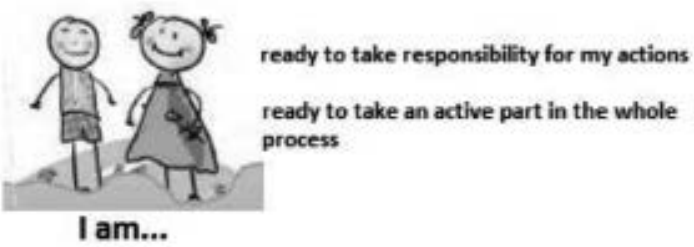

Figure 5. Objectives of the resilience process. Proposed resilience model based on a human rights approach. Alvarán-López, Gil-Beltrán, García-Renedo, Caballer-Miedes and Flores-Builds (2012)

Figure 5 shows the two objectives that must be sought during the process, interacting holistically with all the fields described above.

It is important to stress that each of the points developed operates holistically throughout the progress and application of the project. The resilience process with children conjugates the "I have", "I can" and "I am" in a creative, educational and fun space.

Final assessment

All the assessments already described for the initial phase are applied once again at this stage.

Summary

Various methods will be used in the project, converging on the same objective: "to provide elements in order to achieve peace in the country". Although it is extremely important to develop the study methodologically, it is considered to be even more important to intervene in problematic conduct associated with antisocial and criminal behaviour.

With this research and the application of the resilience model, it is hoped that a process will be generated that can be replicated in other schools, creating a common project that becomes a plan incentivizing the creation of public policies at local, national and international level.

It is also intended to show the importance of psychosocial intervention, as well as confirming that social processes generate change in populations.

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Małgorzata Babula

WSPiA Rzeszowska Szkoła Wyższa

Mental map of non-governmental organizations – from the spirit of Solferino to NGOism

ABSTRACT

The general idea of helping victims of wars and battles was in its original presumption focused on authentic taking care of wounded people, no matter if they were soldiers or civil victims. Henri Dunant and Florence Nightingale started a brand new chapter on the field of humanity. The purpose of this article is to follow the development of non-governmental organizations (including: NGOs, INGOs, MONGOs). Are the main aims still valid? How did – if indeed – the authentic presumptions, original idea and purpose of actions change since 1859 till nowadays? Are victims being helped appropriately, efficiently and sufficiently? Is the beneficiary still the 'subject' or did he become an 'object'?

Subject of research: Role and portrait of non-governmental help.

Purpose of research: The purpose of research is to show the real aspect of nowadays non-governmental help, how it evolved and what is the nowadays *real inspiration and functioning of NGOs.*

Methods: Review of literature

Keywords: Human rights, NGO, INGO, MONGO

1. Introduction

„We think about humanitarian help as something easy – food, water, shelter, eventually medical treatment need to be delivered to people. In that case money needs to be collected, gifts given, someone "somehow" delivers them, someone will "somehow" organize it" (Polman, 2011, p. 8).

Janina Ochojska underlines, that the moment, when mass-media stop informing about situation in the area touched by a crisis, war, cataclysm, etc., is also the time, when humanitarian organizations need to take action and provide their help to those who need it (2011, p. 8)."Usually, we are far away from the scene of production or assistance and cannot observe directly what NGOs are doing. Generally, we assume that they have carried out the responsibilities that we, as a society, entrust to them" (Gourevitch, 2012, p. 3). At some point we put equal sign between human rights and humanitarian help. However, humanitarian help and human rights have same goal, but different point of interesting and the key word defining their actions (Osiatyński, 2011, p. 110). Wiktor Osiatyński states, that the common goal is reduction of suffering, and main difference is their driving force; for humanitarian help this would be the *need*, and for human rights – the *right* itself (2011, pp. 110–111). "Human rights demand mutuality of rights and duties (…) Humanitarian help does not expect mutuality. The donor is not obliged to anything. Help is one-sided, and their beneficent cannot claim it in a court. Donor's motivation is morality not duty" (2011, p. 111).

It is hard to point the date of raising first non-governmental organization. Some claim that first NGO was settled already in ancient times, e.g. Greek *sitesis* where philanthropic was carried by individuals and polis; Roman *frumentationes, congiarium* and *clientela* providing appropriately: wheet, wine and olive, clothes, food and money (*Organizacje pozarządowe – podstawowe informacje*, 2010, p. 4). Others (Michael Freeman) point year 1775 and *Society for the prohibition of slavery*, which was focused on philanthropy (Freeman, 2007, p. 170). However in common consciousness humanitarian help was born in 1859[1] by Florence Nightingale and Henri Dunant, who faced the Solferino war. They saw young people dying from the bullets, dying from the wounds and from the fact, that they did not receive any help. Once wounded – soldiers were left on the field of battle, dying from suffering and pain (Polman, 2011, pp. 15–16)[2]. Dunant

[1] First humanitarian organization focused on human rights was British and Foreign Anti-Slavery Society, set up in 1823. For more information check *The Anti-Slavery Society, Its Task Today,* London 1966 (as citied in P. Kowalski, 2000, p. 237).

[2] Check also: J. Abramowicz, Przestrzeganie międzynarodowego prawa humanitarnego podczas konfliktów zbrojnych oraz misji pokojowych i stabilizacyjnych. In: Wacławczyk, Żarna (eds.), Toruń 2011, pp. 13-15.

believed in the rule *tutti fratelli*, and this caused an impact to organize help for wounded soldiers, no matter of the fact, which army they served. He claimed, that reducing the number of soldier injured in war will lead to savings in a state budget, that would be obliged to pay pensions. Nightingale was a bit in opposite to Dunant. She believed, that the more money government needs to pay due to the war extensions, the more probable is that clerks will try to lead to ending of the war. Moreover, once she organized a military hospital and helped soldiers to get well, she noticed, that most of them got back to the war – and after all died. She spotted, that having not helped – she could contribute to end the war much sooner (Polman, 2011, pp. 17–19). Nightingale stayed in opposite to Dunant, who in 1863 established in Geneva first International Committee of Red Cross, ICRC. This brought the beginning to all other humanitarian and non-governmental organizations, and its rules were accepted and confirmed in Geneva Conventions (Polman, 2011, pp. 20–21). Polman states something obvious, but important to better understanding the change in humanitarian help. She underlines, that times have changed, and nowadays wars are not taking place outside the cities and people dying in a result of wars are no longer only soldiers. War has got inside the village or city, involving civilians (including children and women). I agree with Polman, that this only hardens the dilemma of Nightingale and Dunant (2011, p. 21).

2. NGOs policy direction

In accordance to polish law, non-governmental organizations do not gain incomes for their activity (Art. 3, par. 2, Dz. U. nr 2003 Nr 96 poz. 83). However, H. Hansmann has different understanding of being *non-profit*. He claims, that the main point in being *non-profit* (in the opposite to *for-profit*) is the rule of non-distribution constraint, which is based on the assumption, that net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide (Hansmann, 1980, No 5, p. 838).

Public benefit activity is defined as social benefit activity done by NGOs in the field of public service named in the act (Art. 3, par. 1, Dz. U. nr 2003, op. cit.). 4th article of the Non-profit Activity and

Volunteering Act (Dz. U. nr 2003, op. cit.) lists whole spectrum of different kinds of activities that – in accordance to polish legal system – are to be treated as non-profit activity. Having known the subject as well as the object of non-profit organizations, how can we define NGO?[3] Moreover, should we define NGO apart from non-profit organization? As well as apart from social organizations/associations? What is the legal definition of those subjects (if any)? Regarding to polish legal system there is no significant, clear and comprehensive definition of NGO. Already mentioned article 3 of the Non-profit Activity and Volunteering Act does not deplete all hallmarks; Constitution of Poland doesn't do it either. Apart from this, Constitution of Poland does not use the name *NGO*, but bases on the term *social organization* (Kledzik, 2013, p. 57). Polish law does not provide one valid and homogenous definition of NGO (2013, pp. 92–98). Therefore, Kledzik (2013, p. 67) underlines that it might lead to the acceptance of interchangeable using of *social organization* and *NGO*, as both of them define same subjects and same goals.

United Nations define NGO in accordance to its fundamental feature – its founding in a result of private agreement, not international treaty (Kowalski, 2000, p. 232). Its international character should be realized in its international composition (at least three countries) as well as in its international activity (2000, p. 232). However, we need to remember, that speaking of humanitarian help doesn't necessarily have to equal speaking of human rights. According to Wiktor Osiatyński (2011, p. 115) UN's system has a common point with humanitarian help – it accepts human rights as a privilege of sovereign states. All of the NGOs established between 1945 and 1970 had similar methods of actions (Kowalski, 2000, p. 239). They had quite small number of participants, they had a character of small elite clubs and their task was to make silent impact on international governmental organizations creating human rights regulations (Kowalski, 2000, p. 239).

The fact is, that at the very beginning NGO had to struggle with UN's attitude and lack of trust. However, with the passage of time United Nation not only accepted, but also started to cooperate with NGOs. Let's only

[3] It is not the aim of this article to discuss the specific types of NGOs. The Author wants to take a look at NGOs in general.

mention Article 71 of UN Charter[4]. Nowadays NGOs play also different – more significant – role. They participate in the works of UN, as well as with governments of States. And this factor of their participation is growing (Freeman, p. 171).

Many NGOs "have formal affiliation with intergovernmental organizations", which may agree to grant these NGOs (Esiksson, Sadiwa, p.1). In Poland, *Ustawa o finansach publicznych*, a document that regulates public finance for whole State reflects directly to NGO. Article 127§1 point 1 e states, that grants from budget are also targeted for the tasks assigned to NGOs[5].

Due to the fact, that NGOs have succeeded in their efforts in joining governmental and international bodies in debates, working panels, etc., founding a non-governmental organization became a bit of bite. It didn't take long time to wait for results. Whilst the genocide in Cambodia there were about forty NGOs involved in helping people. In Yugoslavia – already two hundred and fifty. And this is only fifteen years later. Afghanistan – 2004 – involved already two thousands of NGOs. It's not even twice more, but it is four times in comparison to the year 1994 (Polman, 2011, pp. 23–24). Not only the numbers are astonishing, but same feeling causes the way the NGOs help. Especially, that NGOs (no matter if we talk about regular NGOs, INGOs, MONGOs or any other type of NGOs) do not take any responsibility for lack of regularity in disposing of founds (2011, p. 25). And we need to remember, that it is quality that matters, not

[4] The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned; http://www.un.org/en/sections/un-charter/chapter-x/index.html; access: 12 may 2017.

[5] This shows only, that the awareness of how important are NGOs is visible and underline by government. The whole act (Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych; Dz. U. 2009 Nr 157 pos. 1240 with changes) though devoted to public finance, refers to third sector in few articles. However, the aim of this article is not to analyze the Polish regulation on existence of NGOs. Therefore for more information about this aspect, please check: M. Supera-Markowska, *Opodatkowanie organizacji poarządowych*, Warszawa 2015; *Podstawy prawne tworzenia i funkcjonowania organizacji pozarządowych*, Warszawa 2015 oraz *Finansowanie organizacji pozarządowych,* Warszawa 2015.

quantity. Following Michael Freeman, the range of meaning of NGOs is double. First of all they inform and cooperate with governments, scientists and international organizations; secondly they help the victims (Freeman, 2007, pp. 173–174). Author underlines interesting thing. He states, that "probably" the most important task of NGOs is to inform and helping is on a second place (2007, pp. 173–174). And this statement is correct. They often provide with alternative scope of actions and focus social attention on specific topic (seldom wide, more often narrow type). Once they catch the attention, they become more efficient in gaining the measures needful to provide help. Freeman notices also, that in case of NGOs it is easier for them to stay flexible, change scope of actions and adapt to actual requirement (2007, p. 175).

Formal structures of NGOs differ depending on the country. However, most often structure is foundation and voluntary association – for European States, and charity – for USA, Canada and United Kingdom (http://fakty.ngo.pl/formy-prawne-ngo-na-swiecie).

It is estimated, that there are ca. forty thousands of INGOs existing worldwide (Polman, 2011, p. 24; Willetts, 2011, p. 389); over 120 000 NGOs in Poland, over 600 000 NGOs in Germany, over 230 000 in Sweden, 950 000 in USA, 85 000 in Canada (http://fakty.ngo.pl/wiadomosc/2073690.html). They are representing different models, depending on the country and each of them has its own characteristic feature. There are five models (Scandinavian, Rhenish, Mediterranean, Transition period, Anglo-Saxon). Scandinavian type refers to Sweden and Norway and represents an extensive volunteer system where non-governmental organizations only point out problems, but the state is rather a social policy-maker. Rhenish system exists in Germany and Belgium and basis on the presumption that the non-governmental sector is the main public service provider contracted by the state. Mediterranean – Portugal – focuses on the necessity of defending non-governmental institutions against the state's attempts to undermine its independence and autonomy. Transition period in Poland, Czech Republic and Hungary relies on a security of dynamic changes and transformations due to civil society continuing to discover the field that can take place in society. And last type – Anglo-Saxon – differs from all the above types. Non-governmental organizations are a counterweight

to the state. In the area of social policy, the non-governmental sector competes with business, which often leads to its professionalization and market orientation (http://fakty.ngo.pl/ngo-na-swiecie).

Analysis from 2016 done by Stowarzyszenie Klon/Jawor refers to NGOs existing in Poland (http://fakty.ngo.pl/wiadomosc/1912424.html). The analyzed elements of the activity referred to many aspects of everyday functioning, e.g. meanings, workers, impact environment. Here are some of the information gained in a result of the analysis:

1. Almost 45% base on self-employed workers; however form of employment differs;
2. There are 4 payed workers in average NGO;
3. Financial condition of NGOs has improved since 2011;
4. Budget in over half of existing NGOs was supplied with:
   a) funds for the implementation of public tasks from local government and public administration – 60% of organizations;
   b) member contributions – 60% of organizations;
   c) financial and material donations from individuals, companies or institutions – 56% of organizations;
5. 45% of NGOs base on social work, one-third of associations „possesses" one or more regular workers and 20% of NGOs employees at least one worker (contract of employment);
6. Workers employed on the basis of contract of employment (at the range of 53%) within NGOs work also in other locations;
7. 70% of workers has a university degree;
8. One third of workers did participate voluntary in NGO in the past;
9. 65% of NGOs did face problems with material sources (in 2012 the percentage was 68);
10. 29% faced housing problems;
11. Scale of difficulties in cooperation and contacts with government administration[6] stays constant within the period of last 3 years (56% for foundations and 34% for associations);
12. 22% of NGOs point the growth of controls being done by administration (deterioration in comparison to 2012).

[6] Further as: administration.

One of the conclusions from the Report is that NGOs operate more multidirectional and most NGOs provide non-financial support (pp. 31–34 of the Report). Around 57% of NGO reach out to wider audiences and make them aware of what the organization is doing. To reach the widest possible audience, organizations are increasingly conducting information and intensive activities (pp. 34). The percentage of volunteers co-working with NGOs increased within last decade (pp. 44). The scale of this impact depends directly on how big and known is organization. The bigger, the well known – the more volunteers engaged in work within it (p. 46). But there is also another reflection – whilst foundations are more and more popular, their derivative – (voluntary) associations – struggle with decreasing of volunteers and members (pp. 47–49). In the self-assessment questionnaire respondents – organizations – indicated a high level of approval for the form, quality and significance of their activities (p. 109).

If we consider other elements placed in Report, some conclusions from it should be marked. First of all, the percentage of organizations that plan their action in a perspective of a time is almost equal with those, who act *ad hoc* (30% – 21%). Same proportions are in case of making plans regarding outcomes and incomes of organization; those that plan and those that don't plan (29% – 24%). 68% of NGOs stayed faithful to its original mission, whilst 4% constantly changes their scope of work. Within this last comparison one more detail should be added: 51% does not change their direction of policy/action no matter of the lack of interest by sponsors, and 10% declare changes in accordance to sponsors engagement and attention.

Yearly budget of statistic NGO (estimations from 2014) were ca. 27 000 PLN but the range of income depends strongly on the scope of actions and their objects. 57% of NGO declare possessing property, however only 15% of it are money – including bank deposits. The usage on European sources varies, but at least one organization gained such money and the overall number of NGOs which have benefited from EU founds are around 64%. 43% of 52% applying NGOs has used administrative financial assistance. The common difficulty for all NGOs was raising funds and equipment (in the first place), complicated formalities related to the use of funds from European Union donors (in the second place)

and bureaucracy of the public administration (in the third place) (http://fakty.ngo.pl/wiadomosc/1912424.html, pp. 129–161).

Paweł Adamiak indicates, that most NGOs don't pay attention to their image. This reflects in updating their data on websites, only 25% of them exist in social media (Adamiak, 2015, p.8). This impacts on the social knowledge about NGOs. If we consider the economy of thinking and stereotypes (strongly related to them), most of people indicate, that non-governmental organization is a foundation collecting money (2015, p. 13). Still 40% of people, being asked what do they associate NGO with, answer: nothing (p. 15). The factor influencing on our opinion about NGO is multiple. First of all informing about results in actions. And this is interesting thing, definitely commenting. One of the most famous organizations in Poland is WOŚP. The success of it is in some part a result of the fact, that people know, see and are informed about: the results of fundraising, the aim of every action and most of all – they see the things bought for donors' money. And this is clue information for succeeding. Ask and give. Ask for money, help, engagement – give results. And *visible effects of action* is pointed as main goal by 36% of respondents (2015, p. 33). Many of NGOs provide education activity. The more we know about possibilities of action and forms of it as well, the easier people join them. Social support increases if NGOs improve peoples' knowledge about their not only existence, but mostly forms of activity (Brander et. al., pp. 334–345).

Wendy Wong indicates, that NGOs structure has two aspects: formal and informal (Wong, 2012, p. 92). While formal causes no questions, informal might cause only questions (origin of money, techniques and strategy of an organization, if NGO is making any reports, etc.) (2012, p. 92). Important part of NGOs actions is law-making, though formally they are not included in legislative. Collecting information, independent monitoring, fact finding missions are most known actions of NGOs. (Eriksson, Sadiwa, pp. 5–7.). Simple example may be Helsińska Fundacja Praw Człowieka[7] which is one of the most active NGOs on the field of Human Rights in Poland, as well as Amnesty International devoted strongly to campaigns against terrorism, but also – most known aim of AI activity – to free people jailed for voicing their opinion.

[7] Further as: HFHR.

3. Summary

Whatever we say about wrongs done within NGOs as well as abuses in their actions, etc., we have to underline their contribution in spreading not only the knowledge about human rights (all generations, all catalogues, all examples of them), but first of all their impact in providing reliable information not only to the States (Freeman, 2007, p.173) but also to the Worlds community. The truth is, that even though the development of human knowledge as well as the development of human rights is a fact, we face nowadays the crisis of human rights. Wiktor Osiatyński underlines that the firmness of human rights depends on NGOs and their well functioning (2011, p.121). The fact, that NGO have strengthened over the years their position in the political arena, but also in the consciousness of global community secures human rights (2011, p. 122). In the same time NGOs are presenting – or at least are spotted to present – "high moral standing" (Dodds et al., 2016, p. 10). Following Authors, they became *key institutions* of welfare programs (Willetts, 2011, p. 389). Though UN human rights bodies were at the very beginning suspicious of NGOs, they slowly allowed them to speak, to ask their opinion in time.

No matter how many *buts* and *don'ts* we will have toward NGOs, the fact of their existence and work being done by them cannot be underestimated. The globalization and development of mass media (mostly independent journalism and internet) causes growth of knowledge about abuses in human rights, as well as about the range of needs and possibilities to help. NGOs provide the global community with the right to react and protect. To accept and to oppose for actions done by Heads of States and governments. The possibility to *act* is the spine of freedoms and rights of a human being. The thing is, that some changes need to be done. NGOs should not be the rudder, the sailor and the ship in possession of the means that they acquire. The responsibility for mismanagement would be a solution. At least as long as they are being spotted as g*rass-roots* organizations, the trust in them is high (Freeman, 2007, p. 174). And the concept of civil society corresponds to the rule of subsidiary (Goszczyński et al., 2013, p. 16). While considering NGOs, the only punishment possible to implement would be a public account settlement. The price to be paid might be high. In case of NGOs social ostracism represents such a high price for mistakes. Especially, that NGOs are often spotted as cure for shortcoming of governmental solutions

(2013, p. 17). And their effectiveness depends "upon the capacities and capabilities" as well as on "the size and duration of the funds available" (Riddel, 2008, p. 282). The great exam for NGOs (specific type of them: public benefit organization) was the program of 1%. Within the last decade social participation in deduction of 1% of tax rate increased 53 time (https://goo.gl/6ib66B). The audit done by the Supreme Chamber of Control in 2014 showed among others, that lack of earlier controls enables to analyze how in fact NGOs use the money gained from 1%. Authors of the Report underline one significant thing: this 1% action is more accessible for a) at least medium NGOs and b) NGOs focused on charity (p.51). However the growth of donators shows, that NGOs play significant role. They are definitely needed, for sure also sufficient, but there is still a question sign pointed towards their efficiency. Efficiency, understood also as ability of effective and real needed help.

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Protecting minors from Internet threats. Legal instruments or alternative measures?

ABSTRACT

Article about protection of minors from Internet threats provides a review of main questions within this problematic aspects. It focuses on issue concerning a dilemma of a choice the adequate way of safeguard their security in a new – determined by a stride of new communication technologies – environment. First, some basic definitions pertaining a legal perspective of the audiovisual media services and other Internet audiovisual services has been mentioned; as well as a description of notion of minors and their development, which is the particular subject of the protection. Then it is important to point out the different status of a child as a receiver of AMS and as a user of Internet and its implications to the scope and characteristics of the threats. Regarding a growing impact of Internet on children, from the criminological point of view, the threats should be divided into traditional and new risks. Relating to the basic premises of chosen legal and/or alternative methods of protection of minors, especially European soft and hard law and OECD recommendations have to be questioned. The core of the opportunity to solve the escalating problem of the protection of minors in Internet is to combine legal instruments and other methods in adequate way, taking into consideration the needed level of regulation and cooperation (international, domestic), technical criteria as well as kind and seriousness of threats.

***Keywords*:** minors, internet threats, safety, legal instruments, alternative measures

1. Introduction

The issue of a protection of minors from Internet threats is aimed at a presentation of changing picture of them as well as at dilemma of a choice the adequate, effective way of safeguard their security in a new technical, social and cultural environment. Regarding the wide sphere of on-line rapidly growing services it is to be mentioned that due to the changing paradigm of communication (see: Potter W. J., Cooper R., Dupagne M, 1993, pp. 317–321), three forms of it: interpersonal, mass and mass self-one coexist an complement each other within the "composite, interactive, digital hypertext" (M. Castels, 2009, p. 55). The heading problem is going to be more and more complex as it has been 'located' in a multi-dimension milieu, determined by a 'myriad' of flexible factors, where reciprocal overlap of personal and mass level of communication has occurred.

In particular it is tough to categorize certain services as audiovisual media services (AMS) or other Internet ones, within the wide, diversified and permanently growing spectrum of them, all the more that indeed digital media are located between interpersonal and traditional mass communication. The classification is fundamental insofar as they have subjected to the different legal regimes. Thus, the considerations should be preceded by introducing, some basic notions pertaining a regulative perspective of them. The online environment concerns both audiovisual services within the meaning of art. 1.1. of a directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)* and other on-line audiovisual services even though they do not fulfill criteria of mass media.

Audiovisual media services (AMS) are defined by art. 56–57 of the *Treaty on the Functioning of the European Union;* they within are under editorial responsibility of a media service provider, with a principal purpose to provide programs in order to inform, educate and entertain to the general public by electronic communications networks (art. 2 of directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 *on a common regulatory framework for electronic communications networks and services – Framework Directive)***.** Directive 2010/13/EU encompasses linear

(television broadcast – art. 1.1 (e)) and non-linear (on – demand – art. 1.1 (g)) services (programs and audiovisual commercial communications).

Besides, in a global area network which connects computer systems (as well as, used mainly by young people, mobile devices like tablets and smartphones) across the world a lot of – sometimes difficult to unambiguous classification of their private, semi-private or public character – services have been appearing, e.g. social media, online gaming etc. (see especially: Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states *on a new notion of media,* Proposal for a Directive of the European Parliament and of the Council *amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities*, Brussels, 25.5.2016). In such cases general, in principle internal law provisions are applied. This, some kind of smoothness, ambiguity and permanent development of AMS and other Internet services evokes problems in setting up common European framework, regulatory provisions concerning the systemic aspects of children protection.

Regarding the notion of minors, according to the art. 1 of the *Convention on the Rights of the Child* of 20 November 1989, it encompasses every human being below the age of eighteen years (which is a threshold for different legal and systemic regimes). The need for a guarantee them security and safeness in Internet environment required a special attention and should be in core of all considerations relating to the problem, bearing in mind differences of particular age groups (generally children and youth, also referred to as minors or kids and adolescents, teenagers, young people)[1], varieties of solutions across countries and contexts. Because of their immaturity they ought to be protected from any interference with their spiritual, moral and social well-being, including physical and mental health (see: Dodge R., Daly A., Huyton J., Sanders L.D., 2012, pp. 222–235; *Media and the Well-Being of Children and Adolescents*, Jordan A. B., Romer D. eds., 2014). Their normal development, including appropriate socialization is the subject of a protection in – playing the important function in it – audiovisual media sector.

[1] The terms: 'children', 'children and youth' and 'minors' are used interchangeably in this article.

2. Internet threats` review

Contemporary: "our societies are increasingly structured around the bipolar opposition of the Net and the Self" (M. Castels, 1996, p. 3). The Net is based on the pervasive use of networked communication media, when Self is the way of reaffirming, reconfiguring peoples` identities under the structural, especially technological and cultural change conditions, which is in the contrast to their primary (biologically) forms (M. Castels, 1996, p. 5, *idem,* 1997, p. 6). Internet constitutes a timeless and placeless space of flows, introducing a real virtuality culture: "(…) the informational paradigm and the network society, induce systemic perturbation in the sequential order of phenomena performed in that context" (M. Castels, 1996, p. 464). In the 'Information Age', the Internet is becoming an integral part of daily life of minors and even essential element of youth culture (Ferrell J., 2009, pp. 219–227). Children are spending more and more time online (they are 'in' more often and longer); a growing frequency of using Internet, starting it at a younger age, with a wide spectrum of devices comprise some kind of fusion of online and offline world. It is even more important when taking into consideration the major purposes of minors Internet activity, which are social networking; they communicate and create interactions; besides they learn, e.g. do homework/schoolwork and entertain, e.g. play games (see: Livingstone, S., Mascheroni, G., Ólafsson, K.& Haddon, L., 2014).

Thus, it is important to point out the transformation of a status of a child from a receiver of AMS to a user (and – on the other hand – a consumer) of Internet services, where children and youth go beyond watching and listening (TV or radio, video etc.) and start to be a participant, actor, author of user generated content. Generally speaking, Internet has turned out to be a ground for individuals to create, access and share information, worldwide. This change influences a scope and characteristics of the threats.

The OECD[2] overview of online risks faced by children on Internet, has shown the following categories of them: technology ones, when the Internet is the medium through which the child is endangered by contents or where unsafe interactions (contacts) take place and risks related to children as consumers (connecting in particular with their

[2] See: point I. ii of the recommendation of the OECD *The protection of children online,* 2012; also OECD Council report *on risks faced by children online and policies to protect them*, 2012, p. 24.

exposure to aggressive marketing practices or excessive advertising) as well as information privacy and security threats (especially unintentional dissemination of personal data without understanding the consequences of such activities). In similar manner, within the EUkids online researches the: inappropriate content, contact and conduct risks (generally speaking harmful interactions with other minors and, especially with adults) have been distinguished. First category is connected with a receiver status of mass media, second and third with user` s participation and acting (Livingstone, S., Mascheroni, G., Ólafsson, K.& Haddon, L., 2014, p. 3).

Regarding a growing impact of Internet on children, from the criminological point of view, the threats should be considered within the traditional related to the content, e.g. pornography or violence and new concerning the Internet milieu, type of risks.

For traditional mass media (broadcasting), the exposure at inappropriate for particular age groups of children, content should be pointed out. More precisely, they concern any programs which might seriously impair development of minors, in particular that involve pornography or gratuitous violence, as well as those which are likely to impair it, but which scope is set up at internal level, showing sometimes significant differences in perception and defining of what content is appropriate and acceptable for particular age groups between countries (art. 27.1., Chapter VIII *Protection of minors in television broadcasting,* directive 2010/13/EU; see: Badźmirowska-Masłowska, K., 2012, *Ochrona dzieci i młodzieży przed negatywnym wpływem mediów audiowizualnych w świetle dokumentów Unii Europejskiej…*, pp. 71–117).

In the Internet environment access to the abovementioned content has been broadened, which constitutes a crucial modification of the scope of risks and potentially tougher harmful impact on minors` development, from this category of threats. It is due to the fact that: "The ease of accessibility and search-ability of information contained in computer systems, combined with the practically unlimited possibilities for its exchange and dissemination, regardless of geographical distances, has led to an explosive growth in the amount of information available and the knowledge that can be drawn there from" (*Explanatory Memorandum to the Convention on Cybercrime,* 23.11.2001, *Introduction point 4*). This means also a digital migration or rather extension of existing offline

threats to the virtual sphere, bearing in mind their mutual dependence and influence; the good example of bad behavior is online: bullying, harassment or grooming.

Regarding the abovementioned *Internet technology risks* (OECD report, 2012), the most dangerous is illegal content, especially if it concerns the sexual crimes against child (Badźmirowska-Masłowska, K., *Fighting against child sexual abuse and child sexual exploitation in Europe…*, 2013, pp. 147–160); in particular the early sexual abuse, may be detrimental to a child's and young adult's psycho-social development and destructive to minors` health (see: Recommendation No. R (93) 2 *on the medico-social aspects of child abuse*). There is no doubt that: "many more child pornography images [are] available now and many more individuals [are] accessing those images than would have been the case had the Internet not existed. (…); [It] is an active cause of child pornography" (Wortley R., Smallbone S., 2012, p.15), exacerbating the abovementioned problem by increasing: the volume of the images and the efficiency of dissemination of them.

In line with art. 9.1. of the Council of Europe (COE) *Convention on Cybercrime* (Budapest, 23.11.2001; *Title 3 – Content-related offences*), committed intentionally and without right: producing, offering, distributing or transmitting, procuring as well as possessing child pornography should be established as a criminal offences under State-Parties domestic law[3]. The

[3] See: Recommendation 1065 (1987) of the Parliamentary Assembly of the Council of Europe *on the traffic in children and other forms of child exploitation*; Resolution No. 3 *on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults of the 16th Conference of European Ministers of Justice* (Lisbon, 1988); Recommendation No. R (89) 7 *concerning principles on the distribution of videograms having a violent, brutal or pornographic content*; Recommendation No. R(91)11 *on sexual exploitation, pornography and prostitution of and trafficking in, children and young adults* Adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies. Recommendation No. R (2000) 11 *on action against trafficking in human beings for the purpose of sexual exploitation;* Recommendation (2001)16 *on the protection of children against sexual exploitation;* Resolution 1099 (1996) *on the sexual exploitation of children.* In particular Resolution 1307 (2002) *on sexual exploitation of children: zero tolerance*; see also Doc. 9535, report of the Social, Health and Family Affairs Committee, rapporteur: Mr Provera; Doc. 9573, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Piscitello; and Doc. 9575, opinion of the Committee on Culture, Science and Education, rapporteur: Baroness Hooper). *Text adopted by the Assembly* on 27 September 2002 (32nd Sitting).

term is understood as material that visually depicts: "a. a minor engaged in sexually explicit conduct; b. a person appearing to be a minor engaged in sexually explicit conduct; c realistic images representing a minor engaged in sexually explicit conduct" (art. 9.2).

Then, following the mentioned regulation, COE has established a convention strictly devoted *on the Protection of Children against Sexual Exploitation and Sexual Abuse to...* (Lanzarote, 25.10.2007), underlying a: "worrying proportions at both national and international level, in particular as regards the increased use by both children and perpetrators of information and communication technologies (ICTs), and that preventing and combating such sexual [crimes]" (*Preamble*). It might be treated as a basic standard for other legal instruments from the described scope of problems. Within the context of the convention, minors are treated as a victims (art. 3c) of the following, precisely defined, crimes: sexual abuse (art. 18), offences concerning: prostitution (art. 19), child pornography (art. 20), participation of a child in pornographic performances (art. 21) and corruption of children, solicitation of children for sexual purposes. Moreover, State-Parties were committed to settle the age below which engaging in sexual activities with a child is prohibited (age of consent).

Similarly standards has been settled in existing legislation of European Union (EU). Directive 2011/92/EU of the European Parliament and of the Council of the 13 December 2011 *on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA,* emphasizes that: "Sexual abuse and sexual exploitation of children (…), constitute serious violations of fundamental rights" (point 1 of the *Preamble*). It includes detailed provisions concerning the definition of criminal offences in the area of sexual exploitation – recruiting, forcing, knowingly attending pornographic performances, as well as causing or recruiting, forcing a child into a prostitution (art. 4–5). A sexual abuse of children has been also distinguished – causing for sexual purposes, a child-victim who has not reached the age of sexual consent, within the meaning of art. 2b (determined by national law), to witness sexual abuse, activities, even without having to participate or engaging the abovementioned child in sexual activities (art. 3); in particular the solicitation of children for sexual purposes has been indicated (art. 6). It also refers to incitement,

aiding, abetting, attempt and consensual sexual activities aspects of problem, as well as aggravating circumstances of the offences (art. 7–9).

The new, typical for the Internet environment threats are not only connected with a much wider access to an on-line potentially harmful content and simultaneously possibility to create it and share. It concerns, sometimes with the intention to harm the child, contacts, e.g. cyber-grooming (see: Badźmirowska-Masłowska, K., 2015, pp. 171–208) or exposure to hateful interactions, as cyberbullying) too; also bothering behaviors, like self-harm, self-inflicted injury, eating disorders advices websites etc. (see *e.g.* Andrzejewska A., 2014). On the other side a game, computer and cell addictions as a new kinds of Internet dangers have appeared (see *e.g.*: Weinstein A, Lejoyeux M., 2010, pp. 277–83).

Taking into consideration the macrosocial perspective of the threats, mainly a problem of digital exclusion should be mentioned (see: Livingstone S., Bober M., Helsper, E., 2005). Besides, it is important to mark the negative, both in individual and social dimension, consequences of unified pop-culture patterns, determining, irrespective of country, regional, local traditions, values, faiths etc., children` s views, believes opinions, attitudes, behaviors, which is clearly expressed within problematic aspects of body image issue (see *e.g.*: Clay, D., Vignoles, V. L., Dittmar, 2005) as well as wide-spreading of sexting phenomena among youth (see e.g. Andrzejewska A., 2014). Finally, regarding the discussed perspective, it is to be mentioned that directive 2011/92/EU should be fully complementary with directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*: "as some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation" (point 7 of the *Preamble*).

3. Legal instruments and/or alternative measures?

Minors face a broad spectrum of risks when they use new technologies, but risk have to be distinguish from harm, since not all children encounter it, and not all threats result in harm (Livingstone S., Haddon L., Görzig A., Ólafsson K., 2011, pp. 3-4). As they are more vulnerable than adults at the

potentially negative influence, they need a comprehensive, coherent support to be able to cope with the risks, to give a resilient reaction, especially based on an ability to recognize and identify dangerous content, situations and interactions; their approach should be connected with the wide scope of technical and social digital skills (Livingstone S., Haddon L., Görzig A., Ólafsson K., 2013, p. 26). OECD *Report on risks faced by children online and policies to protect them* has indicated the various dimensions of child protection policy: multi-layered, multi-stakeholder and multi-level (pp. 40–49).

The first one comprises direct and indirect policy tools, blending legislate measures with alternative mesaures such as: self and co-regulatory, technical, awareness raising and education, including positive content within child safety zones. It should be mentioned that: "Most countries would subscribe to the statement that what is illegal offline should be illegal online and champion a normative approach to child protection online. In such countries, the main challenge is to enhance the compliance with and enforcement of existing instruments rather than adopt additional laws and regulations" (OECD *Report on risks faced by children online and policies to protect them*, p. 41).

This approach seems to be justifiable, thus subjects to consideration, in particular bearing in mind the significance of net neutrality principle (see: N. van Eijk, 2011, pp. 7–19).

It have to be indicated that minors are entitled to get an exceptional care, given from all stakeholders: public authority, representatives of businesses as well as of a civil, information society, in particular the teachers and parents (guardians). Thus multi-stakeholder policy of an online child protection refer to their various roles, commitments and shared responsibilities. The policy purposes should be adopted at the government level to coordinate and monitor their implementation, initiate national campaigns, cooperation within platforms and awareness centers, as well as to facilitate of other subjects efforts, like self and co-regulation of private sector and activities of non-profit organizations.

The key role ought to be assigned to, directly responsible for children upbringing, parents (guardians). But the growing impact of Internet on children`s life (in particular expressed in universality of pop-culture patterns), which is more noticeable than parents one, has caused a problem of less and permanent reductive meaning of primary, family structures

(groups), define as: "those characterized by intimate face-to-face association and cooperation. (…) [and] (…) fundamental in forming the social nature and ideals of the individual" (Cooley Ch. H, 1910, p. 23). As a matter-of-fact, change of traditional guardians roles, determined by differentiation of the approach and competence of the technical and socio-cultural aspects of Internet, has divided family members into young – 'digital – natives' and old – 'digital immigrants' categories. The latest one are *de facto* excluded from daily, 'mobile' and 'immerse' minors life, even though their members have attempted to counteract this growing divide. As families are not able enough to fulfill their duties, the responsibility to guarantee a safety for children online, some-how has shifted on other stakeholders, such as educators, trainers, social workers, other public institutions (like libraries), in particular representing school environment.

Multi-level policy mechanisms at national and international levels regards mainly a realization of goals within the operational national and international collaboration, reflected in settling regulatory frames of soft law and regional legal standards (see: abovementioned conventions and directives), as well as in increasing international co-operation initiatives: "in the areas of law enforcement, exchange of hotline reports about illegal online material (*i.e.* INHOPE) and sharing of best practices for the protection of children online (*i.e.* INSAFE)" (OECD *Report…*, p. 49; see also: *Protecting children's rights in the digital world: an ever-growing challenge,* 2014).

Concerning the basic premises of chosen legal and/or alternative methods of protection of minors in Internet, primarily the following criteria have to be taken into account:

1) seriousness of threats – whether they constitute crimes, in particular sexual offences against children or any other interferences of their development;
2) technical aspects of access to danger content, contacts and behavior – dependent on match certain services to the linear or non-linear AMS or to the other Internet services;
3) coverage of certain risks – which determines an individual or macrosocial character of threats as well as needed internal or international level of reaction on them;
4) age category of children and youth – which required different security means, both in technical and social context.

Overall, legislation pertaining to all illegal content is applying across all offline and online media and it is predominantly regulated on national level within the scope of general laws (*e.g.* consumer or privacy and information security related risks for minors).

The most anxious issue is connected with a need to counteract (to prevent and to combat) sexual crimes against children and youth and protect their fundamental rights as victims, within the wide national and international co-operation (art. 1 of the Lanzarote Convention, 2007), taking into account the best interest of them[4]. Directive 2011/92/EU establishes precise frame of such activity: "minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography [including online pornography and sex tourism – art. 21 of the directive 2011/92/EU] and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof" (art.1). The framework should apply in both transparent and free from ambiguity manner.

Abovementioned instruments provide complementation of criminal (penal) regulations with necessary other legislative or alternative measures, both preventive and undertaken for assistance, support and protect child victims, especially within a scope of criminal investigations and proceedings. *Nota bene,* the direction is reflected in the aims of *the Global Alliance against Child Sexual Abuse Online*, comprise enhancing efforts to identify victims of child pornography and ensure them all kinds of necessary help, as well as to investigate cases, identify and prosecute offenders; then increasing public awareness of the risks posed by minors` activities and reducing the availability of child pornography online against re-victimization of children are indicated (see purposes of the directive 2011/92/UE and: Global Alliance against Child Sexual Abuse Online: New Report and Threat Assessment, 2015).

Regarding prevention aspects of the issue, education and training are particularized (art. 23.1 of the directive 2011/92/EU). First encourage

[4] See: Resolution 1834 (2011) *Combating "child abuse images" through committed, transversal and internationally co-ordinated action*; Recommendation 1980 (2011) *Combating "child abuse images" through committed, transversal and internationally co-ordinated action*; also: Resolution 1835 (2011) *Violent and extreme pornography*; Recommendation 1981 (2011) *Violent and extreme pornography*.

awareness of the protection and children`s rights, among employees professionally engaged in contacts with them, in the area of education, health, social protection, judicial and law – enforcement (including front-line police officers), also in culture, sport, leisure, should be pointed out; by the way, when recruiting persons for organized voluntary or professional activities involving direct and regular contacts with minors, employers are entitled to check whether they have been convicted for sexual offences against child (art. 10.2. of the directive 2011/92/EU). Taking into consideration broader perspective, awareness raising campaigns addressed to the general public should be performed as well as programs or similar initiatives (projects) involving minors, representatives of public authorities, private sectors (e.g. media in particular through self-regulation or co-regulation) and civil society. Moreover, children as a special category of end-user within the frame od primary and secondary education have to be given an adequate information about the online risks, connected with sexual offences against them (Chapter II, art. 5–9 of the Lanzarote Convention; art. 23.2 and 23.3 of the directive2011/92/EU).

The specialized authorities and adequate bodies are expected to designate mechanisms for data collection or focal points and coordinate on national or local level all activities of the organizations playing on the field (Chapter III, art. 10 of the Lanzarote Convention). Furthermore, combating this kind of criminality (delinquency) national public authorities at least within their territory are obliged to undertake measures against websites containing or disseminating child pornography such as prompt removal them or block access to them (art. 25 of the directive 2011/92/EU).

Protective measures of child victims of the sexual crimes are targeted at establishing a system of the necessary assistance and support for victims, their families and caregivers, within the scope of prosecution and jurisdiction process (art. 17–18 of the directive 2011/92/EU), bearing in mind on one hand that some of them are victims of organized crime (even human trafficking) and significant role of the Internet in producing and disseminating incriminated materials, on the other. This is crucial, that investigation and prosecution are not dependent only... "a report or accusation being made by the victim or by his or her representative, and that criminal proceedings may continue even if that person has withdrawn his or her statements" (art. 15.1 of the directive 2011/92/EU).

In particular reporting suspicion of children sexual exploitation or sexual abuse, setting up information services (helplines) and wide assistance to victims, including such elements like legal advice and physical, psycho-social care and recovery, applied before, during and for an appropriate period of time after the conclusion of criminal proceedings, regardless on the child victim's willingness to cooperate in the criminal investigation, prosecution or trial are the core of the system combating sexual criminality against children (Chapter IV, art. 11-14 of the Lanzarote Convention; art. 19-20 of the directive 2011/92/EU). Finally, it is important to add that intervention programs or other measures ale also dedicated to the persons convicted of any of the sexual offences against child, provided by the relevant provisions (Chapter V, art. 7, 15–17 of the Lanzarote Convention; art. 22, 24 of the directive 2011/92/EU).

According to the provisions of the art. 27.1 of the directive 2010/13/EU (*Chapter VIII Protection of Minors in Television Broadcasting* – Audiovisual Media Services Directive) for linear services the ban of including content which might seriously impair the development of minors (in particular programs that involve pornography or gratuitous violence) has been sustained (as the standard was introduced under the *Television without Frontiers*" (TVWF) directive[5]). The prohibition should also applied to: "other programs which are likely to impair the (…) development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts" (art. 27.2 of the directive 2010/13/EU). Moreover, un-encoded programs ought to be preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration (art. 27.3 of the directive 2010/13/EU).

[5] Council Directive 89/552/EEC of 3 October 1989 *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,* OJ 17.10.1989 L 298; Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 *amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,* OJ 30.07.1997 L 202

Regarding the 'on-demand' AMS restriction of access mainly technical means are applied; precisely services: "which might seriously impair (…) development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services (art. 12 *Chapter IV Provisions applicable only to on-demand AMS,* of the abovementioned directive). There is no reference to a potentially harmful content. The differences of approaches to the linear and non-linear audiovisual media services (similar to other Internet services) are determined by distinctive technical specification of them. The mentioned provisions encourage to sustain broadcasting content ratings system, based on evaluation of the appropriateness of certain programs for different categories of age groups of minors. They also concern media content labeling schemes, including the issue of selecting time to broadcast content unsuitable for children.

In summary, most States include Internet within the scope of updated content regulations: "The regulation of child inappropriate content often has its origins in television regulation, which some countries (gradually) expanded in order to capture television-like formats (linear) transmitted over the Internet and certain on-demand services, with a few countries abolishing any distinction between old and new media (*i.e.* horizontal content regulation)" (OECD *Report…,* 2012, p. 62). Furthermore, "content regulation takes a two-pronged approach: a general ban on illegal content and [applied] national regulation [which expresses particular cultural and societal values] of child-inappropriate content up to defined age levels" (OECD *Report on risks faced by children online and policies to protect them,* 2012, p. 41); while the minimum rules concerning the definitions of criminal sexual offences against child (and sanctions) have been settled at European level, so they subject both to the international/ transnational (COE, EU) and national regulations.

Regarding contact and conduct – related risks (communication acts), some of them had been remarked within the scope of European soft law (e.g. Recommendation Rec(2006)12 of the Committee of Ministers to member states *on empowering children in the new information and communications environmen*t; Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States *on the protection of human rights with regard to social networking services*; Recommendation CM/

Rec(2014)6 of the Committee of Ministers to member States *on a Guide to human rights for Internet users*)[6] and following that have been progressively introducing to the internal law solely as a new criminal offence or a new type of existing crime (e.g. bullying – harassment), but committed via electronic communications. Thus, for example cyber-grooming and cyber-bullying might become new versions of offline grooming and bullying, whereas harmful advice and sharing of problematic content expose children to threats connecting dangerous practices such as self-harm or sexting (nude or semi-nude photographs, video etc.), are considered within the criminal law or image rights provisions (Badźmirowska-Masłowska, K., 2015, pp.171–208). It is to be mentioned that in order to mitigate contact and conduct – related threats for minors online, introducing measures such mandatory monitoring of social media (*e.g.* chats) might be effective.

International and national legislation directed to guarantee the children safeness and security in the Internet environment, have been accompanied with a variety of so-called alternative methods, which are especially particularized and described within the soft law:

1) self and co-regulation – *e.g.* recommendation REC (2001) 8 of the Committee of Ministers to member states *on Self-regulation concerning cyber content*;
2) technical means – *e.g.* recommendation CM/Rec(2008)6 of the Committee of Ministers to member states *on measures to promote the respect for freedom of expression and information with regard to Internet filters*;
3) awareness raising and educational measures – *e.g.* recommendation 1586 (2002) *The digital divide and education*; recommendation Rec(2006)12 of the Committee of Ministers to member states *on empowering children in the new information and communications environment.*

[6] See also: Resolution 1191 (1999) *Information society and a digital world*; Recommendation 1332 (1997) *on the scientific and technical aspects of the new information and communications technologies;*
Resolution 1843 (2011) *The protection of privacy and personal data on the Internet and online media*; Recommendation 1984 (2011) *The protection of privacy and personal data on the Internet and online media*;
Resolution 1877 (2012) *The protection of freedom of expression and information on the Internet and online media*; Recommendation 1998 (2012) *The protection of freedom of expression and information on the Internet and online media.*

The wide spectrum of self-regulatory initiatives, based on a voluntary commitment of certain part of private sector, as well as co-regulatory ones, being a combination of government and private regulation (see *e.g.*: P. Stępka, W. Kołodziejczyk, 2006; Haraszt M., 2008; Palzer C., *European Provisions for the Establishment of Co-Regulation Frameworks Co-Regulation,* 2003, pp. 3-13) and modern forms of governance (e.g. public-private partnership, involving mobile network operators and operators of social network sites) are of a major importance to support efforts to protect minors in a new, 'flexible', online milieu: "Countries deploy various strategies to encourage self-and co-regulation such as by *i*) making explicit reference to these mechanisms in legislations; *ii)* giving a mandate to regulatory authorities to negotiate with stakeholders voluntary commitments; *iii)* creating platforms for stakeholders to convene; and *iv)* stirring problematic areas by threatening to resort to "command and control" style regulation" (OECD *Report on risks faced by children online and policies to protect them*, p. 41)[7].

The initiatives should be strengthen, by a consolidation of existing solutions, extending them from tradition mass media sector to the Internet environment and establish common framework principles across industries, including mobile sector, which within the voluntary commitment, titled: *European Framework for Safer Mobile Use by Younger Teenagers and Children,* 2007 has adopted adequate aims of the activity in a media field. They include classification of commercial content with access control mechanisms for this which is dedicated for adult; besides, the awareness raising campaigns for children and parents and fight against illegal content have been indicated. The cross sectoral solutions might improve the effectivity of the whole system of minors` protection[8].

As the child-inappropriate content both online and partly offline subjects to access restrictions and control (see *e.g.* Badźmirowska-Masłowska, K., *Ochrona małoletnich jako podstawa ograniczenia retransmisji*

[7] "Existing models can be classified according to whether *i)* it is co-regulation or self-regulation; *ii)* it is an industry led commitment or it involves all relevant stakeholders; *iii)* it applies to one country or represents a regional agreement; and *iv)* it is a single group's standard or collective agreement", OECD *Report on risks faced by children online and policies to protect them*, p. 68.

[8] See e.g. Pan-European Game Information as an example of solutions for on-line games, http://www.pegi.info/pl/index/id/364/ (30.06.2017).

audiowizualnych usług medialnych w świetle prawa UE…, 2013, pp. 413–435), the complementary, in regard to legal obligations, role of technical, reliable and usable measures has been raised. "Technologies can be used to *i)* keep certain risks away from children (*e.g.* filtering technologies); *ii)* keep children out or, the reverse, admit only children to specific websites (*e.g.* age or identity verification systems); and *iii)* create child safe zones on the Internet (*e.g.* walled gardens)" (OECD *Report…*, p. 72).

A wide range of filtering techniques to limit access to or block Internet content are based on distinguishing white and black lists of content: "*whitelists* [recommended for younger children] block access to all Web content except when listed as suitable for the user; (…) *blacklists* [better for adolescents] enable access to all Web content except when listed as inappropriate for the user [in particular illegal, as sexual crimes against child]" (OECD *Report…*, p. 72). The most important and the most widely used is parental control software, which include: "services that require an installation or pre-installation on the end-user's hardware; *ii)* service operated only on the server or network side; *iii)* a mix of both (OECD *Report…*, p. 75). It might be used not only to content filtering but also to control of use of the internet (*e.g.* social media), taking into account contact and conduct related risks. Future efforts ought to focus on making it more friendly for end-users, to enable parents (guardians) to choose the most effective personal setting to protect the child.

Contemporary, minors are increasingly accessing the Internet via enabled mobile devices (tablets, smartphones, game consoles), sometimes circumventing the filters which have been deployed on the desktop computers placed at home or school. Moreover, whereas children predominantly depend on parents (guardians) and other adult persons (like teachers, priests etc.), treated them as trusted influencers, during adolescence, youth has been under stronger influence of peer or wider offline and online 'friends' then ever before. Thus it is important to develop the awareness and educational methods, directed to their self-awareness, self-control and self-copy with meeting threats.

Awareness raising measures are aimed to inform and to make people conscious about the issues of public concern, just as children protection, including promoting active risk mitigation and coping strategies. They are addressed to the different group of users: children and parents, educators,

representatives of industry, civic society and policy makers. They are organized by non-profit organization, business, public bodies and within the frame of public-private partnership (OECD *Report…*, p. 79–80).

Empower end-users (in particular both children and their parents) seems to be a core of the effectiveness of the minors protection against online risks in an audiovisual sector, encompassing recognizing dangerous content, situations and interactions, methods to avoid harm (in particular to stay a victim of sexual offences), as well as finding copy strategies, including the significance of responsible behaviors; *inter alia,* acts which form part of the constituent elements of crimes (when a child – depending on certain age and internal legal solutions – might be treated as a perpetrator of a punishable act or even a crime) or caused harm to other person (in particular related to the minors development) must be avoided. Children must be equipped with useful knowledge and skills necessary to stay safe online. Therefore: "Topics [of the education] range from computer skills, cybersecurity and responsible use to fostering creative and critical capabilities, participation and active citizenship. Digital citizenship is a modern concept of Internet literacy which incorporates a number of elements including digital etiquette, digital literacy and digital security and which emphasizes participatory and creative opportunities of the Internet for children" (OECD *Report…*, p. 81).

The educational policy requires a constructive role for all stakeholders, mainly trainers, educators and teachers, in presenting legal boundaries, axiology (cultural, ethical and moral norms and expectations), risks, even though that there is no universally accepted model of them and significant differences between countries, regions, continents are observed; it seems that both European and national approach should be applied, reflecting in particular the local needs. Following the abovementioned direction, ideas of including media and Internet literacy education in school curricula (starting from primary or secondary level) as well as trainings organized for educators, should be pointed out (see: *e.g.* Badźmirowska-Masłowska K., *Edukacyjne aspekty bezpieczeństwa nowych technologii komunikacyjnych dla małoletnich w świetle Strategii Unii Europejskiej na rzecz lepszego Internetu dla dzieci…*, 2012, pp. 433–472).

Finally, it is to be said, that the one of the most important European initiatives, taking into account the abovementioned aspects of the heading

problem is *Safer Internet program* (now *Better Internet for Kids;* see: *From a Safer Internet to a Better Internet for Kids*). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *European Strategy for a Better Internet for Children* of 2012 has focused on: creating a safe environment for children online by in particular stepping up awareness and empowerment and fighting against sexual crimes on the one side and promote high-quality content online for minors on the other (see *e.g.* Badźmirowska-Masłowska, K., *Rozwój nowych technologii komunikacyjnych a bezpieczeństwo dzieci w Unii Europejskiej* (1996–2011). *Perspektywa prawna…*, 2013, t. 1 s. 213–260). It is significant that: "On 7 February, millions of people in 120 countries were marking Safer Internet Day. The European Commission and leading digital players have committed to work towards curbing harmful content, conduct and contact in an Alliance to Better Protect Minors Online" (see: Safer Internet Day 2017: *European Commission welcomes alliance of industry and NGOs for a better internet for minors*).

4. Conclusions

The preceding overview of issues concerning the systemic aspects of the protection of minors against Internet threats brings to mind some general remarks. The mentioned below findings are implicated by the fundamental change of the *communicate on paradigm*, challenged by the dynamic and universally accessible nature of Internet environment.

The heading question of a choice between legal instruments and alternative measures as the adequate way of safeguard the minors security should be reformulated. Instead of connective 'or' an adverb 'how' might be put. That is because, the analysis of existing policies has indicated that only, depending on the kind of risks and technical method of access and use of the Internet, effective combination or may be proper blend them may fulfil their fundamental aim, which is constructing possibly most secure online environment. They should be set up on national level, but within an international co-operation (regional – COE and transnational – EU) in the complementary, coherent, consistent and multidimensional manner, involving all responsible for the children protection, stakeholders,

in particular, responsible for encouraging initiatives, monitoring and coordination of the activities in the area, public authorities (OECD *Report…*, pp. 50–55).

The considerations, analyses, researches have to take into account an individual perspective of the risks, bearing in mind especially the differences between particular age categories of children and youth, which determine their development period (which is – as it was pointed out – the subject of protection in audiovisual sector) and approach to the various threats, as well as macrosocial aspects of them, including the consequences of digital exclusion and worldwide unification of pop-culture patterns among young people.

While online sexual offences against child are cross-border in nature and so require not only regional but even global legislative attention, mainly national policy approaches to regulating content of linear and non-linear AMS as well as a content of other internet audiovisual services have so far predominantly employed in line with general internal law. By the way, framing media or wider audiovisual content (both illegal and inappropriate for children) within regulation across all media platforms (regardless of way of access to them) seems to be envisaged. Similar, the alternative measures should be applied in more coherent way (*e.g.* use of rating and content classification).

Finally, it must to be taken into consideration that legal instruments might not be effective enough, if only it is not possible to ban every single activity which potentially exposes minors to online risks. Thus parental care and educational measures are still of the major importance.

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Personal data protection under legal regulations

ABSTRACT
Contrary to appearances, personal data is a very extensive concept, which is included in the law both on the European and Polish. Today the term Specifies not only a name, but also other data that can be used to identify an individual. Consisting of four parts of the article raises very important questions about the same concept, European law and Polish and malicious activity relating to the misuse of such data. An in-depth analysis of the legal acts and an indication of the specific cases to bring all interested subject of protection of personal data. Article also contains a catalogue of risks associated with both deliberate administration of personal data loss and theft. This work is information and a warning-the goal is to increase awareness and alertness of our society. Making the society aware is an important issue, that many institutions are usually standing over the safety state of their data and of the organization.

Keywords: personal data, sensitive data, safety

1. Introduction

Every day there are numerous institutions, organisations, guards and inspections protecting the safety of all citizens. Nowadays, in the times of rapid changes taking place in every area of life, this requires a lot of work and involvement. However, the actions taken for personal data protection are not a sufficient means in the face of irresponsible activity of the society. Currently, people more or less consciously make available an increasing amount of information about themselves, e.g. through popular

social networks. These include very different data, because users state their names, surnames and provide several other basic data. We can also find there certain data which, under the existing legal regulations, can be considered as sensitive data, which are subject to special protection.

The problems of personal data security were legally regulated not only in the Constitution of the Republic of Poland, but also in the Personal Data Act of 29 August 1997, which has been effective for 20 years, despite many amendments. Inspector General for Personal Data Protection (IGPDP) is the body which governs personal data protection on a daily basis, and it is the activity of IGPDP that will receive particular attention in this article. IGPDP, acting on the basis of the legal regulations, is the contemporary guard of personal data security.

However, all actions taken both by the legislator and by IGPDP, are not a sufficient means to ensure one hundred per cent safety of citizens, because a majority of risks in this field are created by the society, which makes a lot of information about themselves available on a daily basis. This security is additionally reduced by fast development of information technology, Internet and any kinds of social networks. Therefore, among the specialists who handle issues related to personal data protection, there are increasingly frequent opinions about the need to adjust the regulations to the new reality.

2. Personal data and body responsible for their protection

Personal data is a term with very broad meaning, because the legislator did not create a closed catalogue of information which can be defined in this way. Instead, the Act contains a provision saying that *'personal data shall be understood as any information concerning an identified or identifiable natural person*' (Art. 6 of the Personal Data Act of 29 August 1997, Journal of Laws of 2016, Item 922). Due to this, a question arises – what type of information becomes personal data, is this a single piece of information, or a set of information? As explained by the Inspector General for Personal Data Protection, personal data shall not be understood as single pieces of information with a high degree of generality. They include e.g.. information such as:

- street name
- house number
- remuneration amount

However, such information will become personal data when provided with additional information thanks to which a particular natural person can be specified. An example of single piece of information, which is indisputably considered to be personal data is the PESEL number. In the light of Art. 15 of the Act of 24 September 2010 on population registration (Journal of Laws of 2016, Item 722), PESEL number is an eleven-digit numeric symbol which contains the date of birth, ordinal number and indication of gender.

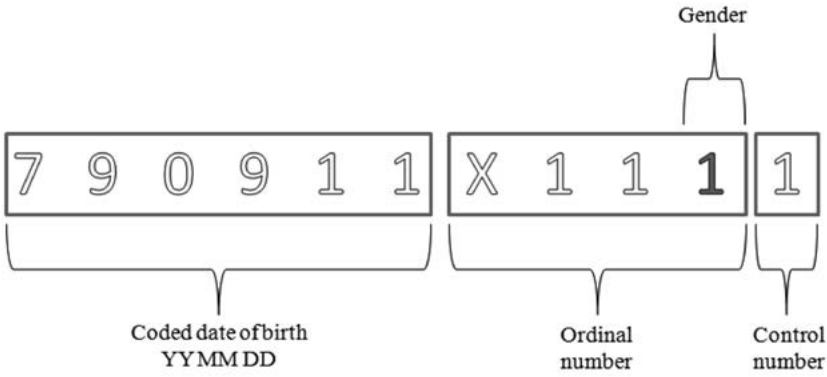

Fig. 1 Description of PESEL number pursuant to Art. 15 of the Act of 24 September 2010 on population registration.

PESEL number consists of elements such as:

- coded date of birth
- ordinal number
- coded gender
- check digit

Digits 0, 2, 4, 6, 8 – mean the female gender, whereas digits 1, 3, 5, 7, 9 refer to the male gender.

In fact, a city card number can also be regarded as personal data, unless establishment of such information generates a large amount of

costs, time and activities. Taking into consideration the fact that a city card contains a number linked to a particular person, assigned by an information system, an authorised carrier's employee is able to determine the owner of a card. The same applies in the case of e-mail address. If it contains information such as name and surname, or surname and company name, the owner can be determined without bearing any costs or excessive measures. It is different in the case when an e-mail address contains a general name and identification of the owner would require significant costs and work.

An example of e-mail address considered as personal data:

jan.kowalski@firmaabc.abc.pl

This address contains information such as: name, surname and name of the company represented by a particular person. Therefore, it is simple to determine the person indicated in the above address.

An example of e-mail address not considered as personal data:

potok@abc.pl

The word 'potok' in the above-mentioned address does not necessarily refer to a surname, location, and it can be a randomly selected word through which the owner cannot be determined easily.

In light of legal regulations, personal data are divided into common data, containing basic information, such as name, surname, PESEL number and sensitive data referring to religious or philosophical beliefs, any information containing ethnic and racial origin, as well as political beliefs and party affiliation. Sensitive data, specified in Art. 27 of this Act, also include medical data, i.e. data describing the health condition, as well as information on the genetic code. The current Act also classified as sensitive the information concerning any type of conviction, as well as penalty judgments, fines and judgments issued during administrative or judicial proceedings (Art. 27 of the Personal Data Act of 29 August 1997 with further amendments). The below diagram was created on the basis of Art. 6 and Art. 27 of the Personal Data Act in order to determine the basic division of personal data.

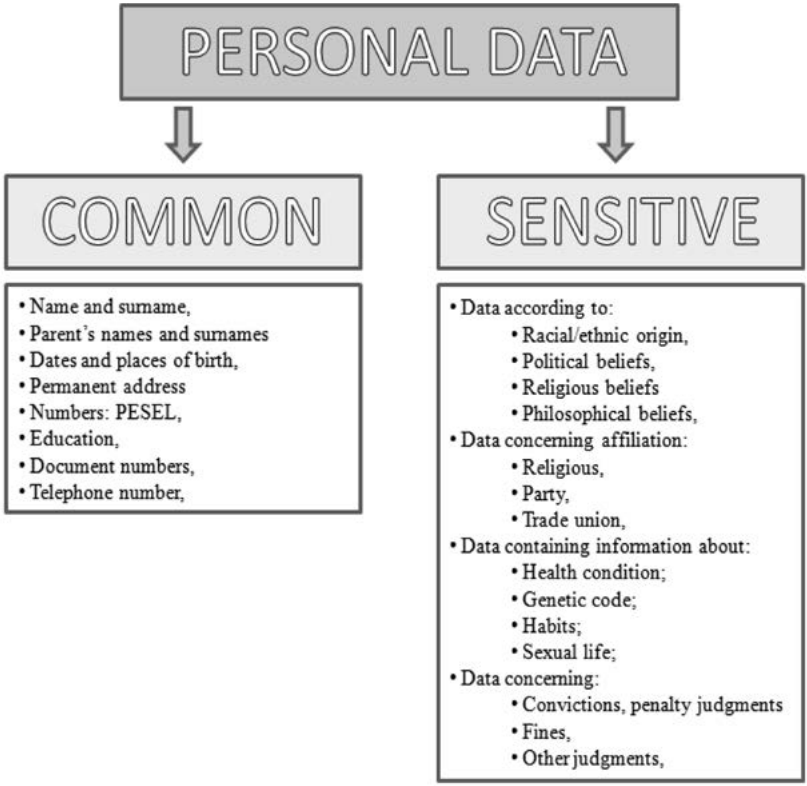

Fig. 2 Division of personal data in light of the Personal Data Protection Act of 29 August 1997.

The body responsible for personal data protection in the territory of the Republic of Poland is Inspector General for Personal Data Protection (IGPDP). Inspector General for Personal Data Protection is appointed and dismissed by the Sejm of the Republic of Poland (with the approval of the Senate) for a four-year term. However, they cannot perform their duties for more than two terms, i.e. 8 years. Upon the expiry of a four-year term, IGPDP shall perform their duties until their successor has assumed their position. The Act precisely defined that Inspector General for Personal Data Protection cannot take up work in a different position, with the exception of a professor of a higher education institution. In order to become Inspector General for Personal Data Protection, a person has to comply with all four statutory requirements included in Art. 8:

- be a Polish citizen and reside permanently in the territory of the Republic of Poland;
- be distinguished by high moral standards;
- have a higher legal education and relevant professional experience;
- have a clean criminal record (pursuant to Art. 8 of the Personal Data Protection Act of 29 August 1997).

This Act also specified the scope of activity of IGPDP. Therefore, acting on the basis of the applicable legal regulations, Inspector General for Personal Data Protection shall perform inspections in the field of appropriate data processing, compliant with the personal data protection regulations. IGPDP's task is also to maintain and provide information concerning registers of personal data, as well as registers of Administrators of Information Safety (AIS). Moreover, IGPDP shall provide opinions on draft acts and regulations concerning personal data protection, as well as participate in works related to this subject in domestic and international institutions. IGPDP shall also undertake a range of activities intended to increase the social awareness of the problem of personal data protection. Therefore, the IGPDP website contains valid legal acts, articles, publications, as well as information on conferences, courses and trainings. However, particular attention should be paid to the available information services, such as the educational and information website eduGIODO.

3. Personal data protection in the Polish legal system

Personal data security is guaranteed particularly by the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, Item 483), in which the legislator focused on securing the most important interests of citizens. Art. 47 of the Basic Law stipulates that *'Everyone shall have the right to legal protection of their private and family life, of their honour and good reputation and to make decisions about their personal life.'* Therefore, activities such as collecting, processing and sharing personal data repeatedly affect the sphere of private life. In accordance with Art. 51 of the Constitution, every human being shall have the right to decide about disclosure of information concerning themselves. This means

that everyone can freely dispose of their own personal data. Also the provisions of the Constitution of the Republic of Poland clearly define that every human being shall have the right to access official documentation concerning themselves. A citizen cannot demand access to private collections and documents belonging e.g. to a collector. However, every human being has the right to demand their own data to be correct, and therefore, everyone has the right to correct or delete wrong data.

The Personal Data Act of 29 August 1997 (Journal of Laws of 1997 no. 133 Item 883) was adopted in the same year as the Constitution of the Republic of Poland, and work on this Act took as many as six years (Barta, Fajgielski, Markiewicz, 2011, 98 – 99). Taking into consideration that this Act did not have a predecessor, its authors faced a difficult challenge. *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* has become the basis of Polish regulations, and in consequence, a kind of model. The way from the moment of drawing up a draft act until its resolution was not a simple road. On 8 October 1996, two draft acts (one by the government and one by MPs) undertaking in detail the issues related to personal data protection were submitted in the Sejm of the Republic of Poland. The first reading of the draft acts was held on 20 November 1996, during the 94th session of Sejm, whereas the second reading took place on 30 July, and the third on 1 August. The voting results were as follows: 325 votes for passing the Act, 5 votes against and three MPs abstained from voting. The Act was eventually adopted during the 114th session of the Sejm of the Republic of Poland on 29 August 1997. A number of amendments have been introduced since then. A significant change in the Act was introduced on 25 August 2001, when the definition of personal data was amended. It was decided then that personal data do not only include the name, surname, VAT number or PESEL number, but also information that may serve to identify or 'make it possible to identify' a natural person. Moreover, the catalogue of sensitive data was extended by including fines and judgments of criminal proceedings (Kałużyńska – Jasak, 2013,124). The current Personal Data Protection Act consists of nine chapters. The first one of them begins with a very important sentence saying that *'everyone has the right to protect their personal data'*, which refers to every natural

person. The first chapter is an introduction to the subject of personal data protection by explaining this term in Art. 6. It also defines the goals of this Act and rules of handling personal data, as well as responds to the fundamental question concerning the necessity of its application. The first chapter also contains a summary of basic terms in this field. The Act defines the principles of functioning of Inspector General for Personal Data Protection and their competences. In a large chapter dedicated to the rules of personal data processing, the legislator precisely determined in points when such data can be processed, as well as the role and importance of a personal data administrator. In Art. 27 of this Act, the legislator included a list of data which are subject to special protection (the so-called sensitive data). Although the term 'sensitive data' is not used in the Act, this notion is used with reference to information revealing racial or ethnic origin, political opinions, religious beliefs, philosophical beliefs, religious, party and trade union affiliations, as well as data about health condition, genetic code, habits or sexual life and data on convictions, penalty judgments and fines, as well as other judgments of court or administrative proceedings. This Act also specifies the rules of providing personal data to a third party country and penal provisions in case of incorrect personal data use. Under this Act, the information concerning conceived yet unborn children, legal entities and organizational units without legal personality or deceased persons is not universally recognized as personal data. Due to this, relatives of the deceased may obviously demand that the information about the deceased will no longer be processed on the basis of the Civil Code with reference to personal data protection. The personal interest in this case is cult of the memory of the deceased (Szewc, 2007, 5). Based on IGPDP's interpretation, personal data shall be understood only as information about a natural person, i.e. a person who participates in legal relationships. The legal capacity of a human being is the capacity to be a holder of the rights and obligations. It is acquired at the moment of birth and ceases at the moment of death, or at the moment of being declared deceased. A person who has deceased or has been declared deceased cannot be a holder of rights and obligations, and therefore is not a party to any legal relationships, nor can they be recognised as a natural person. Therefore, the current Personal Data Protection Act shall apply only to processing personal data of living individuals.

The Personal Data Protection Act, amended several times, has been protecting the safety of personal data of all citizens for twenty years. A number of executive regulations to this Act have been issued. Data protection in IT systems is one of the most important issues in the times of dynamic changes and quick development of information technology. In order to secure data personal data in this field, relevant provisions had to be established to provide framework for such activities. *Regulation of the Minister of Internal Affairs and Administration of 29 April 2004 as regards personal data processing documentation and technical and organisational conditions which should be fulfilled by devices and computer systems used for the personal data processing (Journal of Laws of 2004, no. 100, item 1024)* is a kind of instruction concerning the rules of maintaining documentation related to personal data processing, as well as it determines the technical conditions of devices and IT systems intended for personal data processing. This document also contains a summary of key terms encountered by every person responsible for personal data protection. Here, particular attention was also paid to safety measures, taking into consideration division into basic, increased and high levels.

Another significant executive regulation is the *Regulation of the Minister of Internal Affairs and Administration of 11 December 2008 on specimen of a notification of a data filing system to registration by the Inspector General for Personal Data Protection (Journal of Laws of 2008, no. 229, item 1536)*, as the name suggests, containing a specimen of a notification of a set of personal data to IGPDP. Specimens of documents were also established in the *Regulation of the Minister of Administration and Digitization of 10 December 2014 on notification sample forms regarding appointments and dismissals of Administrator of Information Security (Journal of Laws of 2014, item 1934).* The detailed guidelines for AIS are also included in the *Regulation of the Minister of Administration and Digitization of 11 May 2015 on the methods of running data register by Administrator of Information Security (Journal of Laws of 2015, item 719) and Regulation of the Minister of Administration and Digitization of 11 May 2015 on procedures and methods of implementing measures to ensure the observance of the regulations on personal data protection by Administrator of Information Security (Journal of Laws of 2015, item 745).*

The status of the office of Inspector General for Personal Data Protection was established with the *Regulation of the President of the Republic of Poland of 10 October 2011 on granting the statutes to the Bureau of the Inspector General for Personal Data Protection (Journal of Laws of 2011, no. 225, item 1350).* This document had been preceded by the Regulation of the President of the Republic of Poland of 3 November 2006 on granting the statutes to the Bureau of the Inspector General for Personal Data Protection (Journal of Laws no. 203, item 1494), which, however, expired on 7 March 2011 pursuant to Art. 1 Item 3 Letter b of the Act of 29 October 2010 amending the Act on the Protection of Personal Data and certain other acts (Journal of Laws no. 229, item 1497). The Regulation of 2011 (Journal of Laws of 2011, no.225, item 1350) determines the organisational structure of the Bureau of the Inspector General for Personal Data, as well as its location and branches. There were also amendments in 2015, as specified in the *Regulation of the President of the Republic of Poland of 19 November 2015 amending the regulation on granting the statutes to the Bureau of the Inspector General for Personal Data Protection (Journal of Laws of 2015, item 2020).*

The fast approaching reform of personal data protection has already given rise to many concerns. In May 2016, texts of the following legal acts were published in Ofiicial Journal UE L 119:

- Directive 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Council Framework Decision 95/46/EC.
- Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

The need to create new regulations in the field of personal data protection is motivated by the dynamic development of information technology and the already universal use of Internet almost in every area of life. Nowadays,

the Internet has revolutionised the manner of communication, therefore becoming an inseparable part of life. Due to the universal use of this means of communication, the currently effective legal regulations have become obsolete to some degree. It does not mean that they completely lost their protective functions; however, they fail to cover many important aspects. The changes planned for 2018 are highly required, because Directive 2002/58/EC refers to traditional telecommunications operators, whereas the new regulations will also cover new means of communication, including online telephony, e-mail and Instant Messaging services. Also Facebook, ranked among the most popular social networks, will have to apply the new regulations.

4. Conclusion

Without any doubt the new reality and dynamic changes that we have to face each day required the legislator to introduce changes in the field of personal data protection. The previous regulations were created in the times before Facebook, when the Internet did not play such a significant role. New regulations also mean new challenges, both for IGPDP and all administrators of information security, and they are expected to come into force from May 2018.

Every human being deals with personal data when performing daily duties. The regulations of current Personal Data Protection Act are applied during conclusion of agreements, recruitment process for a particular job position, as well as creation of a social network or e-mail account. Frequently repeated actions are becoming a standard to such a degree that we gradually attach less importance to the problem of personal data security. This happens e.g. in virtual reality which attracts many users, giving them opportunities they had never had before. Nowadays, through social networks, every user can manifest themselves and show their best side, frequently marginalizing the safety rules and abandoning the right of privacy to which they are entitled. Such activities are related to disclosing personal data and photos which may in the wrong hands become a tool for committing a crime.

The primary goal of personal data security specialists is to make society aware that every citizen is entitled to personal data protection; however,

only reasonable use of various means of communication guarantees safety. The best form of security for citizens is reasonable actions and taking care of their own data.

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Human rights obligations of enterprises under public international law

ABSTRACT

Subject of research: It has long been recognized that business can have a profound impact on human rights. Companies do not have the same legal duties as States under international human rights law. However, there has been a long-standing debate about what responsibilities companies do have for human rights.

Purpose of research: In the age of globalization which results in developments of transnational and multinational corporations there is a need to define companies' obligations in the area of human rights and determine the timeless rules that can be accepted by every culture.

Methods: The main method used in the paper is formal-dogmatic. The paper focuses on analyses of the non-binding provisions of international human rights law especially on the UN Guiding Principles on Business and Human Rights.

Keywords: human rights, business obligations, labour norms

1. Preliminary remarks

The impact of business, or more precisely, the impact of activities undertaken by private sector entities (national and international corporations, multinational and transnational enterprises) on human rights are undisputable today. Activities of business enterprises affect the human rights of employees, consumers and communities wherever they operate. This influence can be both positive and negative. The

positive impact can be displayed, for example, by increasing access to employment, improving public services, or more generally, by delivering innovation and services that can improve the living standards for people across the globe. On the other hand, the negative impact can be displayed, for example, by destroying people's livelihoods, exploiting workers (underpaying them), displacing communities or polluting the environment. Consequently, business can have a profound impact on human rights (*The UN Guiding Principles,* p. 2).

Internationals entities as well as national corporations play an increasingly important role at international, national and local levels. There are multinationals which now wield more economic power than some states. Nowadays, in the whole world there are hundreds of transnational and multinational enterprises (*J. Madeley*, 2003, p. 36). These corporations are based in one country, manufacture their products in another one, and pay taxes somewhere else. "The 300 largest corporations account for more than one-quarter of the world's productive assets. They hold ninety percent of all technology and product patents worldwide, and are involved in seventy percent of the world trade. They directly employ 90 million people (of whom some 20 million live in developing countries) and produce 25% of the world's gross product. They are active in some of the most dynamic sectors of national economies, such as extractive industries, telecommunications, information technology, electronic consumer goods, footwear and apparel, transport, banking and finance, insurance, and securities trading" (*D. Weissbrodt*, 2005, *p. 281).* Multinational corporations are increasingly seen as excessively large and powerful, and as having experienced a drastic increase in their power and impact (*J. Madeley*, p. 36).

International human rights standards have traditionally been seen as the responsibility of states and theirs governments. States must prevent, investigate, punish and redress human rights abuses that take place in domestic business operations. This means that companies do not have the same legal duties as States under international human rights law. *States* are still under an obligation to regulate relations between the State and individuals and groups. But with the increased role of corporate entities in global aspects the issue of business' impact on the enjoyment of human rights has also been placed on corporations.

In the age of globalization, which results in developments of transnational and multinational corporations, there is a need to define companies' obligations in the area of human rights and determine the timeless rules that can be accepted by every culture. The main method used in the paper is formal-dogmatic. The paper focuses on analyses of the non-binding provisions of international human rights law especially on UN Guiding Principles on Business and Human Rights.

2. International non-binding regulations

In today's state of international law there is no comprehensive settlement of business-wise issues in relation to human rights in the form of a binding international agreement. Existing sources in the form of corporate codes of conduct, guidelines for multinational enterprises, shareholder resolutions on ethical investing are only *soft law* (*E. Karska*, 2015, p. 114). There is a number of non-binding international guidelines addressing business and human rights. Over the past decade, many activities in the area of business and human rights were undertaken by different organizations and institutions. Special actions were undertaken by the Organization for Economic Cooperation and Development (OECD), the International Labour Organization (ILO) and the United Nations.

In 1976, The OECD adopted the Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws. The updated Guidelines were adopted on 25 May 2011 (*OECD Guidelines for Multinational Enterprises*, 2011, p. 3).

In 1977, the ILO developed its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant labor conventions and recommendations. The Declaration provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. The Declaration was elaborated and adopted by governments, employers and workers from around the world. The updated Declaration was adopted on November 2000, March 2006 and March 2017. Its principles are addressed to multinational enterprises, governments, and employers' and workers' organizations and cover areas such as employment, training, conditions of work and life, industrial relations as well as general policies.

The next initiative was the United Nations Global Compact, which was proposed in January 1999 by the U.N. Secretary-General Kofi Annan. The Global Compact is the leading global voluntary initiative for corporate social responsibility that also addresses the issue of business and human rights. Global Compact aimed at getting business leaders to voluntarily promote and apply within their corporate domains nine (since 2004 ten) principles relating to human rights, labor standards, the environment, and anti-corruption (*The UN Global Compact's ten principles*).

The ILO, the OECD, and the Global Compact initiatives all indicate that they are voluntary, although the ILO and the OECD have established rarely used mechanisms for interpreting their guidelines (*D. Weissbrodt*, 2005, p. 284).

Further work in this field was conducted by the UN Sub-Commission on the Promotion and Protection of Human Rights (*E. Karska*, p. 116). In August 2003, the Sub-Commission approved the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. They reaffirm and reinforce the declarations that have been made so far with regard to human rights responsibilities of business enterprises (e.g. the OECD-guidelines and the UN Global Compact) and concentrate the core guidelines and standards in this new concise document (*K-H. Moder,* 2005, p. 1). The Norms provide companies with an easily understood and comprehensive summary of their obligations under such systems as human rights law, humanitarian law, international labor law, environmental law, consumer law, and anticorruption law (*D. Weissbrodt, M. Kruger*, 2003, p. 921). The Commission did not act on the draft norms. Instead, it appointed, in July 2005 Professor John Ruggie as the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to undertake further study in the area of business and human rights. Ruggie's work led to the development of a business and human rights framework, which the Human Rights Council welcomed in June 2008 (*H. Clayton*, 2011, p. 1)

After reporting on the "Protect, Respect, Remedy" framework, Ruggie then developed "The Guiding Principles on Business and Human Rights for applying the framework. The resulting guiding principles were submitted in March 2011 and endorsed by the Human Rights Council

in its resolution on 17/4 of 16 June 2011 (*H. Clayton*, p. 2). The Guiding Principles are not binding international law. Nevertheless, they are widely viewed as the most authoritative global standard in the area of business and human rights (*S. Jerbi*, 2012, p. 1043). Thanks to the Guiding Principles, there is now greater clarity about the respective roles and responsibilities of governments and business with regard to protection of and respect for human rights. Because they are currently the most up-to-date and quite effective – as for a *soft law* – regulation in practical terms (*E. Karska*, p. 114) the further part of the study deals with the regulation of the Guiding Principles.

The Guiding Principles consist of 31 principles covering the three pillars of the framework: 1) the state duty to protect human rights, 2) the corporate responsibility to respect human rights, and 3) the need for victims of human rights abuses to have access to remedy, both judicial and non-judicial. This paper focuses on the second core principle – the responsibility of business to respect human rights.

It is possible to make different divisions of corporate responsibilities in the area of human rights protection. Nevertheless, the second pillar of the Guiding Principles are organised into foundational principles (respect) and operational principles (procedure). The first responsibility results from Principle 11, according to which business enterprises should respect human rights. Clarification of this statement is contained in Principle 12. The second obligation results from Principle 15 *et seq*., which is an obligation to implement special internal policy and processes.

3. Foundational principles – obligation to respect human rights

According to Principle 12 "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."

Business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that

may turn out to be significant in a particular instance, thereby providing misleading guidance (*J. Ruggie*, 2008, p. 190). The Guiding Principles do not list the specific rights and freedoms which enterprises are obliged to respect. Instead of this, the Guiding Principles indicate *expressis verbis* which international documents are relevant to determine those rights and freedoms. At the same time the Guiding Principles point that those documents comprise a minimum of rights which enterprises are obliged to respect.

In the first place, the Guiding Principles mention the International Bill of Human Rights, which consists of three different documents with different legal biding force. The first is the Universal Declaration of Human Rights of 10 December 1948. The Declaration as a United Nations resolution has non-binding character but it is a milestone document in the history of human rights. The Declaration created common standards of achievements for all people and all nations. It sets out fundamental human rights to be universally protected. The Universal Declaration is codified in international law through (*The Corporate Responsibility to Respect Human Rights,* 2012, p. 10) the International Covenant on Economic, Social and Cultural Rights 16 December 1966 with optional protocol and International Covenant on Civil and Political Rights of 16 December 1966, with two optional protocols.

In the second place, the Guiding Principles mention the International Labour Organization's Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, and revised 15 June 2010 *(ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, 2010).*

According to the ILO Declaration those fundamental principles are: "1) the freedom of association and the effective recognition of the right to collective bargaining, 2) the elimination of all forms of forced or compulsory labour, 3) the effective abolition of child labour, and 4) the elimination of discrimination in respect of employment and occupation." The Declaration covers four main areas for the establishment of a social "floor" in the world of work. These principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both within and outside the ILO. Each of these is supported by two ILO conventions, which

together make up the eight ILO core labour standards (*The Corporate Responsibility to Respect Human Rights, An Interpretive Guide,* p. 89). These ILO conventions include: 1) Convention concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 (No. 87), 2) Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively of 1 July 1949 (No. 98), 3) Convention concerning Forced Labour of 28 June 1930 (No. 29), 4) Convention Abolition of Forced Labour of 25 June 1957 (No. 105), 5) Convention concerning Minimum Age for Admission to Employment of 26 June 1973 (No. 138), 6) Convention concerning Prohibition and Action for Elimination of Child Labour of 17 June 1999 (No. 182), 7) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 29 June 1951 (No. 100), 8) Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination Convention of 25 June 1958 (No. 111) (*The International Labour Organization's Fundamental Conventions*).

Like all agreements the above indicated conventions have to be ratified by states. Not all states have done it. For those that have not, the Declaration makes an important new contribution. It recognizes that the Members of the ILO, even if they have not ratified the Conventions in question, have an obligation to respect "in good faith and in accordance with the Constitution of the ILO, the principles concerning the fundamental rights which are the subject of those Conventions" (*ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, p. 2.)

According to the Commentary to the Guiding Principles, depending on circumstances, business enterprises may need to consider additional standards (*Guiding Principles on Business and Human Rights,* 2011, p. 14). This additional standards may include rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. There are many United Nations instruments in this area concerning the rights of: indigenous peoples (*The United Nations Declaration on the Rights of Indigenous Peoples of September 2007*), women (*Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979*), national or ethnic, religious and linguistic minorities (*International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965*),

children (*Convention on the Rights of the Child of 20 November 1989, with protocols*), persons with disabilities (*Convention on the Rights of Persons with Disabilities of 13 December 2006*), migrant workers and their families (*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990*).

Moreover, in situations of an armed conflict enterprises should respect the standards of international humanitarian law. The International Committee of the Red Cross has published an information brochure called Business and International Humanitarian Law (IHL), which is intended to inform businesses of their obligations and rights under IHL. The brochure explains when IHL is applicable, what the main purpose of this body of law is, and how businesses can conduct themselves in times of an armed conflict so as to avoid violations of the law (*Ten questions to Philip Spoerri,* 2012, p. 1134). The four Geneva Conventions of 1949 and their Additional Protocols of 1977 constitute the main instruments of IHL. Numerous other treaties address more specific topics related to conflicts, such as the regulation and use of specific weapons (ICRC, *Business and International Humanitarian Law,* 2006, p. 12). Like mentioned earlier, human rights are traditionally understood as only binding on States while international humanitarian law binds both State and non-State actors (e.g. managers and staff of business enterprises) whose activities are closely linked to an armed conflict (ICRC, *Business and International Humanitarian Law*, p. 13).

To respect rights essentially means "not to infringe on the rights of others–put simply, to do no harm. The responsibility to respect is the baseline expectation for all companies in all situations" (*J. Ruggie*, p. 194), regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts (*Principle 14*). To fulfil the obligation to respect human rights business enterprises have to: first, avoid causing or contributing to adverse human rights impacts through their own activities; second, have to seek to prevent or mitigate those impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts (*Principle 13*).

4. Operational principles – obligation to implement internal policy and processes

To fulfil the obligation to respect human rights, according to Principle 15, business enterprises should have in place: 1) a policy commitment to meet their responsibility to respect human rights, 2) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, 3) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The policy commitment includes the obligation to have a statement of policy in which companies should express their commitment to meet the responsibility to respect human rights. The Guiding Principles ask businesses to enumerate their human rights expectations so that they are publicly available to all members of the business organization as well as the public at large. The Guiding Principles note that, an effective human rights strategy must be acknowledged by every employee (*J. Martin*, 2013, p. 985). A business is free to make this statement in whatever form it chooses (*D. Weissbrodt*, 2014, p. 161). A statement of policy should be approved at the most senior level of the business enterprise, and be based on relevant internal and/or external expertise. The board of directors should have a significant role in the crafting and monitoring of a corporation's human rights policy (*J. Martin*, p. 985). The statement of policy should stipulate the enterprise's human rights expectations of the personnel, business partners and other parties directly linked to its operations, products or services. Additionally, the statement of policy should be reflected in operational policies and procedures necessary to embed it throughout the business enterprise (*Principle 16*).

To identify, prevent, mitigate and account for how businesses address their adverse human rights impacts, enterprises should carry out human rights due diligence. "Human Rights Due Diligence" is an important concept for the Guiding Principles which is described in the Guiding Principles 17–21. Due diligence is a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights related due diligence is determined by the context in which a company operates, its activities, and the relationships associated with those activities

(*J. Ruggie*, p. 194). Traditionally, in corporate practice, the board's due diligence role was associated with one-time transactions such as mergers and acquisitions. In those instances, the board's function was to monitor management as it performed its due diligence for the transaction and then to make sure that all of the correct protocols had been followed. The Guiding Principles set out how human rights due diligence differs from traditional notions of corporate due diligence, laying out the essential components of what an expanded due diligence strategy would be (*J. Martin*, p. 974, 980). The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how the impacts are addressed. The human rights due diligence process should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships. The process will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations. At the same time the process should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve (*Principle 17*).

In the course of the *due diligence* process business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved. This involvement comprises the direct actions of companies as well as results of their business relationships. In this process companies should engage potentially affected groups and make use of specialized information collected internally and externally. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context (*J. Ruggie*, p. 201).

In the next step the companies should monitor the undertaken actions. In this context they should track the effectiveness of these actions. Monitoring and auditing processes permit a company to track ongoing developments. The procedures may vary across sectors and even among company departments, but regular updates of human rights impact and performance are crucial (*J. Ruggie*, p. 202).

At the same time business enterprises should be prepared to communicate externally information how they address their human rights impacts (*Principle 21*). In all cases this communication should include sufficient information to evaluate the adequacy of undertaken activities, should be understandable and available to its intended audiences.

Even if the Guiding Principles do not say exactly how businesses should engage in human rights due diligence (*D. Weissbrodt*, 2014, p. 162) they represent the most comprehensive international framework to date to ensure that all businesses apply 'human rights due diligence' of all kinds to their business activities to prevent or remedy business-related human rights violations (*H. Slim*, 2012, p. 916).

The third type of business obligation is remediation. Even with the best policies and practices a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business has identified an adverse human rights impact, "its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors" (*Principle 22*). Remedies are only required when the business has itself caused or contributed to a human right abuse; a link through a business relationship is not enough to require that the business provide remediation (*D. Weissbrodt*, 2014, p. 162). In this regard the Guiding Principles state that business enterprises should establish or participate in effective operational-level grievance mechanisms with internal complaint procedures. The guiding principles also includes criteria for judging whether grievance mechanisms are effective (*H. Clayton*, p. 2).

5. Final comments

International human rights treaties generally do not impose direct legal obligations on private actors, such as companies. Instead, States are responsible for enacting and enforcing national legislation that can have the effect of requiring companies to respect human rights-such as laws mandating a minimum working age. There are some exceptions in different areas of law, for example IHL also imposes obligations on private actors, including individuals and companies. However, human rights treaty obligations are generally understood as falling on States only. Given that

companies do not have the same legal duties as States under international human rights law, the Guiding Principles on Business and Human Rights were developed to clarify the different roles and responsibilities that States and companies have to address business impact on human rights (*Frequently Asked Questions,* 2014, p. 4,5).

Under the Guiding Principles business enterprises have the responsibility to respect human rights wherever they operate and whatever their size or industry. Corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their duty to protect human rights. When a business enterprise abuses human rights, States must ensure that the people affected can have access to an effective remedy through the court system or other legitimate non-judicial process. It seems clear that the Principles are only meant to be a starting point, establishing a common global platform for action, on which cumulative progress can be built, step-by-step (*D. Weissbrodt*, 2014, p. 162). Nevertheless, the Guiding Principles have been lauded for a number of successes. These include effectively engaging states and companies in a fruitful dialogue and the corporate uptake of policies aimed at ensuring corporate due diligence (*J. Kyriakakis*, 2012, p. 986). The Guiding Principles clarify the meaning of the corporate responsibility to respect human rights and provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. Together with the United Nations Global Compact, the Guiding Principles constitute the core framework for business and human rights, and have mainstreamed the corporate responsibility to uphold and respect internationally proclaimed human rights (*B. Dubach, M. T. Machado*, p. 1051).

It is important for the Guiding Principle to be clearly and globally disseminated to all States and businesses. From there, it will take cooperation between all of these parties to determine how to create effective (*D. Weissbrodt*, 2014, p. 162) business framework for human rights protection.

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National security as a legitimate excuse to human rights restrictions

ABSTRACT

Subject of research: In a modern political discourse the idea of state security is strictly connected with human rights protection. This relation must inevitably lead to the conflict between the prerogatives of an individual and those of the state. Modern democratic states are considered to guarantee the security of their citizens. In the course of the evolution of the theory and practice of the politics this paradigm has often been modified. In a classic debate on the relations between human rights and the state security the question of the limitations of a state's intervention in the name of its internal security arises. At the global level the inclination of improvement and reinforcement of national security and control at the cost of liberties of citizens can be observed.

Purpose of the research: The issue has been analysed to indicate controversies between the prerogatives of an individual and those concerning the state.

Methods: The work is based on normative considerations and exegesis of legal resources and Strasburg rulings. The intermediate stage of the research involves doctrinal and axiological analysis.

Keywords: state security, human rights, limitation clause

1. Introduction

While analyzing the subject issue it seems important to realize some ambiguity concerning the scope of the concepts used in the title. From a linguistic point of view, the term restriction is synonymous with the

word "limitation", therefore, as R. Mizerski indicates, might well be used in with reference to any forms of human rights limitations (Gronowska, Jasudowicz, Balcerzak, Mizerski, 2010, p. 234). Similarly, the terms "national security (of a nation)" and "the state security (of a state)" are considered equivalent, although, to be accurate, they belong to different semantic categories (Rajchel, 2010, p. 135-148)[1]. However, for practical purposes, they can be both considered synonymous. Such a tendency is noticeable in Polish legal nomenclature, as S. Kozieł and others observe, and both terms are interchangeable in the Constitution (2011, p. 20). Both semantic categories are associated with protection of the public, common good. Having taken the terminology of international legal documents into account, for purposes of this article I use both terms synonymously.

In a modern political discourse national security is strictly connected with human rights protection which frequently results in discord between prerogatives of the individuals and those of a state. Democratic states are considered the guarantors of the security of their citizens. They safeguard the people from external and internal threats, and protect them from chaos and anarchy.

In course of the evolution of political theory and practice the abovementioned paradigm has been frequently altered. T. Hobbes assumed that natural freedom of a human being may be subject of limitations specified by state law. He wrote that the aim of establishing law is nothing else but limitations, without which peace would not exist. And the law was to limit the natural rights of people to ban them from hurting each other and to make them act together to defend themselves against enemies. (Hobbes, pub. 2010, p. 70). If no authority is established or it is not strong enough to safeguard the security, an individual will rely on his own a skills to defend himself against the others, and will be rightful in doing so. (2010, p. 88). Consequently, the core purpose of a state's authorities is the state sovereignty and safeguard the security of its people.

A totally different view was presented by J. Locke (pub. 2010, p 93) who claimed that' whoever has the legislative or supreme power of any commonwealth, is bound (…) to employ the force of the community at

[1] J. Rajchel defines 'national security' as a broader term, comprising a security of a state and internal/public security.

home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.' Inspired by the English Revolution the philosopher was a declared supporter of the limitation of a state sovereignty in favour of natural rights of each individual.

Almost 100 years later S. Staszic recognized the national defence a guarantor of civil rights and liberties. Therefore, the national defence must not even bear a slight resemblance to violating this freedom. As he observed in "A warning to Poland" (pub. 2010),'defence which overcomes the power of the whole nation , becomes the oppression of the nation and to sustain it shall not tolerate the freedom of man ,and deprives him of his personal property and demesne; these being violated there is nothing more left to defend; such defence, I say, is to become no other tool but this of violence, and the defence of tyranny'.

This long polemics concerning a search for the counterpoise between public security and public rights has inspired modern political legal and philosophical concepts. In a classic debate on the relations between human rights and national security the question of the limitations of a state's intervention in the name of its internal security arises. At a global level the inclination to reinforce national security and control at the cost of liberties of citizens can be observed. The aforementioned limitations must be precisely defined because, as Freeman writes, these provisions set the standards of good governance and demanding too much within the field of human rights protection may result in difficulty to counterpoint the criticism, which might diminish the power of their appeal. (2007, p.19). These rights should therefore equipoise other values. A presumption that they are more fundamental compared to other values would be dogmatizing them.

2. National security in the Constitution of the Republic of Poland and international law

In Polish legal system freedoms and rights of citizens may be subject to limitations, under the art. 31, par. 3 of the Constitution, which states that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state

for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations must not infract the essence of the freedoms and rights. Broad construction is not applied to this provision, which derives not only from the very nature of this article but also reflects the intention of the legislator. The results of the limitation shall be proportional to the burden they cause to an individual.

The assertion has been legitimized by the Constitutional Tribunal which stated that the legislator may not impose such limitations that exceed a certain degree of onerousness in particular if they infringe the proportion between the degree of individual right infringement and the weight of the public interest, which is expected to be protected in this way. In these terms, prohibition of excessive interference guarantees the protection of individual rights and liberties (the ruling of 26. 04 1995, sign. K11/94, OTK 1995, p. 1 , sec. 12), yet the criteria of 'excessiveness' must be proportional because of the character of particular rights and liberties[2]. Additionally, the discussed provision particularly emphasises the criterion of "necessity in a democratic State", which signifies that each limitation on individual rights or freedoms must be, primarily, reviewed to meet the requirements of being 'necessary (The judgement of 12.01.2000. Sign: P 11/98K, OTK ZU 2000, no 1, sec 3); as to whether the same aim (effect) could have been achieved by other means, less burdensome for the citizen and, ipso facto, interfering less (more superficially) with their rights and freedoms.

The concept of national security as a necessary aim that allows the limitation of the aforementioned rights seems justified without question. As the Tribunal stated in the ruling of 25 November 2003, care for the common good of citizens not only indicates the need for citizens to bear burdens necessary to safeguard State security when independence is threatened, but also during times of peace. Safeguarding of the independence and integrity of the territory of the Republic of Poland also constitutes a justification for limiting constitutional rights and freedoms. (Judgement TK of 25.11.2003. Sign: K 37/02, OTK-A 2003, no 9, sec. 96).

[2] The principle of proportionality has been mentioned before in ruling of C. T. of 26. 01. 1993, U 10/92, OTK 1993, part. I, sec. 2.

The limitations associated with the security of the State are specified in the Constitution in art. 45 par. 2 (exceptions to the public nature of hearings), in art. 53, par. 5 (limitations to the freedom to publicly express religion) and art. 61 par. 3 (the limitation upon the right to obtain information on the activities of organs of public authority as well as persons discharging public functions). The aforementioned provisions do not disregard the principle of proportionality at least within the scope the their legislative contents do not overlap.

Similar concepts concerning the limitations to public rights were used in the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms. The security of the State justifies the infringement of the following rights declared by ICCPR:

- Freedom of movement and to choose his residence, given to everyone lawfully within the territory of a State (art. 12 par. 3),
- The right of an alien lawfully in the territory of a State Party to the Covenant to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority (art. 13),
- The right of the press or the public to observe all or part of a trial (art 14, par. 1)
- The right to freedom of thought, conscience and religion (art 18 par 3),
- The right to hold opinions without interference (art. 19 par.2),
- The right of peaceful assembly (art. 21),
- The right to freedom of association with others (art 22 par. 2)

The limitations stated in the Covenant are quite general, which makes them blanket rules and enables legislators to apply them to different legislative content (Młynarska, Skotnicki, 1996, p. 107). To interpret limitation clauses The Economic and Social Council of the United Nations ratified on 28 September 1984 the document so called the Siracusa Principles. The principle no. 29 states that "national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force" (*The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* Doc E/CN.4/1985/4).

However, national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. The principle no. 32 underlines the risk of abuse when using the idea of national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against people. It states that the systematic violation of human rights undermines true national security and may jeopardize international peace and security, and a state responsible for such violation shall not invoke national security as a justification for such measures. Additionally, as S. Flacks points ((2011, 863-864), it is a state's responsibility to justify the act of the infringement of principles guaranteed under the Pact.

K. Wojtyczek remarks that the concept of national security within the interpretation of the Constitution is broader than the one shown within the Siracusa Principles (1999, p. 183). He observes that the security of the State may be invoked to justify the limitations upon human rights to protect the state's sovereignty and territorial integrity, even if the threat is only potential. It is quite remarkable that the Constitution of the Republic of Poland has not only adopted most of regulations of the international law concerning human rights , but it also comprises the provisions which standards exceed these of international agreements.

In ECHR the security of a state as a legitimate aim of the limitations appears in the following articles: art. 8, par. 2 (right to respect for private and family life), art. 10 par. 2 (freedom of expression) and art. 11, par. 2 (freedom of assembly and association). The last of the aforementioned articles additionally states it 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[3]. According to

[3] Art. 11 of Human Rights Convention:

1. 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.

2. 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

B. Latos (2008, p. 179) the literal meaning of the regulation implies that it is a specific, dual restriction which can be applied irrespective of the limitation proper.

A lot of controversy have arisen in European countries around the Prüm Treaty, signed on 27 May 2005 by Belgium, Germany, Spain, France, Luxemburg, Holland and Austria. The treaty establishes the rules concerning cross-border cooperation, particularly in combating terrorism and cross-border crime http://register.consilium.europa.eu/pdf/en/05/st10/st10900. en05.pdf). In 2007 Home Affairs Council ratified the decision of the Council on stepping up cross-border cooperation ,which implements some of the Treaty's provisions into the European legal framework[4].

The aforementioned provisions enable the exchanges of information with regard to: automated access to DNA profiles, dactyloscopic data and certain national vehicle registration data (Czapliński, 2006, p. 191-197; Graś, 2006). The convention authorises the transmission of personal data, of an individual being potentially a menace, because of major events and for the prevention of terrorist offences. The cooperation also contains provisions for the deployment of armed air marshals, i. e. police officers on flights between signatory states for maintaining security on board of aircrafts. The provisions of the treaty and the circumstances in which the document was created (Balzacq, Carrera, 2006, p. 115-136, in: Grzelak, 2009, p. 29) have been criticized by scholars as well as non-government human rights organisations.

3. Jurisdiction within the field of national security

The Strasbourg's jurisprudence concerning limitation clauses has been analysed by T. Jasudowicz, who remarks that the security of a Stare is invoked by respondent member states and referred to by the Tribunal,

[4] Especially the decision: Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. (OJ L 210 of 6.8.2008) and Council Decision 2008/616/JHA of 23 June 2008on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210/12 of 6.8.2008).

alongside with a threat to territorial integrity and political sovereignty of a state, a safeguard of democratic system, a State secret, the operations to combat terrorism, political extremism or propaganda within the army or separatist propaganda, and espionage; also with reference to the protection of strictly confidential undertakings of civil service or military forces due to a particular armament project or military discipline, etc.(2012, p. 117).

The security of a state as a legitimate aim adopted in limitation clause, together with public security and territorial integrity of a state has been exposed for the jurisdiction since the Klass case of 1978. (*Klass and others v. Federal Republic of Germany*, claim no. 5029/71, ruling ECHR of 6. 09. 1978). The case involved defining the concept of the victim of a violation of the rights set forth in the Convention, and the grounds on which special measures, violating the right of privacy, can be applied by the empowered services (Rzepliński, 1995, p. 11–146). The Constitutional Court, as well as the Constitutional Commission beforehand, indicated that democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction (sec. 48). The Contracting States enjoy a certain discretion, which is not unlimited, though. The Court acknowledged being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it (sec. 49). In consequence, the Court recognized surveillance an admissible measures to safeguard the national security (sec. 59). At the same time the Court accentuated that it is in principle desirable to establish a supervisory body,(for instance judicial control) to prevent abuse. The Court took the same position in its judgement in the Chahal v. the United Kingdom case, recognising that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. (application no. 22414/93, ruling ECHR of 15.11. 1996, sec. 131). The Court affirmed that national security does not unable the right guaranteed in art. 3 of the ECHR in case of deportation or extradition.

However, the Court has not always recognized the postulate of the State security risk as justifying for a state's intervention. T. Jasudowicz (2012, p. 117) cites the case of Liu v. Russia of 2011. In section 87 of the judgement the Court remarked that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require the measures affecting fundamental human rights to be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. (application no 42086, ruling ECHR of 26 07 2011).

As the case of *Al-Nashif v Bulgaria* exemplifies (application no 50963/99, ruling ECHR of 20.06.2002, sec. 123 and 124), the individual must be able to challenge the executive's assertion even where national security is at stake. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

National security has been the subject matter in the following cases: Hadjianastassiou v Greece (App No 12945/87, judgement of 16.12.1992), Observer (Observer and Guardian v. The United Kingdom, App no 13585/88, ruling ECHR of 26.11.1991.), or Vereiniging Weekblad Bluf (Vereniging Weekblad Bluf v. The Netherlands, App no 16616/90, ruling ECHR of 9.02.1995). The aforementioned cases are analysed by B. Latos, who concludes that State authorities must apply a vast range of measures to combat espionage and foreign intelligence since they may pose a threat to the stability of the State. The disclosure of information concerning the way national intelligence service operates may result in its inefficiency or even disorganisation. In confrontation with conventional law the necessity to combat espionage (acts) against national and public security or national integrity is often given priority (2008, p. 182-183).

National security was also invoked in the case of the claim by the relatives of the victims of the Katyn massacre (*Janowiec and Others v. Russia*, App no 55508/07 and 29520/09, ruling ECHR of 16.4.2012) against the Russian authorities that neglected proper investigations into the mass murders in Katyn. The applicants complained about degrading treatment on the part of the Russian courts that neglected the very fact of Katyn massacre in their statements. The investigations by the Chief Military Prosecutor's Office started in 1990 and discontinued in 2004. The Russian

Government refused to provide a copy of the decision to discontinue the investigation (of 21 September 2004) upon the summon of the Court on the grounds that transferring classified information to a foreign state or international organisation might pose a threat to the security of the State. The Russian government referred to Article 38 of the Convention[5] arguing that it did not prohibit them from withholding information which could impair State security (sec. 93). The Court did not acknowledge the argument since the decision thus related to a historical event, with most of protagonists being already dead, and it could not have touched upon any current police surveillance operations or activities (sec. 108).

The Court declined to apprehend the concern that transparent investigation into the crime committed by the previous totalitarian regime might pose a threat to national security of the present democratic state of Russia, especially having considered the fact that the Katyn atrocity had been recognised by the highest level political authorities an act by the soviet government. However, the Tribunal approved the notion that certain security considerations could have been accommodated with appropriate procedural arrangements, including a restricted access to the document in question under Rule 33 of the Rules of Court[6] and, *in extremis*, the holding of a hearing behind closed doors (sec. 110.) It is noteworthy that at no point in the proceedings did the Russian Government explain the exact nature of the security concerns which required classification of the decision in question, and even the identity of the authority which made the decision on its classification was far from clear. The Court, for its part, was unable to discern any legitimate security considerations which could have justified suppression of information contained in that decision from

[5] Art. 38 of the ECHR:
The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

[6] Rule no 33:
2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice. (J. L. 1993, no 61, 284/1)

public scrutiny. In 2013 The Grand Chamber sustained its assessment as to the absence of its temporal jurisdiction in respect of the procedural limb of Article 2 of the Convention to the merits of the case and the violation of article 3 of the Convention with regard to the majority of the applicants. It also stated that the Russian authorities failed to apply proportionality test concerning the alleged necessity to keep the information in possession of the Federal Security Service secret, and the public interest in a transparent investigation. (the Grand Chamber judgment of 21 10 2013 sec. 150). The Court held unanimously that Russia had failed to comply with its obligations under Article 38 of the Convention.

National security and State secrecy requirements might not be the excuses to fail the obligation to act in compliance with international law. The International Criminal Tribunal for the former Yugoslavia took a similar view in the case against Tihomir Blaskic. The Tribunal dismissed the claim by Croatia which invoked national security as the basis for the refusal to provide with certain evidence of military character, concluding that such a position would prevent the Tribunal from "fulfilling its Security Council-given mandate to effectively prosecute persons responsible for serious violations of international humanitarian law and thus, defeat its essential object and purpose". (*The Prosecutor v. Tihomir Blaškić,* Appeals Chamber judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR, 29.10.1997).

In the case of Janowiec and others v. Russia the European Court of Human Right in Strasburg was one of many international institutions that was unable to investigate the Katyn atrocity due to the claim of State security.

4. Conclusions

Globally, the paradigm of national security has contributed to the affirmation of a modern state and inspired a new concept in politics that aims at maximizing the security of a state at the expense of the liberties of an individual. It is possible due to the international cooperation, especially within the fields of combating terrorism and transnational organized crime. As a result, national security has gained the status of

a legitimate aim of limitation clauses infringing human rights. It is closely associated with the threat of State integrity, and consequently, the security of its people. It generates threats to the human rights and freedoms, and enforces new procedures and demands for State authorities to prevent serious risks. In this respect both impotence of a state that might result in a greater scale and severity of the threat, and excessive intervention, which might lead to violation of the human rights, are not advisable.

The necessity to safeguard the security of people has been also discussed internationally. The need to combating terrorism on an international scale enforced the excessive interference into the citizens privacy (Wieruszewski, 2008, p 20-21). National security has become the value *in se*, requiring a coherent legislative reference. The application of clauses requires to fulfil the following requirements: the adherence to law within the measures applied by a state's authorities, and the necessity of the limitations from the position of a democratic society.

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The role of the concept of diversity management in respecting human rights in an organisation

ABSTRACT

The aspect of human rights in managing organisations has been the topic of discussions for several years, both on the international arena and from the perspective of organisations. Historically, the prevailing view has been that norms pertaining to human rights have applications only in the activities of states (governments), and not in the private sector. Every organisation in every sector has both influence and responsibilities when it comes to human rights. However, applying policies, the proliferation of voluntary initiatives and the belief that every organisation is responsible for respecting human rights, are all indicative of progress. Nonetheless, they have not resulted in the complete upholding of human rights at organisations. The workforce throughout the entire world is becoming more diversified. There is a lot of diversity on all ethnic, cultural, religious, linguistic and age backgrounds. The diversity of human resources is not a new phenomenon. Globalisation requires more interaction between people from different cultures or even social groups than ever before. For this reason, organisations require more diversity to become more innovative. The aim of this article is to present the role of the concept of diversity management in respecting human rights at an organisation. The goal has been reached through literature analysis, observations of social change and economic practice, a review of foreign and domestic research as well as the author's own qualitative analysis of 50 strategies from international corporations. The conclusions from these analyses indicate that incorporating the concept of diversity management into companies and taking advantage of

it, fulfils the obligations of organisations to respect human rights. Companies are engaged and actively support equal opportunities, justice, social justice, two-way respect, diversity and dignity of all people; recognising that an employee/client has the right to participate, learn and work in an open and respectful environment, which promotes equal opportunities and is free of discrimination. Such an approach indicates that strategies pertaining to workforce strengthen the commitment on behalf of diversity, while at the same time respecting human rights.

Keyword: human rights, diversity in organization, diversity management

1. Introduction

Every organisation in every sector has influence and responsibility with regards to human rights. Obviously, organisations can have a positive or negative influence on an entire spectrum of issues regarding human rights in a positive or negative way, including discrimination, sexual abuse, health and security, freedom of assembly and creating workers' unions, rape, torture, freedom of speech, privacy, poverty, food and water, education and housing. An approach concerning human rights, requires an organisation to respect all human rights. There is no possibility of selecting and taking actions by organisations limited only to these issues, with which they feel comfortable with. The scope of human rights consists of a universally-recognised and focused on people approach to both the social and environmental impact of enterprises.

Historically, the prevailing view has been that norms pertaining to human rights have applications only in the activities of states (governments), and not in the private sector. Some companies have alleged that their only duty is respecting national laws, even if these regulations did not meet international standards for human rights. Of course, applying policies, the proliferation of voluntary initiatives and the belief that every organisation is responsible for respecting human rights are all indicative of progress. They have not, however, resulted in the compete upholding of human rights in organisations.

2. Human rights

Human rights are recognized as universally-applicable laws (which have the cause of action to be universally applicable), which means that they are reminiscent of norms solely of a moral character. J. Habermas (2009, pp. 191-193) observes that human rights "can be justified exclusively from the moral point of view" – "they regulate matters of such generality that moral arguments are sufficient for their justification" [1]. According to W. Osiatyński (2011, pp. 10-15) [2], their fundamental, innate and privileged character rests on the basis that they need not to be justified: justifications are required for deviations from these rights.

In the beginning of the 20th century, it was up to the different states to decide whether to recognise human rights. There was not a single, universal and legally-binding catalogue of human rights. Human rights have been formally recognised as one of the priorities of the international community some 50 years ago, in December of 1948, when the Universal Declaration of Human Rights was adopted (Zielińska, 2007)[3]. Only then, did they become universal rules which applied to all aspects of human life. Since its conception, the United Nations Organisation has overseen the creation of legal regulations applying to human rights and undertook all efforts for these norms to become universally-applied law, rather than just being ethical guidelines. Propagating the respect for observing human rights and increasing the responsibility of entities and member states, constitutes a decisive step on the path towards enforcing the agreed upon standards and creating a global system of human rights. The most important documents, which have been signed by all EU member states, are the following:

1. *Universal Declaration of Human Rights* of 10 December 1948 (UN),
2. *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 (amended by Protocols 3, 5, 8, 14 and supplemented by Protocol 2) (Dz. U. 1993 nr 61 poz. 284),

[1] J. Habermas, *Uwzględniając Innego. Studia do teorii politycznej*, Wyd. Naukowe PWN, Warszawa 2009, s. 191-193.

[2] W. Osiatyński, *Prawa człowieka i ich granice*, Społeczny Instytut Wydawniczy Znak, Kraków 2011, s. 10-15.

[3] E. Zielińska, w: red. E. Gross-Gołacka, P. Kaczmarek, *Przewodnik dobrych praktyk. Firma Równych Szans*, UNDP, Warszawa 2007,

3. *UN Convention on the Elimination of All Forms of Discrimination Against Women*, adopted by the United Nations General Assembly on 18 December 1979 (Dz. U. z 1982 roku, Nr 10, poz. 72),
4. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature in New York on 21 December 1966 (Dz. U. z 1969 roku, Nr 25, poz. 187),
5. *International Covenant on Economic, Social and Cultural Rights*, opened for signature in New York on 19 December 1966,
6. *International Covenant on Civil and Political Rights*, opened for signature in New York on 19 December 1966 (Dz. U. z 1977 roku, Nr, 38, poz. 167),
7. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* of 25 November 1981, New York,
8. *Framework Convention for the Protection of National Minorities, prepared in Strasbourg on 1 February 1995* (Dz. U. z 2002r., nr 22, poz.209).

The Community Law of the European Union is, to a large extent, based on the achievements of the UN and the Council of Europe, expressed in the abovementioned documents. The respect for human dignity, freedom, democracy, equality, rule of law and human rights – these values have been contained in EU treaties since the beginning. The rights of EU citizens are listed in the Charter of Fundamental Rights of the European Union, which has been adopted in the year 2000 and has been binding for all EU member states since 2009. All of the main EU institutions – the European Commission, European Parliament and European Council – play a specific role in protecting human rights. The Charter of Fundamental Rights contains, in one document, the human rights binding for EU institutions and bodies, and applies to national governments, when those apply EU law. The citizens who wish to exercise their rights must file a case with the European Tribunal of Justice. The Charter is consistent with the European Convention of Human Rights, which has been ratified by all EU member states.

Moreover, Art. 2 of the Treaty on European Union states that: "(t)he Union is founded on the values of respect for human dignity, freedom, democracy,

equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The fundamentals for defining rules, goals and priorities of the EU in the area of Human Rights and Democracy are delivered by the *EU Strategic Framework and Action Plan on Human Rights and Democracy*, a document adopted by the Council of the European Union on 25 June 2012. It sets the priorities for EU policy in the area of human rights for the next 10 years, including:

- promoting freedom of expression, opinion, assembly and association,
- working through multilateral institutions to promote human rights (e.g. the UN),
- combating all forms and instances of discrimination, especially those, which apply to women,
- combating death penalty to the full extent as well as torture, which constitute serious violations of human rights and human dignity,
- promoting a fair and impartial justice system,
- intensifying political and financial support for human rights defenders and stepping up efforts against all forms of reprisals,
- closer cooperation with the Council of Europe and Organisation for Security and Cooperation in Europe.

The Framework is the basis for developing and implementing actions both for the Union's institutions and the respective member states. Supplementing the Framework is the Action Plan for the Union's Activity on Human Rights. The aim of the Plan is to implement the Strategic Framework and to delineate the goals contained within. Tasked with the responsibility of meeting the respective goals outlined in the Plan, is the High Representative of the European Union for Foreign Affairs and Security Policy, which is supported by European External Action Service (EEAS), the Commission, the Council and member states (in accordance with the separation of competences, specified in the Treaty on European Union. Additionally, responsible for realizing the Plan, in accordance their mandate, is the EU Special Representative of the European Union for Human Rights. The plan has been binding since 31 December 2014.

When discussing human rights, it is also worth mentioning the UN Global Compact initiative[4], which is based on ten universal rules concerning human rights, work standards, the environment and the fight against corruption (UN Global Compact. Communication on Progress, 2011, pp. 5). It has been approved by all 191 heads of states and governments of the United Nations and is legitimized by the consensual resolution of the General Assembly. The first two rules of the Global Compact have been taken from the Universal Declaration of Human Rights, which is the basis of the international human rights system. The second rule stipulates that businesses have to make sure that they are not complicit in human rights abuses.

Basically, the functioning of the human rights system means that even though the international system sets general standards for the protection of rights and freedoms of the citizen, it is the domestic system of a given state that delineates and concretizes it. In Poland, the fundamental legal document is the Constitution of the Republic of Poland.[5] The right of equal treatment and the prohibition of discrimination are contained in Art. 32 and Art. 33 of the Constitution. The most general expression of this rule has found itself in Art. 32: *All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.* This means the right to be treated equally by public authorities – this rule has to be observed by the authorities. From this general rule also stems the prohibition of discriminating in political, social and economic discourse. Discrimination of this sorts cannot be justified by any means. The Constitution knows no exceptions nor deviations from the rule of equality. Furthermore, Art. 33 of the Constitution is an extension and delineation of the declarations contained in Art. 32. This article pertains to the equal treatment of women and men, underscoring that in Poland: *No one shall be discriminated against in political, social or economic life for any reason whatsoever.* This equality should find its full applications in the

[4] *UN Global Compact. Communication on Progress 2011*, UN Global Compact, Rio Tinto 2012, s. 5.

[5] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. (Dz. U. 1997 nr 78 poz. 483 z pózn.zm.).

day to day practices, hence the Constitution highlights different aspects of equality, which should mean it is binding not only in a formal manner, but also in practice.

3. Managing Diversity

The notion of diversity management has been (and still is) associated with equal treatment or preventing discrimination. In the literature on this topic there is a debate regarding the differences between diversity management and affirmative actions (AA)/equal employment opportunities (EEO). This is important, since these two approaches are completely different, and yet connected. Such an approach to equality and diversity has been evolving over the past 50 years. Nonetheless, the equal employment opportunity (EEO) and affirmative actions (AA) that took place in the '80s in the USA and later in EU states, were a response to the pro citizens' rights movements and liberal political philosophy. The traditional requirements of AA/EEO were based on social, moral and legal commitment.

Therefore, it is worth highlighting that AA/EEO policies were an important step in opening workplaces to diversity. On the other hand, they imposed limits on themselves and did not create an environment that could extract all of the potential from diversity. AA/EEO policies have significantly increased recruitment and employment of women in companies. According to M.E. Mor Barak[6] (2011, pp.17–16), AA/EEO policies have drawn attention to diversity management, which had a significant impact on the development of this concept. Many companies are still bound to comply with AA/EEO policies and they are convinced that the programmes and processes of diversity management traverse compatibility with AA/EEO policies, since they are directly connected with matters pertaining to business results (Webb, 1997, pp. 159–169)[7].

Generally speaking, diversity management is not concerned with giving preferential treatment or ensuring equal opportunities for members of a certain group (although this is a by-product), but its aim is

[6] M.E. Mor Barak, *Managing Diversity. Toward a Globally Inclusive Workplace*, Sage Publications 2011, s. 17–26.

[7] J. Webb, *The Politics of Equal Opportunity,* "Gender, Work and Organization" Nr 4(3), 1997, s. 159–169.

recognising that broadly-understood diversity increases the quality of the entire organisation. Discrimination, similarly to affirmation, is ultimately concerned with the individual: they are the ones that avail themselves of equal opportunity programmes. Diversity management typically has broader goals and means of improving organisational culture and applies to all employees. Initiatives of diversity management are "activities aimed at creating an environment, which naturally functions with regards for the needs of the entire group of diversified employees" (Thomas, 1992, pp. 308) [8], and not just, for instance, women and minorities. L.B. Griggs[9] (1995, pp. 1–14) notes that companies that have successfully functioned as employers respecting AA/EEO policies have observed that the diversified human capital, created by them, should be better managed to maximise the potential of human resources and increase their competitive advantage.

Thus, diversity management is not synonymous with equal opportunity policy. Although, diversity management and equal opportunity policy are presented as parallel phenomena, they are in fact two approaches with important differences. M. Özbilgin (2008, pp. 69)[10] has stated that equal opportunities and diversity create a false dichotomy. Today, these two approaches, are quite similar, but not identical, and surely not complementary. Today, in the 21st century, organisations must focus not on realizing affirmative action (AA), equal employment opportunity (EEO) or only appreciating the differences, but approaching diversity as "a way of life". M. Konrad, P. Prasad (2006, pp. 139–158)[11] point out that at its base, diversity is concerned with differences and inclusion. Moreover, diversity is much more than just equal opportunities for everyone – this concept means that in business, different people are appreciated, both employees and customers. The literature on this topic delivers many descriptions of diversity, one of which has been presented in Table 1.

[8] R.R. Thomas Jr., *Managing diversity: A conceptual framework* w: *Diversity in the workplace*, red. S. E. Jackson, Guilford Press 1992, s. 308.

[9] Griggs L.B., *Valuing diversity: Where from ...where to?,* w: *Valuing diversity: New tools for a new reality*, red. L. B. Griggs, L.L. Louw, McGraw-Hill 1995, s.1–14.

[10] M. Özbilgin, A. Tatli, *Global Diversity Management: An Evidence-Based Approach*, Basingstoke and New York: Palgrave Macmillan 2008, s..

[11] *Handbook of Workplace Diversity,* red. A.M. Konrad, P. Prasad, J. Pringle, Sage Publications 2006.

Table 1. Diversity – from a human differences perspective

Categories and types of diversity	Types of diversity
Differences in the social category	race ethnic origin gender age religion sexual orientation physical fitness
Differences in knowledge and skills	education functional knowledge specialist knowledge (expertise) training sessions experience capabilities
Differences in values and perspective	cultural background worldview
Personality differences	cognitive style emotionality motivating factors
Differences in an organisation/society	seniority (work experience) function, position in a company's hierarchy, field etc.
Differences in social relations	relations at work friendships social connections group inclusion

Source: E. Mannix, M.A. Neale, *What Differences Make a Difference?*, "Psychological Science in the Public Interest" Vol. 6(2), 2005, pp. 31–55.

Generally speaking, based on the conducted analysis of the definition of diversity, one can distinguish four areas, which should be included in every approach to diversity from a workplace perspective. These are the following (Gross-Gołacka, 2017, pp. 195):

1. Accepting that the concept of diversity covers a wide range of differences between employees, including age, disability, education level, ethnic origin, family structure, position, geographical location, race, religion,

sexual orientation, style and values, both visible and invisible (the effect will be a wide and universal approach);
2. An aspect of diversity related to the means through which the individual and organisation are influenced;
3. Including the requirements for cultural change in an organisation, for instance, management style, human resources management system, philosophy and approach;
4. Putting emphasis on the perception of the concept of diversity, as something that extends beyond race, gender, affirmative action (AA) and equal employment opportunity (EEO), including the business aspect (costs and benefits)[12].

Diversity management should be defined as broadly as possible and understood as a systematic activity of a company, aimed at engaging diversified human resources in the company's activity and treating them as a strategic advantage. Therefore, diversity in an organisation ought to be an added value and it is necessary to manage it in a manner that is integral with the organisational structure. Under this pragmatic approach, managers are neither afraid of human differences nor perceive them as a threat, but approach them as an area for developing competences, innovation and creativity for the purpose of achieving the best possible results for the company in the organisation (Gross-Gołacka, 2017, pp. 155)[13].

4. Human rights and managing diversity as an element of company strategy

In contemporary globalized organisations, both in the public and private sector, it is necessary to attract and retain a diversified workforce to utilize its diverse knowledge, skills and capabilities. Diversity among employees fulfils both economic and social goals, increasing the capabilities of employees that are underrepresented. In order to generate innovation and create new value, it is necessary for enterprises to take full advantage of the

[12] E. Gross-Gołacka, *Zarządzanie różnorodnością. W kierunku zróżnicowanych zasobów ludzkich w organizacj*i, Difin 2017 (w druku).

[13] E. Gross-Gołacka, *Zarządzanie różnorodnością. W kierunku zróżnicowanych zasobów ludzkich w organizacji*, Difin 2017 (w druku).

capabilities of human resources, which have diversified values and ideas, while promoting their diversity. In Japan, efforts are undertaken to, for instance, support women's careers and promote the exchange of personnel between global headquarters. Mutual respect and understanding between people of different nationality, age, gender, culture, traditions etc., is the foundation of diversity.

In the context of the arguments presented above, a question arises as to whether taking actions aimed at respecting human rights can be beneficial for an organisation from a financial point of view? Why should the ones in charge of a company be interested in human rights? More and more often the answer is yes, however this is not always the case, and most likely not immediately. Dealing with human rights can function as a radar or an early warning system. It allows for identifying potential problems and solving them, before they become more serious and expensive. Focusing on human rights can also improve the relationships with clients and the reputation as well as increase the satisfaction that employees receive from their work, which has a positive influence on efficiency and effectiveness. It can help to avoid additional costs resulting from attracting and maintaining the proper human resources, gaining acceptance or overcoming opposition for new business ideas, which some personnel may have. It could be the case that some clients expect information on how to manage different issues in a company, including human resources.

5. Good practices

Without a doubt, organisations/companies are the main entities contributing to economic development all over the world, and considering the approach to human development, they help to reinforce global human rights (Human Rights Translated: A Business Reference Guide, 2008, p. 7)[14]. An increasing number of companies show respect for human rights through respecting international standards for human rights in frames of their core business practices. An analysis of the key international

[14] *Human Rights Translated: A Business Reference Guide,* Castan Centre for Human Rights Law, International Business Leaders Forum, and Office of the United Nations High Commissioner for Human Right, 2008, s. 7.

organisations, allows one to observe that the issues pertaining to human rights and/or managing diversified human resources in an organisation are an element of the activity of the companies in question. Fifty strategic documents have been analysed, which contained the activities of organisations in the area of human rights, which were available on official websites of international corporations from all over the world. It must be observed that every single one of these companies have strategic documents, which contain guidelines relating to the topic in question as well as good practices[15]. Examples of the activity of companies in observing human rights have been presented below:

Hitachi Construction Machinery

The awareness of human rights is developed throughout the entire enterprise. A dedicated human rights Hitachi Construction Machinery group has been formed. Its goal is to promote diversity as well as to plan and monitor the undertaken activities. The activities are focused on promoting human rights education and preventing both child labour and forced labour. The company is guided by and observes international standards related to human rights, including the freedom of unionizing, rights for action-case lawsuits, preventing child labour and forced labour as well as discrimination against position and occupation. In 2010, the Hitachi Construction Machinery company created its own training material on the topic of diversity and provided an e-learning platform. Workshops on diversity were held (for working women) as well as seminars on life-work balance. At Hitachi Construction Machinery company, human rights are discussed during basic education delivered by the Centre for Career Development, whereas education on human rights is included in training sessions for all new employees, new heads and managers. The company respects the human rights of all interested parties, including clients, suppliers, employees etc[16].

Sharp

[15] Por. *Embedding Human rights in Business Practice*, United nation Global Compact, 2009, p. 10-80.

[16] Oficjalna strona Hitachi Construction Machinery, https://www.hitachicm.com/global/environment-csr/csr-en/people-en/viewpoint02-en/ (23.05.2017 r.)

Similarly, Sharp undertakes actions aimed at respecting human rights and diversity. In its strategic documents, it holds that increased business globalisation significantly increases the number of opportunities for cooperation between employees of different cultures and with different behaviours. As such, the company must pay attention to a more diversified and complex range of human rights. At Sharp, diversity management is an important task, since it considers the active promotion of capable personnel to be of an essential importance – irrespective of factors such as nationality, gender or age. The goal at Sharp is to provide more innovative, added values for products and services through increasing the capabilities and motivations of workers and adding vitality to the organisation through promoting diversity. Among its defined goals, Sharp has included the following: increasing the share of female employees to 5% by 2018, maintaining the index of employing physically or mentally disabled personnel at 2.3%, preventing sexual harassment, which is verified by the level of satisfaction among employees regarding their workplace and superiors, in questionnaires. Sharp, in its mid-term management strategy for 2015–2017, included core activities aimed at reforming human resources in order to select and obtain highly-skilled human resources, irrespective of factors such as nationality, gender or age. Sharp has once again put the emphasis on respecting human rights and managing diversity among its meaningful development strategies[17].

Kyocera

Kyocera is yet another example. In order to increase the awareness of its employees in the area of human rights and workplace rights, meetings are held, which are concerned with workplace requirements, which has been mentioned in the so-called *Guidelines for Kyocera Employees*. Moreover, HR departments carry out independent controls of legal abuse, such as discrimination, proper levels of salaries and managing workhours according to labour laws and regulations, internal rules, and work contracts. Audit units regularly conduct audits to ensure lawfulness. Kyocera believes that promoting women's progress is an important

[17] Oficjalna strona firmy Sharp, http://www.sharp-world.com/corporate/eco/ssr/csr_strategy/materiality/focus_2/ (22.05.2017 r.)

element of management and has been involved in it since 2006. Kyocera is also focused on employing people with disabilities and continuing their employment. Workers with disabilities, who are employed by Kyocera, are selected in such a way, so that they can apply their abilities in the given tasks. For instance, the percentage of disabled workers in Kyocera in 2016 was equal to 2.08%. The company also supports maintaining a balance between work and family life. A benefit system has been put in place to support workers with children. Kyocera has also got a programme for expecting parents with fewer working days that is available for them until the third grade of primary school. As of March, 31st 2016, 272 employees were benefiting from this programme. The Kyocera Group believes that it is necessary to maintain the employees' relations with their families, as it helps to build trust among them. An important element of the company's activity are regular opinion questionnaires for all employees. The polls focus on issues such as the level of satisfaction with work and the environment, management, the level of trust towards the company and suggestions regarding improvements. Generally, the goal of the company in Europe, the USA, China and other countries is to maintain the proper work relations through fundamental consultations regarding work management, according to the labour law of the different states. The work environment and the quality of management are, according to the company, on the same axis and they are key for a successful work attitude. Maintaining this position is supposed to help with solving problems at work and keep the company on a path towards sustainable development[18].

CITI Group

Citi Group supports the protection and enforcement of human rights all around the world with regards to some 200 million client accounts and 231,100 employees in over 100 countries. Citi is also a signatory of the UN Global Compact. Citi's engagement in respecting human rights at work is part of the company's Code of Conduct and policies as well as practices involving human resources. These rules specify, among other things, the issues of promoting a diversified work force and zero tolerance for

[18] Oficjalna strona firmy Kyocera, http://global.kyocera.com/ecology/human_rights.html (22.05.17).

unlawful discrimination and sexual harassment. Among the company's goals is also maintaining an ethical work environment, which mirrors the fundamental values of the company. Citi shares its position on human rights with its employees and expects them to meet these standards. Employees have phone access to the so-called *Ethics Hotline*, which can be used by employees to voice their concerns, questions or complaints. With regards to its suppliers, Citi tries to observe human rights through building a supply chain based on adopted values and rules. Citi's status as a global bank allows it to promote a natural and social environment, worldwide responsibility and respect for human rights through client orders and due diligence[19]. Thanks to its activities in over 100 countries, Citi is well-prepared for constructive influence in the area of human rights in countries, in which its business is present. The company acknowledges that the rights in different countries where business is done, differ from some international human rights standards. In such cases, Citi looks for ways of propagating respect for human rights in a manner that is consistent with its internal rules and standards, while at the same time taking into account the local context. Additionally, the strategy in each country, where Citi is present, is carefully assessed, so that the company can achieve this goal while maintaining high ethical standards[20].

Sony

The Code of Conduct of the Sony Group, which has been published in May of 2003, contains articles pertaining to respect for human rights and delineates global policies, which lead to rules and actions relevant to human rights at the Sony Group. An article from the Code regarding equal employment opportunities sets the Group's policy in terms of recruitment, employment, training, promoting and treating people applying for membership and employees in a different way, irrespective of the traits not related to the activity of the enterprise, including race, religion, skin colour, nationality, age, gender and physical limitations. These regulations

[19] Por. *The "State of Play" of Human Rights Due Diligence Anticipating the next five years Volume One: General Overview*, Institute for Human Rights and Business (IHRB), 2011.

[20] Oficjalna strona internetowa Citi Group, http://www.citigroup.com/citi/citizen/data/citi_statement_on_human_rights.pdf (22.05.2017).

are based on existing international standards, including the UN Universal Declaration of Human Rights. All companies from the Sony Group have Diversity Committees, tasked with discussing unresolved issues and hold workshops on human rights, diversity and other issues relevant to the topic[21].

It is worth mentioning the fact that the above-mentioned actions of companies relating to respecting human rights and/or promoting diversified human resources, can be of different characters. Several processes exist, which can incorporate human rights issues. These can be, for instance, a risk management system, healthcare and security system, environmental and social impact assessments or diversity management systems. Supply-chain management systems also have to be taken into consideration in order to reflect the expectations of suppliers in terms of respecting human rights. Some management certificates such as ISO 9001, ISO 14001, OHSAS 18001 or SA8000, require processes, which could be improved to include a negative-factor impact assessment on all human rights. Moreover, the ISO 26000 norm on social responsibility includes a chapter devoted to responsibility for respecting human rights. When complex processes and systems contributing to respecting human rights are discussed, mostly by international corporations, a question arises, namely: are human rights only relevant to large companies? The answer is: obviously, no. Organisations of all sizes can have a negative impact on human rights. The dangers that a company may be subject to, are influenced by many factors, including the place where it is active, with whom it cooperates and with whom it does business. However, just because a given organisation is a small enterprise, does not mean that it is not prone to dangers regarding human rights or the necessity to respect them[22].

The need for developing guidelines by the analysed companies, resulted from the obvious fact of the influence that business entities have on the state of respect for human rights. This influence can manifest itself in several different ways. Firstly, their activity cannot lead to infringement of rights and freedoms of people employed by them. Such infringements can take the form of sexual harassment of employees, discriminating

[21] Oficjalna strona internetowa Sony Group, https://www.sony.net/SonyInfo/csr_report/employees/diversity/index2.html (22.05.2017).

[22] *My business and human rights. A guide to human rights for small and medium-sized enterprises*, European Commission 2015.

against them, not respecting their right to privacy, breaching fundamental occupational health and safety rules, not respecting labour regulations regarding working hours and minimal wage, taking advantage of slavery etc. Secondly, economic entities can be in violation of rights of other persons, who are affected by their activity, for instance, through contaminating the natural environment, which leads to negative health consequences for people living in the area of their activity or in violation of data privacy of their clients. Thirdly, business entities can support authoritarian and totalitarian regimes through, for instance, trading arms (Biznes i prawa człowieka: czas na pragmatyzm, 2013, p. 1–2)[23].

Some companies even go one step further, and decide to subject their human rights activities to an external audit. Such an external audit is one of the conditions for them to be listed in the stock indexes of companies that observe CSR norms, present on stock exchange markets. Being included in such an index, on the one hand, influences the reputation of the enterprise, which results in an improvement in the financial results of the corporation. On the other hand, it is also an indicator for mass stockholders and investment funds interested in reinforcing the social aspect of investments (Biznes a prawa człowieka – współczesny stan dyskusji, 2017, pp. 7) [24].

6. Summary

An increasing number of companies are becoming aware of their contribution, which they can achieve in promoting human rights on the level of influence and benefits, which can be attained under such an approach for their companies and environment. Although human rights are still the main responsibility of governments, companies can do a lot in terms of their own activity to support and observe human rights. Activity relating to human rights can make sense in business terms, but it is also advisable and ethical

[23] Por. Forum Odpowiedzialnego Biznesu, *Biznes i prawa człowieka: czas na pragmatyzm*, Analiza tematyczna nr 1/2013, s. 1–2, dostępne na: http://odpowiedzialnybiznes.pl/wp-content/uploads/2014/04/analiza-tematyczna_1_2013_prawa_czlowieka1.pdf (dostęp: 1.11.2016).

[24] *Biznes a prawa człowieka – współczesny stan dyskusji*, red. A. Ploszka, Helsińska Fundacja Praw Człowieka i Polska Rada Biznesu, Warszawa 2017, s. 7.

(Ruggie, 2007, pp. 819–840)[25]. The relationship between the functioning of an organisation and human rights has become more visible over the course of the last several years. On the one hand, it can be observed in the development of legal instruments, which has been on-going for the last ten-twenty years and which creates an obligation for entities to respect human rights, while also bringing enterprises to justice for human right infringements caused by them. On the other hand, increasingly more often organisations seek protection from government abuse through human rights. Referencing the "sword and shield" metaphor, which commonly appears in human rights sciences, human rights can, on the one hand, constitute a shield that protects from abuses by organisations, and, on the other hand, a sword acting as a weapon in the organisation's relation to the state (Biznes a prawa człowieka – współczesny stan dyskusji, 2017, pp. 7).[26]

Human rights are one of the most difficult areas of corporate responsibility for companies to handle. Tools and guidelines for human rights are required (A Guide for Integrating Human Rights into Business Management, 2006, pp. 4–8).[27] But it is also important to understand the business justification in terms of decision-marking in this area. Knowledge and innovations, now more than ever, are of crucial importance for ensuring competitiveness in a globalised economy. The demographics in Europe are changing and hence the continent has to tackle low birth rate, an aging population and a shrinking workforce. This means that companies have to take a smarter approach to recruitment to find the right talent that meets the outlined requirements and retain employees within the organisation. It is therefore important to begin mapping the diversity strategy – to be able to realise this strategy. The benefits, which diversified human resources can bring to an organisation in the future, are incontestable. Moreover, companies and clients are increasingly more diversified and have higher requirements. Diversified human resources in organisations are a deeper source of knowledge, abilities, life experience,

[25] J. G. Ruggie, *Business and Human Rights: The Evolving International Agenda,* "American Journal of International Law" Vol. 101, Issue 4, 2007, p. 819–840.

[26] *Biznes a prawa człowieka – współczesny stan dyskusji*, red. A. Ploszka, Helsińska Fundacja Praw Człowieka i Polska Rada Biznesu, Warszawa 2017, s. 6.

[27] *A Guide for Integrating Human Rights into Business Management,* Business Leaders Initiative on Human Rights, 2016, s. 4–8.

perspectives and specialist knowledge. Diversity management, irrespective of the level of a country's development, political system, the area, in which the organisation is active, requires a proactive approach and justification for any actions taken, which include fundamental reasons, but also the pragmatic ones.

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Dignity as the basis of human rights

ABSTRACT

The approach to a person's dignity requires a radical action that highlights on an anthropological reflection, starting with the question about human beings („who is a person and why do you care?") and leading to a new form of rights and to higher levels of human dignity recognitions. Therefore, it is necessary to open a perspective in which the different cultural traditions (today more than ever) have to meet in order to try to reduce the distance that separates them into the identification of a „list of needs and purposes" and of the most effective strategies for fulfilling the needs and the achievement of goals.

Keywords: fundamental needs, dignity, human rights

1. The antropological basis of dignity

The approach to a person's dignity requires a radical action that highlights on an anthropological reflection, starting with the question about human beings („who is a person and why do you care?") and leading to a new declination of rights and to higher levels of human dignity recognitions. Therefore, it is necessary to open a perspective in which the different cultural traditions (today more than ever) have to meet in order to try to reduce the distance that separates them into the identification of a „list of needs and purposes" and of the most effective strategies for fulfilling the needs and the achievement of goals. In this

regard, the West and in particular Europe, must offer to the intercultural debate the most mature result of its ethno-political and religious tradition, which, supported by a strong philosophical base that is lost in the Mediterranean, still suggests a concept of „Human" conceived as a whole of its anthropological constitution. This conception requires that every idea about human rights, liberty, and dignity must deal with the condition of need, along with the bonds, the dependence, the interdependence demanded by this constituent condition, which impels to consider human beings in its fragility that permanently expresses a need for care. This is an approach that, starting from an anthropological basis of dignity and its inalienable corollaries, seeks to put together in a virtuous connection, freedom and the culture of rights on one side, the perception and fulfillment of needs on the other.

More and more often, it seems necessary that problems should be investigated and solved with the logic of "et..et" and not "aut-aut"; using the includendum logic and not the excludendum one. The most rigorous opponent of the search for a suitable response to the increasingly recurring demand for attention and respect of a person's dignity is undoubtedly reductionism that, with its inevitable "reductions", prevents to understand a person as a whole, that expresses the intrinsic needs and rights which demand to be considered in their entirety.

The shattering of the list of needs and rights that the various powers produce for purposes almost never responding to a person's living reality, but only to the powers' own ideological self-referentiality, are often the fundamental cause of the guilty lack of respect towards human beings and their inalienable dignity.

Dignity is certainly an obvious but indispensable concept because it forms the basis of what today are called human rights.

Dignity, as Maritain repeats, is an empty word unless it means that on the basis of natural law, a human being is subject to rights[1] . Although there are many parties claiming a broad consensus on the protection of

[1] Cfr. J. Maritain, *Le droits de l'homme et la loi naturelle*, *vol. II*, in Oeuvres Complètes, 27 voll., Éditions Universitaires Fribourg Suisse e Saint-Paul Éditions Religieuses Paris, 1986-2008. Su questo argomento ci permettiamo rinviare a M. Indellicato, *Diritti umani e legge naturale nel pensiero di J. Maritain* in F. Totaro (ed.), *Legge naturale e diritti umani*, Morcelliana, Brescia 2016, pp. 285-294.

human rights, there is also skepticism about the possibility of their rational justification. "The basic problem about human rights is not so much to justify them today", as Noberto Bobbio wrote,"as much as to protect them. It is not a philosophical but a political problem"[2].

The fulfilment of human potential is the goal towards which democracy itself, conceived as a humanistic policy, must tirelessly strive. Maritain recalls that democracy continually needs to be refocused to overcome the obstacles that arise. Moreover, having faced the Nazi-fascism experience, he states that democracy needs to be rediscovered under totalitarianisms, as their ideological (of the right-wing parties and left-wing parties) and technological (evident or concealed) versions, are anti-humanistic: with their Machiavellianism, they exploit and manipulate human beings. In the name of human beings, in defense of their dignity, arises the necessity to establish democracy, as a policy not aimed to exert power, but to achieve the common good. This implies that human beings are placed at the center of politics with their rights to declare, establish, respect and implement. The same policy has the role of building the fraternal city, above all through the spirit of civil friendship.

The need for an ethical refoundation of democracy can only take place by appealing to brotherhood, which reconciles freedom and equality. Democracy, therefore, can be defined as the human rights policy: rights that must be declared and justified on the basis of human being dignity; that is necessary to aim towards and pursue with respect for a purely non-conflictual pluralism nor exploited by the authority, but aimed at working together towards the achievement of the common good [3].

[2] N. Bobbio, *L'età dei diritti*, Einaudi, Torino 1992, p.16. Non molto diversa è la posizione di Michael Ignatieff, anche se questa conserva una forma di universalismo "minimo" a difesa unicamente della libertà negativa (cfr. M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton 2001. Una difesa pragmatica dei diritti umani è al centro del volume di C. R. Beitz, *The idea of Human Rights*, Oxford University Press, Oxford 2000.

[3] Cfr. a tal proposito l'interessante studio di D. Lorenzini, *Jacques Maritain e i diritti umani: Fra totalitarismo, antisemitismo e democrazia* (1936-1951), premessa di D. Menozzi, Morcelliana, Brescia 2012.

Suffice it to recall the legalization of the dignity that began just after the Second World War: the Universal Declaration of Human Rights (1948)[4], to which Maritain made a significant contribution, the Italian Constitution itself, the Oviedo Convention on Human Rights and Biomedicine (1997), the Charter of Fundamental Rights of the European Union (2000). Treaties, Conventions, Papers that refer to Dignity as a key rule, placed at the top of the legal order.

It is necessary, however, to say that despite the Declarations and International Papers which sanction and claim the recognition of human rights, in many countries of the world they are violated, everyday we witness femicides, violence against women in particular, and as Martha Nussbaum says, "Women are not treated as holders of full rights, as people with their own dignity, worthy of being respected by laws and institutions; instead they are treated as mere tools for others' purposes, that is, as reproducers, caregivers, sex objects, agents of general family prosperity"[5].

[4] La dignità riguarda l'essere stesso di ogni persona e la Dichiarazione cerca di esplicitare che cosa comporti il rispetto della dignità di ogni essere umano inaugurando un nuovo ambito di legislazione positiva che istituisce un livello di esigenze morali inviolabili e inalienabili, superiori a ogni legge comprese le Costituzioni dei diversi Stati (cfr. X. Dijon, *Droit naturel*, Tome I: *Les questions du droit*, Presses Universitaires de France, Paris 1998, pp. 57-60).

[5] M. C. Nussbaum, *Women and Human Development. The Capabilities Approach*, Cambridge University Press, Cambridge – New York 2000; tr. it. di W. Maffettoni, *Diventare persone. Donne e universalità dei diritti*, Il Mulino, Bologna 2001; pp. 15-16. «Soprusi, precarietà, violenze coniugali, prostituzione, criminalità, disoccupazione, sessismo: le prime vittime sono sempre le donne. Peggio ancora, la nostra realtà è piena di zone d'ombra, dove ci sono donne che vivono in uno stato di subordinazione totale, se non di schiavitù; sono le realtà dell'immaginazione, quelle in cui la tradizione e le usanze sfidano la legge. (C. Ockrent (ed.); *Il libro nero della donna. Violenze, soprusi, diritti negati*, Cairo Editore, Milano 2007, p. 14); A. Sen, *Elements of a Theory of Human Rights*, in "Philosophy & Pubblic Affairs", vol. XXXII, n. 4, pp. 316-356. Ogni essere umano deve essere riconosciuto e rispettato come tale, perchè l'umanità è essa stessa una dignità, un valore intrinseco. L'essere umano è un fine in sé che deve essere in quanto tale riconosciuto e rispettato. Il concetto di dignità della persona umana è il cuore stesso della dottrina dei diritti umani, che sono per definizione i diritti di cui ogni essere umano gode in quanto tale, come efficacemente afferma la filosofia ginevrina Hersch. Cfr. J. Hersch, *I diritti umani da un punto di vista filosofico*, a cura di F. De Vecchi, Prefazione di R. De Monticelli, Bruno Mondadori, Milano 2008. Per un approfondimento della tematica dei diritti umani come diritti fondati sulla dignità umana cfr. A. Canese, *I diritti umani oggi*, Laterza, Roma-Bari 2005, pp. 54-59; J. Griffin, *First Steps in an Account of Human Rights*, in " European Journal of Philosophy", vol. IX, n.3, pp. 306-327.

It must be said, however, that even today, despite its significant role within the contemporary ethical-political debate, the concept of dignity is even paradoxical[6], as evidenced by the fact that it is used to justify opposing positions. In the bioethics field, for example, dignity is invoked by both advocates and opponents of very different practices, from euthanasia to embryo experimentation. Patient physicians say no to euthanasia and strongly affirm the patient's dignity towards the natural term of existence, on the contrary there are those who claim the absolute self-determination of the patient and therefore the freedom to decide to die with dignity and end an existence that no longer has meaning to live, such as the last recorded cases of people accompanying in Switzerland where it is legal to pull the plug.

But are human rights really universal?

There are many criticisms on the semantic level and on the western culture interpretation as they would have expressed a universalistic conception of rights based on the dignity of all human beings, without at the same time supporting the recognition[7] of every human being in its personal and cultural original difference. Reservations refer to a conception of human rights referring to metaphysical, theological, and ethical principles rooted in Christianity.

St. Thomas asserted that human beings, endowed with reason and will, participated in the eternal law, and in spite of separation, they coordinated eternal and natural law, human law and divine law[8].

Today in the West, the above principles are no longer readable, for the secularization and ethical fragmentation increasingly widespread in

[6] Cfr. M. Dupuis, Dignité, in L. Lemoine – É. Gaziaux – D. Müller, *Dictionnaire Enciclopédique d' Éthique Chrétienne*, Cerf, Paris 2013, pp. 595 – 606.

[7] La nozione di riconoscimento è presente in diversi pensatori come N. Fraser, J. Habermas, A. Honneth, Ch. Taylor. Il riconoscimento viene anche considerato come "logica dei diritti"; cfr. P. Savarese, *Appunti per una logica dei diritti umani*, Aracne, Roma 2006, pp. 13-41. Particolare significato assume il concetto di riconoscimento all'interno dell'opera di P. Ricoeur del 1990. *Soi – même comme un autre*, soprattutto perché, attraverso essa, è possibile cogliere l'emergenza di tutti i problemi che si articolano intorno alle nozioni di reciprocità, di sollecitudine, di amore, di giustizia, di rispetto, ovvero di tutte quelle forme in cui si declina il rispetto di sé all'altro. Cfr. P. Ricoeur, *Soi – même comme un autre*, Paris 1990; tr. It. Di D. Jannotta, *Sé come un altro*, Jacka Book, Milano 1993.

[8] Cfr. Tommaso D' Aquino, *Summa Theologiae*, I – II, q. 91, a. 1; a. 2; a. 3; a. 4.

a society that Bauman has well-defined liquid[9]. It is also true that these same principles are also used in some forms of ideological claims ready to define what belongs to the Christian tradition in order to reject diversity based on culture and religion, or, on the contrary, those principles are removed to support forms of cultural neutrality guaranteeing freedom, religious choice, thought and conscience.

The hopes placed in the global economy, in the Charter of Rights, in the detailed standardization of human life from birth to death, with the presumption to obtain from "nature", more pervasive and binding rules for a "good life"; these hopes have unfortunately led to a failure. Protocols are disappointing, moratoria are more and more optional, no more observant and binding treaties, destruction of Constitution papers depending on certain interests prevailing on others, hence normativism becomes a weak wall for the culture of the strongest.

There has been a serious omission on this path of history, the function of moral law, which has very different origins from legal rules and law, is underestimated or at least it has been locked within the private boundaries of the options of individual conscience, neglecting its social and collective importance.

There is no need to rhetorically refer to universality. It is necessary to reflect on the universe's sense of confrontation with the changes that have taken place since the Universal Declaration of 1948, and therefore by measuring with what is shared in the plurality of cultures and religions, so that the same universality of rights can be connoted in forms of life and experiences in which every human subject comes to recognize itself, achieving the awareness of one own's identity and at the same time identifying the modes of alterity as the primary condition of self-importance for one own's identity.[10]

[9] Per un approfondimento delle caratteristiche della società liquida cfr. i seguenti studi di Z. Bauman, *Modernità liquida*, Laterza, Roma-Bari 2000; *Amore liquido*, Laterza, Roma-Bari 2003; *Vita liquida*, Laterza, Roma-Bari 2005.

[10] Ricoeur proprio nell'opera *Soi – même comme un autre* vuol dimostrare come «l'alterità non si aggiunga dal di fuori all'ipseità, come per prevenire la deriva solipsistica, ma che essa appartenga al tenore di senso e alla costituzione antropologica dell'ipseità»(P. Ricoeur, *Sé come un altro*, tr. it. 1990, p. 431) Cfr. anche ID., *Parcours de la reconnaissance – Trois etudes*, Stock, Paris 2004.

Identifying what is embodied in human history as universal within cultural peculiarities means to pay attention to identity. This requires, as Taylor states, to distinguish human universes from historical constellations and at the same time to know how to "avoid losing and absorbing the latter in the first, transforming, as we are always tempted to do, our particular modes in expressions in some way inevitable of humans as such"[11] .

The universality of human rights implies meanings to be explored with hermeneutic keys, and the dimensions of identity and alterity require the dialectic of the recognition of the different from oneself.

The encounter of the "ego" and the "other" is an ethical event that brings out the "ego" from ones the self. The other breaks the monolingualism of the ego, and its security, becoming restless, and calling for the subjection of the ego. Lévinas emphasizes a subjectivity not as a closed and jealous identity of oneself, but a subjectivity torn from its security because the other is a constitutive feature of identity. Subjectivity is not "for oneself", it is initially "for others." "The other assumed is others" [12].

It is the face of the other that, with its nakedness, exposure and fragility brings the ego to the accusative inflection form, calls it, troubles it and leads it to ethics and "this questioning of my spontaneity by the presence of others is called ethics "[13].

Today, the need for a theoretical and ethical basis of human rights is a matter of extreme urgency, both because we are witnessing dramatic and continuous violations, also because new and multiple claims are made. The lack of a basis has consequences that have an impact on common and universal recognition. The problem of the human rights basis is a necessary condition for their recognition.

This is certainly not a scientific and evaluative basis, because in the case of human rights it is not only about facts but values: the human being is not only universal abstract nature, but a concrete person, an "entire" in the Aristotelian sense, and therefore cannot be ignored by a concept of "human" conceived in the wholeness of its anthropological constitution.

[11] C. Taylor, *Sources of the Self. The Making of the Modern Identity*, Cambridge University Press, Cambridge (UK) 1989, p. 112

[12] E. Lévinas, *Il tempo e l'altro*, Il Melangolo, Genova 1993, p.48.

[13] E. Lévinas, *Totalità e Infinito. Saggio sull'esteriorità*, Jaca Book, Milano 1988, p. 41.

A person is a subject of action, an incarnate subject, to say it along with Mounier, a responsible and lawful person, since "no experience or conscious acts of mankind can exist by themselves, but they need a subject"[14]. For Seifert, being a person "is the first basis of human dignity, since freedom, awareness and knowledge, as well as the ego and the self that belong to the essence of the person, clearly require a living person and it exists in itself in the being, and it does not depend on these acts nor is it connected to another accident"[15] . Other philosophers such as James Griffin[16] and Alan Gewirth respectively affirm that human rights are protections as the condition of being a "person" and that the idea of human rights must be based on the fundamental characteristics of action, voluntariness and intentionality since the possession of rights is the necessary condition for rational intentional action and must incorporate the concept of equality [17].

Rights, despite having as term of reference universality, deal with life experience and its problems.

An investigation into the human rights basis cannot therefore be ignored by the dignity of the human person and from the reference to natural law. "The concept of natural law assumes that nature is for human beings a conveyor of an ethical message and constitutes an implicit moral rule that human reason actualizes" [18].

2. Human rights and fundamental needs

For the founder of "Esprit", in fact, the person is "the total volume of a human being. It is a balance in length, width, and depth; in every human being there is a tension in its three spiritual dimensions: the one rising from

[14] J. Seifert, *Il diritto alla vita e la quarta radice della dignità umana*, in J. De Dios Vial Correa – E. Sgreccia (eds.), *Natura e dignità della persona umana a fondamento del diritto alla vita. Le sfide del contesto culturale contemporaneo*, Libreria Editrice Vaticana, Città del Vaticano 2003, p. 207.

[15] Ibidem, Un essere umano possiede una dignità personale non solo quando «funziona come persona» bensì quando la possiede in virtù del suo «essere persona» (cfr. ibidem).

[16] Cfr. J. Griffin, *On Human Rights*, Oxford University Press, Oxford 2008.

[17] Cfr. A. Gewirth, *Human Rights*, University of Chicago Press, Chicago 1982.

[18] Commissione Teologica Internazionale, *Alla ricerca di un'etica universale: nuovo sguardo sulla legge naturale, Libreria Editrice Vaticana*, Città del Vaticano 2009, n. 69.

the bottom and incarnating into a body; the one that is directed upwards and raises it to a universal level; the one that is directed towards the width and leads it to a communion. Vocation, incarnation, communion are the three dimensions of a person"[19].

This conception requires that every idea of human rights, liberty, and dignity must deal with the condition of necessity, with the bonds, the dependence, the interdependence demanded by this constituent condition, which impels the human person to consider its fragility and therefore in need of care [20].

The resumption of the reflection on human rights and the human person, which is the "right of existence", the essence of the right to say it as Rosmini, must therefore start from the complexity of this living being that, in the design of creation, has been recognized as the subject and object of needs and rights and that, even in its constitutive fragility, is the highest expression of dignity expressed in the capacity of what it will become and in the recognition and appreciation of freedom to choose one's life in the reality of particular conditions, and therefore of a subject worthy of esteem and respect.

Therefore, as Ricoeur observes, the legal question: "Who is the subject of rights?" isn't distinguished from the moral question: "Who is the person worthy of esteem or respect?" The moral question refers, in turn, to "an anthropological question: what basic features make the self (selbst, ipse) capable of esteem and respect? This proceeding from rights to morality and from morality to anthropology invites us to focus on the detail of the question who, in relation to questions with that, what and why. The question "what?" demands a description, the question "why?" an explanation, the question "who?" an identification [...]. In fact, by looking at the fundamental forms of the question who? and those of the answers, we are led to giving a full meaning to the notion of *capable subject* "[21].

[19] E. Mounier, *Révolution personnaliste et communautaire*, in *Oeuvres Storia*, t.I, Paris 1961, p. 178.

[20] Cfr. M. Signore, *Economia del bisogno ed etica del desiderio*, PensaMultimedia, Lecce 2009

[21] P. Ricoeur, *Chi è il soggetto di diritto?*, in "Prospettiva Persona", Anno III – n. 7, Gennaio – Marzo 1994, p. 11. «La nozione di capacità è centrale in questa riflessione. Essa costituisce, asserisce ancora Ricoeur, il referente ultimo del rispetto morale e del riconoscimento dell'uomo come soggetto di diritti». (Ibidem).

Starting from the consideration that a person is an "entire", every attempt to create temporary or definitive lists of "non-negotiable values" becomes sterile, and to emerge with conviction that a person as a whole is intrinsically "non-negotiable value".

The dignity of the person is not shattered in the search for the fragment that responds to one or another particular vision of life, but it is cultivated and exalted in the whole of the person's life experience.

In this panoramic view, supported by a philosophical anthropology in search of the basis of the person, bioethics must also give up the autopsy presumption (sad experience!) and embrace the panoramic experience, for which a person is a value during its whole lifetime, from conception to the end of life itself. Human dignity should not be sustained only in intermittent moments of a person's life, but in the continuous stream of experience that must lead a person to completely fulfill its capabilities that are the conditions of possibilities that every human being has from conception, thus a person must be helped to fulfill them throughout lifetime. That is why public authorities and institutions are called upon to do so. Starting from this strong premise, the question arises is whether it is possible to imagine criteria or fundamental universal principles that should be followed by all governments and communities to ensure respect for human dignity beyond gender, religious and cultural differences. It is best to look for an approach that less than others can take the risk of reductionism, and the destiny of a glimpse on human beings that cannot embrace it in its "wholeness". For this purpose, the Aristotelian concept on being human can help us, or at least of the neo-Aristotelian liberalism, in which the fact a human being is an "animal with needs" is equally important and fundamental to the possession of reason. Therefore, every conception of rights, liberty and human dignity must deal with the needs of human beings, with the bonds, dependencies and interdependencies created by these needs, starting with the essential functions so there is human life and not only animal. Functions that represent the specifically human mode with which needs are expressed and fulfilled. This, however, requires a change of approach in relation to the human person. In our opinion, we must go beyond the approach of "resources", finally using the capacity approach to evaluate the quality of life of a society and the conditions of each individual. Interestingly, the philosophical position

of the Nussbaum's capacity approach, which distrusts the relativistic conceptions and bases human rights on the fundamental human needs, on its structural needs, rather than on desires that are always culturally conditioned and often prevent to undertake a rational critical position on the existent and to advance the need for fundamental rights[22].

Nussbaum's universalism is very close to the positions of a personalist right already defended by Mounier and Maritain and in Italy by scholars such as Capograssi and Moro[23].

This view does not consider the level of wealth or even just how it is distributed (that is, the level of inequality) it means rather to ask what people are able to do and be in that particular society: how much their dignity as human beings is recognized and valued and how free they are to choose their own lives in the reality of their particular conditions. There is no human dignity not only when there is not enough to eat or when there is no freedom to work and to be independent; or when it is not possible to associate to defend one's own interests or practice one's religion; or even when physical safety is jeopardized by the use of force by others (of course, all this goes without saying that is attributed to respect for dignity!). But there is no human dignity and freedom of opportunity when education that nourishes reason and denial of autonomy are denied (I. Kant, Beantwortung der Frage: Was ist Aufklärung?). And yet, there is no dignity when the possibility of imagination and access to *thaumazein* are extinguished because they have not been nourished at the right time and in the right way.

[22] Cfr. M. C. Nussbaum, *Diventare persone*, cit. Per un approfondimento della filosofia di Nussbaum cfr. i suoi seguenti studi: *Giustizia sociale e dignità umana*, tr. It. Di E. Greblo, Il Mulino, Bologna 2002; *Non- relarive Virtues*: *An Aristoteliam Approach* (1988) in J. P. Sterba (ed.), *Ethics: The Big Questions*, Blackwell, Oxford 1998, pp. 259-276; *Aristotele on Human Nature and the Foundation of Ethics*, in J. E. J. Althan-R. Harrison (eds.), *World, Mind, and Ethics*, Cambridge University Press, Cambridge 1995, pp. 86-131; *Capabilities, Human Rights, and the Universal Declaration*, in B. Werton-S. Marks (eds.), *The Future of International Human Rights*, Translational Publishers, Ardsley, New York 1999, pp. 25-64; *Capacità personale e democrazia sociale*, tr. It di S. Bertea, a cura di G. Zanetti, Diabasis, Reggio Emilia 2003; *Creating capabilities*, The Belknap Press of Harward University Press, Cambridge, Mass 2011.

[23] Cfr. F. Abbate, *L'occhio della compassione*, Studium, Roma 2005, *Intervista* a M. Nussbaum, p. 189; J. Porte, *Nature as Reason*, Eerdmans, Grand Rapids, Mi.Cambridge 2005, p. 148.

How the uncritical respect of certain traditions hurt the dignity of a person! (Marginalized women, exploited children and often used as workforce for war purposes, and all that humanity denied in their fundamental rights). There is no appeal to tradition and values (to a list of values dictated by tradition or politics) that can legitimize the lack of exercise of the abilities a person holds, and the oppression and denial of the abilities before they can be developed and expressed in the full freedom of option. The "capacity" and the attention towards them are a "demanding" concept that requires that the conditions for its development and its implementation are set, although it does not order, does not oblige individuals to actually put it into practice, if it is not wanted. It is not the matter, for example, just to recognize that a disabled person needs additional resources to meet its daily needs (some sort of compensation).

It is also necessary to ensure that the way in which the environment is organized and the set of social rules do not add any further constraints. Here, the respect for one's dignity is entrusted to public policies consciously inspired by the approach of skills and dignity of human life, and therefore not only provide the necessary additional resources but commit themselves to removing obstacles. Here is the role of public policies as "enabling" policies, which lead to combined skills. Perhaps not a new concept, but which we think should be resumed by identifying the sphere of social rights that enable to carry out civil and political ones: education, income security, health care guarantees, a decent home. It is a necessary asset both in itself and for the real use of social and political rights, effectively supporting the centrality of a person's dignity as a universal non-usable good for that exchange of equivalents that dominates and steers the market.

In the approach we have proposed, we predict a society in which each is considered "worthy of respect" because a person and in which everyone is placed in the condition of living in a truly human way (M. Nussbaum), and finally indicating all this as a regulative horizon where it is more plausible to indicate new /ancient but true prospects of peace, overcoming the limits of peace rhetoric or one-way peace preaching without considering human beings.

It is our perspective that unfolds unlimitedly, starting with a glympse at contemporary society in which even in the situation of perfect equity, the

recipient of rights is the rational, conscious and independent individual. But the reality is different: children, elderly people, marginalized women, people who are not self-sufficient and differently-abled risk to be unable to exercise their fundamental rights which are also nominally held. The problem is further complicated when dealing with non-Western cultures. How can we then preserve the universalist force of rights and at the same time ensure that they genuinely guarantee human dignity beyond differences? How can individuals have the possibility, opportunity to be and do what they aspire, fulfilling, without discrimination, their "abilities"?

On these questions we play our will and our commitment, each on its part, to build a world fitted on the measure of the non-negotiable person's "dignity" and perhaps, finally, more pacified.

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Freedom and education: foundations of human rights in J. Hersch

ABSTRACT

Freedom and education: the Foundation for human rights in J. Hersch

The Geneva philosopher J. Hersch says that freedom and education are important foundations for human rights. The capacity of freedom is the essential property of humans and people actually exist as such when the concern that capacity to freedom, creating consequently his own humanity. Education is another essential foundation because it allows every person to respect each other as an end in itself, in the belief that more is the one that offers the conditions personalistic anthropological pedagogy and the most effective social and ethical respect for inviolable rights of the human person and non-negotiable.

Keywords: liberty, education, human rights

1. Introduction

The fundamental theme of our age is the fundamental theme of the story: that of man's destiny and its inviolable rights. The problem is knowing if the being to whom belongs the future will continue to be called and be truly human, and to what extent it will be possible to release human rights from our tradition of political culture and affirming them on a planetary scale. We are witnessing a dehumanization processes in all fields of culture, morals and the social, legal and political, and

meanwhile is the moral conscience that is foreshadowed, for they need, now, more than ever, an awakening in the same subtended by a strong commitment to education so that there is a compass to guide human life toward those values and to respect the constituent foundations of rights be person. In this respect we believe may be useful reflections of Jeanne Hersch, ideally start from this "gesture of freedom"[1] that philosophy in Geneva, already played in Europe in the years of his teaching from the chair of Geneva, performed by breaking the magic circle of pure philosophy, and opening at the same time his mind to listen to the voices of the world and history, also and above all of the voices of the world and of history, especially of the voices of the «without language» to use an expression dear to Simone Weil.

In 1968, on the occasion of the celebration of the twentieth anniversary of the Universal Declaration of human rights, had spread the suspicion that, human rights are a western idea only, christian and humanistic tradition-bound. Solicited by that complaint, the philosopher J. Hersch became the promoter of a collection of testimonies from different cultural traditions in respect of human rights, thus an ethnic and ethnographic experiment of great value. He asked the representatives of all countries to send texts taken from their traditions and anyway before 1948, «in which, in their view, manifested, in any way, a way for the rights of human beings». The resulting comforting consent, documented by the ensuing publication namely a valuable essay entitled *Le droit d ' être un homme*[2], translated into many languages.

The consensus was around human rights, with the search for Hersch, apparently today is compromised by an uncontrolled proliferation of

[1] Cfr. J. Hersch, *L'exigence absolue de la liberté. Textes sur le droits humains* (1973-1995), a cura di F. De Vecchi, Metishesses, Gèneve 2008.

[2] Cfr. *Le droit d'être un homme – Anthologie mondiale de la liberté*, Unesco- Payot, Paris-Lusanne; tr.it. E. Marini, SEI, Torino 1973, poi Mimesis, Milano 2015. It's an interesting collection of texts, prepared under the direction of J. Hersche, which would now rethought and who picked up a significant consensus around the Declaration of human rights of 1948. That collection was the empirical basis of reflection that led the Geneva based human rights philosopher until the last days of his life. From distant countries and more remote from the few arrived in Paris the thoughts through which man has proved himself, in his inviolable dignity (Cfr. J. Hersche, *I diritti umani da un punto di vista filosofico*, tr.it. di F. De Vecchi, Bruno Mondadori, Milano 2008, p.61).

rights, fostered by the mass. Concerned moral issues and the rising individualistic approach to the topic concerned. The responsibility can be detected in the detachment of the rights by reference to objective measure of natural law as noted Benedict XVI on the occasion of a speech at the UN General Assembly in 2008, the year of the sixtieth anniversary of the proclamation of the United Nations. On that occasion, Pope Benedict XVI said: «these rights are based on the natural law inscribed on the human heart and present in different cultures and civilizations. Remove human rights from this context would mean restricting their scope and give in to a relativistic conception according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of cultural contexts, different political, social and even religious»[3].

According to Ratzinger subjective rights have their basis in objective law: natural law. The desire for freedom and the defense of it, always operating in the heart of man go to a natural law, and together combine to determine its contents. The transition from immediate practical experience to natural law requires the mediation of culture. Only through the mediation of cultures and their comparison natural law becomes known; Therefore the recognition of cultural mediation of moral conscience and therefore also of the legal does not mean *ipso facto* negation of every natural law.

2. Freedom and human rights

The Hersch philosopher's reflections on the relationship between freedom and human rights stem from questions that the thinker arises, such as: what is the Foundation of human rights? How this Foundation can be both absolute and plural? In that sense we can speak of the universality of human rights? Universality is only the West? What kind of rights are? What they mean? What is the strength of the universal declarations? Are all key issues and Hersch responds from his idea of freedom. Given that Hersch was a student of Karl Jaspers and having deepened Bergson's philosophy, it can be said that his philosophizing on

[3] Benedetto XVI, speech at the UN general Assembly, 2008.

the experience and "by the evidence of things seen and experienced" as she herself says[4].

Hersch locates the absolute and universal human rights foundation in the experience of one's own ability to actualize and affirmation of freedom of every human being. The philosopher defines this absolute need for deep, emotional and personal experience and research the terms discount and development of concrete and real freedom[5].

According to Hersch you can understand the Foundation of human rights only taking the philosophical point of view thus trying to locate the "raison d'etre" of human rights and therefore the need for absolute, constitutive of every human being, to be recognized as free. Freedom is in the Centre of *human rights from a philosophical point of view*[6], Hersch, in fact, speaks of liberty as capacity and specifies that the capacity of freedom is the essential human property that sets it apart from every other living being[7].

In that capacity, freedom is the order of the possibility and not the factuality, because all human beings are universally free in power while they're free to done to the extent that everyone makes, creates and implements in its own way the staff capacity for freedom. If it is true, as it is true, that freedom is the essential property of humans, we can say that people actually exist as human beings when the concern that capacity to freedom, by discounting their humanity. The words "freedom" and "humanity" and "human" and "free" are equivalent and will involve each other.

Freedom and equality are not a given, but an ideal to be pursued, not a being but a need. Even existence for Hersch and another word for freedom and the verb "exist" for the genevan philosopher has an

[4] Cfr. J. Hersch, *L'illusion philosophique*, pref. di K. Jaspers, Plon, Paris 1995; tr.it. di F. Pivano, *L'illusione della filosofia*, Bruno Mondadori, Milano 2004², p.30.

[5] Cfr. J. Hersch, *L'exigence absolue de la liberté*, cit., p.104.

[6] Cfr. J. Hersch, *I diritti umani da un punto di vista filosofico*, a cura di F. De Vecchi, Pref. di R. De Monticelli, Bruno Mondadori, Milano 2008; original title *Les droits de l'homme d'un point de vue philosophique*, Unesco, Genève-Paris 1990; pubblicato in seguito in R. Klibansky, D. Pears (sons la direction de), La philosophie en Europe, Gallimard, Paris 1993, pp. 505–540; ora ripubblicato in J.Hersch, *L'exigence absolue de la liberté*, cit., pp.103–125.

[7] These beliefs are the leitmotif of the entire production and herschiana for a discussion on the development of this thesis and the idea of freedom, we return to a significant paper of F. De Vecchi, *La libertà incarnata. Filosofia, etica e diritti umani secondo Jeanne Hersch*, Bruno Mondadori, Milano 2008.

etymology which refers to the idea of a spring state and then to the ability of human beings to emerge from the causality of the laws of nature, to establish itself freely and humanly[8].

Freedom is for Hersch "shaping a matter", ability to act by exercising a grip trainer on reality. And the human being all the more intensely lives the more gives strength to his activity, to his work and then acts, knows, contemplates and creates. An act which means do creatively: a *praxis* that is both a *poiesis*. The absolute freedom is the Foundation of human rights. The human involved in human rights is the ability of freedom that is the Foundation of human rights or, even better, a fundamental human right. This Foundation for Hersch is absolute and universal and is absolute because the implementation of the capacity of freedom and the affirmation of one's own existence as a human being are an absolute requirement. If prevented from exercising its freedom and humanity, the human being is no longer and he has no chance to fulfil themselves humanly. It is universal, because the capacity of freedom is the constitutive property of all humans, as every human being wants to be recognized in this capacity so says Hersch: «Freedom, human rights foundation, is also an *absolute requirement* and *situation*. If it is not seen as absolute, it soon dissolves in consideration of causal sequences. If is not experienced in practice, which requires its countless data, it loses its reality up to abstraction emptier»[9].

3. Freedom and education

Freedom and education are not irreconcilable; but they can and should coexist in the respect of fundamental human rights, which constitute the natural rights of man, that no authority can arbitrarily abolish, and respect the law, which is not a tyrannical imposition but an expression of the free will of the members. The person «as an end in itself» buy every social purpose, and as a result people's rights prevail over every social disposition and condition the legitimacy; in fact the social being

[8] Cfr. J. Hersch, *Éclairer l'obscur, entretiens avec G. et A. Dufour, L'Áge d'Homme* , Lousanne 1986, p.53; tr.it. di L. Boella e F. De Vecchi; *Rischiarare l'oscuro. Autoritratto a vita voce*; intr. di C. Boella, postf. di F. De Vecchi, Boldini Castoldi Dalai, Milano 2006.

[9] J. Hersch, *L'exigence absolue de la liberté*, cit., p.118; infra, p.89.

determines the human being, but a human being connotes humanly society in which it participates. With this you will not want to diminish the value of the company; here means the company as endogenous in person, not in the sense the immanence and monistic absolute idealism, but in the sense that the person contains within itself its social destination, nor could be fulfilled as a person if this would contravene his destination. Hersch affirms the importance of the community as indispensable to the realization of the freedom of the person and in this regard affirms that «it is necessary to recognize that the community is, in *many ways*, *indispensable* to the *individual* who is part of it, and the actualization of his freedom. It is the community which gives it in the past, culture, means to ensure material safety, human context, language, scope for action. It is also responsible for compliance with or violation of the rights of each and every one. It has therefore actually rights, but these are derived from those of the person and not the reverse»[10]. Hersch insists that freedom and education are linked in a relational paradigm and reciprocity and constitute the essential basis for a path of humanization and of respect for human rights. It happens to everyone if you can count on good reflection, in which those who are growing find authoritative reference guide imitative as adults but liberating.

All this requires a real commitment in the special conditions and personal and community educational responsibility that aims to make effective those principles which lead to the practical implementation of human rights. This does not allow us «to use a leaning towards Angelism that would allow us to escape the relativity of human condition»[11]. Instead the need for absolute respect for human rights engages us in our temporal condition «in efforts to be made step by step, in the course of life and history. In its and in concrete»[12]. Hersch is convinced that anthropological opinion better able to offer education prerequisites for a realistic profile of the subject to educate in today's cultural climate should remain anchored to the personalist tradition. For the personalism that person is ' an incarnate spirit» in the words of Mounier. There is, therefore,

[10] J. Hersch, *I diritti umani da un punto di vista filosofico*, cit., p.88.

[11] Ibidem.

[12] Ibidem.

scope for an evanescent anthropology; so is exceeded every legacy of dualistic separations between "soul" and "body". In this direction should be the lesson of Hersch. In the compost synthesis of "soul" and "body" as well as in inextricable game of their mutual reciprocal difference lies the *unicum* of human being and so its oneness and uniqueness. The man has a soul and a body, and as a «living body and deadly belongs to nature. And nature is the realm of strength (...). Nature does not know the law or rights»[13]. If it were only a soul man «could ignore the strength, and be tempted to forget (...). Could dream of an Angel and should not worry about your rights»[14]. But as inseparable unity of body and soul he «lives his own humanity in the *intersection* of one and the other. The reality of nature, of factual, takes on decisive importance, and man needs to live *for* (...) aims of ends. *Want*, *wish*, *select*, *choose*. It and try to be a responsible freedom. Therefore, at the same time as the size of *intention*, *purpose* and *history*, introduces worldwide empirical realities of *rights* and the *right*»[15]. But this does not imply the detachment from nature, because if the right and rights were completely separate from the force would not have the same force and reality had nothing to human if it were not subject to the law. So, since man is unique to living this intersection of opposing kingdoms of nature and freedom, feel in him the need to safeguard his opportunities to make of himself what he is capable of becoming, by demanding the recognition of dignity because it is the only to aspire knowingly to a future.

A pedagogy of the person, therefore, holding very much alive the interconnectedness between body and soul, between freedom and education, based on this data to an educational project dedicated to the awareness that an education anthropological compelling concreteness part from an anthropological perspective "holistic", where contemporary balance are *homo rationalis*, *homo spiritualis* and *homo sentièns*. So according to Hersch, for respect for human rights in the existential experience, which teaches to respect them in the exercise of a personal freedom and an educational responsibility that become conditio sine

[13] Ivi, p.60.

[14] Ivi, p.61.

[15] Ibidem.

qua non of an educational project to combat the risk of sleepwalking and keep alive the consciousness in order to enable you to understand how the figure "ethics must be" urging to adhere to good and related values, Plexus has corresponded with the unavoidable task of its humanization. For Hersch the freedom that is characterized as the key category of anthropology, remains the heart of the legal and ethical and pedagogical reflection. In fact, if education is intended to make the man what he can become, none of this can happen without that he prove an adequate commitment of freedom. But the path towards such a goal requires, in any case, two interconnected movements: the one (freedom from), of progressive distancing from alleys and conditionings, the other (freedom to), by striving for a well considered worthy of being pursued. Ultimately it is a *freedom to be freed*[16].

Freedom and education are the fundamentals of human rights, and the genevan philosopher insists on universal education on human rights, inspired by the "ethical boundaries" that Jaspers was present when «recommended modesty (*sich bescheiden*) in front of the absolute»[17].

This universal education, now more than ever, represents the biggest challenge for the man of the third millennium, if only for a moment, we look at the news, unfortunately marred by serious problems as hunger, refugee camps, without asylum boats swept away by the sea, blackmail, wars, persecutions, terrorism. And yet, says Hersch, «how to keep quiet when it sometimes seems that the root interior of human rights, this absolute root you say " you've gotta" or saying " no, at no cost" and that should be at the core of any human rights teaching is likely to atrophy? Without this root, continues the philosopher, rights lose all their meaning. You have to treat it, nurture it, stimulate it, while preserving and trust measuring an incarnation always imperfect and progressive, to be implemented in many ways and, in particular, with the legal instruments inspired by the Universal Declaration»[18].

[16] Cfr. O. Dürr, *Educazione alla libertà*, tr.it., La Scuola, Brescia 1971. Si veda anche E. Calicchi, A. M. Passaseo (a cura di), *Educazione e libertà nel tempo presente. Percorsi, modelli, problemi*; Armando Siciliano, Messina 2008.

[17] Cfr. J. Hersch, *I diritti umani da un punto di vista filosofico*, cit.,p.102.

[18] Ibidem.

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Personal data security – challenges, current state and outlook[1]

ABSTRACT

Due to the rapid development of the information society recent years have brought new technological challenges and related threats to the security of personal data. The answer to these phenomena was the legal regulation of the means, rules and institutions that guard the security of personal data.

The purpose of this paper is to analyze the current legal framework applicable at national level in Poland, to assess legislative changes at the European level, and to take position on their adequacy. The study is limited to the issues of securing personal data laid down in Chapter V of the Polish Act of 29 August 1997 on the Protection of Personal Data and to the relevant provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, included in section II (articles 32–34). The paper uses mainly the method of legal-dogmatic analysis and the comparative method.

Keywords: data security, guarantees of personal data security, General Regulation on Personal Data

1. Introduction

The process of creating a legal framework for the protection of personal data is dynamic, which is clearly illustrated by the already completed

[1] Pursuant to the applicable legislation as of June 1, 2017.

legislative work on the new EU Regulation on the protection of natural persons with regard to the processing of personal data[2] and on the new Polish Act on the Protection of Personal Data.[3] Intensive legislative work is a response to the present day requirements. A rapid technological development in the past decades has brought new challenges in the field of personal data protection both in the public and private sectors. The scale of data exchange and data collection has grown tremendously. It is assumed that technology has completely changed both the economy and social life. New threats to the privacy of individuals have emerged such as profiling, the violation of personal rights, e.g. image or identity theft and phishing, harassment, defamation or cyber terrorism (Brzozowska, 2012, p. 95; Ciechomska, 2017, p. 37). It should be taken under consideration that challenges related to the development of new technologies and possible interference with the right to privacy – such as profiling, geolocation or cloud data processing – allow highly undesirable manipulation in the event of improper data protection.

2. Protection of personal data as an instrument to counteract breaches of privacy

Data protection is legally guaranteed at both national and transnational levels. The Constitution of the Republic of Poland in Art. 47 grants citizens the right to privacy, and Art. 51 guarantees every person the right to the protection of information concerning that person. At European level Articles 7 and 8 of the Charter of Fundamental Rights of the European Union recognize respect for private life and the protection of personal data as related fundamental rights. The Polish definition of personal data, based on the assumptions of Directive 95/46, is extremely broad because, in the light of Art. 6 of the Act on the Protection of Personal Data, personal data shall be deemed to contain all information relating to an identified or

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Official Journal of the European Union, L 119, 4 May 2016, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:119:TOC, 5.05.2017.

[3] https://mc.gov.pl/aktualnosci/projekt-ustawy-o-ochronie-danych-osobowych, 6.05.2017.

identifiable natural person. These include, in particular, information that allows direct identification such as: name, address, PESEL identification number or DNA code, as well as information that indirectly determines the person's identity: in particular one or several specific factors determining his or her physical, physiological, mental, economic, cultural or social features (Article 6 (2) of the Act on the Protection of Personal Data).[4] Other information such as psychophysical characteristics, state of health, likes, interests, participation in social life (events, events, use of a physician named by name, acquired qualities, skills, etc.) may also be included. The subject of personal data is every human being from birth to death (Hoc and Szewc, 2014, p. 4). According to the judgment of the Provincial Administrative Court in Warsaw of 9 July 2014 also a video monitoring system, due to the fact that it allows identification of persons, is a collection of personal data and subject to the provisions of the Act on the Protection of Personal Data.[5]

Similarly, giving a phone number and an e-mail address is giving personal information within the meaning of Art. 6 Paragraph 1–3 of the Act on the Protection of Personal Data because these data allow to identify a specific person quickly.[6] In other words, the data subject does not need to be indicated explicitly, it is enough to ensure traceability. This was ruled by the Supreme Administrative Court in Warsaw in the judgment dated of 19 May 2011, which stated that if the IP number indirectly allows the identification of a particular individual, it should be regarded as personal data within the meaning of Art. 6 Paragraph 1 and 2 of the Act on the Protection of Personal Data of 1997. A different interpretation would be contrary to the constitutional norms contained in Art. 30 and 47 of the Constitution of the Republic of Poland.[7]

[4] Such a broad legal definition of personal data makes the status of personal data potentially available to any information relating to an individual. Personal information may take different forms. In addition to traditional data, these may include photos, videos, recorded voices, so-called biometric data, etc. regardless of the manner and extent of their acquisition and disclosure (Barta/Litwiński, Ustawa o ochronie danych osobowych, Komentarz, 3. Ed., Warszawa 2015, art. 6, p. 77, subpara. 5).

[5] II SA/Wa 2393/13 judgment of the Provincial Administrative Court in Warsaw of 9 July 2014.

[6] II SA/Kr 682/13 judgment of the Provincial Administrative Court in Cracow of 11 October 2013.

[7] SK 1079/10 judgment of the Supreme Administrative Court in Warsaw of 19 May 2011.

Pieces of information that characterize a person but do not allow identification are not considered to be personal data. Anonymous information is not regarded as personal information (Jarzęcka-Siwik and Skwarka, 2012, p. 798). Sensitive data require a special protection from the point of view of the right to privacy. In accordance with the provisions of the Act on the Protection of Personal Data these include information that reveals racial or ethnic origin, political views, religious or philosophical beliefs, religious affiliation, party or trade union membership, and health information, genetic code, addictions, or sexual life. This group of data is subject to more intensive protection, inter alia due to the fact that Art. 49 of the Act on the Protection of Personal Data provides for stricter criminal liability for their illegal processing. Another category of sensitive data is data on convictions, punishments and penalty notices, as well as information on judgments given in court or administrative proceedings.

In the era of technological development and modern economy, data security is therefore designed to protect the privacy of natural persons, on the one hand, and on the other hand to increase the confidence of consumers and entrepreneurs in the information society. The European Commission's priority is to ensure that personal data are effectively protected, regardless of the technology used to process the data (Szpor, 2013, p. 56). Finally, the complexity of the issues related to the protection of personal data and the conflict of interests arising in this context should be emphasized. While companies in the computer technology and telecommunications industries, in an effort to maintain good customer relationships, have begun to take measures aimed at encrypting mobile services to prevent unauthorized access to data, it is still an ongoing problem that a large amount of easily accessible data on citizens are collected and their content is surveilled by government agencies or eGovernment services.[8]

[8] Institute for Human Rights and Busienss, Top 10 List of Business and Human Rights Issues for 2015, http://www.ihrb.org/top10/2015.html (20.05.2017).

3. Obligation to protect personal data under the Act of 29 August 1997 on the Protection of Personal Data

According to the definition given by Drozd, data security is a set of legal norms which consist of obligations to protect personal data against unauthorized processing (Drozd, 2008, 14). Among the obligations of securing personal data there are technical and organizational measures, some authors also distinguish physical measures (Barta and Litwiński, 2015, p. 380). In this context, it is crucial to identify the entity responsible for securing the processing of personal data. It can be assumed that the scope of obligations concerning the personal data protection has gradually expanded. According to the assumptions of the Act on the Protection of Personal Data (Article 31) data processing security is essentially in the hands of a data controller who processes or outsources data processing on a contractual basis. Barta and Litwiński note that since 2004 there has been a provision in Polish legislation that equates the responsibility for the processing of data of the processor and the controller, but such an approach conflicts with the fundamental responsibility of the controller for complying with the provisions of the Act on the Protection of Personal Data (Barta and Litwiński, 2015, p. 331-332). In this respect, it can be assumed that the division of responsibilities of the processor and the controller for the security of data processing is unclear. According to the content of Art. 31 Paragraph 4 the responsibility for complying with the provisions of the Act rests with the data controller and the data processor is liable for processing the data contrary to the contract of entrustment. Certain data protection responsibilities may also be assigned to a data protection administrator, although in principle he performs control functions and not the managerial ones (Drozd, 2008, p. 26).

It should be emphasized that the legislator, in Art. 52 of the Act on the Protection of Personal Data, provided for fines, restriction of liberty or deprivation of liberty for the violation of the obligation to properly secure the data. It is assumed that such an offense can be committed by any person who manages, i.e., administers personal data in the course

of processing the data.[9] The Act does not define the concept of data administrator. It is therefore assumed that this is anyone managing the data, although it does not have to be a data controller. The administrator's status is governed by the internal regulations of the data controller and these regulations assign data protection responsibilities to specific individuals. It is assumed that only after analyzing such acts as security policy, organizational regulations, contracts of employment, scope of activity, it is possible to determine who, in case of a given employer, is the data administrator responsible for the protection of personal data.

On the basis of the provisions of Chapter V of the Act on the Protection of Personal Data there are several responsibilities for the data controller (processor) that aim at protecting personal data. From Art. 36 Paragraph 1 of the Act on the Protection of Personal Data follows the principle of proportionality of the data protection measures that are applied to the threats and the categories of data processed. The obligation of adequate protection is linked to the principle of proportionality. The duties of the data controller – especially ensuring security of data so that they are not made available to unauthorized persons, or removed by unauthorized persons, damaged, destroyed, altered, lost, processed in violation of the Act – are closely related to the category of tasks entrusted to him. It should be remembered that these obligations also apply to a person processing the data on the basis of a commission from the controller. These obligations relate to data processed in a traditional way and to those processed in information systems. Based on the assumptions of Art. 17 of Directive 95/46, the Act on the Protection of Personal Data stipulates that the controller and data processor respectively should implement technical and organizational measures ensuring a level of security appropriate to the risks represented by the processing of data and the nature of personal data processed. The technical and organizational measures include physical security, video surveillance, alarm systems, access control – access protection, identification cards, biometric identification – and IT security such as IDs and passwords subject to periodic changes, firewall and encryption (Krzysztofek, 2014, p. 185).

[9] As stated by the Supreme Court in the decision of 11 December 2000 the criminal liability of a subject who processes personal data is however not a data administrator are considered when his behavior – recognized as punishable by the law – results from the data processing entrusted to him. II KKN 438/00, OSNKW 2001 / 3-4 / 33.

In this context, in the Ordinance of the Ministry of the Interior and Administration of 29 April 2004 on the documentation of the processing of personal data and the technical and organizational conditions that should be met by the equipment and information systems used to process personal data, three levels of protection of personal data are generally enumerated and appropriate protection measures are assigned to them. The obligation to secure data, as Barta and Litwiński point out, is dynamic, as the controller should analyze and evaluate the changing security risks and appropriately select data protection measures (Barta and Litwiński, 2015, p. 382). Doctrine and case-law also assume that the controller is not obliged to use all possible data protection measures, but only those that are necessary, taking into account the level of risk and financial outlay.[10]

Additional requirements for data processing security named in doctrine also include other categories of obligations that complement security measures of data processing. Under Article 36 Paragraph 2 of the Act on the Protection of Personal Data it is a responsibility of the controller to maintain adequate documentation describing the way in which the data are processed and the technical and organizational measures that ensure their control. In turn, Article 39 Paragraph 1 provides for the obligation to keep records of persons authorized to process the data, and those who have been authorized to process the data are obliged to keep secrecy about the data and the means of securing the data.

Another obligation of the data controller is, in accordance with Art. 36 of the Act on the Protection of Personal Data, the obligation to designate a data protection administrator (hereinafter referred to as DPA) (*pol. ABI – administrator bezpieczeństwa informacji*). Although this obligation existed even before the entry into force on 1 January 2015 of the amendment of the Act on the Protection of Personal Data. (Formerly Article 36 (3)), it is emphasized in the doctrine that the DPA, previously provided for in the Act, did not meet the conditions of the so-called data protection officials provided for by EU law. There was no sufficient statutory basis for his independence, his scope of competence was extremely limited and he was not granted a so-called simplified registration procedure (Fajgielski, 2014, p. 2014, 39–40).

[10] The case-law assumes that no organizational and financial nature can be treated as a basis for the unlawful processing of personal data by banks. Judgment of the Supreme Administrative Court of 4 March 2002, II SA3144 / 01.

On the basis of the current provisions of the Act on the Protection of Personal Data (Articles 36a-c) DPA's subjective requirements have been determined, his position in the organizational structure of the data controller has been specified, guaranteeing him a certain degree of independence, and relatively broadly clarifying the scope of his responsibilities. These include, in particular, compliance with the provisions on the protection of personal data and the keeping of records of data files processed by the controller. The appointment of a DPA should be reported within 30 days of the appointment to the Inspector General for Personal Data (IGPD), who keeps an open record of all appointed DPAs. From a practical point of view, the provisions of Art. 36 of the Act on the Protection of Personal Data are of importance as according to these provisions IGPD may refer to a DPA, who has been entered in the registry, to control the lawfulness of the processing of personal data by the controller who appointed the DPA (Barta and Litwinski, 2015, p. 402). Where a controller appoints and registers a DPA, he or she is exempted from the obligation to register personal data files with IGPD, but this exclusion does not apply to sensitive data sets. It shall be noted that if a DPA is not appointed, the data controller performs DPA`s tasks on his own (Article 36b).

The security of data processing is also indirectly guaranteed in Art. 37 and 38 of the Act on the Protection of Personal Data by the duties of a controller to allow the processing of information in the IT system and beyond only by authorized persons and to ensure control over the data flows, i.e. to ensure what personal data, when and by whom were entered, and what data, when and to whom were transferred.

4. Security of personal data in the General Data Protection Regulation of the European Parliament and of the Council (EU) 2016/679

The issue of security of personal data is covered in Section II (Articles 32 to 34) of the Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.[11]

[11] According to art. 99 sec. 2 it is envisaged that the regulation will become effective from 25 May 2018.

With regard to the scope of data security obligations, the EU legislature assumed that if the processing operation was carried out on behalf of the controller, the controller selects a processor that guarantees the implementation of appropriate technical and organizational measures and procedures. This is probably motivated by the need to ensure the lawful nature of the processing and guarantee legal protection of data subjects.

Following the so-called principle of adequacy, it was stipulated that the controller and the processor implement data protection authorities technical and organizational measures to ensure the level of security appropriate to the processing risks and the nature of the personal data to be protected, taking into account the latest technological developments and the costs of their implementation. Compliance with data protection obligations can be demonstrated, inter alia, by applying an approved Code of Conduct referred to in Art. 40 or an approved certification mechanism referred to in Art. 42 of the Regulation.

In the light of Art. 32 of the Regulation, the controller and the processor are therefore required to put in place appropriate measures to ensure the security of processing by extending the obligation provided for in Article 17 Paragraph 1 of the Directive 95/46 / EC on processors, regardless of the terms and conditions of the contract concluded with the controller. Literal interpretation of Art. 32 of the Regulation indicates that the responsibility of the controller and the data processor has been equalized.

Articles 33 and 34 of the Regulation provide for a new obligation of notification of a personal data breach, based on the obligation to give notice of personal data breaches as specified in Article 4 Paragraph 3 of the Directive 2002/58/EC on privacy and electronic communications.[12] The aim of the duty is to strengthen the rights of data subjects and enhance the supervisory powers of data protection authorities. At present, the supervisory authorities and individuals are not always informed of such breaches. (Szpor, 2013, p. 60). It should be expected that the competent national authorities will have full and accurate data on security breaches when such an obligation is introduced. Data controllers will be required to keep records of personal data breaches

[12] Official Journal of the E of 2 November 1995, L 281/31.

in order to enable the competent national authorities to analyze and evaluate, and consequently to eliminate similar cases in the future. According to Article 33 Paragraph 1 of the Regulation in case of a personal data breach, the controller shall report such a breach to the supervisory authority without undue delay and if possible no later than 72 hours after the breach is found, unless the breach is unlikely to result in the risk of a breach of freedom of natural persons. In turn, the processor warns and informs the controller immediately after the personal data breach has been established. Under Article 33 Paragraph 5, the controller shall prepare a record of any personal data breaches for the supervisory authority, including the circumstances of the breach, its effects and the remedial action taken.

Pursuant to Article 34 (1) of the Regulation, the natural persons who might be adversely affected by a personal data breach shall be informed forthwith so as to enable them to take the necessary precautions. A data breach may result in, inter alia, identity theft, damaging reputation, or identity fraud. Notification of a natural person should clearly and simply describe the nature of a personal data breach and include information on the measures taken to remedy the breach, as well as recommendations for the individual concerned.

Importantly, Article 35 of the Regulation provides for the so-called principle of data protection impact assessment. It signifies that if processing operations pose a particular risk to the rights and freedoms of data subjects, the controller or the processor shall conduct an impact assessment of the anticipated processing operations on the protection of personal data within the scope of the rights and freedoms of the data subject. The Regulation therefore provides for reacting to the changing environment in the processing of personal data and technology, in particular in case of the growing scale of data processing on the Internet. The provisions of the Regulation do not obligate to implement all possible security measures, regardless of the costs and capabilities of the controller in question, but it should be borne in mind that the lack of data protection possibilities cannot constitute grounds for abandoning the measures necessary to ensure security appropriate to the risks.

It should be stressed that the above provisions of the EU Regulation will apply directly to the Polish legal order (Kozik, 2017, p. 18).

5. The draft Act on the Protection of Personal Data of 28 March 2017

The draft of the new Act on the Protection of Personal Data of 28 March 2017 states that the Polish legislator has decided that the proposed new data protection Act will not repeat the provisions of the EU Regulation, but will only regulate and clarify issues not addressed at the EU level.[13] The following issues, inter alia are covered: the issue of accreditation and certification of data processors, regulation of details of proceedings concerning cases of personal data breaches and control proceedings. Also the EU regulations on the institution of the data protection officer have been detailed. In the context of data security a new legislative proposal at national level is obligating the President of the Office for Data Protection to issue non-binding good practices on data security safeguards that may be followed. The purpose of good practice recommendations is to support controllers and processors in assessing what technical and organizational measures can be implemented to adequately address the risk of data processing in a particular case. This will ensure a greater sense of legal certainty, thereby increasing the degree of compliance by administrators and processors with the provisions of Regulation 2016/679.

6. Summary

Technological progress and globalization have radically altered the way data are collected, including access to and use of data. These phenomena are accompanied by the ever-increasing danger of breaches of the right to privacy. The threat to the security of personal data can lead to social harm and economic loss. It can be prevented by rational norms aimed at the security of personal data.

The issue of securing personal data had already been regulated by the Polish legislation under the Personal Data Protection Act of 29 August 1997, which implemented Directive 45/96 EC. The Act had imposed a number of obligations on the data processors in relation with ensuring security guarantees. In this area, inter alia, the following obligations

[13] https://mc.gov.pl/aktualnosci/projekt-ustawy-o-ochronie-danych-osobowych 06.05.2017.

were introduced: an obligation of adequate protection, maintaining appropriate records, keeping records of persons authorized to process data, and finally an obligation to establish a DPA. Legal solutions, adopted as of 1 January 2015, relating to the DPA's competences and his place in the administrative structure of the controller concerned were intended to prepare the data controllers for the regulations envisaged in the EU Regulation that was being drafted at that time. They assume, inter alia, the functioning of independent Data Protection Officers, who cooperate with the data protection authority and with the data controller in the process of guaranteeing data security. A certain flaw in the national Act is that, according to the doctrine, there is an unclear separation of responsibility for improper data protection between the controller and the data processor. In view of the above, the EU Regulation on data protection analyzed herein, which stipulates that the processor is liable for data protection to the same extent as the data controller, should be assessed positively.

According to the requirements of the present day, there is a tendency in EU law – including the content of the mentioned Regulation – to strengthen the rights of citizens, including the guarantee of the security of personal data processing, by extending the controllers' information obligations regarding data security breaches. These obligations are to be exercised in order to inform the supervisory authorities as well as the data subject. The adopted legislative approach should be considered accurate from the point of view of data security and from the perspective of human rights protection. It can therefore be assumed that the reform of data protection law aims to ensure the protection of personal data in the EU, while at the same time increasing the users' ability to control their own data.

Ensuring data security as an element of protecting the privacy of individuals remains one of the challenges faced by the modern information society. It may be assumed that along with technological changes we will be faced with a further search for a balance between business or public administration interests and the protection of personal data of individuals, while the shape of the regulation on security of personal data in Poland will be mainly determined by the final scope of the new Act on protection of personal data.

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The security of your personal data on the Internet

ABSTRACT

Subject of research: The issue of the protection of personal data is related to the constitutionally guaranteed human right to protect his privacy. Particularly important seems to be focusing on the protection of personal data on the Web, as with the development of new technologies, a large part of our activities both in private life and professional-in a natural way is transferred to the Internet.
Purpose of research: The aim of the article is to show the need to unify and systematize the legal regulations on the protection of personal data on the Internet. The aim of the research is the need to find answers to several important theoretical questions on the protection of personal data on the Web, the presentation of the basic principles for the correct interpretation and application of the institutions for the protection of personal data in this space and show the relationship of constitutional rules and relationships statutory standards on this issue.
Methods:
1) the analysis of the legal code
2) the analysis of documents
3) method of comparative law

Keywords: protection of personal data, the human right to privacy, Internet and new technologies

1. Introduction

Increasingly our activity in the real world is supplemented or even replaced by activity in the virtual world. The Internet gives us great

opportunities, but also entails many risks. The need for the existence of the network is so large, that new technologies are not only used in the work or as a tool for acquiring knowledge, but also private life increasingly takes place in the virtual world. Social networking sites, via email, websites, where registration is required-this Web space where used and processed are our personal data. Very important is the awareness of the threats posed by data in the Internet, as well as care for their safety. Human rights on such issues must be highlighted and adjusted to the constantly changing and evolving human needs. The author of the article focuses on issues such as the genesis and the analysis of the concept of ‘ personal data ‘ and the discussion of the specific types of personal data used on the Internet such as email address and IP address.

The need for the protection of personal data and the regulation of their acquisition, collection and processing has grown with the increasing proliferation of the use of information systems. It was necessary to introduce such legal regulation, which involved to problem storing, sharing, and protection of personal data in the manner of a complete, comprehensive. This type of regulation is the law of 29 August 1997 o ochronie danych osobowych (u.o.d.o. -on the protection of personal data -consolidated text Journal of laws 2002 No 101, item. 926, as subsequently modified). The purpose of this Act is to establish legal protection of the sphere of privacy of citizens by ensuring the safety of the personal information that is stored in the systematic collection, held by the various institutions. Threats to privacy in this area derive not only from the very fact of collecting information, but also with the involvement of technique in the process of collection and processing. Automation and computerisation of data used by different types of institutions, on the one hand, facilitated the use of collections, on the other hand, contributed to the increase in the danger to disclose personal data to non-authorised or even accidental. Particular threat seems to be the common sharing of personal data on the Internet.

2. Genesis and the concept of personal data

The issue of the protection of personal data is related to the constitutionally guaranteed human right to protect his privacy. The right to privacy belongs to the first generation of human rights, and the privacy

sphere of life as separate legal welfare is now protected in most modern legal systems (Pryciak, 2010, p. 212). The relevant regulations have been introduced also to the Polish legal system. To ensure the safety of your personal data is a fundamental responsibility of all entities that collect and process, and the need for the protection of personal data and the regulation of their acquisition, collection and processing has grown with the increasing proliferation of the use of information systems that provide the ability to store data in massive quantities (Fleszer, 2008, p. 2.) In the Polish legal system there are currently a number of legal regulations on the protection of personal data and the security of information. The primary (though not the only) legal acts governing this issue is the Constitution of the Republic of Poland adopted on 2 April 1997 and the law of 29 August 1997 o ochronie danych osobowych (u.o.d.o. -on the protection of personal data -consolidated text Journal of laws 2002 No 101, item. 926, as subsequently modified). Guarantee of the right to the protection of information and right to privacy are first of all the provisions of the Constitution of the Republic of Poland. Guarantees it expressly general right to "legal protection of private life, family, honor, a good property, and the right to decide about your personal life" (Journal of laws of 1997, no. 78, item 483. as amended). Regardless of the article. 51 provides guarantees for the protection of personal data. Protection of the right to privacy so constant constitutional principle that only in exceptional cases, it may be repealed.In addition to the privileges of the citizen in the field of the protection of its privacy-art. 51 of the Constitution is a key variable to ensure him the right of access to information, that it applies to, and is in the possession of the authorities of the Member State and local government.

The provisions governing the processing of personal data, were introduced to the Polish legislation the personal data protection act, which was a consequence of the international obligations of Polish. Significant impact on the content of the Act were, in fact, above all the appropriate international regulations, in particular: – the Convention No 108 of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data; (Convention No 108 of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data (Journal of laws of 2003 No. 3, item 25) Directive 95\/46\/EC of the European

Parliament and of the Council of the European Union (Directive 95\/46\/EC of the European Parliament and of the Council of the European Union 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. EU L 281 of 23 November 1995)

A key term in this relatively new area of law is the term "personal data". Understanding of all aspects of the legal definition contained in the Act, as well as an explanation of the difference between data and information is necessary for the proper application of the provisions of the Act and perform operations on personal data fairly and lawfully. The term is used for a long time, but recently has been shaped in its importance. Yet several years ago representatives of the doctrine argued that the concept of personal data there is in almost constant, a fixed definition. The gap filled article 6 u. o. d. o. It provides that personal data is any information relating to an identified or identifiable natural person. In the article. 6 paragraph 1. 2 the legislature becomes that person possible to identify a person, whose identity you can specify, directly or indirectly, in particular referring to an identification number or one or more specific factors that determine its physical, physiological, mental, economic, cultural or social. Provision of art. 6 paragraph 1. 3 u. o. d. o. introduces a restriction, by requiring that the information is not considered to determine the identity of the person, if it would require excessive costs, time or activities. A key issue that must be addressed by analyzing the concept of "personal data" is to compare the concepts of "data" and "information".

This is even more important, that in everyday language these terms are used interchangeably and often treated as synonyms. Consisting of two members, the term personal data does not occur in that statement in Polish language dictionaries. Dictionary to translate the word "data"-it: things, facts, on which you can rely in the above considerations, information, news; less often-rationale themes. There are data: autobiographical, biographical, personal, personal, experimental, empirical, observational, measurement, numerical, radar, statistical, technical, topography. In the terminology of it while "data" means any information processed by the computer. The word "data" occurs in the Polish language only in the plural. The word "a" occurs only as the past participle of the verb "give", to

use upon order, as quoted, this referred to. In the literature of the subject meets reviews, that for this reason personal information is unfortunately selected a term that should be replaced with the words "personal information" or "information imienno-passenger", because the word information can be used for both plural and singular. Accented is also opposing the position that there is no need to change that terminology. The arguments for the appropriateness of this position is to some. First of all, the term "personal data" in the way the point captures the essence of this notion, and besides, it is the exact reflection of the terms that are used in Directive 95\/46\/EC and in foreign languages (English personal date and German Personenbezogene Daten), in which these terms appear only in the plural. The word "personal" translates as "people for people". Personal data are therefore all kinds of information, news about the people. It is considered that this is the common understanding of the wording. So you can conclude that the common understanding of the term personal information has a slightly different scope than the legal definition contained in the Act, there is missing item identification of the natural person, binding it with a specific person. The ability to identify a specific person, determine its identity is a condition that the information must meet to be personal data within the meaning of u. o. d. o. of the possibility of establishing the identity of individuals often determines the context – sometimes information "out" from the context can not be considered legally protected personal information (although within the meaning of the ordinary can be considered as personal data), sometimes even in the absence of a common identifying information it is possible to identify the identify the person (within the meaning of colloquial, such information is not considered personal data).

3. Electronic mail address

The email address belongs to the category of information, which is not in the doctrine of conformity in the context of qualifying for personal data. The controversy come from here, that some email addresses meet all these criteria specified for personal data, and the other is not. This is an obstacle to the unconditional treatment of all email addresses as personal data. According to one accented position in literature "interpretation

of the definition of personal data gives rise to the timing as the personal information of certain email addresses, for example. have the form "name. surname@xxx. waw. pl". The address points to a name and surname of the natural person the user the email box and the name of the company, for which the server has been established. The domestic domain "pl", in which it was registered, it is suggested that the company operates in the Republic of Poland, and the regional domain "waw" clarifies that it carries out economic activity on the territory of Warsaw and the surrounding area. The use by a natural person this at suggests that she is an employee, whose name has been registered in the domain address. (…) There are also a ton of addresses that do not give virtually no guidance on people, that the address of the registered and it uses. For example, the email address "internet@yahoo. com" does not contain personal information. The only clue for people wishing to determine its owner is that the person who uses this address, use your email through an international Web portal Yahoo (Fleszer, 2008, p. 25). According to the second position while the email address should always be classified as personal data, regardless of whether they are in it featured additional features homing on the person who uses it. Same for the possibility of identification is a prerequisite necessary to pass this information to personal data that email address. Email address of the form eg. "xawery@kr. onet. pl" by itself does not allow, although the identification of the person, but the nature of the personal data it will have at least on the server from which it was founded the crate. This is due to the fact that the identification by the ISP is possible on the basis of data obtained earlier, when concluding the contract Subscriber (Konarski, 2001, p. 12.).

In the literature to support the fairness of the first position appear arguments proving that email address can be considered as information belonging to personal and legal protection, but it depends on his character and this should be led individually for each email address. For appropriateness, this post speaks of the fact that it happens that one email address is a group of people. a few people performing duties on its position (in the Office or registry of employers), which is assigned to business email. Such sharing one email address by a few people may also be accepted in social circles. The email address can indicate a variety of people who use it. Inspector General for the Protection of Personal Data information personal information that the e-mail address belongs to the category of

personal data only when it contains information about the named user or "similar information" (R. Cisek, 2003). Such a position also supports D. Fleszer claiming that the use by the pseudonym in the name of the e-mail address for the average user the network makes it impossible to determine its identity (Fleszer, 2008, p. 26).

The second post also has its supporters. According to X. Konarski e-mail address belongs to the category of personal data, if the user ID used in the his first and last name (e. g. jankowalski@xyz. pl), or service provider in the provision of electronic mail boxes has collected at the conclusion of the agreement for the provision of services the user's personal data (X. Konarski, 2004, p. 165). According to W. Zimny "when the message arrives in the recipient's email address, this means that it is identified by the address". A. Drozd thrush notes, however, that in assessing the legal nature of the e-mail address information, account should be taken of the position of the Working Group, that relying on the judgment of the European Court of Justice of 6 November 2003 on the Bodil Lindqvist (C 101\/01), considered the identification of physical persons through the names of only one of the possibilities of establishing the identity of the natural person. It is therefore assumed that the e-mail address is in the category of personal data regardless of the adopted name of the user or the fact that other information about the user and only exceptionally will not be counted in this category (e. g. If it is assigned to a non-natural person). Such a position is also a partial confirmation in art. 18 paragraph 1. 1 section 6 of the law of 18 July 2002 o świadczeniu usług drogą elektroniczną -on the provision of electronic services (Dz. U. Nr 144, poz. 1204). In accordance with that provision, the electronic addresses (and especially email addresses) are included in the recipient's personal information. Under the law in force in the United Kingdom it is assumed that all personal Web addresses constitute personal data because of this, that each of them is connected only with one person, and therefore the electronic collection of data can be put together around the person designated by the adress.

Opponents of assigning email addresses to your personal information in any situation they notice, that the fact that the message reaches the recipient, does not always mean that the sender has the option to establish the identity of the recipient. In addition to this there are email accounts

(and their assigned e-mail addresses) that are associated with a specific business function, not a specific person. In such cases, therefore, you cannot talk about the possibility of identification of the person to the recipient. Web addresses that refer not so much to the person as to the computer from which a lot of people in different locations can use. So the question of the possibility of indirect identification of an individual (Barta., Fajgielski, Markiewicz, 2004, p. 386).

The right one seems to be the interpretation recognizing that Web addresses that meet the criteria laid down for personal data only when identifying people by their father in law (e. g. by entering into your name) or combined with other processes, together with the address information (e. g. at "normal") (Carey, 2000, nr 1, p. 10). Email address in most cases allows unambiguous identification of the account holder (the person) and should, in principle, is to be treated as personal data. There is however such reasons in the case of Web addresses that are assigned to specific functions, created as a contact mailbox. Cannot be considered as personal addresses allocated free of charge, with a random name, if their content does not allow for the identification of the owner (for example, if you used a pseudonym), and it is not possible to identify on the basis of other available information (when the service provider failed to collect information). In summary, just some Internet addresses can identify individuals who use them, and therefore should be treated as personal data. There are those who in their business base and harvest email addresses, contact addresses of their customers and are in the collections of both addresses, which can be thought of as a personal, as well as those that do not meet these criteria. The administrator is in this case the problem, or should I report a set of registration, or there is no such obligation. It seems that way (Barta., Fajgielski, M388).arkiewicz 2004, p. 386.

4. IP Addresses

A particular problem concerning the qualifications of the information to the category of personal data appears in relation to the so-called. dynamic IP addresses i. e. changing addresses allocated by network access provider to the end user in any case, the use of the network (Barta., Fajgielski, Markiewicz, 2004, p.386). IP addresses are unique identifier, which enables

the unambiguous identification of a computer and its user. True is the condition of possibility of the identification of the person, which speaks for the qualification of such identifiers as personal data. It should also be noted that the IP addresses of the computer allow without excessive effort to establish a user name by a provider of Internet access. Similarly, Internet service providers, who are on the server register IP addresses assigned to individual users, are able to determine the identity of the persons to whom it is assigned a specific IP address (Fajgielski 2008, p. 34).

They are, however, cases where the Internet service provider can say with absolute certainty that IP addresses are assigned to users that cannot be identified. This situation occurs when your ISP provides internet cafes only. In such cases, IP addresses can not be considered personal information (Fajgielski 2008, p. 34).

The issue of IP addresses as personal data has been the subject of analysis working group. She accepted IP addresses for details of the person identifiable. Stated that "Internet access and the local network administrators can use the ways by which you can use to identify Internet users, which allocated IP addresses, because it systematically record in the file date, time, duration and dynamic IP addresses assigned to Internet users. The same can be said about Internet service providers engaged in the registry on the server. In such cases, you can certainly talk about personal data (. . .)". In cases where the processing of IP addresses is to identify the users of the computer (for example, by copyright holders in order to prosecute users for violation of copyright), the administrator provides that the ways which you can use to determine the identity of the person who may become available, for example, by way of judicial review and, therefore, this information should be considered as personal data (Opinia 4/2007 w sprawie pojęcia danych osobowych, Grupy Roboczej ds. ochrony danych -Opinion 4/2007 on the concept of personal data appointed by virtue of art. 29 Working Group 95/46/WE, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_pl.pdf).

The Working Group also points to the particular type of IP addresses, which in some circumstances does not allow identification of the user with various technical and organizational reasons. As an example, given IP addresses assigned to computers in Internet cafes, where user identification is not required. In such cases, it is not possible based on the

IP address identify the person could be so considered that such information may not be classified as personal data. While Internet service providers do not know most of what IP addresses allow you to identify and what not-process so they data associated with an IP address, which does not allow to be identified in such a way as information associated with IP addresses registered users and identifiable. They must therefore (except when it is assured that the data subject users to identify) for security reasons, treat all information related to IP addresses as personal data.

5. Personal information in online stores

In the case of stores and websites, the registration database and the relevant administration already from the very nature of the business i. e. trade, service orders, as well as marketing activities. Already at the time of the order by the buyer, it is the registration number, and the store becomes the administrator of personal data. – At this point, you must accept the terms and conditions, agree to the processing of personal data, and sometimes also collect them for marketing purposes. The obligation to protect the personal data of the users websites and data security appropriate to this basic task administrators operate on the Internet (http://www.serwisprawa.pl/artykuly,102,15624,e-commerce-chron-dane-osobowe-swoich-klientow).

Ways of securing personal data in the network describe the guidelines regulation of the Minister of Internal Affairs and administration of 29 April 2004 on the transfer of personal data documentation and technical and organisational conditions, which should correspond to the device and it systems for the processing of personal data (Journal of laws 2004 No. 100, item 1024). In the case of information systems, data administrators, who have access to the public network security measures are appropriate for "high level". The main requirements of a high level of safety should be:

- the application of logical security, including control of the flow of information between the information system of the controller and the public network,-the application of the control activities are initiated from the public network and computer system administrator, data-use of cryptographic protection to the data used for authentication (login) that is transmitted on a public network (for example,. SSL).

- the use of "difficult" passwords for authentication, which is a password consisting of at least 8 characters long, containing the uppercase and lowercase letters, and numbers or special characters.
- password changes every 30 days a detailed description of the safety conditions for levels: high and higher can be found in part C of Annex VIII-C XIV of the Minister of Internal Affairs and administration of the Council of 29 April 2004 (OJ 2004, no. 100, item 1024) (http://www.memex.pl/ochrona-danych-osobowych-w-sieci/).

To sum up – By registering on the various social networks we decide to share your personal information. By accepting the terms of service, we agree to the processing of such data. However, you might want to pay attention to the privacy and security issues (protection of personal data), to our data were not used in the wrong order. Social care about their users and are trying to build. privacy policy (http://www.infor.pl/prawo/prawo-karne/ciekawostki/298879, Ochrona-danych-osobowych-w-serwisach-spolecznosciowych.html). However, it is largely from the users themselves depends on how their data will function on the Internet. You only need to follow a few basic rules to keep our data secure. First of all you need to predict the consequences of ill-considered actions on the network. In addition, it must be to make only those data that are necessary (not very detailed) to use with your website. It is also important cultural behavior in the network, since any efforts to breach someone's dignity or reputation, and also of a vulgar meet with instant reaction network administrator (http://www.infor.pl/prawo/prawo-karne/ciekawostki/298879, Ochrona-danych-osobowych-w-serwisach-spolecznosciowych.html).

So important is that knowledge on the protection of privacy Knowledge on the protection of privacy and personal data and the principles of safe use of the Internet is an essential part of education and school education, in accordance with the basis of software-pre-school and general education in different types of schools. Each student should have not only awareness of the risks and limitations associated with the use of the benefits of new technologies, but also possess the knowledge and ability to protect your privacy and the use of rights in this respect (http://www.giodo.gov.pl/1520061/id_art/8510/j/pl).

You should also have in mind that the dynamic technological development (including computer networks and information systems used in public administration) poses new challenges for effective protection of privacy and personal data. The rapid development of mass communication, new forms of communication and sharing of materials increase the risk of violations of personal rights and unlawful processing of personal data (Barta, Markiewicz, 2001). The source of the specific threats become global computer networks. In this connection, that the increased prevalence of the use of information systems (which is associated with the development of technology) more and more personal data is collected, processed, and then made available to other entities. It is therefore necessary to constantly updating and customizing legal regulations on the protection of personal data, so that in the most effective, ensure the security of personal data.

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The private property guarantee in the banking resolution administrative procedures[1]

ABSTRACT

Subject of research: Human needs and the quality of law

Objective: The need of the determination of the content of the right of the private property as a human right has a new scope. Since the development of a new public power, as the banking resolution one, englobes the possibility of intervening credit institutions, requires the delimitation of its exercise, from the perspective that contributes to the safeguarding of this human right of private property.

Research methods: The methodology used in the preparation of this paper has been both deductive and inductive. The deductive logic method has generally been applied in the analysis of the authorities powers' new regulation (from the general to the particular rule), and the inductive empirical one has also been applied, through the study of the case, that is, through the legal analysis of jurisprudence (from the particular to the general rule).

Keywords: private property, banking resolution, administrative procedures, bank resolution authority.

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1. Introduction: private property as a human right and public utility as a limit

The article 17 of the UN Universal Declaration of Human Rights of 1948 recognizes the right of everyone to individual or collective ownership, declaring that no one "shall be arbitrarily deprived of his property". This right is further clarified in other rules, as in the I Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of March 20, 1952, which article 1 provides that any person or company has right to respect for their property. No one may be deprived of his property other than for the sake of public utility and under the conditions provided by the Law and the general principles of international law, but it must be understood without prejudice of the right of States to enforce such Acts as they deem necessary for the regulation of the use of the property in accordance with the general interest, or to guarantee the payment of taxes or other contributions or fines. In a similar sense, the national rules of the different Member States of the European Union include in their Constitutions the limitation of the right of private property in favour of public utility or social interest, but always recognizing the right to compensation, thus respecting its essential content. Therefore, the right of private property is not absolute but must yield to the needs of public utility or general interest.

However, limitations to this right that can be ruled by States laws must be balanced according to the principle of proportionality between private property and the reasons of general interest that confines it, as it had been emphasized by the European Court of Human Rights in the Judgment of 1 March 2001 (case Malama v. Greece).

2. Financial stability as a collective good of general interest

The serious consequences of the global economic crisis that began in 2007-2008, which originated in the instability of the financial system, has introduced the concept of financial stability as a collective good in the general interest. Financial stability is now considered as a global public good (PALÁ LAGUNA, 2013, pp. 39-40; and GARCIA ARIAS, 2004,

pp. 45 a 60), and its neglect can generate damages on a general scale as a result of irresponsible private actions. This is what legitimizes the public intervention for its control.

Financial stability has traditionally been identified with the good functioning of the economy by performing its functions, such as channelling funds from savers to investors, providing financial services to the general economy, executing payments, and distributing the risk among economic agents in an orderly and efficient manner. Currently, the extension of its concept tends to guarantee a correct functioning of the credit institutions, the financial markets and the operating infrastructures that support them, so that the system as a whole can cope with unexpected shocks without jeopardizing its functions (VERGARA, 2006, p. 14). In general, financial stability is protected by the prudential supervision of entities, however, the rules introduced from 2009 onwards at International, European and national level (in Spain) tend to expand the concept of prudential supervision so that controls go beyond mere supervision of solvency controls. In the European Union, the Banking Union has been created for this purpose, following the international standards of the Basel Committee, which are strictly assumed[2]. From European law, those standards pass to the laws of the Member States as a set of rules with binding legal effects. These standards constitute hard law and not soft law. The unification of European legislation is sought through Regulation (EU) N. 575/2013 of the European Parliament and of the Council of 26 June 2013 on the prudential requirements of credit institutions and investment firms and the Directive 2013/36/EU, which constitute the legal framework to rule access to the activity, supervision framework and prudential provisions of credit institutions and investment firms. In both cases, prudential supervision is defined

[2] Vid Recital 79 et seq. Directive 2013/36/ EU of the European Parliament and of the Council of 26 June 2013. In addition, in the European Union, the High Level Group on Financial Supervision in the EU chaired by Jacques de Larosière proposed to the Union to develop a more harmonized financial regulation and the European Council of June, the 18th and the 19th, 2009 also stressed the need to create a single European regulatory code applicable to all credit institutions and investment firms in the internal market. This project arises parallel to the gestation of the international standards of Basel III.

as a minimum regulation that does not prevent the adoption of more restrictive regulatory measures if its national characteristics advise it to protect its financial stability[3].

One of the basic elements of the structural reform of the banking regulation in Europe is the European Mechanism of Resolution, through which a network of national authorities of the participating Member States is created to intervene in the cases in which the standards of solvency by the national credit entities are not fulfilled. This mechanism is able to apply measures of early action or even bank resolution. The latter measures involve the public intervention of entities and may involve measures similar to a compulsory expropriation of the assets of the intervened entities and their partners or participants, and even their creditors.

3. The impact on private property as result of the resolution measures

Looking at the Spanish legislation, the intervention of credit institutions is a manifestation of the administrative intervention power on private companies whose foundation is found in Article 128.2 CE. The interpretation of an administrative intervention of this kind, despite being very invasive of the citizens' rights especially affecting the business freedom, is that we are in front of an administrative procedure by which its management is affected without the ownership of its patrimonial elements (Martín-Retortillo, 1989, p.30).

At present this sense can be maintained if we refer to the procedures regulated in articles 70 and ss. of the Act on management, supervision and solvency of credit institutions, of the Jun 26, 2014, that contain measures of intervention and substitution of credit institutions, in situations that could be considered normal or not exceptional. However, Act number 11/2015 on the Recovery and Resolution of Credit Institutions and Investment Services Companies that develops and incorporates into Spanish Law Regulation (EU) No. 806/2014 of July 15, 2014, includes exceptional cases that allow the management of the non-viability of credit institutions by

[3] In this regard, Recommendation N. 10, Report of the Larosière group (The High-level Group on financial supervision in the EU Report) of February, the 25th, 2009.

the public authority and in defence of the general interests. These general interests are concretized in the possibility that the non-viability of the entity in crisis may affect financial stability.

Thus, the Preamble the referred law makes a distinction between the administrative activity that has always been identified with the intervention of credit institutions and the new banking resolution activity, which is still an administrative intervention, but goes further, setting: «The classic mandate of the supervisory authorities is to ensure compliance with regulations governing the activity of entities and, in particular, solvency regulations, with the ultimate aim of protecting financial stability. On this mandate, a new call is now being added to ensure that if an entity becomes unable to remain active on its own, despite traditional regulation and supervision, its closure will occur with minimal distortions over the financial system as a whole, and, in particular, without any impact on public finances. It is time to articulate a new public-financial function aimed at ensuring that entities are, in fact, liquid able without carrying an economic impact of such a magnitude that it can harm the economy as a whole. It is not, therefore, a simple new supervisor approach, but a new area of public intervention that, autonomously, will require the entities to exercise their activity in such a way that its resolution is feasible and respectful of the interest in cases where traditional supervision is insufficient»[4].

The current meaning of what we understand as a bank intervention depends on whether we are in a situation that we could call normal or exceptional. The first one complies with the rules of the Act on management, supervision and solvency of credit institutions, and allows the Bank of Spain to intervene or substitute the administrators of the entity. We must classify as exceptional the banking interventions regulated in Law 11/2015, which may also affect the ownership of the private corporate participations, since the resolution instruments are: a) The sale of the entity's business, b) The transfer of assets or liabilities to a bridge-entity,

[4] The Preamble of the Act number 11/2015 specifies that this new function is intended to „ensure that if an entity becomes unable to remain active on its own initiative, despite traditional regulation and supervision, its closure will occur with minimal distortions on the whole of the financial system and, in particular, without any impact on public finances".

c) The transfer of assets or liabilities to an asset management company, and d) Internal recapitalization. So that, the three former cases produce effects similar to forced expropriation, because they affect the ownership of the assets to which they are referring to[5].

For this reason, bank intervention as a manifestation of the new power of resolution of credit institutions that is carried out by the bank resolution authority of Spain (FROB, of the acronym in Spanish), must be analysed, from the outlook of its effects, because can be fully identified with the traditional concept of administrative intervention of companies, and its current regulation does not take it into account, with the result of the detriment of some of the classic guarantees of administrative law. Appraising the result of all the bank resolution system we must reconsider its legal regime.

4. Requirements to settle bank resolution measures: weak guarantees of the owner of the assets affected.

The bank resolution is defined by the 11/2015 Act as an administrative (non-judicial) process, which manages the non-viability of credit institutions and investment services companies that cannot be undertaken through liquidation of bankruptcy for reasons of public interest and financial stability[6]. It is conceived as an insolvency proceeding (Fernández Torres, 2015, p. 9), which is applied as an alternative to the ordinary one, and that is special for credit institutions and in view of their particular characteristics and systemic importance (Mingot, 2014, p. 260). The resolution procedure may involve its restructure so that the entity continues the activity, or may involve its liquidation, but with some differences from ordinary bankruptcy proceedings (Pérez Troya, 2010, pp. 241–259).

[5] In the case of Bank of Valencia resolution, the interests of the holders of the affected assets were analyzed in the Judgment of the Audiencia Nacional, Chamber of Contentious Administrative, Section Six, No. 2292/2016, of June 16, which referred to Sentence of the Tribunal Constitucional n. 166/1986, according to it: expropriatory laws are subject to limits because the guarantees established in art. 33.3 of the Spanish Constitution.

[6] In this sense, the Preamble of the n. 11/2015 Act.

The administrative resolution settlement will proceed when in an entity concur the circumstances provided in article 19 of n. 11/2015 Act. These circumstances are the enabling requirements of administrative intervention in this case, and as we shall see, not every circumstance is defined as it might be in order to guarantee the necessary legal security of the intervened entity. They are the following requirements:

a) The unfeasibility of the entity: it is necessary that the entity was unfeasible, or that was reasonably foreseeable that it would be unfeasible in the near future.

The main problem in relation to this circumstance is the legal sense of the term ‘’viability” since it is identified both with cases of true insolvency according to ordinary bankruptcy regulations, and cases of non-compliance with the solvency standards according to the regulations of prudential supervision (Fernández Torres, 2015, p. 17). In the task of determining the non-viability requirements we also encounter difficulties because some of them are indeterminate legal concepts. Thus, according to article 20 of the same law, an entity is unviable if it is in any of the following circumstances: a) The entity breaches in a significant or reasonably foreseeable way that it breaches in a significant way in the near future the solvency requirements or other requirements necessary to maintain its authorization. b) The entity's liabilities are higher than its assets or it is reasonably foreseeable that they will be in the near future. c) The entity cannot, or is reasonably foreseeable that in the near future it will not be able, to fulfil punctually its obligations. d) The entity needs extraordinary public financial assistance (in the latter case, the entity shall not be considered unworkable if extraordinary public financial assistance is provided to avoid or remedy serious disturbances of the economy and preserve financial stability).

In the assessment of the reasonable predictability of insolvency, its elements are very difficult to identify and this is incompatible with what would be desirable in terms of legal certainty. As an example, we can refer to the Resolution of the Governing Commission of the FROB of January 14, 2014 that agreed the intervention of the Caja Rural de Mota del Cuervo, Cooperative Society of Credit of Castilla La Mancha, and applied as an instrument of resolution the sale of the assets of social capital. In this case, although there was no declared insolvency situation of the entity, the non-viability of the entity was related to the systematic non-

compliance of the solvency requirements, and without the possibility of overcoming this situation by its own means. The impossibility of resolving the situation by the entity's own means was estimated by the Bank of Spain in view of the entity's own agreements, which led to the supervisor's understanding that there was a reasonable predictability of insolvency in the near future. In this case, we appreciate that the magnitude of the margin of discretionality granted to the resolution authority to assess the bank resolution requirement was immense.

The property right that may be affected as a result of administrative activity requires the rational application of the power of resolution (Rodriguez Pellitero, 2013, p. 854–855.), since the danger to the stability of the system and the public interest concerned which legitimizes administrative activity is justified but does not preclude the application of the principle of proportionality (Carrillo Donaire, 2013, p. 824.)[7].

b) The second enabling requirement to settle the initiation of the resolution procedure is that there is no reasonable prospect of what measures from the private sector may prevent the entity from being unfeasible within a reasonable period of time. It is the inadequacy of bail-in measures to recover the situation of stability of the entity.

Public interventions made through the resolution procedures must observe the principle of minimizing the burden borne by taxpayers, so that it results from various rules, which in the first instance require measures that apply the resources of the (bail-in mechanisms), which should imply for the competent authorities the observance of a strict legal regime aimed at achieving the application of capitalization instruments that best fit this principle (Tejedor Bielsa, 2014, p. 268.), avoiding if possible, a public bailout.

Thus, the problem will be for the supervisor to appreciate the inadequacy of the bail-in measures in order to recover the stability of the entity, as well as the concurrent circumstances that advise the immediate application of the

[7] In this sense, we can look at the STEDH Sporrong and Lonnroth c. Sweden of 23 September 1982, that refers to the need for proportionality or "fair balance" between deprivation of property for reasons of public utility and the safeguarding of the right to property. In this way, we must not only consider that proportionality exists in the proper valuation of the assets that are expropriated or intervened in some way, but that the same proportionality of the means used with the general interest that is intended to protect with public activity, because it is what gives to the whole process legitimacy.

resolution phase, which implies the a greater administrative intervention. The possibility of intervening by adopting resolution measures, bypassing those of early action, should be justified by the fact that the latter would not serve to redress the financial situation of the entity, since the principle of gradation or proportionality requires other measures. Proportionality must be understood in terms of the intensity of the intervention, and it reaches the proportionality of the planning of the measures (Colino Mediavilla and Freire Costas, 2015, p. 183–184)

In this case, the supervisor's decision is protected by a considerable margin of discretionality as it was in the assessment of the bank in viability.

c) The third requisite is that public interest reasons should be involved, so that it was necessary or appropriate to undertake the resolution of the entity to ensure the continuity of the entity, or avoid adverse effects to the stability of the financial system.

The resolution of an entity, as a case of administrative intervention, displacing a possible ordinary insolvency liquidation procedure, is justified in the trust of the relationship of credit intermediation and in the detrimental consequences that the application of general insolvency rules would entail for stability of the whole financial system (Alonso Ledesma, 2014, p. 349–350).

Resolution procedures should be based on a public interest that has been recognized as a global general interest recently, and it is financial stability (Conlledo Lantero, 2014–2015, p. 159–174). The Spanish Administrative Court of the Audiencia Nacional, has identified the public interest of these administrative actions with financial stability, in its Judgment 2559/2016 of June 23 (Fourth Law Foundation), and it has been specified that this public interest entails the purposes or objectives of the resolution authority according to article 3 of the 11/2015 Act, which in essence are confined to the limitation in the use of public resources and the protection of depositors, making both compatible with the continuity of the entity or its ordered liquidation.

In its application, the resolution of the FROB of January 14, 2014, which agreed the resolution of the Caja Rural de Mota del Cuervo referred to financial stability as a general interest subject to protection in that settlement, and implied that it was anticipating the estimation of a systemic hazard based on the difficult predictability of the transmission

of instabilities but that these were not based on the importance of the intervened entity that was of small size. At the same time, it was considered that this general interest agreed the resolution of the entity by the exceptional way provided by law and at that time, it was not considered convenient to wait for the entity's real insolvency to liquidate it through the channels of ordinary bankruptcies estimating that this last scenario would be more unfavourable for the interests affected by the loss of value of the assets. However, the affectation of financial stability, as remote as it was raised in the resolution, does not seem very convincing to motivate the concurrence of the public interest in this case.

The public interest understood in this way allows to affect to some extent the guarantees of the concurrent individual interests, being essential that a specific system of challenges be introduced in the current regulation in order to be able, if appropriate, to fight the compensations received in pay of the deprivation of rights resulting from public intervention (Conlledo Lantero, 2014-2015, p. 163), or to challenge the procedure on formal issues. Both mechanisms in the current regulation are not foreseen.

5. Conclusions

Administrative measures adopted in favour of the public interest are justified in accordance with EU Directive 2014/59 where they are strictly necessary in the defence of that public interest and any interference with the rights of shareholders and creditors must be compatible with the Charter of Fundamental Rights of the European Union, and such interference must be proportionate to the risks to be faced. Spanish regulation follows this criterion, but, as we have seen, to a great extent the problem is the lack of definition of the requirements to be assessed by the resolution authority, which makes a rational judgment inevitable to respect the principle of proportionality in each specific case. No general rules can be established, being indeterminate in the Law when the public interest allows carrying out a resolution procedure. This lack of definition weakens the guarantees that the classic Administrative Law recognizes to the citizens to protect their property right in front of the procedures of public intervention.

Consequently, in view of the lack of definition and the flexibility of the law it is necessary that in order to adequately guarantee the right of ownership as a human right, a specific system of administrative challenges should be introduced into the administrative procedure for bank resolution, through which the citizens affected by the resolution authority settlement would apply for the fair redress of the affected property.

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Human rights, postmodernity and biotechnological issues

ABSTRACT

The technology applied to the human has accentuated the protection of common rights. The problem involves a cultural nature options, ethical, religious and political, that often lead to an antinomy between the various fundamental rights guaranteed by the Constitutions.

The law, in fact, as an individual expression of ethics and social responsibility, should drive economic and technological development in a truly human and inclusive dimension that assumes essential valence.

In this perspective, given that human rights derive from the dignity and worth of the person, the individual is the central subject of human rights and fundamental freedoms.

Keywords: human rights; social rights; globalization; technology applied to human.

1. Global society, human rights and techno--scientific developments. Right, individual ethics and social responsibility. The need to combine environmental ecology and human ecology

In a global society - attentive to both individual and social human rights –, it's strongly relevant the question of *technology* development ap-

plied to man[1]. The profile covers, for example, genetic manipulation, cloning techniques and electronic commerce of semen and ova[2]. The problem affects not only economic matters but also options of a cultural, ethic, religious and political nature, which often lead to a contradiction between fundamental rights guaranteed by the national Constitutions[3].

The identification of new techniques and advanced research instruments, which could be able to affect people's lives, from the beginning to the end of life[4]; or, again, prenatal and postnatal genetic investigations;

[1] About the mandatory limits to scientific research, introduced in order to safeguard the value-man, cfr. F. Parente, *La società post-moderna e i confini della soggettività*, in *Civitas et Lex*, 2016, 4 (12), p. 48; Id., *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*, Neaples, 2003, p. 71; Id., *Ingegneria genetica e valutazione del giurista*, Neaples, 1988, p. 14; also, on the evolution of person's protection according to technological development, v. F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici*, in *Rass. dir.civ.*, 2008, p. 397 ss. On the relationship between science and ethics, v. P. Perlingieri, *Riflessioni sull'inseminazione artificiale e sulla manipolazione genetica*, in Id., *La persona e i suoi diritti. Problemi del diritto civile*, Neaples, 2005, pp. 169–170; M. Nigro, *Lo Stato italiano e la ricerca scientifica*, in *Riv. trim. dir. pubbl.*, 1972, p. 740 ss.

[2] F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, cit., pp. 447–449.

[3] F. Parente, *La persona e l'assetto delle tutele costituzionali*, in G. Lisella and F. Parente, *Persona fisica*, in *Tratt. dir. civ. CNN*, supervised by P. Perlingieri, Neaples, 2012, p. 7 ss.; Id., *La società post-moderna e i confini della soggettività*, cit., p. 48.

[4] About the beginning of human life, cfr. F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, cit., p. 447, note 9; P. Schlesinger, *Il concepito e l'inizio della persona*, in *Riv. dir. civ.*, 2008, p. 247 ss.; C. Casonato, *Introduzione al biodiritto. La bioetica nel diritto costituzionale comparato*, Trento, 2006, p. 30 ss.; G. Villanacci, *Il concepito nell'ordinamento giuridico. Soggettività e statuto*, Neaples, 2006; G. Oppo, *L'inizio della vita umana*, in *Riv. dir. civ.*, 1982, p. 499 ss.; F. D. Busnelli, *L'inizio della vita umana*, in *Riv. dir. civ.*, 2004, I, p. 535 ss.; P. Zatti, *La tutela della vita prenatale: i limiti del diritto*, in *Nuova giur. civ. comm.*, 2001, II, p. 157 ss.; P. D'Addino Serravalle, *Questioni biotecnologiche e soluzioni normative*, cit., p. 39 ss.; G. Biscontini e L. Ruggeri (edited by), *La tutela della vita nascente. A proposito di un recente progetto di legge*, Neaples, 2003; P. Zatti, *Quale statuto per l'embrione umano?*, in *Riv. crit. dir. priv.*, 1990, p. 458; G. Oppo, *Scienza, diritto, vita umana*. Lectio doctoralis *di Giorgio Oppo*, in *Riv. dir. civ.*, 2002, I, p. 14 ss.; C.M. Mazzoni, *La tutela reale dell'embrione*, in *Nuova giur. civ. comm.*, 2003, II, p. 457 ss.; S. Piccinini and F. Pilla (edited by), *Aspetti del Biopotere. Gli organismi geneticamente modificati. La procreazione assistita*, Neaples, 2005; G. Oppo, *Declino del soggetto e ascesa della persona*, in *Riv. dir. civ.*, 2002, I, p. 830 ss.; G. Biscontini and L. Ruggeri (edited by), *La tutela dell'embrione*, Neaples, 2002; P. Zatti, *Diritti del non-nato*

the new medically assisted procreation techniques[5]; the use of medicines *over the therapy*, not for curative or diagnostics purposes, but to improve physical, cognitive and emotional abilities of healthy person, that requires

e immedesimazione del feto nella madre: quali ostacoli per un affidamento del nascituro, in *Nuova giur. civ. comm.*, 1999, I, p. 112 ss.; 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*, Neaples, 2006, p. 417 ss.; N. Lipari, *Legge sulla procreazione medicalmente assistita e tecnica legislativa*, in *Riv. trim.*, 2005, p. 518 ss.; G. Oppo, *Procreazione assistita e sorte del nascituro*, in *Riv. dir. civ.*, 2005, I, p. 101 ss.; M. Sesta, *Dalla libertà ai divieti: quale futuro per la procreazione medicalmente assistita?*, in *Corr. giur.*, 2004, p. 1405 ss.; A.M. Azzaro, *La fecondazione artificiale tra atto e rapporto*, in *Dir. fam. pers.*, 2005, p. 231 ss.; C. Casini, *Tutela della vita umana nascente, con particolare riguardo alla tutela dei diritti dell'embrione*, in C. Romeno e G. Grassani (edited by), *Bioetica*, Tourin, 1995, p. 337 ss.; F. Mastropaolo, *Lo statuto dell'embrione*, in *Iustitia*, 1996, p. 126 ss.; E. Giacobbe, *Concepito*, in S. Patti and P. Sirena (edited by), *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 (edited by), *La tutela giuridica della vita prenatale*, Tourin, 2005, p. 35 ss.; G. Baldini, *Il nascituro e la soggettività giuridica*, in *Dir. fam. pers.*, 2000, I, p. 362. About the cessation of life phenomenon, which presupposes the determination of the legal concept of death, cfr. F. Parente, *o.u.c.*, p. 449, note 10; L. Cariota Ferrara, *Il momento della morte è fuori della vita?*, in *Riv. dir. civ.*, 1961, I, p. 134 ss.; V. Sgroi, *Morte (diritto civile)*, in *Enc. dir.*, XXVII, Milan, 1977, p. 103 ss.; F. Mantovani, *Morte (generalità)*, *ivi*, p. 82 ss.; P. Rescigno, *La fine della vita umana*, in *Riv. dir. civ.*, 1982, I, p. 634 ss.; P. Rescigno, *Morte*, in *Dig. disc. priv.*, *Sez. civ.*, XI, Tourin, 1994, p. 458 ss.; R. Barcaro and P. Becchi, *Morte cerebrale e trapianto di organi*, in *Bioetica*, 2004, p. 25 ss.; F. Caggia, *Morte*, in S. Patti and P. Sirena (edited by), *Dizionari sistematici. Diritto civile. Famiglia, successioni e proprietà*, cit., p. 138 ss.

[5] On the point, cfr. 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 ss.; A. Renda, *Lo scambio di embrioni e il dilemma della maternità divisa*, note to Trib. Rome, Sez. I, ord., 8 August 2014, in *Dir. succ. fam.*, 2015, p. 206 ss.; A. Nicolussi and A. Renda, *Fecondazione eterologa. Il pendolo tra Corte costituzionale e Corte EDU*, in *Eur. dir. priv.*, 2013, p. 212 ss.; U. Salanitro, *Il divieto di fecondazione eterologa alla luce della Convenzione Europea dei Diritti dell'Uomo: l'intervento della Corte di Strasburgo*, in *Fam. dir.*, 2010, p. 988 ss.; 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*, Tourin, 2004, p. 29 ss.; G. Sciancalepore, *Disposizioni concernenti la tutela del nascituro*, in P. Stanzione and G. Sciancalepore (edited by), *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, n. 40*, Milan, 2004, p. 30 ss.; M. Sesta, *Procreazione medicalmente assistita*, in *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 ss.; P. Stanzione and G. Sciancalepore, *Tutela della vita e fecondazione assistita: prime applicazioni giurisprudenziali*, in *Corr. giur.*, 2004, p. 1531 ss.; M. Sesta, *Dalla libertà ai divieti: quale futuro per la procreazione medicalmente assistita?*, *ivi*, p. 1408 ss.

daring bioethical choices[6]; the right to die without fruitless therapeutic obstinacy[7], are *current issues* that involve both the biomedical research and neurosciences[8] as much as ethics, morality and law, who work to identify the evolution limits of scientific and technological progress, beyond which the same research and its applications endanger the survival both of the individual and the human species[9].

In contemporary legal systems, therefore, inevitably, the protection of the environment – namely the context of life of the human being - is combined with the protection of human health[10] and the *environmental ecology* intersects with the *human ecology*[11]. In the light of the outlined perspective, human rights complement an absolute value that becomes the basis for *sustainable development*[12].

Law, in short, as an expression of individual ethics and social responsibility, must drive economic and technological development to a dimension that is properly speaking both humane and based on solidarity, which assumes an essential value. In fact, social rights imply the need to meet the requirements related to the individual's fundamental needs[13].

[6] P. Stanzione, *Biodiritto, postumano e diritti fondamentali*, in *www.comparazionedirittocivile.it*.

[7] F. Parente, *La fisicità della persona e i limiti alla disposizione del proprio corpo*, in G. Lisella and F. Parente, *Persona fisica*, cit., p. 470 ss.; C. Lega, *Il «diritto di morire con dignità» e l'eutanasia*, in *Giur. it.*, 1987, IV, c. 472.

[8] C. Perlingieri, *Amministrazione di sostegno e neuroscienze*, in *Riv. dir. civ.*, 2015, p. 330 ss.; L. Tafaro, *Il futuro del diritto: il neurodiritto*, in Aa Vv., *Estudios en Homenaje a Mercedes Gayosso y Navarrete*, Universidad Veracruzana, 2009, p. 709 ss.; Id., *Neuroscienze e diritto del futuro: il neurodiritto*, in Aa.Vv., *Studi in memoria di Giuseppe Panza*, Neaples, 2010, p. 685 ss.; 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 ss.; Id., *Security and human rights in the future: neurodiritto*, in *J.f Modern Science*, 2012, p. 211 ss.

[9] P. D'Addino Serravalle, *Questioni biotecnologiche e soluzioni normative*, cit., p. 30 ss.; F. Parente, *La società post-moderna e i confini della soggettività*, cit., pp. 48–50.

[10] F. Parente, *La protezione giuridica della persona dall'esposizione a campi elettromagnetici,* cit., p. 397 ss.

[11] Papa Francesco, *Pensieri dal cuore*, Milan, 2013, p. 32; Id., *Lettera Enciclica Laudato sì sulla cura della casa comune*, Rome 24 May 2015. On the relevance of ecological profiles in the sphere of sustainable development, cfr. M. Pennasilico, *Contratto e uso responsabile delle risorse naturali*, in *Rass. dir. civ.*, 2014, p. 760 ss.

[12] Cfr. M. Pennasilico, *o.l.c.*, p. 753 ss.; 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*, in *Corti pugliesi*, 2007, p. 780.

[13] F.J. AnsuÁtegui Roig, *Rivendicando i diritti sociali*, Neaples, 2014, p. 20; F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 50.

2. The dignity of the human person as the foundation of a fair and equitable Right. Sustainable development and economic ethics principles. Third and fourth generation rights

It is true that the new needs arise in correspondence social conditions changes, but it is also necessary to coordinate its protection with the *new* ethics and cultural *sensitivities*, based on shared rules in a regulatory framework that must strive to realize the coexistence of a "plurality of diversities"[14].

If the cultural contaminations imposed by the globalization process are investing more and more the entire planet, however, technological innovations, cultural pluralism and socio-economic differences should not weaken identity and dignity of the human person[15]. This means that a *fairly traded* right must be able to combine the need for progress either in social and economic relations than in scientific breakthroughs with the awareness never losing sight of the dignity of the human person's value[16].

In systematic terms, the unitary conception of the legal system, which tends to make innovative values for the protection of the person, does not preclude that the rights of third generation[17], many and varied, among which assumes importance the right to healthy environment, could follow rights of fourth generation[18], which tend to regulate the effects increasingly harrowing of biomedical research, in function of the human individual's genetic heritage preservation [19].

[14] F. Parente, *Il ripensamento dei diritti fondamentali della persona nell'area dell'Unione europea*, cit., p. 782; N. Bobbio, *L'età dei diritti*, Tourin, 1997, p. XIV; F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 50.

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

[16] P. Morozzo della Rocca, *Il principio di dignità della persona umana nella società globalizzata*, in *Dem. dir.*, 2004, p. 209 ss.; F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 50.

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

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

[19] F. Parente, *La «biogiuridicità» della vita nascente tra «libertà» della ricerca biomedica e «dinamismo» della tutela dei valori esistenziali dell'uomo*, cit., p. 467 ss.; Id., *La società post-moderna e i confini della soggettività*, cit., p. 50.

3. The subjective rights characterized by social significance. The social formations and the role of the intermediate communities. The multidimensional character of human rights

In other words, the integral protection of the person tends certainly to the patronage of individual rights, but is also directed at the protection of social rights, which are connoted for the primacy of the solidarity moment [20]. The regulatory instruments that stigmatize the rights of the person put the individual at the center of the legal system; this means that the individual is safeguarded in its different attitudes, in its subtleties and individuality[21]. Nevertheless, the subjective rights characterized by social significance participate in the definition of the person beyond the individual specificity, striving for the individual's integration into the Community's life[22]. In fact, fundamental rights reflect the needs and interests of the human person that are confirmed by the social order and by the style of life of the Community[23].

In the analysis of the subjectivity phenomenon, this reconstruction requires a perspective change with respect to the past, which would allow to protect the human person in his individuality without downgrade the solidarity values[24]. This perspective allows also to conceive the *Com-*

[20] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, 3ª ed., Neaples, 2006, p. 438; Cfr. R. Di Raimo, *Date a Cesare (soltanto) quel che é di Cesare*, in *Rass. dir. civ.*, 2014, 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. Perlingieri, cit., p. 17.

[21] F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 51; P. Perlingieri, *A margine della Carta del Diritti fondamentali dell'Unione europea*, in Id., *La persona e i suoi diritti*, cit., p. 66.

[22] V. Scalisi, *Ermeneutica dei diritti fondamentali*, cit., p. 147; A. Falzea, *Introduzione alle scienze giuridiche. Il concetto di diritto*, 6ª ed., Milan, 2008, p. 385 ss.

[23] 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. Perlingieri, cit., p. 18; Id., *La società post-moderna e i confini della soggettività*, cit., p. 51.

[24] Cfr. V. Rizzo, *Contratto e costituzione*, in *Rass. dir. civ.*, 2015, p. 350; S. Rodotà, *Solidarietà. Un'utopia necessaria*, Bari, 2014.

munity in function of the man, as a mean of integration of the person into the social system[25].

From this point of view, all social formations in which the person is realized, especially the intermediate community, represent the *natural place* of personality unwinding and serve to ensure the person's *full development* in respect of its dignity[26].

Essentially, place that human rights derive from the dignity and the value of the person[27], it must be concluded that the individual is the core for human rights and fundamental freedoms[28].

The perspective that assigns to the dignity the role of moral foundation of human rights confirms the *multidimensional nature* of these rights, characterized by a moral dimension and a legal one[29], and allows to overcome the differences between people's freedom and equality[30].

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[25] 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. Perlingieri, cit., p. 18 ss.; Id., *La società post-moderna e i confini della soggettività*, cit., p. 51.

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

[27] Cfr. F.J. AnsuÁtegui Roig, *Rivendicando i diritti sociali*, cit., p. 39;P. Perlingieri, *Il diritto civile nella legalità costituzionale*, cit., p. 435 ss.; 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. Perlingieri, cit., p. 22 ss.

[28] F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 53; F.J. AnsuÁtegui Roig, *o.l.u.c.*

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

[30] F. Parente, *La società post-moderna e i confini della soggettività*, cit., p. 53; F.J. AnsuÁtegui Roig, *o.c.*, p. 34.

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Ability to pay, equitable distribution and social justice

ABSTRACT

Today, the power to impose taxes, far from being mere discretionary plying, unmotivated and sole, is manned by a number of limitations and guarantees for the protection of the taxpayer: a particular role in this context, it is covered by the principle of ability to pay under article 53 of Constitution, as a result of which the legislator is not free to subject to tax any fact of life, being able to apply the tax only to cases that are manifestations of wealth. Therefore, the ability to pay presents itself, at the same time, as assumed, limit and measure of taxation. In the absence of a normative notion, in the recent past, the ability to pay has been depicted as a kind of "empty box". Nevertheless, it is necessary to indicate, positive and symptomatic, individual indexes of the principle of ability to pay. Among the "direct" indices can be counted the income, assets and increases in value, while constitute "indirect indices" consumption, business or transfer of assets. The paradigm cannot be divorced from the source system and normative values, having to be coordinated to the inviolable rights of man and the duties required by political, economic and social solidarity, as a basis for the constitutional state: the duty of each person to participate in public spending becomes the mandatory principle of social solidarity, which descends directly from article 2 of Constitution. The Constitutional Court, in reconstructing the scope of the principle, has identified three requirements that must comply with the ability to pay: effectiveness, certainty and timeliness. The ability to pay is inextricably linked to the principles of reasonableness and tax equality, so that equal situations should match the same taxation regimes and, correlatively, to different situations an unequal tax treatment.

Keywords: *jus impositionis*; obligation to contribute to public expenditure; principle of ability to pay; fair allotment; social justice.

1. Limitations to j*us impositionis* and guarantees for the protection of the taxpayer: the principle of ability to pay

In the current rule of law the *jus impositionis* is not reconnected, as before, to exercise of discretion, unmotivated and unquestionable power, expression of the sovereignty of State, being guarded by a number of limitations and guarantees for the protection of the taxpayer.

A particular role in this context, it is covered by the principle of ability to pay under article 53 of Constitution (Tesauro, 2009, p. 68).

As a result of this paradigm, the legislator is not free to subject to tax any fact of life, being able to apply the tax only to cases that are expressions of ability to pay (Tesauro, 2009, p. 69; Micheli, 1976, p. 93; Santamaria, 2011, p. 51; Moschetti, 1988, p. 7), namely in situations likely to gain economic benefits from which both rationally subjective suitability of deductible tax liability (Uricchio, 2017, p. 38): this allows you to validate a design ethic of tax performance, orienting the *jus impositionis* so as to hit the only expressive assumptions of wealth to meet public expenditure.

The article 53 of Constitution, stating a principle of substantive tax law, with a statutory provision programmatic significance, states that «everyone is expected to contribute to the public expense because of their ability to pay»: the statutory provision does not restrict the duty insurance are citizens, but extends it to all those who, in relation to the various situations considered by the individual tax laws, are in touch with our legal system (Micheli, 1976, p. 13).

Furthermore, the constitutional enunciation, where has that "everyone" are obliged by virtue of "their" ability to pay, find the connecting factor between the ability to pay and the party responsible (Moschetti, 1988, p. 11).

In this way, just the ability to pay tribute holders are required to apply for public expenses, within the limits of such ownership: as a result of semantic link between "all" and "their", place in article 53 of

Constitution, each taxpayer is required to pay by reason of their ability to pay, not because of an ability to pay in whole or in part attributable to others.

This fact raises the question of the constitutionality of the figures of the substitute and the responsible tax, "almost subjectivity" hypothesis that pursuing a paramount purpose of collective interest, allowing you to facilitate the assessment and collection of taxes: despite the substitute and the responsible are required to pay in connection with ability to pay of other person, the institute of recourse allows you to comply with the prescriptions of article 53 of Constitution (Gaffuri, 2008, p. 437).

As regards the scope of application, the ability to pay cannot be generalized, but it should be limited only to taxes to ensure the cost of public services indivisible, included in the concept of sets, without understanding those aimed to affecting the cost of public services divisible, within the concept of tax[1] (Moschetti, 1988, p. 3-4; Maffezzoni, 1980, p. 1012; Micheli, 1976, p. 97; Granelli, 1981, p. 30-31; La Rosa, 1968, p. 51-52; Gaffuri, 2008, p. 430-431; Parente, 2013, p. 533).

Moreover, when the constituent assembly (Falsitta, 2013, p. 789; Falsitta, 2009, p. 97), the introduction of such a principle was not at all obvious: numerous doubts concerns were raised by those who considered it pointless to impose substantive conditions on the entity's right to claim the tax levying, being ability to pay entity immanent to the entire system of values on which he leaned the Constitution (Uricchio, 2017, p. 35). In addition, the constitutional coverage could lead to the belief that the *jus impositionis*, while finding no basis in supremacy exercised by the State on its territory, could be limited (Uricchio, 2017, p. 35). It was believed, therefore, inappropriate to devote a constitutional provision in order to enshrine an obligation essential to the life of the community, being able to descend to contribute to public expenditure from the values required by economic, political and social solidarity inherent in an organized group; nevertheless, the principle has found bin in the article 53 of Constitution (Uricchio, 2017, p. 35).

[1] In case law, comp. Cons. St., 14 dicembre 1963, n. 1058, in *Riv. dir. fin.,* 1964, II, p. 166; Cass., 13 luglio 1971, n. 2247, in *Dir. e prat. trib.,* 1972, II, p. 176; Cass., 18 ottobre 1971, n. 2930, in *Dir. e prat. trib.,* 1972, II, p. 1099.

2. The ability to contribute as a prerequisite, limit and measure of taxation

The provision sets must satisfy the requirement's ability to pay "to be constitutional, not to be tribute" (Tesauro, 1987, p. 6), since, for sorting, the tax benefit is only that conforms to the Constitution, therefore, linked to ability to pay (Bertolissi, 1992, p. 529; Bartolini, 1957, p. 9-10; Parente, 2013, p. 523-524).

As a result, the ability to pay presents itself, at the same time, as assumed, limit and measure of taxation[2] (Uricchio, 2017, p. 35-36; De Mita, 1987, p. 455-456, nt. 1; Moschetti, 1988, p. 2; Manzoni, 1967, p. 13-14 and 73), makes limitation for an ordinary legislature's freedom in choosing impassable of taxable persons, the assumption and the amount of the tax benefit (Micheli, 1976, p. 94; Moschetti, 1988, p. 2): assumption of imposition, as there may be cases where the contribution attributable to the taxpayer's obligation is not likely to express an ability to pay, as there are an inseparable link between the present case and tax liability; parameter of the imposition, since, in the event that there is such a link, the extent of competition in public spending will vary because of the concrete economic ability manifested by the taxpayer: the greater will be the economic capacity of the subject, the higher will be the tribute that it must correspond to the exchequer; extent of taxation, because the taxpayer will not be asked for a contest at public expense in excess of their economic capacity, otherwise, would hit an ability to pay in whole or in part does not exist (Uricchio, 2017, p. 37).

The principle also allows you to monitor the constitutionality of tax rules and, in the manner provided by law, ask the court of guardianship laws, insofar as they are inconsistent with this principle, not reconnecting that duty (constitutional) of share of the costs of the community to a economically assessable (Micheli, 1976, p. 94; Lupi, 2007, p. 688).

In this way, you can carry out a control on the fairness of the tax laws, becoming the ability to contribute a vital instrument for the interpretation and application of the tax law (Santamaria, 2011, p. 52).

[2] In addition, comp. Corte Cost., 6 luglio 1966, n. 89, in *Boll. trib.,* 1966, p. 1832; Corte Cost., 10 luglio 1968, n. 97, in *Giur. cost.,* 1968, I, p. 1538; Corte Cost., 29 dicembre 1972, n. 200, in *Boll. trib.,* 1973, p. 433.

Finally, the policy presents the advantage to qualify the activity taxation by reconnecting it to the needs of society: the latter, on the one hand, undergoes a deprivation of their wealth; on the other, takes advantage of a strengthening of the rights whose enjoyment is subject to the existence of financial assets (Bertolissi, 1992, p. 529).

In this context, the constitutional norm constrains the ordinary legislator and restricts the discretion, preventing him from typing as social behaviors that are not tax assumptions manifestation of wealth, nor economic strength (De Mita, 1987, p. 455; Parente, 2013, p. 526).

The ability to pay denotes the suitability of the person to bear the economic burden of taxation and is aimed at identifying the extent of participation of the individual public expenditure (Del Giudice, 2011, p. 127; Lupi, 2007, p. 687): as a "Janus" (Antonini, 1996, p. 244 ff.), it becomes, then, as a guarantee for the taxpayer and to limit the State apparatus (Parente, 2013, p. 526).

With regard to limits imposed by ability to pay to the taxing powers, you relinquishing at least two very significant: an absolute limit, which forces you to select – which requirements of the tribute – get fit to demonstrate actual and present economic strength; a relative limit, which constrains the legislature to assume what ratio of the charge, expressed by the assumption, a principle consistent with those found in the sort order and reasonable than the public cost sharing purposes (Fantozzi, 2005, p. 26; Micheli, 1976, p. 93).

In sum, the constitutional provision protecting two interests of equal rank: the public interest in the competition of all public expenditure, expressive of the function of solidarity; the interest of the individual to respect for his ability to contribute, symptomatic of the function of constitutional guarantees of the law (Fantozzi, 2005, p. 19).

3. Direct and indirect indices of ability to pay

In the absence of a normative notion, in the recent past, the ability to pay (Griziotti, 1953, p. 351 ff.; Giardina, 1961; d'Amati, 1964, p. 464 ff.; Manzoni, 1967; Micheli, 1967, p. 1530; Gaffuri, 1969; Maffezzoni, 1970; d'Amati, 1973, p. 106 ff.; Moschetti, 1973; Berliri, 1974, p. 114 ff.; La Rosa, 1981, p. 233 ff.; De Mita, 1984; Marongiu, 1985, p. 6 ff.; De Mita, 1987,

p. 454 ff.; Moschetti, 1988, p. 1 ff.; Antonini, 1996, p. 274; Perrone, 1997, p. 577 ff.; Batistoni Ferrara, 1999, p. 345 ff.; Fedele, 1999, p. 971 ff.; Russo, 2007, p. 48 ff.; Gaffuri, 2008, p. 429 ff.), based on three legal arguments of identity – the vagueness of the concept; the absolute immunity of legislative choices; the opportunity to report article 53 of Constitution to the tax system as a whole (Moschetti, 1988, p. 5) -, was depicted as a kind of "empty box" (Balladore Pallieri, 1948, p. 63; Giannini, 1950, p. 273; Ingrosso, 1950, p. 158; Balladore Pallieri, 1955, p. 370; Tesauro, 2009, p. 69; Micheli, 1976, p. 93; Fantozzi, 2005, p. 21; De Mita, 1987, p. 454; for critical remarks, comp. Maffezzoni, 1980, p. 1009; Gaffuri, 2008, p. 431; Parente, 2013, p. 527-528).

Considering that a fact is an indication of ability to pay when it is economic in nature, namely expresses economic strength (De Mita, 1987, p. 455-456, nt. 1; Giardina, 1961; Gaffuri, 1969; Lupi, 2007, p. 683), the paradigm of article 53 of Constitution has been assigned (Tesauro, 2009, p. 69; Gaffuri, 1969, p. 63 ss.; Zonzi, 1976, p. 2218; Lupi, 2007, p. 687; Perrone Capano, 1979, p. 83-95; for a different orientation, comp. Granelli, 1981, p. 30 ff.) the meaning of minimum economic capacity (Moschetti, 1988, p. 6; Maffezzoni, 1980, p. 1009), but without identifying the ability to pay with the limited economic capacity of the subject (Parente, 2013, p. 529-530).

In fact, the ability to pay, while assuming the economic capacity, is not identified with it, but implies an assessment regarding the taxpayer's position and its ability to contribute to public loads (Moschetti, 1988, p. 10; Vanoni, 1937, p. 89-90 and 94): in this light, are expressive of ability to pay the facts indexes of force or economic potential, namely those who have wealth in a broad sense[3] (Gaffuri, 2008, p. 438).

[3] Comp. Corte Cost., 16 giugno 1964, n. 45, cit.; Corte Cost., 31 marzo 1965, n. 16, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 6 luglio 1966, n. 89, cit., p. 1832; Corte Cost., 10 luglio 1968, n. 97, cit., p. 1538; Corte Cost., 18 maggio 1972, n. 91, in *Dir. e prat. trib.,* 1973, II, p. 193; Corte Cost., 22 giugno 1972, n. 120, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 28 luglio 1976, n. 200, in *Giur. cost.,* 1976, I, p. 1254; Corte Cost., 20 aprile 1977, n. 62, in *Giur. cost.,* 1977, I, p. 606; Corte Cost., 23 maggio 1985, n. 159, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 4 maggio 1995, n. 143, in *Riv. dir. trib.*, 1995, parte II, p. 470; Corte Cost. n. 21/1996, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 22 aprile 1997, n. 111, in *Giur. it.,* 1997, I, p. 476; Corte Cost., 21 maggio 2001, n. 155, in *Riv. dir. trib.*, 2001, II, p. 589; Corte Cost., 21 maggio 2001, n. 156, in *Giur. it.,* 2001, 10, p. 1079; Corte Cost., 28 gennaio – 6 febbraio 2002, n. 16, in *Giur. it.*, 2002, p. 1788; Corte Cost., 8 aprile – 10 aprile 2002, n. 103, in *Giur. cost.*, 2002, p. 853.

However, hypothesize generically that all economic facts are expressions of ability to pay is rather an understatement (d'Amati, 2006, p. 31-32; d'Amati – Uricchio, 2008, p. 37; Gaffuri, 1969, p. 88 ff.; Manzoni, 1967, p. 73 ff.), being, however, must locate, positive and concrete, individual indexes symptomatic of the principle of contribution (De Mita, 1987, p. 457; Parente, 2013, p. 530-531).

Not surprisingly, they do not conform to the above principle those tributes affecting subjective qualities, such as the culture, beauty and technical expertise, the ability of these qualities generate wealth or as themselves revealing wealth: one thinks, for example, to the case of a degree which, although, in theory, more opportunities to derive economic results from their knowledge and skills compared to a person with a degree lower, that doesn't support the conclusion, in concrete terms, that this potential constitutes ability to pay index, being merely hypothetical use of such subjective conditions to produce income (Uricchio, 2017, p. 39-40).

As to the exact configuration of ability to pay, have formed different currents of thought (Gaffuri, 2008, p. 434-435): a first reconstruction[4] (Basilavecchia, 2002, p. 292; La Rosa, 2000, p. 185) has embraced a subjective notion of ability to pay, referring to the actual suitability of helping to cope with the tax duty, through indexes concretely detectors of wealth; a different orientation[5] married a objective view, identifying the notion in any economic fact likely to be expression, even without the subjective suitability requirement; in the middle there is the thesis, perhaps more reasonable, which drew up a relative concept (Fantozzi, 2005, p. 25), as a function not only of the need for each assumed economic potential, but also expresses the need to differentiate between taxpayers and tributes (on the evolution of the orientation of constitutional jurisprudence in the matter, comp. Salvati, 1998, p. 507; Marongiu, 1999, p. 1757).

Among the "direct indices" of contributory capacity (Moschetti, 1988, p. 6; Cosciani, 1977, p. 393 ff.) may be counted the income (wealth acquired) (Tesauro, 2009, p. 71; De Mita, 1987, p. 457), the heritage (wealth

[4] Comp. Corte Cost., 10 luglio 1968, n. 97, cit., p. 1538; Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 20 aprile 1977, n. 62, cit., p. 606.

[5] Comp. Corte Cost., 21 maggio 2001, n. 156, cit., p. 1079, with note by R. SCHIAVOLIN, *Prime osservazioni sull'affermata legittimità costituzionale dell'imposta regionale sulle attività produttive.*

possessed)[6] and its increases in value[7], while they constitute "indirect indexes" consumption, business and transfer of goods (Tesauro, 2009, p. 71-72; De Mita, 1987, p. 457; Parente, 2013, p. 531-532).

Who knows if in the future, given the new forms of production of wealth and lifestyle increasingly frantic, even the "free time" can be counted, like consumption, between indirect indices contributory capacity.

These indexes express the attitude to the contribution, understood as a collection of events and conditions that manifest the ability to cope with the public expenditure by paying taxes (Gaffuri, 2008, p. 430).

In fact, the decision of what hit them with the imposition is also dependent on the conception that you have of the State, of its role and relations with taxpayers: a classical-liberal strand focuses on proprietary rights with respect to the public interest to levy (on tax interest, comp. Boria, 2002), minimizing state intervention; an egalitarian approach and welfare regulation, however, rejects the model of "minimal State", reevaluating the public interest to the levy to the rights owners (Gallo, 2007, p. 19; Gallo, 2009, p. 399).

4. The ability to pay as a mandatory principle of social solidarity

The article 53 of Constitution cannot be considered divorced from the source system and normative values, having to be coordinated, through hermeneutics systematic and axiological, to the legislation that recognizes and guarantees the inviolable rights of man, and forces the fulfillment of the duties required by political, economic and social solidarity (article 2, paragraph 1 of Constitution), constitutional State foundation (Micheli, 1976, p. 14 and 92; Moschetti, 1980, p. 3; Santamaria, 2011, p. 51-52; De Mita, 1976, p. 338; Braccini, 1977, p. 1258; Forte, 1980, p. 28-29; Tesauro, 2009, p. 66; d'Amati – Uricchio, 2008, p. 37; Lupi, 2007, p. 689; Parente, 2013, p. 534).

In this view, the duty of every person to cope with public spending

[6] Comp. Corte Cost., 22 aprile 1997, n. 111, cit., p. 476, with note by E. MARELLO, *Sui limiti costituzionali dell'imposizione patrimoniale*.

[7] Comp. Corte Cost., 30 settembre 1987, n. 301, in *Boll. trib.,* 1987, p. 1747.

because of their ability to pay becomes a mandatory principle of social solidarity, which descends directly from article 2 of Constitution by requiring each member of the state community to participate in needs of the community not by virtue of a commutative relationship with the State, but as a member of the community (Micheli, 1976, p. 14; Maffezzoni, 1970, p. 29 ff.; Tesauro, 2009, p. 66-67; De Mita, 1987, p. 455; Maffezzoni, 1980, 1009 ff.; Fedele, 1971, p. 27; Moschetti, 1988, p. 3; Parente, 2013, p. 535).

The value of the setting is that of giving the tribute a function of social justice, making public expenditure contribution become duty of solidarity (Gallo, 2009, p. 403). In this context, there is the reconstruction (d'Amati, 1973, p. 126) that relies on the ability to pay the mediating function between two values of equal rank: the contribution, on the one hand, and the enjoyment of public services, of the other part (Uricchio, 2017, p. 45). This function cannot be understood as mere correspondence between cost and benefit, resulting in rather a link, in political and social terms, between the contest at public expenses and the use of public services by the individual partner, in a distribution perspective (d'Amati, 1973, p. 126; Uricchio, 2017, p. 45, nt. 44).

In fact, the foundation of the duty to contribute to the collective needs can be found not so much in the benefit that an individual receives from the State, against the fulfillment of general or special services, as in the duty of political solidarity, capable of expressing the interest of all the creation and life of the public body (Micheli, 1976, p. 13-14; Moschetti, 1988, p. 10; Perrone Capano, 1979, p. 82-83).

The tribute not expressed solely, purely tax, to raise government revenues, but also fulfills a no taxation purpose: implement the principle of social solidarity, realizing a fair allotment through the use of taxation for economic purpose, redistribution, social and out of taxation in general (Moschetti, 1988, p. 10; Micheli, 1976, p. 94; Tesauro, 2009, p. 67; for critical remarks, comp. Gaffuri, 2008, p. 436). In this way, fiscal performance, without divest fiscal order (procuring revenue to the treasury), it generates a plurality of positive effects (Uricchio, 2017, p. 46).

Also the tributes with paramount purpose out of taxation – purpose that may fall in the context of the case of taxation or remain outside it – must comply with article 53 of Constitution connecting to symptomatic situations of ability to pay, such as get economically significant capable

of constituting manifestation of wealth (De Mita, 1987, p. 464; Tesauro, 2009, p. 67; Fantozzi, 2005, p. 25; Maffezzoni, 1980, p. 1023; Gaffuri, 2008, p. 435-436).

Moreover, in certain cases – environmental taxation (Gallo – Marchetti, 1999, p. 115 ff.; Gaffuri, 2008, p. 437; Selicato, 2008, p. 111 ff.; Uricchio, 2013, p. 731 ff.; Parente, 2015, p. 319 ff.) – taking into account negative externalities caused by the polluting activities and costs to be incurred for the reclamation and rehabilitation of the area, it is considered appropriate to demonstrate subsisting *ipso iure* circumstances of ability to pay, there is a sort of "qualified ability to pay", resulting from savings, future and possible, of public expenditure.

5. Effectiveness, certainty and timeliness, such as requirements that must comply with the ability to pay. The principles of reasonableness and tax equality

The Constitutional Court[8], in reconstructing the scope of article 53 of Constitution, identified three requirements that must comply with the ability to pay: effectiveness, certainty and timeliness (d'Amati, 2006, p. 32; d'Amati – Uricchio, 2008, p. 37; Micheli, 1976, p. 96; Parente, 2013, p. 537).

Under the first requirement, the link between wealth detector and tribute must be made effective, and not apparent or fictitious, expressing the suitability of assumption with respect to the tax liability, which must be a real economic event, such as to allow the measurement of an existing income and not merely alleged (Santamaria, 2011, p. 54; Tesauro, 2009, p. 73; Fantozzi, 2005, p. 23; De Mita, 1987, p. 463; Micheli, 1976, p. 97; De Mita, 1981, p. 60; Gaffuri, 2008, p. 439; on the exemption of "minimum subsistence", comp. Moschetti, 1988, p. 9; Maffezzoni, 1980, p. 1011-1012).

[8] Comp. Corte Cost., 12 luglio 1967, n. 109, in *Riv. dir. fin.,* 1967, II, p. 223; Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 26 marzo 1980, n. 42, in *http://www.giurcost.org/decisioni/1980/0042s-80.html*; Corte Cost., 22 aprile 1980, n. 54, in *Rass. Avv. Stato,* 1980, I, 1, p. 691; Corte Cost., n. 252/1992, in *http://www.giurcost.org/decisioni*; Corte Cost., 29 gennaio 1996, n. 73, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 26 luglio 2000, n. 362, in *http://www.giurcost.org/decisioni/index.html.*

In other words, in the present case, must fall situations that, both subjective and objective level, are likely to show an unequivocal manner, wealth (Uricchio, 2017, p. 36).

Like this, the competition at public expense is linked to the possession of an actual ability to pay and suitability for taxation. Therefore, cannot be classified as an economic suitability not based on ability to pay "real facts", but on a "basic dummy"[9] (Moschetti, 1988, p. 13).

The second requirement is closely related to the first, having to be unequivocal and timely ability to pay and not purely hypothetical[10] (Fantozzi, 2005, p. 23).

Finally, applying the "current events", the tribute should be related to an ongoing ability pay, no past or future: the ability to pay must be when you experience the withdrawal.

In this perspective, the timeliness is an irreducible limit the introduction of "retroactive taxation"[11] (Fantozzi, 2005, p. 25; Tesauro, 2009, p. 75), which are unconstitutional when they lost at the time of their application, «an appropriate relationship with the then existing wealth, but now probably spent»[12] (Gaffuri, 2008, p. 442).

In truth, the three requirements are inextricably linked: the timeliness is an explanation of effectiveness, which in turn has an affinity with the certainty requirement (Tesauro, 2009, p. 75; Parente, 2013, p. 539).

The topical parameter, as mentioned above, excludes the possible adoption of retroactive taxation, which, having to get past, refer to a current, but not passed ability to pay (Amatucci, 2005; Mastroiacovo, 2005).

In fact, given the actual connection between premise and tax, even under the temporal profile, the legislature cannot impose retroactive duties, as such in contrast with both the current principle of ability to pay, than with that of legal certainty[13] (Moschetti, 1988, p. 15).

[9] Comp. Corte Cost., 26 marzo 1980, n. 42, cit.

[10] Comp. Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 26 marzo 1980, n. 42, cit.; Corte Cost., n. 252/1992, cit.; Corte Cost., 29 gennaio 1996, n. 73, cit.; Corte Cost., 26 luglio 2000, n. 362, cit.

[11] Comp. Corte Cost., 22 aprile 1980, n. 54, cit., p. 691.

[12] Comp. Corte Cost., 10 giugno 1966, n. 64, in *Giur. cost.*, 1966, p. 737; Corte Cost., 15 luglio 1994, n. 315, in *www.giurcost.org/decisioni/1994/0315s-94.html.*

[13] Comp. Corte Cost., 4 aprile 1990, n. 155, in *Foro it.,* 1990, I, c. 3072.

In any case, in tax matters, the principle of non-retroactivity cannot be interpreted rigidly, since retroactive duties are constitutionally legitimate when they hit past events that express a contributory capacity still current[14].

In this regard, article 3, paragraph 1, Law July 27, 2000, no. 212 (the Statute of the rights of the taxpayer), entitled "temporal effectiveness of tax rules", enshrined the principle of non-retroactivity in tax matters, ruling that «except as provided by article 1, paragraph 2, the tax provisions do not have retroactive effect. With regard to periodic tributes, changes introduced only apply from tax period following that existing on the date of entry into force of the provisions that provide for».

Therefore, in the light of this provision, which codified, even in the field in question, the general principle of non-retroactivity of the law according to art. 11, paragraph 1, preliminary provisions to the civil code, has excluded the retroactive application of the law, if retroactivity is not expressly established[15] (Parente, 2011, p. 480, nt. 57).

The category's ability to pay, as a basic constitutional on fiscal matters, aimed to guarantee the taxpayer, can also be used as an interpretative criterion: between multiple interpretations, the interpreter has to stick to the one that face except the connection between tax and assumed (De Mita, 1987, p. 460).

Finally, the ability to pay is inextricably linked to the principles of reasonableness (Luther, 1997, p. 341 ff.; Paladin, 1997, p. 900 ff.) and tax equality, connoting ethical value of the tribute: the combination between articles 53 and 3 of Constitution implies that equal situations should be equal taxation regimes and, correlatively, to different situations an unequal tax treatment[16] (Paladin, 1997, p. 305; Micheli, 1976, p. 95; Moschetti, 1988, p. 17; Gaffuri, 2008, p. 430).

[14] Comp. Corte Cost., 23 maggio 1966, n. 44, in *Giur. cost.,* 1966, p. 737; Corte Cost., 11 aprile 1969, n. 75, in *Dir. e prat. trib.,* 1969, II, p. 349; Corte Cost., 27 luglio 1982, n. 143, in *Boll. trib.,* 1982, p. 1764; Corte Cost., 20 luglio 1994, n. 315, in *Fin. loc.,* 1994, p. 1199; Corte Cost., 19 gennaio 1995, n. 14, in *Foro amm.,* 1997, p. 1597; Corte Cost., 27 luglio 1995, n. 410, in *Foro it.,* 1995, I, c. 3074; Corte Cost., 4 novembre 1999, n. 416, in *Giur. it.,* 2000, p. 678.

[15] On the topic, comp. Cass., 2 aprile 2003, n. 5115, in *http://rivista.ssef.it*; Cass., 9 dicembre 2009, n. 25722, in *https://webrun.notariato.it/notiziario*

[16] Comp. Corte Cost., 6 luglio 1972, n. 120, cit., p. 1452.

The transposition of this principle to the tax matters helps create a fair tax system, characterized by the same regulation of economic facts that express equal ability to pay and from a different discipline for situations which do not exhibit the same wealth (Tesauro, 2009, p. 78).

So, identical or similar taxpayer are treated in, as far as possible, an equal or similar way, by supporting a higher sacrifice for those who demonstrate greater ability to cope with collective expenses, according to reasonably progressive criteria (Commissione Diocesana "Giustizia e Pace", 2000, p. 6).

Therefore, the principle of progressive improvement models taxes on condition of individual taxpayers, guaranteeing a rational and efficient reallocation of wealth (Turchi, 2010, p. 469).

This allows to ability to pay to be absorbed by the principle of equality, guaranteeing the redistributive wealth, more noble purposes than merely corresponding. The setting has the merit to identify the basis of the tax, initially limited to the fiscal sovereignty of the State, in contribution-related duty, understood as a bond of solidarity, which corresponds the exercise, for the purpose of apportionment, a legislative power of taxation (Gallo, 2009, p. 401).

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Reception of the asylum seekers, their rights and duties in the light of the EU human rights standards

ABSTRACT

For several years now, Europe has been struggling with the migrant crisis. The number of migrants dramatically increased after the outbreak of civil war in Syria. The migration crisis revealed the imperfection and inadequacy of the asylum system in the European Union. The problems with regards to the human rights and freedoms have for years been the subject interest of both the international asylum system and internal systems of EU Member States. Legal standards governing the issues are extraordinarily complex.

The article analyses the legislation and rulings regulating the issues of protecting the rights of foreigners applying for international protection. At the end proposals for legislative improvements de lege ferenda were specified.

Keywords: protection, freedom, foreigner, migration, crisis

1. Introduction

For several years now, Europe has been struggling with the migrant crisis. The number of migrants dramatically increased after the outbreak of civil war in Syria. The migration crisis revealed the imperfection and inadequacy of the asylum system in the European Union. Analysis of the crisis allows for the adoption of the thesis that one of the basic causes thereof is the direction of changes in the aspect of international legal

instruments for the protection of the rights of foreigner applying for international protection. In this aspect, it is key to increase the rights and freedoms of the examined group of foreigners in the scope of reception due to legislative changes and in particular the rulings of the European Court of Human Rights.

The problems with regards to the human rights and freedoms have for years been the subject interest of both the international asylum system and internal systems of EU Member States. Legal standards governing the issues are extraordinarily complex. On the one hand, these are the standards of international law resulting from developing a certain standard of human rights protection, regardless of citizenship, place of stay or legal status[1]. On the other hand, they are the standards of domestic law. The reason is that every state should have the freedom to act in relation to all people staying on its territory. This means that granting certain rights or imposing obligations should be included in own competences of the receiving state and should be regulated by the internal law thereof[2].

Alongside the development of the international human rights protection standards, a system of protecting the rights of foreigners applying for international protection has been developed. With time, the scope of rights granted to foreigners has been significantly expanded. It is acknowledged that the rights and freedoms granted to every human being, naturally apply to foreigners seeking international protection. The direction of changes in the discussed scope leads to obscuring the international legal standards concerning the rights of foreigners with universal human rights protection[3]. Therefore, competencies of states receiving foreigners applying for international protection, to autonomously shape their internal migratory policy is being gradually restricted. In this aspect, particular concerns are raised by the fact that the States are being limited in their capacity to introduce domestic legislation, essential due to the necessity of ensuring state security or that of the effectiveness of the asylum system, due to the risk of such regulations being interpreted as

[1] A. Szklanna, Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 74

[2] J. Gilas, Prawo międzynawowe, Toruń 1999, p. 250

[3] A. Szklanna, op. cit., s. 76

infringing on human rights of foreigners (an example may be the current discussions in the Work Group on Asylum about the Reception Directive in the scope of the principles of restricting social assistance to people creating a hazard).

2. Legislation and rulings

The first act of an international nature regulating the issues of protecting the rights of foreigners applying for international protection is the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948. The Act does not use the term *foreigner applying for international protection*. Nevertheless, the very first sentence of Art. 2 of the Declaration in accordance with which *Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* indicates the rights guaranteed therein may also be exercised by foreigners applying for international protection[4].

Additional acts of international nature that define the minimum foreigner rights protection standards is the Convention concerning refugee status, prepared in Geneva on 28 July 1951 and the protocol thereto, signed on 31 January 1967 in New York. The Convention determines the definition of a refugee and defines their legal status in the country providing protection thereto. The Act does not include provisions relating to the proceedings determining refugee status. Nevertheless, it would seem to constitute a certain framework, based on which the receiving state should develop a system of procedures regarding foreigners applying for international protection.

The international foreigner rights protection system also includes regional mechanisms of protecting these rights. The basic act of regional international law regulating the discussed issue is the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 04 November 1950, as well as the protocols attached thereto.

[4] A. Szklanna, Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 78;

The analysis of the presented legal acts indicates that in the context of the rights and freedoms of foreigners, of greatest importance are: the right to life, ban on torture, inhuman and humiliating treatment, right to court, right to freedom, personal and family safety, right to freedom of thought, conscience, religion and beliefs, right of free movement and choosing a place of residence within any state, right to education, as well as the obligation of respecting the non-refoulement principle resting with every state (Art. 33 of the Geneva Convention).

The legal acts indicated above, constituted a framework to create the European asylum system specifying e.g. the minimum standards for accepting foreigners applying for international protection. It should be emphasized that agreeing on common minimum standards of handling foreigners applying for international protection turned out to be an extremely difficult task. Member State reception systems differ in terms of the quality of reception standards granted to foreigners. The main reason is the fact that every Member State faces a different economic situation, as well as traditions and geographical location. Full harmonization of foreigner reception systems is not possible, in particular with regards to the amount of financial assistance, which if standardized, would result in a better treatment of people applying for international protection than their own citizens.

The standards of foreigner reception constitute an answer to the needs of foreigners applying for international protection. Differences in reception systems of Member States will result in a situation where states with lower reception standards will experience the effect of a transit state. Based on these discussions, a question arises whether a state has from the very beginning been perceived as a safe place in the scope of protecting the most important first generation rights? The reason is that foreigners leave these states, heading to states with better social conditions. The solution to the indicated phenomenon is a mechanism of diverting foreigners back to the state responsible for examining the application for international protection, established by way of the Regulation of the European Parliament and of the Council (EU) No. 604/2013 of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a

third-country national or a stateless person. As a rule, that state is the first Member State, the borders of which have been first crossed by a foreigner applying for protection.

The general framework of rights and obligations of third state nationals applying for protection, in the scope of reception, is indicated by Directive of the European Parliament and of the Council 2013/33/EU of 26 June 2013[5]. The Act is an expression of efforts for a full recognition of the rights and freedoms of foreigners, with a simultaneous restriction of the competences of receiving states in the scope of a possible limitation thereof to strictly limited, exceptional situations.

The foreigner reception system in place in Poland is regulated by the Act of 13 June 2003 on granting protection to foreigners in the Republic of Poland. This Act determines the standards of receiving the nationals of third states applying for international protection. The developed standards of treatment of the examined group of foreigners are not only the effect of implementing EU regulations in the Polish legal system, but also of the development of international legal instruments in the scope of human rights protection, and, first and foremost, the effect of long-term actions constituting an answer to the changing global migration situation. Among the human rights of most importance in the scope of receiving foreigners applying for international protection, we should indicate the ban on inhuman or humiliating treatment, right to education and freedom of movement and selection of a place of residence within a given Member State, as well as the right to private and family life. The Polish reception system acknowledges the human rights indicated above, however, maintaining the balance between their implementation and protection of safety and public order (one of the conditions of which is to provide efficiency of the procedure of granting international protection).

In the Polish reception system, foreigners applying for the provision of international protection have decent life conditions guaranteed. They are entitled to use social assistance starting from the date of their submission of the application for provision of the international protection, they benefit from education and care in public nursery schools, primary schools and lower-level secondary schools on the same terms as the Polish citizens. The

[5] OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU

right to family life is abode, understood as, first of all, the right to maintain family bonds and preserve family privacy, a particular expression of which is the possibility of having a cash benefits to cover own accommodation costs on the territory of Poland, inter alia, when it is necessary in order to protect and maintain the bonds of the foreign family[6].

Foreign nationals applying for the provision of international protection have the right to freedom and free movement and to choose a place of residence on the territory of the Republic of Poland. However, in the Polish reception system these rights have some restrictions. In the first place it should be indicated that foreign nationals are obliged within 2 days from the submission of the application to appear at the centre for foreigners, unless they indicated in the application the address at which they will be residing. In the event of any breach of the obligation the procedure for the provision of the international protection will be remitted. In addition, Polish reception system has also accepted the possibility to oblige an indicated group of foreign nationals to reside in a designated place or to report in a specified time intervals to the indicated authority (the so-called detention alternative). In certain situations the right accepts the possibility of application of detention, the farthest possible restrictions of the above indicated rights [7].

It seems, in the context of issues concerning the rights and freedoms of foreign nationals applying for the provision of international protection, the most important role is played by the jurisprudence of the European Court

[6] OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013

[7] The premise for application of one of means restricting the rights and freedoms of foreign nationals is, in particular:
a) the need for collecting, with the participation of the foreigner, the information being the basis for an application for the provision of the international protection,
b) existence of the risk of escape of the foreign national,
c) the need to perform the decision on obligation of the foreign national
d) considerations of state defence or security or protection of security and public order.
It should be emphasized, however, that a detention measure is not applicable to four groups of foreign nationals. The first group includes people in the case of which placing in guarded institution would cause a hazard to the life or health of foreign nationals, the second group includes people whose mental and physical condition may justify a presumption that they were victims of violence, the third and fourth group are unattended minors and the disabled.

of Human Rights. The decisions of the Court determining directions of the interpretation of the above indicated regulations affect application of the regulations of the Reception Directive and the mechanism of sending the foreign nationals back to the first entry country on the basis of Dublin III Regulation. The Court oftentimes referred in their decisions to the issues related to the rights of the foreign nationals.

One of the crucial decisions of the European Court of Human Rights with regard to the interpretation of the regulations governing the rights and freedoms of foreign nationals reception is the decision dated 21.01.2011. *M.S.S. v. Belgium and Greece*.[8] The case was concerned with the expulsion to Greece of a person applying for refuge by the Belgian authorities by means of the EU Dublin II Regulation. In this decision the Court noted that Belgium violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, exposing the foreigner to a risk related to shortages of the refuge procedure and bad living conditions, which the foreigner experienced when applying for the provision of the international protection in Greece. The consequence of the indicated decision was the limitation of the use of procedures specified in the Dublin II Regulation towards the foreign nationals, to whom Greek jurisdiction would apply.

Another decision of the European Court of Human Rights, which similarly to the adjudication in the case M.S.S. v. Belgium and Greece, in practice limited Member States' use of the mechanisms ensuring the effectiveness of asylum system, namely Dublin III procedures, is the decision dated 4.11.2014. *Tarakhel v. Switzerland*.[9] In the case concerned, the Court concluded that diverting the people applying for the provision of international protection to Italy as the state responsible for the examination of the application, may interfere with the guarantees set forth in the Article 3 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case in question, similarly to *in M.S.S. v. Belgium and Greece*, the Court pointed, inter alia, to the inappropriate reception conditions prevailing in the

[8] ECtHR – M.S.S. v Belgium and Greece [GC], Application No. 30696/09

[9] Tarakhel v. Switzerland, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/cases,ECHR,5458abfd4.html

country competent for examination of the application for provision of the international protection. In this context, the Court concluded that bad conditions of the reception and accommodation of Tarakhel's family in Italy reached a considerable level of severity, in respect of which returning them to Italy would result in inhumane or humiliating treatment. The consequence of the indicated decision is the limitation of the possibilities of sending the foreign nationals back to Italy.

The aforementioned decision of the European Court of Human Rights indicates a direction of disturbingly extending interpretation of the basic human rights and freedoms. When examining the *M.S.S. v. Belgium and Greece and Tarakhel v. Switzerland cases,* the Court did not take into consideration the extraordinary circumstances in which Greece and Italy found themselves, due to the mass influx of foreign nationals.

However, the Court took a correct position in the adjudication dated 15.12.2016 on *Khlaifia and Others v. Italy*.[10] In this decision the Court noted that although conditions in the centres for foreigners during the time, in which the complainants resided in Italy, they infringed some reception standards, due to difficulties, with which Italy were struggling at that time (related to the mass influx of foreign nationals) it cannot be stated that manner of treating of the appellants violated Article 3 of the Convention.

3. Stance

The Member States should have at their disposal mechanisms enabling provision of efficiency of proceedings related to granting the international protection, which is necessary in order to increase the chances of internal safety of particular countries, and thus the whole European Union. Decision of the Court leading to extended interpretation of the basic rights and freedoms of foreign nationals with regard to the reception system limit the possibility of the use of the Dublin mechanism by the Member States, and thus result in distortion of the asylum system. Decision on the possible violation of the rights and freedoms of foreign nationals with regard to the reception system, should occur through the prism

[10] Khlaifia and Others v. Italy (no. 16483/12)

of the situation of a given Member State. It should be emphasized that reception systems of the Member States should conform to the standards of basic human rights. Nonetheless, their constant increase may result in a situation where the Member States, particularly in the event of mass influx of foreign nationals, will not be able to meet them.

The decisions of the European Court of Human Rights by the means of application of the international law in practice, determine trends of migration policy. Excessive expansion of interpretation of different rights regulated by the European Convention on Human Rights, *in fact* leading to distortions of the primary assumptions of the human rights protection system, with simultaneous limitation of sovereignty of different countries with regard to regulation of their own internal migration situation, leads to dispersion of the European asylum system, and, as a consequence, to its ineffectiveness. In practice, the constantly extended interpretation of the human rights made by the European Court of Human Rights makes it impossible to apply the previously developed asylum system mechanisms, in particular the Dublin Regulation and the Reception Directive. It should be emphasized that both the wording of these regulations itself and, as a principle, their application abides the basic human rights included in the Convention. The problem is not the non-compliance with the regulations of the Convention by particular Member States, but their expanding interpretation forced by the Court, which in particular applies to Article 3, namely the prohibition of torture and inhumane and humiliating treatment.

Of course, it cannot be excluded that in an individual case it may come to a violation of one of the basic human rights. In such a situation also a foreigner must be entitled to a fair trial and finally the right to issue a complaint to the European Court. It is inappropriate, however, to reach, on the basis of the decisions issued in individual cases, a general conclusion that in each subsequent case the same violation will be observed. Such a statement in each case requires an individual analysis. Meanwhile, in cases regarding the application of the Dublin III mechanism since the adjudication in the case M.S.S. v. Belgium and Switzerland, Member States in practice were afraid of transferring foreign nationals to Greece (and also to Italy since the adjudication in the case of Tarakhel), *a priori* acknowledging that any such transfer could therefore be breach of Article

3 of the Convention. Mechanism of sending the foreign nationals back to Greece is being gradually restored. Nonetheless, due to the critical position, inter alia, of the United Nations High Commissioner for Refugees, Member States are still afraid of applying the Dublin mechanism in relation to Greece.

Every rational policy, including the migration policy requires predicting the effects of its decisions. Therefore, it should be considered where an indiscriminate acceptance of the line of judicial decisions of the Court, detached from the extraordinary situation of Europe, struggling today with the migration crisis may lead. It is worth considering, for example, in a situation of mass influx of foreign nationals, the meaning of the necessity of providing "suitable accommodation" referred to in Article 13 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced people and on measures promoting a balance of efforts between Member States in receiving such people and bearing the consequences thereof[11]. If "suitable accommodation" is interpreted including the current, extensive tendency of judicial decisions of the Court, and not the primary interpretation of the basic rights and freedoms, probably all Member States will be in violation of Article 3 of the Convention. If Member States want to comply with the requirements resulting from the rulings of the Court, it would be necessary to significantly reduce the number of foreign nationals, looking for protection, and let into the EU territory, which would, however, be an obvious breach of the Geneva Convention concerning refugees. Europe, in practice, has no actual possibilities (for instance in terms of accommodation) to fulfil the inflated standards of the Court. Return to the primary interpretation of the basic human rights seems to be the only and fully relevant way to prevent a dilemma as to which provisions of the Convention should be applied first. As a consequence, Member States would regain their right to rational management of a migration situation on their territory, which gives a chance to restore proper operation of the European asylum system.

[11] OJ L.212/12-212/23; 7.8.2001, 2001/55/EC

4. Conclusions

When analysing legal acts governing the rights and freedoms of foreign nationals, and the present migration situation, the following should be assumed:

1. Referring to the basic human rights of an absolute nature, including also Article 3 of the Convention – they must be absolutely observed, however their absolute character does not provide basis for their extensive interpretation. It seems that this is the direction of judicial decisions of the Court. It is legally unjustified, and additionally with regard to the reception of foreign nationals - it is irrational, as it omits special migration circumstances which currently affect Europe. Continuation of such a direction will lead to exacerbation of the current crisis, or emergence of new ones.
2. With regard to other basic human rights - for proper operation of the asylum system, the receiving states should have the possibility to make autonomous decisions with regard to limitation of some of them, within the binding law. This category includes e.g. the right to move freely and inhabit on the territory of the receiving country. Every Member State should have at its disposal broad competences, with regard to determination of the premises for regulation of the said law. Depending on the specific nature of the asylum system of a given state, in particular, due to the necessity to provide security and efficiency of the proceedings for international protection, the state should have freedom to decide as to the selection of suitable detention measures or use of the so-called border procedures. Acknowledgment that exercise of this right is a breach of the Convention will lead to exacerbation of the present migration crisis. The Member States should also have at their disposal the right to effective verification which people are really entitled to enter their territory, before these people cross the border. Such verification, already conducted on the territory of the state after the foreigner crosses the border, is definitely belated and it should be indicated as one of the reasons that may give rise distortions in the asylum system.
3. Referring to mutual relations between the decisions of the Court and binding regulations governing the asylum system - the aforementioned decisions of the Court resulted in creation of a practice of the Member

States, consisting in withdrawal from the analysis of individual cases (to which they are obliged on the basis of the provisions) and assuming a special precedent, which in the enacted law (rather than common law) system is an unacceptable intervention of judicial power in the competencies of the legislative authority.

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"Novation security of alimony"

ABSTRACT

The paper discusses the problem of novation security of alimony, regulated in the provisions of Art. 753 of CCP. This institution is particularly important for the alimony creditor. Its purpose is to provide the party entitled to alimony with financial means necessary for subsistence for the period of frequently long-lasting examination proceedings. The purpose of this work is an analysis of the subject-matter type of security, the effects of which are *de lege ferenda* postulates submitted.

Keywords: novation security, alimony, protection

1. Introduction

This publication describes a vitally important, from the practical point of view, issue of the security of alimony. On the grounds of the applicable legal regulations a party entitled to alimony may exercise two types of security of the claims due to the party: novation (regulated in the provisions of Art. 753 of CCP (Act of 17 November 1964 – the Code of Civil Procedure (here of 31 October 2016, Dz.U. 2016, item 1822 as amended)) or maintenance (regulated in Art. 747 of CCP). The latter is commonly used to secure financial claims. Whereas the former is of a specific nature, since it is exclusively assigned to secure claims indicated by the legislature. The subject of this publication is the novation model of securing alimony. It constitutes a temporary financial security of parties applying for alimony. The fact that a party may apply for the security of

alimony prior to the instigation of divorce or separation proceedings, in its course, and also during ongoing alimony proceedings is also relevant. This model is particularly important for the alimony creditor, due to the fact that the order of the Court concerning securing alimony constitutes an enforcement title, to which the writ of execution is assigned *ex officio*, thus allowing for the possibility to initiate enforcement.

The purpose of this work is an analysis of the subject-matter type of security, the effects of which are *de lege ferenda* postulates submitted.

2. General issue

At the beginning the definition of alimony should be explained, which is specified in Article 128 of FGC (Act of 25 February 1964 – the Family and Guardianship Code (here of 9 March 2017, Dz.U. 2017, item 682)), where it is stipulated that alimony is the duty to provide means of subsistence and if required means of education. The circle of people entitled to receive and obliged to pay alimony is quite wide, therefore a considerable significance is given to the provisions of Art. 129 and 130 of FGC which specify the order of parties obliged to pay alimony. The provision of Art. 130 of FGC sets the rule of the priority of a spouse to perform the alimentary duty for the benefit of the other spouse after the termination or annulment of marriage, and also after the ruling of separation. It supersedes the alimentary duty of the relatives of that spouse. Where the spouse is absent or insolvent, the provision of Art. 129 of FGC applies, which specifies the following order of the parties obliged to satisfy alimentary claims:

1) descendants,
2) ascendants,
3) siblings.

Close relatives are encumbered before distant relatives, while relatives of the same degree are encumbered in parts corresponding to their financial and earning capacities.

In ruling alimony, the Court should take into account the justified needs of the entitled party and the financial and earning capacity of the obliged party (§1 of Art. 135 of FGC).

Cases regarding alimony are heard by District Courts (Art. 16 in conjunction with Art. 17 Subsection 4 of CCP), having territorial jurisdiction over the place of residence of the respondent (Art. 27 of CCP) or the entitled party (Art. 32 of CCP).

There is also a possibility to seek alimentary claims in separation or divorce proceedings, where the competent court is the Regional Court.

It is worth mentioning that the legislation does not allow the possibility, in the course of pending divorce or separation proceedings, to instigate other proceedings to satisfy family needs or to seek alimony, regarding payment for the period beginning with the day the divorce or separation proceedings were instigated (Art. 445 §1 sentence 1 of CCP) (Cf. Z. Krzemiński, W. Żywicki, Palestra 1967, No. 4, p. 28 and subsequent; T. Żyznowski, *Komentarz do art. 445 k.p.c.,* 2016, Legalis). Such a claim or application for security of the claim is heard by the Court which hears the divorce case, pursuant to the provisions on the proceedings to secure claims (Art. 445 §1 sentence 2 of CCP). The Court of Appeal in Kraków indicated that the expression "to adjudicate on the basis of the provisions on the proceedings to secure claims" in conjunction with Art. 753 § 1 of CCP does not release the Court from examining the actual state of affairs as to *"the amount of the family maintenance costs arising out of the financial and earning capacity of the family"* (Order of the Court of Appeal in Kraków of 28 September 2010, I ACz 1039/10, Legalis no. 298079).

The alimony proceedings instigated prior filing a claim for divorce or separation are suspended at the time the claim for divorce or separation is filed, with regard to the payment for the period beginning with the day the claim was filed (Art. 445 §2 sentence 1 of CCP) (Resolution of the Supreme Court of 20 October 1966, III CZP 84/66, Legalis no. 12835). When suspending the proceedings the court should consider the application to secure the claim (Resolution of the Supreme Court of 14 July 1966, III CZP 52/66, Legalis no. 127460).

Issuance of an order to grant the security to perform the alimentary duty in a case for divorce or separation results in the suspension *ex lege* of the execution of non-final decisions to perform the duties of payment which were issued in a previous case, for the period beginning with the date the divorce or separation proceedings were instigated (Art. 445 § 2 sentence 2 of CCP).

3. Novation and maintenance security

Proceedings to secure claims are characterized by an accessory and supporting character towards examination and enforcement proceedings. The proceedings to secure claims is to ensure a temporary protection of the entitled party, which is manifested in securing the claim due to the entitled party. In principle, the proceedings to secure claims serve two important functions:

- they prevent the debtor from conducting activities which could preclude the satisfaction of the creditor,
- they create a possibility for a temporary regulation of relationships between the parties (T. Młynarski, Monitor Ubezpieczeniowy No. 49, June 2012, https://rf.gov.pl/publikacje/artykuly-prac ownikow-i-wspolpracownikow/Tomasz_Mlynarski_Zabezpieczenie_nowacyjne_roszczen _odszkodow awczych_o_rente_oraz_sume_potrzebna_na_koszty_leczenia_M_21020#_ftn1 [accessed: 17 May 2017]).

Due to these functions there are two types of securities: novation and maintenance. The former creates so to say a new situation between the parties. Whereas the latter consolidates the existing state of affairs (Ibidem). The purpose of the novation security is to ensure that the entitled party receives the means of support needed day-to-day subsistence. While the maintenance security is to safeguard future payments granted by a judgment in an alimony case. In the former case the security is granted solely on the basis of substantiation, and not on the proof of the existence of the claim (Art. 753 § 1 sentence 2 of CCP), which means that the entitled party is not required to show a legitimate interest in having the security granted (Art. 730^1 of CCP), while in the latter case the entitled party must show such an interest (M. Muliński, *Komentarz do art. 753 k.p.c.,* 2015, Side no. 8).

The novation security was regulated in the provisions of Art. 753 CCP. Its purpose is to provide the party entitled to alimony with financial means necessary for subsistence for the period of frequently long-lasting examination proceedings. The obliged party undertakes to pay the entitled party a specified amount of money, which can be paid as a lump-sum or in determined intervals (§ 1 of Art. 753 of CCP). The doctrine indicates that the alimentary security in the form of a lump-sum payment should

only be granted in exceptional, justified circumstances, for instance when the Court provides for an expeditious termination of the proceedings in a particular case (M. Muliński, *Komentarz do art. 753 k.p.c.,* 2015, Side no. 2). In my opinion, the possibility to take advantage of such an opportunity should depend not solely on the decision of the Court, but also on the intent of both parties. If both parties agree on the willingness to pay a lump-sum of the security by the obliged party, the court should uphold this position.

The jurisprudence indicates that due to the duration of alimony proceedings, it is justified that the amount of the security cover the entire means of support of the entitled party, since this model of security prevents from accumulating enforcement arrears and the defendant has a foreseeable procedural situation (Judgment of the Court of Appeal in Gdańsk of 14 December 1995, I ACr 850/95, Legalis no. 33880).

The provisions of Art. 753 § 1 of CCP constitute an exception to the rule specified in Art. 731 of CCP which states that interim orders may not lead to the satisfaction of claims (Ibidem). The departure from this rule is justified by the specific nature of claims for alimony, aimed at satisfying the current needs of the entitled party, and this is fulfilled by periodic payments of a specified amount of money for the benefit of the entitled party, made in order to secure the said claims (Ibidem). In the doctrine the novation security of claims, which results in a full or partial satisfaction of the claim, is referred to as anticipation security (J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, 2009, p. 527).

Note that the party seeking alimony may also exercise the maintenance security in order to safeguard their right. While exercising this type of security, it is relevant to take into account the contents of Art. 747 of CCP, where the admissible manners of securing financial claims are listed. Those are as follows:

1) *"forfeiture of movables, salary, receivables from a bank account or other receivables, or other property right;*
2) *encumbrance of a real estate of the obliged party with a compulsory mortgage;*
3) *imposing a prohibition to alienate or encumber a real estate for which no land and mortgage register is kept or which land and mortgage register has been lost or destroyed;*

4) *encumbrance of a ship or a ship in construction with a ship mortgage;*
5) *imposing a prohibition to alienate a housing cooperative member's right to premises;*
6) *establishment of a receivership over an enterprise or agricultural holding of the obliged party or over a facility belonging to the enterprise or over its part or over a part of the agricultural holding of the obliged party"* (Cf. M. Muliński, *Komentarz do art. 747 k.p.c.*, 2015; I. Gil, *Komentarz do art. 747 k.p.c.,* 2017; A. Zieliński, *Komentarz do art. 747 k.p.c.,* 2017; J. Jagieła, *Komentarz do art. 747 k.p.c.*, 2015 for more information about each manner of security).

This is a closed list, which means that should other than above-mentioned manners of security be given in an application to grant security, such an application shall be rejected (M. Muliński, *Komentarz do art. 747 k.p.c.,* 2015, Side no. 1).

Due to the framework of the work described in the introduction, the analysis of each indicated manner of security is deliberately omitted. It is worth noting that a party seeking alimony has the right to simultaneously exercise both manners of security: novation and maintenance.

4. Course of proceedings to secure claims

Security of alimony can be granted solely on application, and not *ex officio*. It seems that this is not an adequate solution from the point of view of an alimentary debtor, who due to their frequent helplessness in life or unawareness of the law, may not take advantage of the opportunity to exercise their right in this respect. For that reason I consider the previous legal arrangements – prior to the amendment of the provisions of the Code of Civil Procedure of 2 July 2004 (Dz.U. 2004, No 172, item 1804) – to have fulfilled the needs of the practice more efficiently than the current legal regulations. Therefore, returning to the previous arrangements seems reasonable (In such case, the contents of Art. 732 of CCP should modified, which allow for the possibility to instigate proceedings to secure the claim *ex officio* exclusively in such cases which can be initiated *ex officio*), or alternatively, imposing a duty on a family court to notify the party entitled to alimony of a statutory possibility of securing the claim

due to the party. The nature of alimony which serves to satisfy the current needs of the entitled party undoubtedly supports this solution.

However, there are different opinions in the literature, which support the current arrangements. For instance, A. Zieliński claims that: "these regulations restore the principles of dispositiveness and contradictoriness to their proper position. It should be assumed that in the current state of the law the Court may, if it deems reasonable, instruct the entitled party on the possibly of filing an apllication to secure claims for alimony (Art. 5 of CCP)" (A. Zieliński, *Komentarz do art. 753 k.p.c.,* 2017, Side no. 1).

The application to secure the claim should be filed with the first instance Court having jurisdiction over the case. Where such jurisdiction cannot be determined, the Court competent to grant the security shall be the Court in the district of which the order to grant the security shall be executed. In the absence of this legal basis, the District Court for the capital city of Warsaw shall be the competent Court. Note that should such an application be filed in the course of alimony proceedings, it shall be adjudicated by the Court of the instance where the proceedings are pending (Art. 734 of CCP).

The formal requirements of the application to secure claims for alimony (Cf. A. Górski, MoP 2006, No. 1, p. 23 and subsequent for more information about the application) should correspond to the requirements provided for a pleading, and also contain the manner of the security together with stating the amount of the security in the case of financial claims and the substantiation of circumstances which justify the application (Art. 736 § 1 of CCP). Where the application has been filed prior to the instigation of the proceedings, the subject-matter of the case should additionally be described (Art. 736 § 2 of CCP). It should be noted, however, that while determining the amount of the security, it may not exceed the amount of the claim sought, together with interests and the costs of the execution of the security (Art. 736 § 3 of CCP).

In the light of the above legal provisions, the position of the Court of Appeal in Szczecin, according to which "the application to grant a novation security of claims for alimony is not required to contain the amount of security referred to in Art. 736 § 1 Subsection 1 of CCP" (Order of the Court of Appeal in Szczecin of 29 October 2010, I ACz 590/10, Legalis no. 340427. M. Muliński also indicated that the position of the

Court is arguable. There are no legal regulations which would release the entitled party from the duty to state the amount of the security – idem, *Komentarz do art. 753 k.p.c.,* 2015, Side no. 10) should be deemed wrong. Taking into consideration the literal interpretation of Art. 736 of CCP, stating the amount of security in the application is a necessary element of the contents of the filed application (The same in I. Gil, *Komentarz do art. 736 k.p.c.,* 2017, Side no. 3; similarly in A. Zieliński, *Komentarz do art. 736 k.p.c.*, 2017, Side no. 6). Stating the amount of the security was an optional element of the application prior to the amendment of the provisions of the Code of Civil Procedure by the Act of 2 July 2004 on the Amendment of the Act – the Code of Civil Procedure and Certain Other Acts (Dz.U. No. 172, item 1804).

However, it is indicated in the jurisprudence that not including the amount of the interests and the costs of the execution of the security in the amount of the security, should not result in the return of the application in full, since the intention of the legislation is not excessive formalism in this respect (Order of the Court of Appeal in Katowice – I Civil Division of 21 August 2012, IACz 786/12, Legalis no. 735488).

The application to secure the claim should be adjudicated forthwith, but not later than within a week of the date it was submitted, and where the application is to be adjudicated at a hearing, the hearing must be held within a month of the day the application was submitted (Art. 737 of CCP).

The ruling of the presiding judge of the first instance Court concerning the return of the application to grant security is subject to appeal (Resolution of the Supreme Court of 28 August 2008, III CZP 65/08, Legalis no. 104458).

The Court serves both parties with an official copy of the order concerning cases for alimony (Art. 753 § 2 of CCP). The security for claims for alimony can also take place at a closed hearing. In such case the Court serves both parties with the order together with its reasons (Art. 357 § 2 of CCP).

The execution of such an order takes place in an enforcement procedure, after the Court assigns it a writ of execution (Art. 743 § 1 of CCP). In principle, the enforcement is initiated on a motion which can be filed by the following entities: the creditor specified in the enforcement

title or an entitled authority, e.g. a prosecutor or a non-governmental organization (Art. 796 § 1 and 3 of CCP). However, there are doubts as to whether the Court has the right to initiate the enforcement *ex officio* in order to exercise the granted security. According to J. Jagieła "Since the execution of the order to grant the security, which is eligible for the execution by way of judicial enforcement, takes place on the basis of the provisions on enforcement proceedings applied accordingly, it should be assumed that the initiation of the enforcement concerning the execution of the order to secure alimony may also take place *ex officio* on the request of the Court which granted the security (Art. 1085 in conjunction with Art. 743 § 1)" (J. Jagieła, *Komentarz do art. 753 k.p.c.,* 2015, Side no. 8; idem, PPEgz 2004, No. 7–9, p. 27). This view is arguable, since according to § 2 of Art. 796 of CCP "in cases which may be opened *ex officio*, the enforcement may be initiated *ex officio* on the request of the first instance Court which heard the case and referred the request to the competent Court or bailiff", taking into account the fact that the cases concerning the security of claims for alimony may not be executed *ex officio* by the Court. While it can be concluded from the literal interpretation of Art. 1085 of CCP that the possibility of initiating the enforcement *ex officio* refers solely to the cases where alimony has been awarded. There is no reference to cases concerning the security of alimony in the legislation. Obviously, representatives of the doctrine are right to indicate that J. Jagieła's position fulfills the needs of the practice (P. Gil, *Komentarz do art. 1085 k.p.c.*, 2017, Side no. 3). However, in my opinion, in order to remove the doubts in this respect, the contents of the provision of Art. 1085 of CCP should be supplemented by adding the wording: "and cases where the security of alimony has been granted".

The request to initiate enforcement should be submitted to the competent enforcement authority. The motion to initiate enforcement should correspond to the formal requirements of a pleading, which are specified in Art. 126 and subsequent and in conjunction with Art. 13 § 2 of CCP and indicate the benefit claimed. The enforcement title should be appended to the motion (Art. 797 § 1 of CCP). The fulfillment of these requirements constitute the grounds for initiating the enforcement procedure.

Note that to the party entitled to the security of alimony, the provisions of Art. 753^2 of CCP are relevant, which allow for the

possibility of issuing a judgment at a closed hearing, awarding a benefit satisfying the entitled party to a certain extent. Exercising such a type of right is admissible, should the obliged party acknowledge the claim. Some representatives of the doctrine indicate that this acknowledgment is binding to the court if it does not contradict the law and principles of community life, and it does not lead to the circumvention of the law (Art. 213 § 2 of CCP) (A. Zieliński, *Komentarz do art. 753² k.p.c.*, 2017, Side no. 2). Such an opinion does not seem to be justified, due to the fact that the provisions indicate the acknowledgment of the claim (in the substantive aspect, the so-called appropriate acknowledgment) and not the whole lawsuit – which supports the opinion that the court is bound by the acknowledgment (Cf. inter alia M. Muliński, *Komentarz do art. 753² k.p.c.,* 2015, Side no. 1. on the groundlessness of the examination of the acknowledgment of the claim with respect to its conformity with the law and principles of community life).

The groundlessness of the restriction of applying the provisions of Art. 753² of CCP exclusively to unsatisfied benefits is justifiably depicted in literature. It is accurate to indicate that "Provisions of CCP do not provide for a lawsuit to be left without adjudication, even in the event the defendant has voluntarily fulfilled the claim sought, and for the assumption, that the order to grant the security connected with the acknowledgment of the lawsuit and satisfaction of the claim within the scope of satisfying the entitled party, is equal to a final judgment" (J. Jagieła, Komentarz *do art. 753² k.p.c.,* 2015, Side no. 3 and cited literature).

In the light of the above, it seems justifiable to *de lege ferenda* modify the contents of Art. 753² of CCP in order to include the possibility of issuing at a closed hearing a judgment awarding the benefit within the scope of acknowledging the claim by the obliged party, both to the satisfied and unsatisfied part (Similarly ibidem). The acknowledgment of the claim in full should be relevant in this respect.

It is important for the obliged party that they may demand that the final order by which the security was granted be reversed or amended when the reason for the security has changed or disappeared (§ 1 of Art. 742 of CCP). The order concerning the reversal or limitation of the security may be issued solely after conducting a hearing (§ 2 of Art. 742 of CCP). The order reversing or amending the order concerning granting

the security is subject to appeal, lodging of which suspends the execution of the order (§ 3 of Art. 742 of CCP). The disappearance or change of the reason for the security take place, e.g. when after granting the security, the conditions for its granting became invalid, when the secured claim ceased to be credible, when the obliged party satisfied the secured claim, when the claim expired for other reasons, or when the solvency of the obliged party ceased to be endangered (Order of the Court of Appeal in Poznań – I Civil Division of 5 February 2014, IACz 133/14, Legalis no. 796864). The literal interpretation of Art. 742 § 1 of CCP supports the statement that the entity eligible to file a motion to reverse or amend the final order by which the security was granted is the obliged party. Nevertheless, it must be noted that the entitled party has the possibility to limit the scope of the security both when the proceedings are instigated and in the course of the proceedings, which seems to be justified by the fear of the entitled party being held liable for damages, as specified in Art. 746 of CCP (J. Turek, MoP 2010, No. 15, pp. 828-829).

5. The annulment of the security

At the end of this work several remarks will be made concerning the annulment of the security. The annulment of the security occurs when the previously issued order concerning the security loses effect.

The annulment *ex lege* takes place in the following instances: valid return or rejection of the lawsuit or application, dismissal of the lawsuit or application, or discontinuance of the proceedings (Art. 744 § 1 of CCP). The annulment of the security also occurs when the security had been granted before the instigation of the proceedings and the entitled party failed to file for the entirety of the claim in the proceedings, or filed for a claim other than the secured one (Art. 744 § 2 of CCP). The reason pertaining to the failure to file for the entirety of the claim, which may be e.g. fulfillment of a part of the claim by the obliged party, seems to be relevant in this respect (Similarly in J. Jagieła, *Komentarz do art. 744 k.p.c.*, 2015, Side no. 3), and the importance of which seems to be forgotten in the legislature. Taking into account the purpose and the nature of the proceedings to secure claims, I think that the assumption that in such a case only a part of the security is annulled would be reasonable (J. Jagieła

also writes about reservations of this kind, not allowing, however, for the possibility to accept partial annulment of the security. Instead, the author offers filing by the entitled party a subsequent application to secure the already sought claim – idem, *Komentarz do art. 744 k.p.c.*, 2015, Side no. 3), thus the order securing the remaining part of the unsatisfied claim should remain in effect.

It seems that the justification of my position may be supported by the order of the Court of Appeal in Łódź of 7 May 2015, where the possibility to acknowledge the annulment of the security exclusively in the part of the claim satisfied by the obliged party was allowed for (Order of the Court of Appeal in Łódź– I Civil Division of 7 May 2015, IACz 672/15, Legalis no. 1482016).

Furthermore, it was indicated that the Court eligible to issue an order to declare the annulment of the security should each time, depending on the actual state of affairs, assess whether the annulment of the security was due to the failure to file a lawsuit for the entirety of the claim (Ibidem). *De lege ferenda* the contents of Art. 744 § 2 of CCP should be modified.

A different opinion can be found in jurisprudence, stating that due to the fact that the annulment refers to the enforcement title, it cannot be assumed that the annulment of the security was only partial (Order of the Court of Appeal in Poznań of 27 April 2011, I ACz 535/11, Legalis no. 370226).

Other grounds for the annulment of the security have been specified in the provisions of Art. 754^1 of CCP. These grounds constitute the failure by the entitled party to file a motion to instigate enforcement proceedings within a month of the date the ruling granting the claim became valid.

The court, on the motion of the obliged party, issues an order declaring the annulment of the security. Due to the fact that the annulment occurs by the operation of the law, this order is of a declaratory nature.

Note that the annulment of the security does not result in the cancellation of the enforcement actions carried out by the operation of the law. To this end, filing of an appropriate motion to the competent enforcement authority is required (Order of the Supreme Court of 14 December 1987, I PZ 102/87, Legalis no. 26093).

6. Summary

In the summary of the presented work it is worth making several general and systemic remarks and conclusions.

Firstly, not all of the amended provisions within the scope of proceedings to secure claims deserve approval. I do not appreciate the withdrawal of the possibility to secure claims for alimony by the Court *ex officio.* The reason for this view is even not uncommon helplessness in life and unawareness of the law of people entitled to alimony.

Secondly, I think that it should be considered to impose on the Court a duty to notify such people of the admissibility to claim for the security of alimony due to them. It seems that by adopting such a solution not only the people entitled to alimony would benefit considerably, but it could also be positive for the State Treasury and local government units, since "alimentary unsatisfied" people frequently require the aid from the State or competent local government authorities.

Thirdly, I think that at the next amendment of the Code of Civil Procedure, the modification of the following provisions should be considered:

- Art. 753^2 of CCP in such a way as to allow for the possibility of issuing at a closed hearing a judgment awarding the benefit within the scope of acknowledging the claim by the obliged party, both to the satisfied and unsatisfied part,
- Art. 744 § 2 of CCP in such a way so that the annulment of the security does not occur each time the entitled party fails to file for the entirety of the claim due, in the course of the proceedings in the case for alimony.

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"Electronic will"

ABSTRACT

Modernization of the current forms of wills would make the socially desired opportunity of easier, quicker and more reliable drawing up wills realistic. Since the current legal-civil turnover is simply saturated with technology, we are living in the times of e-courts, e-protocols, e-signatures etc., I believe there are no contraindications to introducing a new opportunity of drawing up an e-will. Certainly, works related to implementation of a new form of a will, or a new method of registering a will would have to be preceded with a more detailed debate in this regard, in a broader community. I believe that the very issue is significant enough to give it considerably more thought as part of an enhanced discussion with both law theoreticians and practitioners.

***Keywords**: inheritance, will, electronic will, formalising a will, animus testandi*

1. Introductory notes

Inheritance is an extremely significant issue both from a theoretical and a social perspective. Contrary to what one might expect, this is not an easy subject. The specialist literature puts forward some more or less legitimate suggestions: introducing new legal constructions such as a division in the will or a mystical regulation, supplementing titles of inheritance with inheritance contracts, including a donation *mortis causa* as well as correlation between the provisions of law of succession and the regulations of other normative acts concerning, among others, alimony or tax on inheritance and donations (T. Mróz, Przegląd Sądowy 2008, issue 1, p. 81 ff.; H. Witczak, A. Kawałko, 2008, p. 71).

Without disregarding the need to conduct a thorough reform of the Polish law of succession and harmonize it with the EU regulations, I am going to concentrate on succession according to the will and, more specifically, on the issue of electronic will. This concept has already met several analyses in the specialist literature, however, there are still many doubts remaining in that regard.

The powers to administer property rights in case of death is without doubt one of the basic privileges of a natural person, related to the constitutional and absolute ownership right. It is because the basic law guarantees citizens freedom of acquiring property rights, exercising them and disposal of them in *inter vivo* turnover. The society's increase in wealth caused by economic growth is one of the reasons why we attach increasing importance to the opportunity of managing our property in case of death, thus trying to discuss the need of constant improvement of legal mechanisms aiming at transferring ownership between generations (J. Turłukowski, 2009, p. 11; M. Załucki, Przegląd Sądowy 2008, issue 1, p. 95 ff.; M. Rzewuski, 2014, p. 18 ff.).

2. Formalising a will

In many European and global legal systems a will still constitutes a basic, if not only, alternative to inheritance *ex lege*. This instrument in most cases allow heirs to effectively manage their property *post mortem*. A will is, however, a formalised legal act (Cf. J. Gwiazdomorski, Nowe Prawo 1966, issue 6, p. 713 ff). There are at least several reasons of this situation. The most important ones include: striving to know the testator's will and guaranteeing the possibly highest degree of probability that the will reflects the bequeather's actual intentions (D. Horton, Georgetown Law Journal 2015, vol. 103, p. 605 ff.; E. Skowrońska-Bocian, 2004, p. 18; M. Załucki, 2010, p. 38 ff). With an aim of exercising these proposals, the Polish legislator has introduced provisions concerning the form of a will (art. 949–958 of the civil code), indicating at the same time in article 958 of the civil code that a will, which infringes these provisions shall not be valid.

Formalising a will does not mean the necessity to mark it with a name such as 'The Will'. What is necessary is an intention to draw it up, awareness of the legal importance of the conducted act and adherence to

the formal regulations provided for by the law. This issue looks different in legal regulations of the *common law*, in which there is a generally binding rule that an appropriate title needs to be included, such as *'Last Will and Testament'*, for the avoidance of doubt as to the actual intention of making a will (G. Boreman Bird, The Hastings Law Journal, 1980–1981, vol. 32, p. 605; E. Skowrońska, 1991, p. 28).

The doctrine assumes that formalising a will exercises many various functions. The most common ones include:

- evidence – it provides reliable evidence confirming the bequeather's actual intentions and circumstances of drawing up the will,
- standardization – it standardizes the procedure of transferring the succession property from the bequeather to the heirs,
- warning – it contributes to the bequeather's sense of seriousness and legal importance of the act conducted *mortis causa*,
- protection – it protects the bequeather from any pressure from the outside and allows them to freely express their will (More broadly: J.H. Langbein, Harvard Law Review 1975, vol. 3, p. 489 ff.; M. Niedośpiał, 1993, p. 29 ff.; F. Błahuta, 1972, p. 1868; M. Pazdan, 2000, p. 797; K. Osajda, 2013, p. 331).

Introducing detailed statutory regulations as regards the form of a will therefore has a precisely defined purpose, which constitutes the grounds for the succession law system.

According to the Polish legislator, there are two types of wills: ordinary and extraordinary ones. An ordinary will might be drawn up at any time freely chosen by the testator. On the other hand, drawing up an extraordinary will depends on occurrence of circumstances provided for by the law and its validity is limited in time (art. 955 of the civil code). Ordinary wills in Poland include: a manuscript of a will, a will in the form of a notary act and an allographic will. Extraordinary wills include: an orally communicated will, a will draw up on a Polish aircraft or ship and a military will.

It is important to note that Napoleon's Civil Code also made a distinction between two groups of wills, that is ordinary ones, that could be drawn up in everyday conditions and extraordinary wills allowed only during the times of war or plague and only to certain specific individuals. Ordinary

wills included: manuscripts of wills, official wills signed by notaries and secret wills also called mystical ones. Ordinary wills could be drawn up only in writing, pursuant to specific formal requirements provided for by the Code (E.J. Barwiński, 1938, p. 19).

Current legal systems govern the issue of forms of a will in various ways. The Italian legislator, for instance, provides only for two ordinary forms of dispositions in case of death, that is: a holographic will and a will signed by a notary. The latter, however, functions in two alternative forms – public and secret – art. 601 of the Italian civil code (More broadly: G.P. Cirillo, V. Cufaro, F. Roselli, 2006, p. 779–780; L. Ferroni, 2006, p. 738). The Dutch legislation, on the other hand, provides for three forms of dispositions in case of death, each of which requires the presence of a notary and two witnesses. They include: 1. an open (public) will draw up by a notary pursuant to the bequeather's declaration of last will, marked with signatures of the notary and witnesses; 2. a holographic will, handwritten by the testator, then deposited with a lawyer with the presence of two witnesses; 3. closed (secret) will that does not require hand-written form or the bequeather's signature, deposited with a notary in the same way as in the case of a holographic will. The presented list shows that drawing up a will pursuant to the Dutch law requires the presence of a public notary. Without the notary's presence a bequeather might only draw up a codicil, in which they indicate the executor for the issues related to the funeral and exercising bequests related to movable property (J. Pazdan, Rejent 2005, issue 3, p. 11; *Information from the Polish embassy in Hague concerning enforcement of wills in the Netherlands and the Dutch provisions concerning statutory inheritance and inheritance according to the will*, http://www.haga.polemb.net/files/wk/info_spadki_pl.pdf).

By way of derogation from analysing individual types of wills, which would go beyond the scope of this study, it is necessary to note that each of the ordinary forms of will has its defects: a manuscript of a will is subject to a high risk of hiding, destruction or falsifying by a third party, a notarial will is a paid disposition, whereas an allographic will frequently turns out to be invalid given the rather common situation, in which it is drawn up without the presence of a degree in law. The given circumstances significantly reduce the freedom of drawing up a will and sometimes even destroy the bequeather's actual intentions. Unfortunately, the opportunities

of remedying such risk are not guaranteed by extraordinary wills that might only be drawn up in precisely defined conditions, sometimes only by precisely defined entities and their legal force is always limited by time (Cf. B. Kordasiewicz, Państwo i Prawo 1975, book 5, p. 163).

It seems legitimate here to ask a question whether the Polish legal solutions concerning the forms of a will are adequate to the requirements of the contemporary world with its technology, digitalisation and virtual reality.

The global specialist literature indicates the need to use the new technologies in the law of succession. Many authors emphasize the need to introduce new forms of a will using electronic communication media to the domestic inheritance forms. The issue is not only to electronically record the last will of a bequeather, but also to be able to confirm their actual intentions.

Nowadays there is a computer in nearly every household. Most of us use smart phones, we send e-mails every day and use a broad range of websites. This entails a well-grounded temptation to use electronic for the purposes of the law of succession (G.W. Beyer, SSRN Electronic Journal 2014, vol. 4, item 1 ff.; M. Załucki, Wrocławskie Studia Sądowe 2014, No. 4, p. 234 ff).

It needs to be emphasized that in some legal systems judicial authorities have already needed to consider correlations between maintaining the form of a will and the need to reflect a bequeather's intentions expressed in an electronic form. As a general rule, such form of a disposition does not comply with the traditional formal requirements provided for in individual legal regulations. In spite of that, effective attempts to maintain such disposition in force have been undertaken in many cases. As regards Anglo-Saxon solutions, the majority of views state that diversity and unpredictability of certain circumstances cannot restrict the bequeather's right to manage their property in case of death (J.P. Hopkins, I.A. Lipin, Iowa Law Review Bulletin 2014, vol. 99, item 61 ff.; B. Kucia, Kwartalnik Prawa Prywatnego 2012, No. 2, p. 425 ff).

3. Electronic will – attempts to solve the problem

The need to change the current solutions regarding the form of a will has also been noticed under the Polish law. According to K. Osajda, it would be legitimate to primarily expand the provisions concerning the

hand-written will by way of supplementing the written form with two eligible forms such as a printed will and an electronic will. The first of these would be drawn up using a typewriter or a computer, then printed and marked with the bequeather's signature. The latter would constitute a reaction to the technological progress in the sense that the declaration of last will would have a virtual form instead of a paper form. An e-will, therefore, would be a file drawn up using a text editor, then recorded on an external carrier and signed using a secure electronic signature (K. Osajda, Rejent 2010, issue 5, p. 61 ff.).

The doctrine also includes a suggestion of supplementing the catalogue of dispositions in case of death with a will draw up at court. Such disposition could be drawn up not only in the presence of a judge, but also with a presence of a court referendary. Such person's task would consist in hearing the bequeather and collecting a declaration of last will from them. The benefits of introducing the presented form of disposition would include a sense of security that the testator's intentions are fully accomplished *post mortem*. Such sense would be a consequence of the fact that the bequeather's will would be declared before a court, in the presence of an entity that applies the law on an everyday basis. Certainly such security would be enhanced by an electronic protocol documenting the bequeather's declaration of will using audio and video registering equipment. An additional benefit related to introducing will at court to the civil code would consist in expanding the opportunity of applying the bequest to the form of *mortis causa* disposition. Since the institution might be used by drawing up a will before a notary, there are no grounded reasons to prevent a testator from the opportunity of declaring its last will before the court (More broadly: M. Rzewuski, Rejent 2013, issue 10, p. 122 ff.).

Another suggestion of modernizing the Polish legislation as regards the form of a will has been brought up by M. Załucki. The author suggests introducing the construct of a video-will to the civil code. He states that the opportunity of communicating last will in such form addressed to the close relatives would make the act of drawing up a will more personal than it is now. As regards the technical issues, it would be enough to register the image and sound (*audio-video*) with appropriate equipment to cause legal effects, if the quality of the record left no doubts as to the identity of the testator and their will. By communicating their last will

orally the bequeather would indicate the person appointed to inheritance or, potentially, make other dispositions (e.g. a bequest, an order or a disinheritance). By accurately presenting the act of preparing a will the described form would allow to clearly identify the bequeather's will (M. Załucki, Roczniki Nauk Prawnych 2012, issue 2, p. 44 ff).

The specialist literature increasingly frequently puts forward suggestions to make law of succession more flexible in order to allow the bodies applying the law to maintain wills in force provided that the *animus testandi* of the bequeather might be proven beyond doubt in spite of any formal irregularities.

The scholars putting forward this doctrine distinguish two methods of solving this problem. One of these suggests introducing a regulation to the civil code indicating the necessary elements of a will (at least, the bequeather's declaration of will recorded using audio-video recording equipment). Additionally, it would be necessary to expand the act with an interpretation rule based on the *substantial compliance* doctrine, which would allow to consider the testator's will in spite of certain formal irregularities in the will (Cf. S. Clowney, Trust & Estate Law Journal 2008, vol. 1, item 62; S.M. Johnson, J. Lindgren, R.H. Sitkoff, 2005, p. 236 ff). The other solution consists in introducing only a general definition of the form of a will and related minimal requirements of the disposition to the legal system. It would consist in the necessity of recording the testator's declaration of last will without indicating the specific form and method of recording it. In such case a statutory requirement of determining whether the given bequeather's representation constitutes a valid *mortis causa* disposition would have to be imposed on the body applying the law. Recording a testator's last will is one of the most important tasks of a regulation in the form of a will (M. Załucki, Państwo i Prawo 2017, z. 3, p. 45).

An interesting solution has been put forward by M. Załucki. The author states that the future code regulation could be based on the following provision: 'the bequeather might draw up their will by expressing their last will by an act that makes it sufficiently clear and the representation is recorded on a carrier that allows to play it and identify the person making the representation'. According to the author, the remaining provisions of the civil code in the chapter related to the form of a will, aside from art. 958 of the civil code and, potentially, regulations concerning witnesses'

capabilities to participate in drawing up the will, should be revoked. In these circumstances a will would constitute a formalised legal act, but this formalism would not refer to a strictly defined form of a will – it would only require recording a declaration of last will in a way that allows to read it. Such regulation would refer to the image of the document adopted in Poland that presents it as communication of a person's will, with its intellectual content including a declaration of will that needs to be recorded in a way that allows for reading it after the date of opening the inheritance, irrespective of the type of carrier, on which it was recorded (Ibid., p. 46.).

Justification of the Author concept is as follows: 'the change in law of succession suggested above goes in line with the tendency to de-formalize the perspective on civil-law relations nowadays. A similar perspective could be taken in the case of a will, as the justification to the draft act on the document form indicates. In this context the content of a will could therefore be disclosed in a freely chosen way (orally, by graphic signs, sound or image) and it would need to be recorded, but also on a freely chosen carrier (paper, electronic data carrier) and using freely chosen means (a pen, a computer or a tablet). This neutrality, on the other hand, would be limited by the evidential function of the document that requires the method of recording the content to allow for storing and playing it. As the initiators of the document form act draft indicate, the information containing a declaration of will needs to be properly recorded on a carrier so as to be played. These two elements combined (that is, reproducible information and a carrier) constitute a document – in this case, a will. The very information, without a carrier, would therefore not constitute a will such as a carrier without the information. Such a suggested form of a will would therefore be a form less formalized than a manuscript or other presently known forms and it would not exclude using the holographic form and other present forms. Authorities applying the law could keep controlling whether a declaration of will submitted by a bequeather aims at producing legal effects with respect to inheritance (*animus testandi*) – this would guarantee the evidential and protective function of the provisions concerning the form. The obligation of recording a declaration of will would, in turn, constitute implementation of the preventive function of the provisions concerning the form. It might, on the other hand, require

discussion, whether such regulation would exercise its standardization function. As a rule, a transfer of property to heirs as a consequence of the bequeather's will would still occur according to the concept of a will as an alternative to legal succession. It would also be necessary to record the testator's last will, which at least indirectly exercises the indicated function' (Ibid., p. 47).

4. Final comments and conclusions

It seems that the forms of last will dispositions provided for by the Polish law do not fully comply with the practical needs, drifting away from the constantly changing social and economic conditions and indisputable technological progress.

It is also easy to imagine a situation, in which a given person is taken captive, kidnapped, lost in a climbing expedition, drifts in a sea as a ship survivor or simply feels unwell as a consequence of a nearing heart attack etc. The effective provisions of the civil code concerning the form of a will or, more broadly, the provisions related to succession seem not to consider this type of problems. For obvious reasons, including no access to a notary, in such cases a manuscript of a will or an orally communicated will would be applied, although the latter – given the necessity of witnesses' participation in the process of preparing a will – does not seem an effective solution of these issues.

Contrary to appearances, the problem might not be solved by the opportunity to draw up a manuscript of a will that the law provides for. It only requires three elements: a manuscript, a date and the bequeather's signature. One might ask: what happens in a situation when the bequeather has lost their capacity to write due to suffered injuries or other circumstances? Would they be deprived of the right to dispose of their property in case of death in this situation?

It is necessary to remember that the chance to determine the future lot of one's property *post mortem* constitutes one of the basic, constitutional and nearly natural rights of a natural person. This is one of the reasons why any attempts to limit one's opportunity of preparing a will such as increasing formal requirements as to the form of will dispositions should be deemed as ungrounded.

Another question arises therefore: does the applicable legal regulation concerning Polish wills correspond with the practical requirements?

I believe a negative answer should be given to such questions. Any methods alternative to a manuscript of a will always require presence of third parties who hear the testator, then draw up a protocol, which means that they register the bequeather's oral declaration of will. I believe that the indicated registration, given the technological progress of the previous fifty years could as well take a different, more modern form, while respecting the principle of freedom of preparing a will and the bequeather's *animus testandi*.

It cannot be ignored that the methods of communication covered by making a declaration of knowledge and will are at present increasingly refined and frequently saturated with electronics. These circumstances were certainly not taken into account by the legislator at the moment of implementing the civil code in 1964. On the other hand, it seems that there are no rational reasons why a bequeather could not draw up a will today using such mechanical (electronic) devices. Their declaration of will in case of death could be recorded using an audio-video recorder. A nearly general access to computers, smart phones, tablets and other devices able of audio and video recording is clearly visible today. Would recording a bequeather's speech using such equipment not provide equally – if not more – reliable proofs confirming the actual *animus testandi* of a bequeather as a protocol handwritten by a third party witnessing oral communication of a will?

Certainly, some might object that such electronic will would be charged with a high risk of destruction – more specifically, destruction of the carrier or the recorded material. However, the same risk occurs in case of any manuscript of a will as well as a protocol of a testator's orally communicated will. Moreover, a witness preparing a traditional will might simply destroy a previously written document, lose it or distort its contents in their own favour, mostly in cases, in which the legislator does not require that the witness reads the contents of the written document.

It is worthwhile to mention here that in such situations a sole oral declaration of the testator's last will should be deemed as a formal will and a recording of such speech would constitute a method of determining its content and, consequently, learning the bequeather actual intentions.

Moreover, in many cases the legal force of the recording could be additionally confirmed by statements of persons who have been present during the testator's declaration *mortis causa* and might confirm its contents, which, in fact, could also be registered using electronic equipment.

5. Summary

Modernization of the current forms of wills would make the socially desired opportunity of easier, quicker and more reliable drawing up wills realistic. Since the current legal-civil turnover is simply saturated with technology, we are living in the times of e-courts, e-protocols, e-signatures etc., I believe there are no contraindications to introducing a new opportunity of drawing up an e-will. Certainly, works related to implementation of a new form of a will, or a new method of registering a will would have to be preceded with a more detailed debate in this regard, in a broader community. I believe that the very issue is significant enough to give it considerably more thought as part of an enhanced discussion with both law theoreticians and practitioners.

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The human right to communicate in the light of the development of IT technology at the turn of the XX and XXI centuries

ABSTRACT

The human right to communicate was noted by the doctrine in the 80s of the twentieth century. Legal bases of its are in the acts of international and national law. Most often, it is guaranteed by the constitutional provisions. The technical and technological progress of IT makes that the communication between the human beings is becoming easier. However, this may be a subject of many abuses in cyberspace by ordinary criminals and organized groups. Hence, the Internet law, implemented by States or the international organizations, provides the opportunity to restrict or to suspend that right for some reasons, for example due to the social security matters.

Keywords: human rights, the need to communicate, cybersecurity, the Internet law, the Internet crimes

1. Introduction

The subject of this study is the human being's right and the need to communicate with others. The social nature a person, of which Aristotle wrote in ancient times, is a base and source of this right and need. According to the philosopher from the city of Stagira, a human being has a natural ability to live in community, especially family or state. The goal or effect of the human social nature is friendship built on the virtues that

man should lead in life[1]. The opposite point of view on human nature was proclaimed by J.J. Rousseau, according to which the primitive man lived in perfect state of happiness and a person was independent and free. Only with time, as a result of the need to preserve the conditions for the survival, the human being changed his nature and formed the family and then the structure of the state [2].

In both quite divergent views on the nature of man, a common element is the statement that society is a natural environment for human life and development, especially for the development of his personality. Hence, the escape is something unreasonable or contrary to the social nature of a person. Nowadays, the exclusion of a man from society may be due to the lack of new communication technologies. This phenomenon is referred to as social exclusion. In order to restore the individual to the society, the European Union is introducing programs to help overcome technical and technological barriers to the fullest possible integration of individuals into society[3].

One aspect of the social nature of person is to satisfy his or her communication needs. This need is independent of whether people communicate verbally or non-verbally, such as using sign language, gestures, or symbols. This communication can take place directly – face to face, or indirectly through the use of various technical or teleinformatic devices such as telephone, fax. Today, the electronic means of communication are most commonly used.

[1] See: I. Andrzejuk, *Arystotelesowska koncepcja społeczności jako ludzi powiązanych przyjaźnią*, pp. 1–11. http://katedra.uksw.edu.pl/katedra.htm [access: 6.03.2017]. Arystoteles, *Dzieła wszystkie*, v.5, *Etyka nikomachejska*, Ksiega IX, 1169b, p. 272, Warsaw 1996, translation D. Gromska.

[2] See: M. Baranowska, Jana Jakuba Rousseau refleksja o naturze człowieka p. 69. http://www.repozytorium.uni.wroc.pl/Content/66121/04_Marta_Baranowska.pdf [access: 16.03.2017].

[3] The Community Initiative EQUAL is one of the European Union program focused on combat with the social exclusion. See: D. Łażewska, *Wykluczenie społeczne a rozwój osoby ludzkiej. Aspekty filozoficzno-pedagogiczne*, Journal of Modern Science 3/18/2013, pp. 29–47. The exile –*exilium* was one of the most severe punishments in Roman law. See:. G. Kelly, *History of exile in the Roman Republic*, Cambridge 2006; M. Jońca, *Parricidium w prawie rzymskim*, Lublin 2008, pp. 277 and the following. In the Catholic Church, the excommunication (can. 1364 §1) is the analogous panishment, that is the exclusion from the community of believers and members of the community. See: J. Syryjczyk, *Sankcje w Kościele,* Warszawa 2008. Apart of the Canon Law, this kind of punishment is not used today and it is even forbidden by international law.

The context of human right to communicate was doctrinally built in the late second half of the twentieth century and it is undoubtedly linked to the development of IT techniques, especially of the Internet and the social media. The interpersonal communication has become a global issue and it is perceived as a benefit, especially in Western civilization. In the doctrine, the right to communicate has been defined already in the early 1980's. D. Fisher and S.H. Leroy wrote about the right of communicate as about a new human right[4].

The subject of the study is to present the content of human rights to communicate through the prism of analysis of normative acts, case law and doctrine. The research hypothesis is to assume that this law is not intrinsic and absolute, and therefore it may have some limitations. Hence, this research will show the limits in exercising this right and the unlawful practices used by uniformed and secret services, or the unlawful practices by some states such as North Korea or China.

In order to interpret national and European law and in order to analyze the case law and doctrine, the dogmatic-legal method will be used in this work.

2. Scope of the right to communicate

In doctrine, among others. C. Hamelink, it is assumed that the right to communicate is not an intrinsic right. It is a component of other human rights. It should therefore be considered in the conjunction and relation with other rights, especially with the right to personal freedom. The duty of the state to guarantee to every citizen the right to freedom also includes the obligation to respect the right to communicate with others[5].

As C. Hamelink noted, the right to communicate is not just a process by which an individual has the ability to share information with others or with authorities. This right includes, in particular, the possibility of active (right to publish) and passive access (the right to know the content published in

[4] D. Fisher, S.H. Leroy (ed.), *The right to communicate: A new human right*. Boole Press 1983.

[5] See:. C. Hamelink, *Statement on the Right to Communicate by Article 19 Global Campaign for Free Expression,* London February 2003, p. 2 Website: https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf [access: 1.03.2017].

national and international publications) of individual to media, the right to create and publish cultural works (material and non-material), the right to use of any language, the right to participate in public decision-making processes (participation in a referendum), the right of access to information – including the public information, the right to privacy, including the right to anonymously publicize their views or opinions[6].

The right to communicate is an essential element of the content of the right to privacy. It is enough if one of the parties of communication wants to conceal the content of this communication. As such, it is subject to criminal law protection. According to the article 267, § 3 of the Criminal Code, the protection of speeches is provided to participants in conversations, if at least implicitly, a confidential nature was given, without regard to the intentions of such statements. The violation of this right may occur by disclosing the content of the conversation by any of the participants of the conversation, by a third party by those who has overheard the conversation or illegally recorded the content by means of a wiretap. In the Supreme Court's Decision of 27th April 2016, signature III KK 265/15, is stated that the object of protection of art. 267 § 3 of the CC is *the secret of communication and the related right to privacy, guaranteed by the article 49 of the Constitution of the Republic of Poland, the article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the article 17 of the International Covenant on Civil and Political Rights* (Legalis).

3. The right to communicate and the new technologies

Currently, the human right to communicate is very closely linked to technical means and new technologies of social life organization. The direct communication, *face to face*, which for millennia has been the primary form of human communication, is being replaced today by new techniques and technologies of social life organization on a global scale. Undoubtedly, the Internet together with social communicators

[6] Ibidem.

like Facebook, Skype, Gadu-Gadu, Tlen (O_2), Pidgin and many others are mainly the new techniques or instruments for communicating with people. It is also important to mention forums, blogs, information portals, which are also instruments to communicate. The advantage of this communication is the practical ability to communicate without barriers and without obligations and most often without fees. Hence, this communication is not only done for private use but also for professional purposes, often between public offices. The communication can be in the form of text, voice or video, depending on the will of the communicators.

New technologies also change the shape of social relationships and their pace. They are becoming less and less personal contacts, which are replaced by contacts by means of the Internet. At the same time, the traditional family ties are weakened, especially marital and parental ones, for which the current basis, also statutory, was the physical proximity of another person. On the other hand, with the increasing migration of people, such means of communication are an opportunity to maintain these contacts. Perhaps with time, there will be the change in the content of the article 113, § 2 of the Act of 25th February 1964 – the Family and Guardianship Code[7], which now states: *Contacts with a child include, in particular, staying with the child (visits, meetings, taking a child out of his or her permanent residence) and direct communication, maintaining correspondence, using other means of distance communication, including electronic means of communication*[8]. The statutory obligation of physical contact between the parent and the child can be further weakened and parental responsibility can be exercised through, for example, social communicators.

New IT technologies used to communicate between people also influence the shape of interpersonal friendship. Increasingly, they do not occur any longer during family or friendly gatherings, but just in the network. The people are less and less united by a common history or experience. In the network, people choose friends according to completely different criteria like in the past, such as: profession, common interests, political views, hobbies. The nature of assemblies or social integration is also changed. The political demonstrations of 1956, 1968, 1970, 1976 or 1980, as well

[7] Consolidated text: Dz.U. z 2015 r. poz. 2082 (Journal of Law, 2015, pos. 2082).

[8] Comment to art. 113 see: K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*. edition. 5, Warsaw 2016. Legalis.

as meetings with Pope John Paul II or great charity questions remain in Poles' memory. Thanks to the Internet, everything is changed. It is enough to mention the 2008 Barack Obama presidential election, which has won thanks to the consolidation of its supporters through a marketing campaign skillfully conducted on the Internet. In this way, money was also collected to finance the election campaign[9]. Another example is the collection of money on the car – fiat seicento of the perpetrator of Prime Minister B. Szydlo's accident, in Oswiecim. In just two days using the Internet, more than 80 thousand zlotys was collected[10]. In this way, many charitable donations are being carried out today. We can also imagine the situation that in the near future the political decision will be made with the use of Internet.

One of the problems with the right to communicate is when there are people who are not able to speak and who face real obstacles. The legislator, in the article 4, paragraph 1 of the Act of 19th August 2011 on sign language and other means of communication (hereinafter referred to as: jmskU – Journal of Laws No. 209, item 1243), decided that *the entitled person* (own note: the deaf person) *has the right to freely use the form of communication of his or her choice*. If the person does not have full legal capacity, he or she has the right to co-decide with the parents or legal guardians about the form of communication (paragraph 2). The people with dysfunction in hearing and speaking also have the right to support from public administrations to facilitate their communication. Therefore, the article 9, paragraph 1 of jmskU states that the public administration bodies are obliged to provide communication support services to such people (paragraphs 1 and 2). In addition, the public body should publish the information about these services so that all interested parties can benefit from it (paragraph 3). This information may be published in the Internet, in the Public Information Bulletin or on the local or central authority's website (paragraphs 3 and 4). In the article 10 of jmskU, the legislator also provided to those people the use of sign language interpreter or the translator the guide on public expense. Finally, in the article 18 of jmskU, the legislators

[9] See: T. Frontczak, *Barack Obama już wygrał w internecie! Strategia marketingu internetowego Obamy*, https://sprawnymarketing.pl/barack-obama-juz-wygral-w-internecie-strategia-marketingu-internetowego-obamy/ [access: 5.03.2017].

[10] See: *Maluch dla Hanksa*, https://silesion.pl/zbiorka-na-seicento-zebrali-70-tysiecy-w-dwa-dni-15-02-2017 [access: 5.04.2017].

provided financial support to people with these dysfunctions. Often, those people have very limited financial resources, and without public support those people will find it hard to take advantage of their right to communicate with others and with the environment.

4. The legal framework for human rights to communicate

The oldest legal basis for human rights to communicate is the article 19 of the Universal Declaration of Human Rights of 1948, in which we can read: *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontier*s. There is no "right to communicate" in the above-mentioned text, but it is possible to point to the elements that directly relate to that right. The content creators of article 19 considered that the constitutive element of this law is the freedom of every human being to express his or her opinion, manifested by the ability to not only have the opinion or to collect the information but, above all, by proclaiming it using all means, also technical means, irrespective of political or economic boundaries. Hence, in the content of article 19, the right of every person to global communication. can also be seen.

However, the most important in the content of article 19 of the Declaration is the limitation or even exclusion of the possibility of limiting this right by the state, whether through legal regulations or practical actions, for example: by creating a single, state-controlled communication center. [11]

The analogous regulation is found in the article 10, paragraph 1 of the European Convention on Human Rights of 1950 and in the article 19, paragraph 2 of the International Covenant on Civil and Political Rights1996[12]. Also in the regional conventions there is no direct reference to this law, for example – the article 13, paragraphs1 and 2 of the American Convention on Human Rights of 1969[13].

[11] See: C. Hamelink, *Statement on the Right to Communicate by Article 19 Global Campaign for Free Expression,* London February 2003, p. 3. web site: https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf [access: 1.03.2017].

[12] Journal of Law, 1997, no. 38, pos. 167 (Dz. U. z 1977 r. nr 38, poz. 167).

[13] Text of Convention see: http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm [access: 28.02.2017].

The development of technology that facilitated interpersonal communication after the Second World War and the exercise of important human rights components for communication had undoubtedly affected the Conciliar Fathers in the early 1960s. In the decree of the Second Vatican Council of December 4, 1963 on the social media of social communication (*Decretum de instrumentis communicationis socialis – Inter mirifica*), in number 5, there is a clear reference to this right. Namely, it was stated that Everyone has the right to collect and proclaim news. According to the Council Fathers, the information has become extremely useful because it gives the ability of each person to read information at their own discretion, regardless of the source of that information[14].

Since then, the technical and technological progress has gone much further, hence there is a need for further discussion on this right, especially its content, its application and respect by the state authorities.

For the first time the phrase "right to communicate" was used *expressis verbis* in the article 7 of the Charter of Fundamental Rights of 2000 (hereafter: CFR): *Everyone has the right to respect for his or her private and family life, home and communications.* Prima facie of the formulation of such a legal provision follows a clear change in the previously established content of the right to communicate. In this optics, it is more closely related to the right to privacy not only personal privacy, but also family and home privacy rather than to the right to personal freedom. It seems, however, that such a restrictive interpretation of the article 7 of the CFR is wrong because the right to privacy includes primarily the right to personal freedom. Within this freedom lies the right of the individual to decide on the will to communicate, the choice of means of communication and the interlocutors, and to disclose information about himself only to those he or she deems appropriate. According to J. Sobczak, this right prohibits the interference of public factors into the private life of individuals. An individual has the right to participate also in mass communications. The communication cannot be restricted to

[14] Text of the Decree see: *Sobór Watykański Drugi. Konstytucje, dekrety, deklaracje*. Paris 1967, pp. 63–75. (Polish version) or http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19631204_inter-mirifica_en.html – English version [access: 28.02.2017]

correspondence only[15]. The author further points out that the right to communicate includes a guarantee of confidentiality. This means that no public authority or private person can interfere with the content of the communication. Its integrity both de iure as well as de facto must be preserved. It is therefore not permissible to censor, to eavesdrop, to take over, to hold, to record, or to publicize the communication process, except the situation and cases describe in legal regulations. This understanding of the right to communicate also arises from the article 17 of the International Covenant on Civil and Political Rights of 1966[16].

In the Constitution of the Republic of Poland of 1997, the right to communicate is expressly stated in the article 49, in which the legislator decides that *The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute*. This provision is quite rich in content and it is rather different interpretation of the right to communicate than it does with respect to international law. B. Banaszak points out that the author of article 49 of the Polish Constitution has indicated that communication is a manifestation of freedom in a singular dimension. As such, it is protected. No one can be forced to participate in the process of communication – one can only be invited. Involuntary invitations to communications are treated as violations of constitutionally protected freedoms and rights [17]. According to M. Wild, the right to communicate is a constitutional value distinct from the freedom to express one's views or to acquire and disseminate information as referred to in the article 54 of the Constitution of the Republic of Poland[18].

In practice, the fullest possible realization of the right to communicate depends on two factors. The first is the legal arrangements for the organization and functioning of uniformed and non-uniform services. These are the basis on how much citizens can move in cyberspace or how to use conventional means of communication. The second factor affecting

[15] See: J. Sobczak: A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz*. Warsaw 2013, Legalis. See also: Goban-Klas, *Komunikowanie masowe. Zarys problematyki socjologicznej*, Kraków 1978, p. 19.

[16] Ibidem.

[17] See: B. Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz,* Warsaw 2012, pp. 304–305.

[18] See: M. Wild: M. Safjan, L. Bosek (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warsaw 2016. Legalis.

the quality and level of human communication is the economic resources of the state, which will allow them to build the appropriate technical infrastructure that is the basis for communication. However, it should be remembered that there is no target or optimal communication model. All ideas in this regard are derived from the experience and legal and economic capabilities of the state and the individual, and above all from the level of technical and technological development.

5. Restrictions on the right to communicate

New ways of communicating can be and are used by organized crime groups, terrorist organizations, hackers, or individual users of cyberspace against another person. In practice, it is enough to point out the use of the Internet for criminal purposes, among others: by pedophiles, dishonest contractors, organized crime, or by terrorists such as Al-ka'ida or the self-proclaimed Islamic state – ISIS to recruit new followers or willing to carry out terrorist attacks.

The increasingly widespread possibility of global communication is becoming increasingly difficult to control by state authorities or international organizations, such as the European Union. In some countries, efforts are being made to limit or inhibit the development of this communication. North Korea, which has built its own Internet or we should actually say the Intranet, with only 28 domains across the country can be a good example of such activities[19]. In turn, China censors the content posted on the Internet[20].

However, it still remains an open issue the answer to question on how much State control over the complex process of communicating with people and institutions in global cyberspace is permissible. From a human-rights perspective, the human right to communicate is not an absolute right or fundamental law, so is the right to life. Hence, based on legal regulation (Act), this right can be restricted in some way and even suspended.

According to J. Sobczak, the content of article 7 and the article 8, paragraph 1 of the European Convention on Human Rights allows the possibility of

[19] See: K. Kopańko, *Tak wygląda Internet w Korei Północnej. Mają tylko 28 domen*: http://www.spidersweb.pl/2016/09/korea-polnocna-internet.html [access: 15.03.2017].

[20] See: P. Borkowski, *Koncepcja cyberbezpieczeństwa w ujęciu Chińskiej Republiki Ludowej – wybrane aspekty*, Przegląd Bezpieczeństwa Wewnętrznego 13.7 (2015), pp. 49–59.

controlling correspondence in certain situations. However, the goals of legislators must be legitimate. In fact, the jurisprudence of the European Court of Human Rights states that democratic societies are very often threatened with sophisticated forms of espionage and terrorism and often of international character. This forces the states to undergo a secret investigation of suspected of such activity[21]. And further, J. Sobczak writes that *the public authorities enjoy some freedom in determining the nature and use of certain means, but that freedom is not unlimited* (judgment of 06.09.1978, Klass and others vs. Germany, A28, the report of European Commission on Human Rights of 09.03.1977, Complaint No. 5029/71; M.A. Nowicki, Europejski Trybunał Praw Człowieka. Orzecznictwo, vol. II, pp. 812–818)[22].

It is important to look for an answer to the question on the ability to control communication in the Internet, due to the fact of potential abuse. It is favored by the rather poorly developed legal science in this regard, and thus poorly developed the legal regulations. As it was noted by P. Wojtunik, in some countries such regulations do not exist at all[23]. The Internet law, especially the rules governing the movement in the cyberspace and the responsibility for all the activities carried out there, are just evolving, so they are *in statu nascendi*. Undoubtedly the United States has currently the most well-developed laws in this area.

The broadly-defined human right to communicate can therefore conflict with certain values and consequently, with human rights, including such rights as the right to individual and collective security or the right to good name. The organic right to communicate can be one of the tools to restore a balance between these values or rights.

Restricting the right to communicate may result from legal provisions, generally from the act. Such a situation is usually unique. One such case is the issue of people with mental disorders that endanger the lives, health or sexual freedoms of others. In the article 23, paragraph 2 of the Act of 22nd November 2013 on the treatment of persons with mental disorders posing a threat to the life, health or sexual freedom of others (Journal of Laws of 2014, item 24, as amended – hereinafter referred to as PostZabPsychU),

[21] J. Sobczak, op. cit.

[22] J. Sobczak, op. cit.

[23] See: P. Wojtunik, *Strategie i cele wykorzystywania mediów przez organizacje terrorystyczne*, https://www.bbn.gov.pl/download/1/1967/zeszyt9wojtunik.pdf [access: 5.03.2017].

legislator decided that in the case of a person with a mental disorder that threatens the life, health or sexual freedom of another person, the preventive supervision may be replaced with the operational control. The manner of setting this control raises doubts of the Ombudsman, who asked the Constitutional Tribunal to check the constitutionality of the above-mentioned legislation. He stated that this measure was disproportionately applied and unduly restricted the right to protection of private life and the freedom of communication and the right to the protection of the confidentiality of such communications (Legalis).

In its judgment of 23rd November 2016, the Constitutional Tribunal decided that there is no doubt that the challenged provision of the Act of 2013 significantly interferes with the human sphere of freedom, and in particular through the non-custodial measures (preventive supervision) and the isolation means (placement at the Center) – may constitute a legal basis for the limitation or deprivation of personal liberty, as well as the sphere of its privacy or the freedom of communication and the right to the protection of the secret of communication. The Constitutional Tribunal has ruled that this law does not violate the right to privacy or freedom of communication (Legalis).

Another area where there may be a need to control or restrict communication is the hate in the Internet. With the use of short commentaries being the part of hate speech, on various portals, the public figures belonging to politics, arts or science life are often defamed. Also, very often the wave of hate has the micro-local scale. The goal is to discredit a particular person in a very narrow environment. The same effect is achieved by creating an offensive web page. The hate as a negative social phenomenon is recognized as the acts of cyberbullying or psychological harassment[24]. This is such type of hate speech, where the attacked person is usually helpless. The way of defense is very long and costly. It requires the protection of personal rights in the court based on the article 23 of the Civil Code or the article 212 of the Criminal Code, and this road may last for years.

[24] Zob. I. Jakubowska-Branicka, *Hate Narratives. Language as a Tool of Intolerance,* Frankfurt am Main 2016, pp. 25 and following.

6. Conclusions

In the conclusion of the work, it should be stated that the technical and technological development in the IT field is a great gift for humanity. People have received new tools that allow them to communicate remotely (long distance communication). As a result, the human right to communicate has grown, the right that is derived from human's social nature. Thanks to this progress, the numerous barriers of interpersonal communication have been overcome, also in the case of the deaf or the blind people.

One cannot fail to notice the changes and the dangers that are made by such a wide range of communication possibilities. The relationship between people, also in the family, is changing. The most important thing, however, is that the increased capacity for communication has created an opportunity simultaneously for all kinds of crime. For this reason, it is necessary to introduce some legal regulations limiting or suspending the use of new technologies and thus the limits in communication. Hence, the legal instruments for the functioning of cyberspace have been developed for a long time. However, it is useful to repeat after the Court of Appeal in Warsaw: the electronic network serving billions of users worldwide is not and will never be regulated and controlled in the same way (Judgment of the Appeal Court in Warsaw, I Civil Department, 1st October, 2015, I ACa 142/15).

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Human rights in relation to LGBTI people in the light of the modern public international law

ABSTRACT

Subject of research: The purpose of scientific research is to analyze human rights issues that affect LGBTI people. The jurisprudence of the European Court of Human Rights and the Amnesty International reports, which largely determines the general trend of recommendations for states that should introduce anti-discriminatory regulations and take legislative action to harmonize and introduce legislation, issues of rights for LGBTI people. LGBTI people insist on not discriminating against their sexual orientation in every sphere of national life, just at the national level. In some cases, the European Convention for the Protection of Human Rights and Fundamental Freedoms has proved very effective in the case-law of the Commission on Human Rights and the European Court of Human Rights in Strasbourg, and has had an impact on the subsequent revision of national legislation. We now have to think that we are just one step away from changing the case line and setting common European standards on sexual orientation. Undoubtedly, the topic discussed will be problematic for a long time. The reason for this is the cultural differences that occur in European countries, as well as the fact that issues related to family and marriages belong to the exclusive competence of the states.

Purpose of research: The jurisprudence of international bodies dealing with the protection of human rights affects the shape of the legal regulations of countries under the jurisdiction of these authorities (international courts or tribunals).

Amnesty International reports contribute to increasing awareness of human rights violations, aiming at enhancing the respect for human rights in the monitored countries.
The development of the fourth generation of human rights is the goal of ensuring non-discrimination against sexual minorities in relation to those for heterosexuals.
Methods: Analysis of legal acts and scientific achievements in the field of human rights in public international law

Keywords: human rights, right to sexuality, public international law

1. Introduction

The purpose of scientific research is to analyze human rights issues that affect LGBT people. The jurisprudence of the European Court of Human Rights and the Amnesty International reports, which largely determine the general trend of recommendations for states that should introduce anti-discriminatory regulations and take legislative action to harmonize and introduce legislation, issues of rights for LGBTI people. LGBTIs insist on not discriminating against their sexual orientation in every sphere of life in the country, precisely at national level. In some cases, the European Convention for the Protection of Human Rights and Fundamental Freedoms (of 4 November 1950, Journal of Laws (93) 61/284) has proved very effective in the case-law of the Commission on Human Rights and the European Court of Human Rights in Strasbourg, and has had an impact on the subsequent revision of national legislation. We now have to think that we are just one step away from changing the case line and setting common European standards on sexual orientation. Undoubtedly, the topic discussed will be problematic for a long time. The reason for this is the cultural differences that occur in European countries, as well as the fact that issues relating to family and marriages are the exclusive competence of the states.

The canon of sexual and reproductive rights in a specific, refers to the human rights of people of different sexual orientation, including lesbians, gays, bisexuals, transsexuals and intersexuals (LGBTIs), and the protection of these rights, even though they equally apply to heterosexuality. The right to sexuality and freedom from discrimination based on sexual orientation

is based on the universality of human rights and the inalienable nature of the rights of every person by virtue of being human.

The World Association for Sexual Health (organization information was taken from the official website of the organization: http://www.worldsexology.org, access date: 15 April 2017) recognizes that people with different sexual orientation, gender, gender identity and body language diversity require protection of human rights, also all forms of violence, discrimination, exclusion and stigmatization constitute a violation of human rights and affect the well-being of these persons, their families or communities. Interventions in clinical sexology are designed to promote, maintain and restore sexual health. The World Association for Sexual Health bases its mission primarily on promoting sexuality. It is a global organization that engages in professional support for the promotion, promotion and, above all, the development of sexology, with a strong emphasis on the development of sexual rights guaranteed to all (*erga omnes*).

2. Selected case law of the European Court of Human Rights

Discussing selected case law of the European Court of Human Rights[1] should begin with the indication of the Case of Goodwin v. UK which was a breakthrough judgment because the previous point of view of this Court has changed (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 May 2017). In this judgment for the first time from 1986[2] the Court determined that ensuring the rights to transsexual persons belongs to the obligations of the states (§ 86-88 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95). 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 conclusion, the ECHR has referred to the meaning and interpretation of the Convention in a way that enables practical and up-to-date practice of its application, and covers this issue with its protection, highlighting the need for its dynamic interpretation aimed at development (wider: W. Burek, 2007, pp. 114-128, M. A. Nowicki, 2013, p. 701).

Presenting other problematic issues concerning LGBTI people, you cannot get past the matter of the same-sex marriage. One of the most commonly cited case is Schalk and Kopf v. Austria (Case of Schalk and Kopf v. Austria, Judgment, Strasbourg 24 June 2010, application no. 30141/04). In this judgment European Court of Human Rights was extremely cautious in his judgment. The applicants stated that Art. 12 of European Convention for the Protection of Human Rights and Fundamental Freedoms (of 4 November 1950, Journal of Laws (93) 61/284) should not be interpreted only in such a way that marriage can be contracted exclusively by persons of the opposite sex. The applicants pointed out that both women and men are entitled to this right. In this regard the Court, however, took the view that Art. 12 of the Convention must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms used in it in their context and in the light of its object and purpose. In addition, one needs to refer to the historical context in which the Convention was adopted, in 1950 marriage was understood in the traditional sense that it is a union between partners of different sex. The favourable reference to the applicants' position could lead to a situation in which every different definition of marriage under domestic law constitutes a violation of Art. 12 of the Convention (Case of Schalk and Kopf v. Austria, Judgment, Strasbourg 24 June 2010, application no. 30141/04, § 55). In conclusion it should be noted that this right does not belong to non-derogable rights, however, none of the aforementioned

documents demonstrate specific restrictions in exercising this right. These restrictions, or rather competences in terms of regulating this right, lie with the states. The rationale for the above construction is the fact that that family is the basic social unit.

One of the latest breakthroughs judgments was the Case of Taddeucci and McCall v. Italy (Case of Taddeucci and McCall v. Italy, Judgment Strasbourg 30 June 2016, application no. 51362/09) which is new in the case law of the European Court of Human Rights on equal treatment of sexual couples. For the first time, the Court found a breach of the prohibition of discrimination on grounds of sexual orientation (Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 8 of the Convention), where it is stable same-sex partners do not enjoy the same rights as different-sex spouses, they take into account the fact that same-sex couples do not have access to marriage in accordance with the relevant national law. It is worth mentioning here the arguments of the Court, pointing to a new approach to the problem: *The Court reiterates that sexual orientation is a concept covered by Article 14. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, "particularly convincing and weighty reasons"*[3]*, particularly where rights falling within the scope of Article 8 are concerned. Differences based solely on considerations of sexual orientation are unacceptable under the Convention* (Case of Taddeucci and McCall v. Italy, Judgment, Strasbourg 30 June 2016, application no. 51362/09, § 89). The Court therefore concluded that, in deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, Italy had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Conevntion.

Emphasis on full consent and acceptance of the argument used in the judgment was concurring opinion, in which two judges (Judge Spano, joined by Judge Bianku), in a very concise manner, drew the substance of Article 8 of the Convention: *the fundamental principle of human dignity, which is one of the cornerstones of Article 8 of the Convention, guarantees to each and every individual the right to found a family with whomever they choose, irrespective of their sexual identity or sexual orientation.*

Case of Oliari and others v. Italy surely represents a cutting-edge judgment in the ECtHR case-law on rights of sexual minorities, as it recognizes a positive obligation upon the States to implement a general legal framework regulating same-sex relationships, regardless of the timing when such institution should be enacted or if civil unions already exist for different-sex couples. In so doing, *Oliari* moves forward with the line of reasoning previously explained in *Shalk and Kopf v. Austria* and *Vallianatos and others v. Greece* respectively (*Oliari and Others v. Italy: a stepping stone towards full legal recognition of same-sex relationships in Europe*, 16 September 2015**,** written by Giuseppe Zago, Researcher of Comparative Sexual Orientation Law, Leiden University**,** access date: 28 April 2017)**.**

The Court emphasizes its earlier case-law on Art. The 8th Convention pointed out that, although the primary objective of Art. 8 is to protect individuals from arbitrary interference by public authorities, and it may impose certain positive obligations on the State to ensure effective enforcement of rights protected under the law, which may include measures to ensure respect for private or family life, even in the sphere of interpersonal relations between together (Case of Oliari and Others vs. Italy, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 159). *The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance* (Case of Oliari and Others vs. Italy, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 160).

The Court later referred to the margin of appreciation of the state, generalizing the scope of this margin. After all, how can the State benefit from it? This is what the Court has attempted to establish in order to ensure that states nevertheless perceive the problems of the individual more broadly and try to balance the interests of individuals and of the entire state community. *In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted*[5]*. Where, however, there is no consensus within the*

member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider[6]*. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights*[7] (Case of Oliari and Others vs. Italy, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 162).

To summarize the cited case law of the European Court of Human Rights, it should be emphasized that its argumentation on discrimination against persons with different sexual orientation: for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised". Where sexual orientation is in issue, there is a need for particularly convincing and eighty reasons to justify a difference in treatment regarding rights falling within Article 8 (Case of E.B. v. France, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 91), and that the differences based on sexual orientation require particularly convincing and weighty reasons" by way of justification. Where a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (Case of Vallianatos and Others v. Greece, Judgment Strasbourg 7 November 2013, applications no. 29381/09 and 32684/09, § 77).

In conclusion judgments of the European Court of Human Rights provides some groundbreaking approach in the context of LGBTI people, however, because of the margin of appreciation granted to States, they do not give full satisfaction in protecting those individuals to the extent that they claim it.

3. Respect for the rights of LGBTI people on the basis of the Reports Amnesty International

Monitoring of respect for human rights is extremely important in given the image of human rights in almost whole world. Monitoring can be carried out by a variety of entities, including non-governmental organizations. The

definition of monitoring was provided by the University of Minnesota, indicating that *"Monitoring" is a broad term describing the active collection, verification, and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with Government authorities to obtain information and to pursue remedies, and other immediate follow-up. The term includes evaluative activities at the UN headquarters or operation's central office as well as first hand fact-gathering and other work in the field. In addition, monitoring has a temporal quality in that it generally takes place over a protracted period of time* (University of Minnesota, *Training Manual on Human Rights Monitoring,* point 27, see more about monitoring: Nowicki M., Fialova Z., Warszawa 2000; H. Kasprzak, J. Kopczuk, Warszawa 2009, pp. 576-592).

Thanks to the human rights monitoring conducted by Amnesty International, we can see what state steps are taken to ensure the rights of LGBTI people, or what violations are still committed by individual states. However, as we know, the reports cover only about 160 countries out of all, but still the reports give us an idea of what is going on in the world. The information presented in the report is divided into regions of the world and then described in each country.

Amnesty International's actions are designed to lead - without violence – to improving respect for human rights, the elimination of discrimination, and systemic changes in the functioning of state institutions.

Pointing out only the outline of the issues presented in the latest report, it is worth mentioning that the overall assessment of the rights of lesbian, gay, bisexual, transgender and intersex people is taking a breakthrough and change, but they do not progress as The assumption of the fourth generation of human rights could indicate. The report has shown many examples, specific violations to be condemned.

By dividing only the continents, as the most important information gathered in Europe, it can be stated that there was a progress in the rights of lesbians, gays, bisexuals, transgenders and intersex (LGBTI) people. For example in Report 2016/2017 (Amnesty International Report 2016/2017 The State of the World's Human Rights, pp. 16-55) Amnesty International pointed out that France adopted a new law scrapping

medical requirements for legal gender recognition and Norway granted the right on the basis of selfidentification, this non-governmental organizations notice similar moves were under way in Greece and Denmark. Going further investigated that a number of countries moved to respect the rights of same-sex couples and second-parent adoptions, for example Italy and Slovenia adopted legislation recognizing same-sex partnerships. At the opposite end of the spectrum, consensual same-sex acts remained criminal offences in Uzbekistan and Turkmenistan. In Kyrgyzstan, draft legislation to criminalize "fostering a positive attitude" towards "nontraditional sexual relations" was still under discussion in Parliament, and a constitutional amendment banning same-sex marriage was approved in a referendum in December. There was also push-back from increasingly organized, sometimes state-supported, conservative groups. Amnesty International reported that proposals for referendums to change constitutional definitions of marriage and family to explicitly exclude same-sex couples were blocked by the President in Georgia, but allowed to be put to Parliament by the Constitutional Court in Romania.

In contrast, in the African region, the Report shows that there is still discrimination and marginalization among the weakest social groups: including women, children and lesbian, gay, bisexual, transgender and intersex people. LGBTI people, or those perceived to be so, continued to face abuse or discrimination in countries including Botswana, Cameroon, Kenya, Nigeria, Senegal, Tanzania, Togo and Uganda.

The report further identifies further violations of LGBTI rights by providing the following information: legislative and institutional progress in some countries – such as the legal recognition of same-sex marriage – did not necessarily translate into better protection against violence and discrimination for LGBTI people. Across the Americas, high levels of hate crime, advocacy of hatred and discrimination, as well as murders and persecution of LGBTI activists persisted in countries including Argentina, the Bahamas, the Dominican Republic, El Salvador, Haiti, Honduras, Jamaica, the USA and Venezuela. Amnesty International also stresses those situations that are positive, for example they notice that in the Dominican Republic the electoral process during the year saw several openly LGBTI candidates run for seats to increase their political visibility and participation.

On the other hand, in Asia, the report shows that spontaneous demonstrations of assassination and other attacks have occurred in Bangladesh, where authorities arrested nearly 15,000 people in a delayed response to blog attacks, atheists, foreigners and lesbians, gays, bisexuals, Transgender and intersex (LGBTI). In the context of the above, further developments have been highlighted, such as the fact that the Government has often violated the obligation to pursue accountability, such as arbitrary and secret detention. In particular, the disturbing situation in Sri Lanka has been highlighted, where LGBTIs are facing harassment, discrimination and violence. The high level of impunity persisted against perpetrators of violence against women and girls.

Amnesty International has been criticized by many countries, such as the Democratic Republic of the Congo, the People's Republic of China, Vietnam, and Russia, which attacked Amnesty International mainly for the fact that the reports of this non-governmental international organization are only one-sided reporting. On the other hand, it should be acknowledged that Amnesty International, in monitoring human rights, does not use a methodology that could defend some of its very subjective statements. Moreover the assumption of monitoring, which should be reflected in the reports should be objectivity in presenting the facts set, the information collected, unfortunately in the case of Amnesty International is not so far (see: University of Minnesota, *Training Manual on Human Rights Monitoring;* Nowicki M., Fialova Z., Warszawa 2000; H. Kasprzak, J. Kopczuk, Warszawa 2009, pp. 576-592).

Human rights are evolving over time, and their catalog is expanding in the internal legal systems of states and in international law (it is worth remembering that international law defines a minimum standard of human rights protection for nations of different traditions and cultures; Freedoms are included in these universally recognized catalogs by national law).

New laws and freedoms are being formulated, looking for procedures that more effectively guarantee their adherence, and through various techniques, counter the violation by rulers of officially recognized human rights today. Since the tendency to limit the rights of individuals is an immanent feature of power, including the power of majority, it seems that social action for human rights will always be needed. Today it is evident that the more mature the democracy is, the stronger and more numerous

are the organizations that protect the individualism and uniqueness of the human person against the rulers of the rulers.

4. Summary

Today, the fundamental rights of LGBTI people are still violated, encompassing for example 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, p. 5). For example, we can indicate recent reports from Chechnya Amnesty International on torture and murder of homosexuals (https://amnesty.org.pl/akcje/czeczenia-zatrzymaj-porwania-i-zabojstwa-osob-lgbti).

Different countries have different cultural influences on the legislation they introduce. They may come from deeply rooted traditions, but also, as in the United Kingdom, from the design adopted in the Parliament, where Lords Spiritual is in the House of Lords, with a specific position and legislative influence (see more: Johnson P. and Vanderbeck R. M., 25 April 2017).

International instruments for protection of human rights aim to protect every people and to eliminate any and all forms of discrimination. LGBTI people, whose rights have been violated, are granted protection on the basis of the right to privacy. Rights of LGBTI people, 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 Court.

By examining the rights of LGBTI people, it must be stated that, since the European Court of Human Rights recognizes the protection of private and family life under the Convention for the Protection of Human Rights and Fundamental Freedoms, Member States must therefore provide for a way of guaranteeing their rights under domestic law. Therefore, for many years, there is a need to harmonize the approach to LGBTIs globally because of their different approaches. The solution would be to create a convention that would address the issue comprehensively and at the same

time be universal and universal. As regards the legal nature, the spectrum of emerging issues is enormous and encompasses both civil law and civil, administrative and administrative proceedings, as well as criminal law, or even constitutional principles, and, of course, human rights. Although there are already many solutions in this area, both under national law and under international law, there is still no full acceptance and full regulation by which LGBTIs continue to be exposed to discriminatory acts.

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Endnotes

[1] Wider on the ECHR judicature related to transsexual persons, among others in: K. Osajda, 2009, pp.35-41, W. Burek, 2007, pp. 114-128,

[2] That year was rendered the first judgment 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 of Reese v. UK, Judgment Strasbourg 17 October 1986, application no. 9532/81.

[3] See also Case of X and Others v. Austria, Judgment Strasbourg 19 February 2013, application no. 19010/07, § 99; Case of Smith and Grady v. the United Kingdom, Judgment Strasbourg 27 September 1999 applications no. 33985/96 and 33986/96, § 90; Case of Lustig-Prean and Beckett v. the United Kingdom, Judgment Strasbourg 27 September 1999, applications no. 31417/96 and 32377/96, § 82; Case of L. and V. v. Austria, Judgment Strasbourg 9 January 2003 applications no. 39392/98 and 39829/98, § 45; Case of E.B. v. France, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 91; Case of Karner, Judgment Strasbourg 24 July 2003, application no. 40016/98, § 37 and Case of Vallianatos and Others v. Greece, Judgment Strasbourg 7 November 2013, applications no. 29381/09 and 32684/09, § 77.

[4] See also Case of Salgueiro da Silva Mouta v. Portugal, Judgment Strasbourg 21 December 1999, application no. 33290/96, § 36; Case of E.B. v. France, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 93 and 96 and See also Case of X and Others v. Austria, Judgment Strasbourg 19 February 2013, application no. 19010/07, § 99.

[5] See also Case of Christine Goodwin, Judgment Strasbourg 11 July 2002, application no. 28957/95 § 90; Case of Pretty v. the United Kingdom, Judgment Strasbourg 29 April 2002, application no. 2346/02, § 71. http://hudoc.echr.coe.int/eng?i=001-60448

[6] See also Case of X, Y and Z v. the United Kingdom, Judgment Strasbourg 22 April 1997, application no. 21830/93 § 44; Case of Fretté v. France, Judgment Strasbourg 26 February 2002, application no. 36515/97, § 41; Case of Christine Goodwin, Judgment Strasbourg 11 July 2002, application no. 28957/95 § 85.

[7] See also Case of Fretté v. France, Judgment Strasbourg 26 February 2002, application no. 36515/97 § 42; Case of Odièvre v. France, Judgment Strasbourg, 13 February 2003, application no. 42326/98, §§ 44-49; Case of Evans v. the United Kingdom, Judgment Strasbourg 10 April 2007, application no. 6339/05, § 77.

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A disabled person's human right to fair and equitable medical treatment as an example of an inalienable right

ABSTRACT

To make an analysis and evaluation of the disabled people's perception of their right to fair medical treatment. To obtain answers to the following questions: is the right to fair medical treatment in Poland viewed as non-transferable? Does this law function only in theory or is it put into practice?

The survey was conducted among the disabled with different degrees and types of disabilities. The questionnaire consisted of 45 closed questions and 3 open ones. The research was conducted from autumn 2016 to spring of 2017 in the Environmental Self-help Centres, Support Centres, Protected Accommodation Foundations and Activation Programs, selected hospitals around the voivodship, District Adjudication Teams, Social Security Institution branches, departments of PFRON (with the agreement of all the selected units) and the Institutions of Job Safety.

The research has concluded that the disabled right to fair and equitable medical treatment is frequently violated. This right is not respected by doctors, nurses, and other members of medical personnel, especially in the case of these patients suffering from mental disorders or coupled disabilities. The key factor here is the possibility of easily used patient's insanity argument. In addition, this group of people still lacks adeqite knowledge about their rights, does not know how to react or who to turn to in such situations. And even if one has such awareness, a battle with the "well-tightened" medical staff circle and the "limping" system of the Polish health service is practically a no-win

situation. Especially since this sector seems to be most exposed to corruptive activities.
In Poland, the disabled's right to fair and equitable medical treatment is repeatedly violated. There is a lack of holistic model of diagnosis and medical treatment not only for this social group but also fo all citizens. The research conducted and the NIK's audit have unequivocally demonstrated numerous deficiencies in respecting the basic (and non-transferable) rights of the patients.

Keywords: human rights, equitable medical treatment, hospital, patient, medical treatment

1. Introduction

It would seem that with the dynamic progression of technology, which today's medicine takes full advantage of, (Załuska, Kobrzyńska-Żochowska, Dyduch, Balicki, 2012, pp. 251–257)[1] and the changes in understanding of the world (and each other), people will be able to create a law that is fair to all citizens. Although the term "justice" is (nowadays) understood (what is important) as "giving according to the need," it can be noticed that the use of it in practice already causes a great deal of trouble (Anczewska, Indulska, Raduj, Pałyska, Prot, 2007, pp. 427–434)[2]. (though many say it does not)[3]. Apart from the UN Convention on the Rights of

[1] Modern technology, technology, neurons, medicine, etc.

[2] And above all: NIK, *Przestrzeganie praw pacjenta w lecznictwie psychiatrycznym*, nr ewid. 19/2012/P/11/093/KZD, Information on the results of the audit conducted in 2009–2011.

[3] As an example you can give: *Osoby psychicznie chore w zakładzie zdrowia*, http://www.altea-poznan.pl/files/Osoby_psychicznie_chore_w_zakladzie_zdrowia.pdf (27.05.2017). The most interesting part is: "During psychiatric hospitalization, patients also have the opportunity to participate in programs that restore specific interpersonal and social skills that have been lost as a result of the disease. There are different types of programs aimed at shaping such behaviour as contact, expressing one's own needs, planning activities, controlling emotions, recognizing the first signs of recurrence, etc. There are special therapeutic sessions taking place in the following stages: 1) modeling (model behavior), (2) playing role (replaying this behavior), (3) social reinforcement (provided by group members), and (4) transfer of training (applying learned behaviour to everyday life situations). A private hospital, not a public one is taken into consideration here.

Persons with Disabilities (General Assembly of the World Program for Action for the Disabled. Resolution 37/52 of 3 December 1982)[4] and the Convention on Vocational Rehabilitation and Employment of Persons with Disabilities[5], Poland pays a lot of attention to Art. 32 (pt. 2), art. 67 (item 1), Article 68 (point 3), art. 69 of the Constitution of the Republic of Poland and the Charter of the Rights of Persons with Disabilities[6]. According to these documents, every human being has some *ad hoc* rights, that is to say, stemming from the very fact of "being human"[7] and having the inherent human dignity.

[4] The main point of the program was to equalize the chances of "pulling" the problem of the disabled into "daylight". It was then understood that they could not be "pushed to the margin". They should therefore be dealt with by the social services in the standard activities.

[5] In Poland the Act on vocational and social rehabilitation and the employment of disabled people of 27 August 1997. At present, Polish legislation allows for the existence of three degrees of disability: considerable, moderate and light. They are granted by the County Disability Disability Papers. The degree of recognition is granted to those who are physically impaired, incapable of work or able to work only under sheltered conditions. In addition, it requires constant or prolonged care and assistance from third parties to perform social roles (which is inextricably linked to the inability to live independently, that is, the inability to meet basic life needs alone without the help of others). Moderate has the same reference, but a person needs temporary or partial help from others in social roles. A ligh degree means lowered ability to perform the me work in comparison to the capabilities of a person with full mental and physical fitness in the same position. The condition that this level can be attributed to is visible restriction of the abilities to perform social roles that can be corrected by, for example, orthopedic, ancillary or technical means. Children up to the age of 16 are considered disabled without a descriptive degree.

[6] The 1st August 1997 Charter of the Rights of Persons with Disabilitities includes the right to an idividual, independent and active life, the prohibition of discrimination on disability grounds, and in particular: 1) access to goods and services enabling full participation in social life; 2) access to treatment and medical care, early diagnosis, rehabilitation and therapeutic education as well as health services including the type and severity of disability, including orthopedic supplies, ancillary equipment, rehabilitation equipment; 3) access to comprehensive rehabilitation aimed at social adaptation; 4) psychological, pedagogical and any other assistance enabling the development, acquisition or raising of general and professional qualifications; 5) social security that takes into account the need to incur increased costs resulting from disability as well as the inclusion of these costs in the tax system; 6) living in a environment free from functional barriers.

[7] And there is no need, in this place, to explain the concepts of *man, life, death, limits of humanity or dignity*.

Human rights, as expressed in the Universal Declaration of Human Rights, have, without exception, a universal, inborn, inalienable character (Garlicki, 2011; Nowicki, 2001; Nowicki, 2017; Gmitrowicz, Orzechowska, Talarowska, Florkowski, 2013, pp. 84–90.)[8], and inviolable, natural and indivisible nature. They do not need to be justified (which does not exclude making an in-depth analyfsis of them). The only situations requiring justification are the ones which prove to be exceptions. One of the basic human rights is "the right to such standard of living that will guarantee a healthy life and wellbeing (...), including food, clothing, housing, medical care and necessary social protection" (Universal Declaration of Human Rights, adopted and proclaimed resolution of the UN General Assembly 217 A (III) on 10 December 1948, Art. 25, item 1).

For the purposes of my article, the key rights are therefore the positive ones covering social rights, like health protection (and therefore fair and equitable medical treatment)[9] and social assistance. In that case, some other documents ought to be included here, namely the 12th March 2004 Law on Social Assistance (Journal set 2016 pos. 930, with changes), the 11th September 2015 Public Health Act (Journal set 2015. pos. 1916),

[8] In the article the following understanding of the term "non-transferable" is adopted:the rights entitled to an individual (citizen-human) which can not be given up by any means, for example by a written renunciation. Any cases of renouncing tof hese rights do not matter from the beginning and are not taken into account by any "law enforcement" institutions. Currently there are two opposite concepts of understanding the relation between the citizen and authority. The first one points out to the precedence of power over citizens, and the rights it gives are of "kindness" and "goodness" shown by it. The second concept is based on the social contract: "the people" elect their representatives and are able to do something for the authorities (e.g. pay taxes, be punished for commited offenses or crimes, etc.), and the power "does something for the people" in return, eg it refrains from interfering in some areas of their lives (which is connected to the idea of freedom). The agreement may be equally beneficial for both parties, or one of them will be less favorable to the other. One form of such an agreement is the Constitution. It is worth mentioning that there is only one possibility of self "ridding" of all rights, and it is death, which is the consequence of, eg suicide.

[9] The term "fair and equitable medical treatment" will be used in the following sense: treatment according to an individual case. This treatment will therefore have a material and non-material dimension. In the first case it is all about the means by which diagnosis and treatment can be made, ie diagnostic apparatus. The second one focuses on the knowledge and experience of doctors who are subject to the law while performing various activities.

the 19th August 1994 Law on Mental Health Protection (Journal set 2016 pos. 546, with changes), and the 27th August 2004 Law on Publicly Funded Health Care Services (Journal set 2015 pos. 581, with changes).

The NIK audit on the assessment of clinical hospital operations in the years 2013-2014 (NIK, 25.05.2015, p. 8) has shown that there is a lack of systemic solutions to the functioning of clinical hospitals (they play a vital role in the clinical, didactic and research areas), and the current regulation hinders their activity (some in a very bad economic situation, which threatens their further functioning), and the lack of well-established costs of clinical teaching (obsolescence of fixed assets) is observable. In addition, the obligation imposed on hospitals to treat and monitor the effectiveness of pain control is not properly performed by most health care units (NIK, 29.05.2017).

According to the NIK: "Most hospitals have not been investigated and no rules have been developed to ensure the treatment (...) of pain in all patients suffering from it. Therefore, patients are not provided with adequate access to the treatment of pain, which would be adjusted to the level of its intensity." (NIK, 29.05.2017). There is no comprehensive, coherent and effective health prevention system in Poland, which means that access to health services is insufficient, and some patients are cut off from the possibility of preventive examination (NIK, 11.04.2017). The NIK has vetted 13 clinical hospitals operating in Poland, and many concerns have been raised about the organization of clinical trials, particularly those commissioned by private pharmaceutical companies (NIK, 29.05.2017). Hence, my conclusion is that the right of people with disabilities to fair and equitable medical treatment is violated in many Polish multidisciplinary hospitals. Actually – it concerns most of our country citizens.

In the cases of mentally ill people (who are mostly disabled), attempts to implement an environmental model of psychiatric treatment are made. Its key assumption is to provide treatment in the patient's everyday environment as the main location where treatment should take place. At the same time, the literature points to numerous risks of total exclusion from hospital treatment, e.g. among others, the increased population of those with severe mental disorders whose aggressive behavior can be a serious threat to others (Załuska, Kobrzyńska-Żochowska, Dyduch, Balicki, 2012, p. 252.).

In Poland, however, obsolete methods of treatment and rehabilitation of psychiatric petients are still being used (Pawełczyk, 28.05.2017), because "changes (...) in fact consist in creating more and more specialized training sets that, in their assumption, are intended to compensate for the deficits triggered by the illness in cognitive, emotional or social sense." (Bronkowski, Chotkowska, 2016, p. 14.) These training kits are implemented (albeit dubiously) by public daycare (therapeutic, rehabilitation) units and not by hospital services. Most people with mental illness can not afford private treatment, such as private day care. Most of them do not deal with serious cases, but people with "mild" disorders, like bulimia, anorexia or borderline. The NIK's audit, whose results were publicized on 25th January 2017, concerning the implementation of the National Mental Health Program, clearly indicates that the program ended with a "fiasco":

In addition to the low level of funding, the way in which psychiatric services are organized in our country is the main barrier restricting access to services for patients with mental disorders (...) The failure to fulfill the majority of the program's objectives and tasks has prevented the environmental model dissemination. (NIK, 25.01.2017, p. 14.)

As early as 2012, the NIK pointed to the dangers that could have caused the program's failure, which was reflected in the results of monitoring the patient's compliance with psychiatric treatment. The NIK's evaluation was negative due to the non-compliance with patients' rights while being admitted to psychiatric hospitals without their consent and with the use of direct coercion (NIK, 8.05.2012, p. 5).

The right to fair and equitable medical treatment is a fundamental and therefore inalienable right of every human being. With regard to the disabled, however, it has a special meaning, because this social group's needs for proper diagnosis and the application of appropriate treatment methods are much greater.

Method

The data on the disabled's perception of the right to fair and equitable medical treatment as a non-negotiable right was gathered by means of a self-prepared questionnaire containing 50 questions divided into the following thematic blocks: 1) the disabled's previous

and recent hospital stays experiences, 2) the disabled's subjective perception of those places, and, above all, their positive and negative aspects, 3) the disabled's subjective perception of institutions whose duty is to exercise custody and control over the disabled (ZUS, District Disability Adjudication Teams, Municipal Family Relief Centres, PFRON), 4) the disabled's material, professional and social situation; 5) the disabled's present psychological (emotional) situation, related to the type and level of their disability (how the disabled feel about their disabilities on daily basis and how these disabilities are perceived by others, e.g. by strangers), 6) their life goals, professional preferences, dreams, 7) their knowledge of the rules and regulations concerning people with disabilities, 8) their knowledge and understanding of the terms "disability", "dysfunction", "treatment", "illness", "decent medical treatment", "law", "non-transferable right".

In addition to the closed questions, the following three open questions were also included: what changes in the Polish law (including treatment in clinics, hospitals, reimbursement,refunding of suppertive measures, granting pensions and deciding on the degree of disability) would they suggest themselves? Would they consider "Polish medical treatment" as fair and equal? If not – why? The research was conducted between autumn of 2016 and spring of 2017 in: foundations, associations and other charity organizations for the disabled, selected hospitals within the voivodship, District Disability Adjudication Teams, ZUS units, PFRON branches (with the consent of all selected departments). Persons with a mild, moderate and significant degree of disability were taken into consideration (if direct personal contact was possible, eg with people whose disability was a direct result of their mental illness).

A distinction was made – which is generally adopted while determining the degree of disability and its type – into people physically and mentally disabled. Individuals with coupled disabilities were also included in the survey. Respondents were asked to mark gender, education, the degree and type of their disability in the questionnaire.

Results

During the research, the survey was completed by 750 people filled, 45% of who were male and 55% female (all respondents marked their gender correctly). The structure of education was as follows: higher

education – 22% of respondents, secondary school – 53%, vocational education – 17%, basic primary school education - 8%. The respondents were predominantly well-educated and gender was well-balanced.

Positive responses

Within the closed questions the positive answers usually concerned: 1) doctors and nurses who were kind and positively oriented towards the respondents as disabled people. They were perceived as helpful, well-mannered, always willing to assist, sensitive to the patient's needs, knowledgeable, experienced in medical treatment.

Mentally ill people pointed to their favorite hospital activities, as well as the kindness of psychiatrists and psychologists; 2) access to the institutions that deal with their fate mainly via the Internet, including the possibility of sending e-mails; 3) their at least good professional, material and social situation. People with mild and moderate disabilities pointed to the help of third parties, such as parents, siblings, grandparents, friends and colleagues in a way that does not deprecate this assistance. Their professional situation was linked to their work in a Protective Work Plant or on the "free market" (if they had such a possibility); 4) positive reception of their "otherness" by the society. The respondents with physical and coupled disabilities often poited to the fact of giving up seats to them on buses, letting them jump queues in shops, strangers offering help in carrying their shopping; 5) the respondents referred to their dreams and goals they would like to achieve in a clear and concrete manner, especially those ones related to their health improvement, rehabilitation stays, family holidays, getting employment " to the extent of their capabilities "; 6) the respondents positively rated the law,rules and regulations which give them the opportunity to: a) receive a disability degree which is directly connected to obtaining a special car park card, the possibility to shop more cheaply or to get free public transport tickets, to be employed in the Institutions of Job Safety (the workers receive subsidies from PFRON); b) receive a pension from Social Security (which for many of the respondents equals "survival"); c) get employment thanks to being subsidized (otherwise the employer would not take them to work); 7) The respondents who offered positive feedback on all of the above issues did not suggest their ideas for change in the open questions section; 8) They also expressed an opinion

that "Polish medical treatment" is "fair and equitable" and does not require any (at least radical) changes. However, it is worth noting one thing: in cases when the disabled themselves did not make any negative comments, their caretakers did so.

Negative answers

Respondents were more likely to make negative remarks regarding my undertaken subject of fair and equitable medical treatment and the rights of people with disabilities in this regard. They were also more accurate than positive responses. They were therefore divided into: 1) related to physical illnesses, 2) related to mental illnesses.

2. The specificity of physical disability

The disabled who are affected by physical disabilities most often pointed to the following negative occurrences: 1) too long ambulance waiting periods, physicians' discontent, " indelicate" behaviour of doctors and nurses, terrible quality of meals (which had to be replaced by their own food delivered by family members, friends or other visitors), too strict adherence to visiting hours, unprofessional care (and sometimes lack of it for extended periods of time), deficiency in available hospital beds, inadequacy in hospital admission possibilities and procedures, too much extended Emergency Room waiting periods (for the non-admitted); 2) officials' brusqueness, abruptness lack of understanding, their ironic approach, lack of possibility to self-access some basic information, being continuously sent back to others, not providing financial support or services to those in need, random disability adjudication, ignoring, not reading the patient's file, but making decision "just because" ("well, you never know,his hand might grow back one day"), taking away benefits according to the argument that "you'll manage somehow" or "someday you have to go back to work"; 3) receiving benefits not sufficient enough to be able to afford all the necessary means (eg medicine, funding rehabilitation classes or any medical treatment,in fact, for example in cases of rare diseases); the inability to get any job due to disability, which is conditioned by the negative attitude of many Polish employers; bad experiences connected with motor disability, including being mugged, robbed or beaten;

4) lack of possibilities to achieve goals or make dreams come true due to poverty or privation (as a result of the inability to get employment); their current situation is described as "bad", "very bad" or "average" (with the emphasis on "bad"); they feel perceived as "social parasites" by the society that instead of going to work, they "get sick"; people with disabilities sometimes feel that they have no right to become ill (and in drastic cases even to live); 5) overriding the "consent to surgery" clause (as a result of will statement), which in some cases was signed on an operating table; failure to receive appropriate care and services in local clinics (eg, National Health funded consultation with a physician was to take place long after surgery, ie 1.5 years later), impossibility to perform surgical procedures covered by the NHF as quickly as the situation requires (respondents also indicated opinions expressed by certain doctors, working for the National Health Fund (NFZ), that all necessary tests and surgery itself ought to be paid "from the patient's own pocket"); 6) in most cases the physically disabled know their rights (even in great detail), but because of the different occurrences they are violated, and no steps are taken or specific sanctions applied towards the perpetrators; 7) from the point of view of the disabled "Polish medical care" is dishonourable, their rights are repeatedly violated, the help received from the state does not cover their needs ("starvation-level" benefits); 8) as one example of a possible solution the respondents give, is simply respecting their rights, but also the importance of proper introduction of modern technology into Polish hospitals (which may prevent disability, improve one's quality of life or offer someone a chance to get completely cured).

3. The specificity of mental disability

The mentally disabled have marked a comparable amount of negative responses as the people with physical disabilities. Open questions also included very detailed assessments. Typically, they concerned: 1) the implementation of forced medical treatment (admission to hospital without the patient's consent); excessively rigorous control of all personal belongings, eg, some respondents indicated that they could not carry a phone charger cable ("they may attack other patients"), matches ("they may set the hospital on fore at night"), supplements (which must previously be

consulted with their psychiatrist); issues concerning receiving temporary passes to be able to leave the hospital ward; aggressive behavior amongst patients towards each other (related to hospital overcrowding, putting "serious" and "mild" cases together); some responses revealed detailed information about the types of reactions from hospital staff members when a patient behaves aggressively); lack of privacy (cameras, light switched on in the corridors, other patients walking around, overcrowded rooms); restricted visiting hours, no possibility television watching after 10:00 p.m.); noise (during the day and at night); terrible quality meals ("awful" and "cold"); toilets equipped with transparent panes of glass (which are often used by patients to peek at their mates) and the fact that toilets are co-joined with bathrooms (the respondents indicated that they were walked on by others while showering on numerous occasions); cigarette smoke coming from the smoking room and entering their living quarters was also a bit of an issue mentioned by non-smokers; 2) too few physician visits and meetings with a psychologist; too little psychological support, no interest in the patients' life and fate, inappropriate behaviour on the staff members' part ("malicious", "nasty", "aggressive");

For questions from sections 3), 4), 5), 6) the responses were similar to the ones given the physically disabled. The successive blocks provided me with some discrepancies. People with mental disabilities had much less knowledge of their rights, as well as certain terms (which they were asked to define or explain). The respondents with vocational and basic primary school education top the hierarchy, followed by their secondary school educated peers (having or not having passed their final leaving examination), and finally – people with higher university level education close the list. Good knowledge of one's rights results in informed reactions to their violations, so it concerns this group of people who are aware of specific occurrences and know how to act accordingly.

According to most psychiatric patients, "Polish medical treatment" (in the case of psychiatric care, to be precise) is not designed to cure patients or make them better. What it does serve to do, however, is that it violates their basic human rights. Also, the forms and methods of treatment used are so outdated and old-fashioned that one might assume they were adopted from "the Middle Ages". The respondents clearly point out some possible and simple changes that could easily be implemented.

For example, amonst others: improving the quality and quantity of meals, the way the hospital admissions are conducted, the introduction of twin rooms, total and complete makeover and renovation of the hospitals, the restriction of pathological insidents (eg respondents often point to notorious ward theft of items such as shower washers, cigarettes, lighters or even clothes); raising awareness among doctors and nurses (who lack this level of empathy, and teaching them how things ought to be done), increasing the number of psychiatric appointments, admission to local clinics in emergency cases, facilitating the acquisition of disability degrees and making Social Security Institution (ZUS) benefits more easily accessible.

4. The specificity of coupled disability

In the cases of physical and mental disability co-existence, the respondents' feedback concerned the problems that the mentally ill people encounter individually (because their lives were determined by their mental illness) and the physically disabled experience (in their case the "physical" dysfunction was the key factor that put them into that group).

It was easily noticeable that people with conjugal disabilities point to similar ways how the human right to fair and equitable medical treatment is violated and have expressed similar ideas as well as offered similar suggestions to the two previously mentioned groups. Often, mentally ill people pointed to a number of adequacies of the "only human body" health service. The research has also revealed a reversed trend.

5. Conclusions

By analyzing all respondents' answers, it must be explicitly stated that these negative remarks should be considered the most crucial. The respondents point to such areas of Polish medical care, which undoubtedly require a quick and comprehensive "repair". The positive aspects described by the disabled reveal their second face in the light of the negative opinions. The research has concluded that the right of people with disabilities to fair and equitable medical treatment treatment in Poland is simply ignored. Health care needs to be reformed (not just because of this group of

people), due to the fact that most of the "difficulties" noted are the result of insufficient subsidies from the state. It is also important to seriously consider the existence of such pathological occurrence as the aggression of patients and medical staff members towards each other, drastically low quality of meals in multi-disciplinary hospitals, the suicide rate among the disabled, violations of the rights of persons with disabilities by doctors and officials in local clinics, District and Voivodship Disability Adjudication Departments or Polish Social Security Institution ZUS.

"Disability and suffering are great money-makers" (Żuraw, 2016, p. 41.) because people with disabilities, whose rights to receiving fair and equal medical treatment are repeatedly marginalized (ie violated), start seeking help elsewhere (just like people with no disability degree do as well). They usually go for private medical practices, outpatient clinics and hospitals. Whatever public health care is not able to provide (after all, the right to fair and decent medical treatment is a non-transferable right), is simply done outside of it. Particularly worthy of attention in my research, however, is the practice of signing surgery consent forms on ... operating tables (which is unacceptable), sending patients to private appointments (because "we have used up our limit and there are no vacancies left"), keeping patients for hours in the corridors of emergency rooms (because "I have not had a coffee break yet"), writing prescriptions for medicine pushed by pharmaceutical companies, forced (often aggressive) "admitting" mentally ill patients into closed units.

There is a marked absence of holistic medical care model in Poland, not only for disabled patients but for all citizens. Holistic approach, however, in practice treats a human being as a very complex "whole" in which there are multiple connections between "body" and "psyche". Unfortunatelly, so far, this approach works only "on paper."

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The rights of foreigners in Polish Administrative Procedure – selected issues

ABSTRACT
Subject of research:
Nowadays, more and more attention is being paid to the issues of human rights. This applies not only to the first generation of human rights but also to political, economic, social and cultural rights. The guarantees for the protection and the execution of these rights should be enshrined in the provisions of the code of administrative procedure which governs proceedings before public administration bodies. However, taking into consideration today's diverse and multicultural society, the administrative procedure seems to be not flexible enough and insufficient to ensure the protection of the constitutional rights and freedoms of foreigners.
Purpose of research:
The aim of this paper is to analyze the adopted procedural solutions in proceedings before public administration bodies when one of the parties is a foreigner. This paper will focus on selected institutions of the administrative procedure in the context of the protection and implementation of the fundamental constitutional rights and freedoms of every person.
Methods:
The formal-dogmatic method, the system-structural method and the method of legal interpretation.

Keywords: rights of persons and citizens; rights of foreigners; administrative procedure

1. Introduction

Nowadays, more and more attention is being paid to the issues of human rights. This refers to the first generation of human rights as well as to political, economic, social and cultural rights. Those rights are expressed not only in constitutions of respective countries but also, and more importantly, in numerous international regulations, which set the world standards in this regard. The realization of the above-mentioned rights is very often dependant on the actions taken by the organs of public authority which shall function on the basis of, and within the limits of, the law[1]. Consequently, the guarantees for the protection and the execution of these rights should be enshrined in the provisions of the code of administrative procedure, which governs proceedings before public administration bodies. Taking into account the aim of this paper it will be necessary to analyse legal solutions introduced into the Polish legal system, especially regulations governing administrative procedure, which concern foreigners. Our analysis will focus not only on special provisions applicable specifically to the latter but also on general principles guaranteeing protection of human rights for every person. As a starting point for our discussion we will adopt the European perspective, paying special attention to the values of the European Union (EU) as well as the measures conducive to the achievement of the objectives of the Treaties. Our analysis will concentrate on the language policy solutions and the rights arising therefrom.

The aim of this paper is to analyse the adopted procedural solutions in proceedings before public administration bodies when one of the parties is a foreigner. We will focus on selected institutions of the administrative procedure in the context of protection and implementation of fundamental constitutional rights and freedoms of every person, giving priority to the so-called right to communicate with public authorities in the language that one understands as a guarantor of the enforcement of the other rights.

In the first part we will discuss the subject of multilingualism in the EU and its implications in the area of the adopted legislative solutions. Then we will briefly present rights of foreigners in proceedings before public administration bodies, conferred on them by the Constitution

[1] According to Article 7 of the Constitution of the Republic of Poland of 2 April 1997 „The organs of public authority shall function on the basis of, and within the limits of, the law."

of the Republic of Poland[2] (Constitution), the Code of Administrative Procedure[3] (CAP) and other special provisions. In the remainder of the paper, we will refer to and analyse the Polish language legislation and the guarantees resulting from it in the context of the protection of rights and freedoms of persons who do not hold Polish citizenship. Finally, we will consider if, taking into account today's diverse and multicultural society, the administrative procedure is flexible and sufficient enough to ensure the protection of constitutional rights and freedoms of foreigners.

2. Language policy of the European Union

In a multilingual European community languages not only play a key role in the everyday life, but they are also crucial in order to respect the rights of persons as well as cultural and linguistic diversity. And the respect for linguistic diversity is one of the fundamental values of the EU, which is incorporated into the primary legislation of the EU (European Parliament, 2017,p. 17).

The content of the preambles of both treaties (the Treaty on European Union[4] (TEU) and the Treaty on the Functioning of the European Union[5] (TFEU)) constitutes the axiological basis of the treaties and provisions contained therein. Taking into consideration the fact that, as of now, the EU is comprised of 28 member states and has 24 official languages (which are also authentic languages of the EU), the wording of the preamble of the TEU seems to play an important role in understanding the EU's institutional arrangements. According to the preamble of the TEU the High Contracting Parties of the Treaty have decided to establish the EU:

> " […] confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

[2] The Constitution of the Republic of Poland of 2 April, 1997 (Journal of Laws of 1997, No. 78, item 483, as amended). English translation available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[3] The Act of 14 June 1960 – the Code of Administrative Procedure (Consolidated text: Journal of Laws of 2016, item 23, as amended). English translation available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1329.

[4] The Treaty on European union (Consolidated version 2016) – OJ C 202 (2016).

[5] The Treaty on the Functioning of the European Union (Consolidated version 2016) – OJ C 202 (2016).

> […]
> desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, […]
> resolved to establish a citizenship common to nationals of their countries, […]
> resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity, in view of further steps to be taken in order to advance European integration, […]".

The fact that the preamble contains references to the values such as the respect for the history, culture and traditions of the peoples of the member states, constitutes a declaration of the will to preserve the multicultural character of Europe also in its new institutional order. Moreover, pursuant to Article 3 (3) of the TEU, the EU shall both respect its rich cultural and linguistic diversity and ensure that its cultural heritage is safeguarded and enhanced. Additionally Article 4 (2) of the TEU constitutes the principle of the respect of the equality of all member states and their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Similar provisions are contained in the Charter of Fundamental Rights of the European Union (Charter)[6]. According to its preamble the EU:

> "[...] contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels [...]".

This declaration is subsequently repeated in Article 22 of the Charter, which states that the EU respects cultural, religious and linguistic diversity. Furthermore, Article 21 of the Charter prohibits any forms of discrimination on account of language. In addition to that, Article 41(4) of the Charter constitutes the every person's right to communicate with the institutions of the EU in one of the languages of the Treaties and to receive an answer in

[6] The Charter of Fundamental Rights of the European Union (Consolidated version 2016) – OJ C 202 (2016).

the same language. The indicated right is considered to be one of the rights constituting the right to good administration (Mańko, 2017, p. 2).

The linguistic issues are also referred to in the TFEU. According to its Article 165 (1):

> "The Union [recognize] […] the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity [...]".

Furthermore, according to Article 20 TFEU every citizen of the EU has the right to petition the European Parliament, apply to the European Ombudsman, and address the institutions and advisory bodies of the EU in any of the Treaty languages and obtain a reply in the same language. This is confirmed by Article 24 TFEU, which also regulates the right of every citizen to communicate with the institutions and bodies of the EU in any of the authentic Treaty languages. It should also be noted that according to Article 342 TFEU the rules governing the languages of the institutions of the EU are laid down by the Council, acting unanimously by means of regulations. There are two Council Regulations, which were issued separately for the then European Economic Community and Euratom in 1958[7] and repeatedly amended afterwards, still in force as the legal acts defining the linguistic system of the EU (Mańko, 2017, p. 3). It is also worth mentioning that the European Parliament also (2017, p. 18):

> "[…] has adopted a full multilingual language policy, meaning that all EU languages are equally important. All parliamentary documents are translated into all the official languages and every Member of the European Parliament has the right to speak in the language of his or her choice. […]"

From all of the above-mentioned provisions it follows that the linguistic issues and the question of using a particular language are widely addressed in the primary and secondary law of the EU. Therefore, it can be said that the EU has a well-developed system of language rules, which constitutes the principle of multilingualism (Schilling, 2008, p. 1232). This is strongly connected with the fact that, as Czarnecki observes (2014, p. 38):

[7] Council No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Council Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community.

> " […] the democratic values, on which EU's policy is based, clearly support multiculturalism and linguistic pluralism as a prerequisite for a common policy of transparent relations between the Community institutions and bodies".

For the purposes of this article the most interesting element of the principle of multilingualism is the right of citizens of the EU to communicate with the EU institutions in any of the authentic languages of the EU, together with the right to get an answer in the language chosen by them. These legally guaranteed rights are not only a way of improving communication between the EU institutions and citizens of the EU but are also, as it was mentioned before, important components of the right to good administration which constitute a guarantee of the enforcement of the other rights and freedoms. And as Baaji states (2012, p. 3):

> "[...] democratic entitlements of EU citizens play a role in the external element of institutional multilingualism, that is, in the external communication and interaction of EU institutions with European citizens and stakeholders. The EU policy here aims to ensure that EU citizens have equal access to EU institutions and the legislation that they adopt, without language barriers. [...]"

3. The rights of foreigners in proceedings before public administration bodies

The number of foreigners in Poland who hold valid documents authorising them to stay in the territory of the Republic of Poland has been increasing every year – from 146,000 in 2013 to over 234,000 in 2016[8]. Thus, it comes with no surprise that administrative proceedings either commenced by foreigners or when one of the parties is a foreigner have become more frequent. It must be noted that in proceedings before public administration bodies foreigners have certain rights, under both constitutional, statutory and international law, which overlap to a large extent with the rights conferred on Polish citizens. The most interesting and fundamental of those rights, in the context of administrative procedure, will be presented in this section.

[8] Statistics available at: https://udsc.gov.pl/ponad-234-tys-cudzoziemcow-z-prawem-pobytu-w-polsce/.

The Constitution sets out several general principles referring to the rights of all persons and citizens. For instance, it requires all the public authorities to respect and protect the inherent and inalienable dignity of all persons, which constitutes a source of freedoms and rights of persons and citizens (Article 30). It also provides that all persons have the right to equal treatment by public authorities and no one shall be discriminated against in political, social or economic life for any reason whatsoever (Article 32 (1) and (2)). Consequently, foreigners shall be treated by all public authorities in the same manner as Polish citizens with due respect for human dignity. In this place it should be also pointed out that the Constitution provides that potential limitations on the constitutional rights and freedoms with respect to foreigners shall be specified by the statute (Article 37 (2)). Of the remaining constitutional rights and freedoms afforded to both citizens and foreigners, particular attention should be given to:

1) the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority (Article 63 of the Constitution);
2) the right to appeal against decisions made at first stage of the proceeding (Article 78 of the Constitution);
3) the right of everyone whose constitutional freedoms or rights have been infringed to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 (1) of the Constitution)[9];
4) the right to apply to the Ombudsman for assistance in protection of a person's freedoms or rights infringed by organs of public authority (Article 80 of the Constitution).

Furthermore, foreigners have been afforded the additional protection by the Constitution. Under Article 56 foreigners have the right of asylum in the Republic of Poland in accordance with principles specified by statute ((1)) and the right to be granted refugee status in

[9] The right established in Article 79 (1) of the Constitution does not relate to the right of asylum and the right to be granted refugee status laid down in Article 56 of the Constitution.

accordance with international agreements to which the Republic of Poland is a party ((2)).

In addition to that, the Constitution sets out one of the fundamental principles governing the functioning of the public administration. According to its Article 7 all the organs of public authority shall function on the basis of, and within the limits of, the law. A similar provision has been included in the CAP, whose Article 6 says that public administration bodies shall act in accordance with the law. It basically means that all actions taken by the public authorities must comply with the law and be based on an appropriate legal basis. It follows that the organs of public authority are obliged to respect all the rights granted to foreigners in administrative procedure by the Constitution, the CAP and others statutes. Among those rights Wencel (2009, pp. 4-16) mentions:

1) the right to information which consists of: the right to obtain full and proper information regarding the factual and legal circumstances which may affect the establishment of the rights and the obligations that are the subject of the administrative proceedings as well as all the necessary clarifications and advice from the public administration bodies (Article 9 of the CAP); the right to be actively involved in each stage of proceedings and to express an opinion on the evidence and materials collected and the claims filed before any decision is issued (Article 10 of the CAP); public administration bodies' obligation to explain to the parties the basis for the rules used to decide a case, so that a decision may be implemented by the parties without the need for coercive measures (Article 11 of the CAP); the right to view the files and to make notes or copies thereof at each stage of the proceedings (Article 73 of the CAP);
2) the right to have one's case dealt with by a public administration body without undue delay (Article 12 of the CAP);
3) the right to be represented by an attorney unless the nature of the case requires it to enter a personal appearance. Any natural person having an unlimited legal capacity may act as attorney (Article 32 and 33 of the CAP);
4) the right to bring a petition, complaint or proposal to state bodies, local government bodies and social organisations and institutions (Article 221 of the CAP);
5) the right to communicate in the language intelligible to a foreigner.

The right to communicate in the language intelligible to a foreigner deserves a particular attention due to the fact that it constitutes a prerequisite for the actual exercise of the other rights granted to foreigners in proceedings before public administration bodies. Therefore, the other part of the paper will focus on the analysis of the right to communicate in the language intelligible to a foreigner in proceedings before public administration bodies in the light of selected issues of the Polish language policy as well as its fundamental importance in achieving the full enforcement of the rights and freedoms of the individual.

4. The Polish language policy

The Polish legislation, as it was already mentioned, grants foreigners numerous rights and freedoms which oftentimes overlap with the rights and freedoms conferred on Polish citizens. It must be taken into consideration that the enforcement of the most of those rights is very often dependant on the actions taken in the proceedings before public administration bodies, which shall function in compliance with the principle of the officialdom of the Polish language[10]. In this part of the paper the basic legal acts governing the issues of the use of the Polish language, both in private and in public, will be presented.

The Constitution contains two provisions which directly refer to linguistic issues. One of them is Article 27, located in Chapter I – the Republic, which states that "Polish shall be the official language in the Republic of Poland" and that this "shall not infringe upon national minority rights resulting from ratified international agreements". Another one is Article 35, located in Chapter II – the Freedoms, Rights And Obligations Of Persons And Citizens, whose paragraph 1 guarantees "Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture". In addition to that paragraph 2 sets out the right of national and ethnic minorities "to establish educational and cultural institutions, institutions designed to protect religious identity, as

[10] The principle of the officialdom of the Polish language is expressed in Article 27 of the Constitution according to which Polish shall be the official language in the Republic of Poland.

well as to participate in the resolution of matters connected with their cultural identity".

The principle set out in Article 27 of the Constitution, which mandates Polish as the official language of the Republic of Poland, is in principle addressed to the bodies and institutions which exercise public authority. This principle is further developed in the Act on the Polish Language[11], which obligates public administration bodies to use exclusively Polish language when fulfilling their tasks and duties. Its Article 4 sets out a catalogue of public bodies and institutions which shall use the Polish language as an official language. The indicated provision refers to all Polish Constitutional bodies, including inter alia public administration bodies and administrative courts. Moreover, Article 5 (1) of the Law on the Organisation of Common Courts[12], which is also applied to the proceedings before administrative courts on the basis of Article 29 (1) of the Law on the Organisation of Administrative Courts[13], states that the official language of proceedings before common courts is the Polish language. It must be noted that Polish legislation does not contain separate provisions regulating the issue of so-called judicial language (Mostowik, Żukowski, 2001, p. 67). However, it seems that the constitutional obligation to use the Polish language, addressed to the public authorities, does not extend to the Polish citizens. The Constitution does not contain any provisions which impose the obligation of knowing the Polish language on Polish citizens[14]. Consequently, the requirement of knowing the official language of courts and public administration bodies certainly cannot be imposed on foreigners.

It is worth noting that quite detailed regulation of the issues concerning the protection of the Polish language in public life results from, to some

[11] The Act of 7 October 1999 on the Polish Language (Consolidated text: Journal of Laws of 2017, item 60, as amended).

[12] The Act of 27July 2001 – The Law on the Organisation of Common Courts (Consolidated text: Journal of Laws of 2016, item 2062, as amended).

[13] The Act of 25 July 2002 – the Law on the Organisation of Administrative Courts (Consolidated text: Journal of Laws of 2016, item 1066, as amended)

[14] Furthermore, the Act on Polish Citizenship does not regulate this issue explicitly. Its Article 30 (2) provides that a foreigner (with the exceptions) applying for recognition as a Polish citizen should have officially confirmed knowledge the Polish language. See the Act of 2 April 2009 on Polish Citizenship (Consolidated text: Journal of Laws of 2012, item 161, as amended).

extent, historic reasons. This is indicated by the wording of the preamble to the Act on the Polish Language, which says the Parliament of the Republic of Poland adopted this act having regard to the experience of history when the conquerors' and occupiers' fight with the Polish language was an instrument of denationalisation and to the fact that the Polish language constitutes a fundamental element of the national identity and presents a value of the national culture[15].

The linguistic issues are also regulated by the Act on National and Ethnic Minorities and on the Regional Languages[16]. Its adoption constitutes a response to the commitments made by the Republic of Poland when acceding the Council of Europe's Framework Convention for the Protection of National Minorities and signing the European Charter for Regional or Minority Languages.

Among the most essential provisions of the above-mentioned Act one can identify the definition of the national and ethnic minority, the catalogue of minorities which are recognized as national minorities by the Act, the right to use, as supporting, the minority language as well as the official one before municipal authorities. The Act on National and Ethnic Minorities and on the Regional Languages obligates public authorities to take appropriate measures in order to support the activity aimed at protection, maintenance and development of cultural identity of the minorities[17].

5. Rights of foreigners to use a language other than the official language before public administration bodies

It is worthwhile noting that the principle of the officialdom of the Polish language, which assumes that all the official actions of the public administration bodies as well as parties' documents and declarations of

[15] The Preamble to the Act of 7 October 1999 on the Polish Language. English translation available at: http://www.polishlaw.com.pl/pdf/act28b_new.pdf.

[16] The Act of 6 January 2005 on national and ethnic minorities and on the regional languages (Consolidated text: Journal of Laws of 2017, item 823). English translation available at: http://ksng.gugik.gov.pl/english/files/act_on_national_minorities.pdf.

[17] See http://mniejszosci.narodowe.mswia.gov.pl/mne/prawo/zapisy-z-konstytucji-r/6481,Podstawowe-prawa.html.

will shall be performed in Polish language, is limited by certain special regulations. In the following part of the article, selected statutory regulations which allow foreigners, and in some cases also Polish citizens, to communicate with public administration bodies in a language other than the official language will be presented.

Taking into consideration the purpose of this article, regulations introduced by the Act on National and Ethnic Minorities and on the Regional Languages deserve special attention. This is due to the fact that they govern a number of linguistic issues, such as the use of minority languages as a supporting language before public administration bodies. Thus, Article 7 and 8 of the Act in question (located in Chapter 2 – The use of a minority language) provide for the right of people belonging to a minority to use and spell their first and last names according to the spelling rules of their respective minority language, in particular in the official register and identity documents, as well as the right to use freely their minority language in public and private life, spread and exchange information in their minority language, run information of a private nature in their minority language and learn their minority language or to be taught in this language. Whereas, according to Article 9 (1) it is permissible to use, as supporting, the minority language as well as the official one before the municipal authorities. However, this is restricted only to these municipalities where the number of minority residents, whose language is to be used as a supporting one, is no less than 20 percent of the total number of the municipality residents and who have been entered into the Official Register of Municipalities where a supporting language is used (Article 9 (2))[18]. The possibility to use the minority language as a supporting language is described in Article 9 (3), which states that persons belonging to a minority have the right to apply to the municipal authorities in the supporting language (both in written and oral form) and the right to obtain, on a person's distinct request, an answer in the supporting language (also in written or oral form). In addition to that, paragraphs 4-7 of Article 9 lay down further rules concerning the use of the supporting language, such as the right to submit an oral or written

[18] The list of the municipalities which have been entered into the Official Register of Municipalities where a supporting language is used is available at: http://mniejszosci.narodowe.mswia.gov.pl/mne/rejestry/urzedowy-rejestr-gmin/6884,Urzedowy-Rejestr-Gmin-w-ktorych-jest-uzywany-jezyk-pomocniczy.html.

application in the supporting language and the exclusive use of the official language in the appeal proceedings. What is particularly important is that any doubts shall be resolved on the basis of a document drawn up in the official language. It follows that the supporting language, under the provisions currently in force, may be used only "in addition to" the official language and never "instead of" it (Skora, 2005, p. 415).

In a slightly different context the issue of using a language other than the official language before public administration bodies is regulated by two other acts – the Act on Foreigners[19] and the Act on granting protection to foreigners within the territory of the Republic of Poland[20]. These two acts lay down comprehensive rules governing the administrative aspects concerning the foreigners' stay within the territory of the Republic of Poland (Kamiński, 2011, p. 187). Therefore, both of them often constitute the legal basis in jurisdictional administrative procedure understood as (Kamiński, 2011, p. 186):

> "[…] the type of proceeding which is conducted by public administration bodies in order to settle an individual administrative case by issuing a specific individual administrative act called an administrative decision. […]"[21]

Moreover, bearing in mind foreigners' particular status, the above-mentioned acts provide some specific procedural solutions to administrative proceedings where one of the parties is a foreigner (Kamiński, 2011, p. 190). As Kamiński observes (2011, p. 190) the aim of those specific procedural solutions is to:

> "[…] simplify and expedite proceedings by mitigating certain procedural requirements, taking into account the particular nature of the subjective and objective circumstances of administrative cases which are the subject of proceedings governed by those acts. […]"

[19] The Act of 12 December 2013 on Foreigners (Consolidated text: Journal of Laws of 2016, item 1990). English translation available at: http://enbss.uw.edu.pl/wp-content/uploads/sites/91/2015/11/act_on_foreigners_en_EC.pdf.

[20] The Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of. Poland Foreigners (Consolidated text: Journal of Laws of 2016, item 1836). English translation available at: https://emn.gov.pl/ese/legislation/polish-legal-acts/8783,The-main-legal-acts-regulating-the-situation-of-foreigners-in-Poland.html

[21] Regarding an administrative case and an administrative decision see: Kamiński, 2011, 186, and the literature listed therein.

The discussed distinctive procedural solutions, which stem from the particular nature of administrative cases involving foreigners, concern, inter alia, the principle expressed in Article 4 of the Act on the Polish Language. That is because the general obligation to use Polish as the official language applies to all actions taken by public administration bodies, regardless of whether the case is dealt with orally or in writing. With regard to the latter, according to Kamiński (2011, p. 191), the obligation to use the Polish language extends to:

> " […] all the documentation in the files of the case, which also implies that the sworn translations are
> required in the case of source documents drawn up in a foreign language. […] "

Amongst the provisions of the Act on Foreigners particular attention should be paid to Articles 7 and 8. According to the former the administrative body instituting checks in relation to a foreigner shall instruct the foreigner in writing in a language understandable to him/her about the procedure and its principles, as well as about the rights granted to him/her and obligations imposed on him/her (Article 7 (1) point 2). Whereas the latter states that applications submitted in proceedings in front of a consul and documents drawn up in a foreign language, used as evidence in proceedings under the Act on Foreigners conducted in front of a consul, shall be submitted in the Polish language or in the language indicated by the consul (Article 8 (3)). On the other hand, according to Article 11 (1) of the Act on granting protection to foreigners within the territory of the Republic of Poland the authority carrying the proceedings, shall ensure – if need be – the translation into Polish of documents written in a foreign language, accepted as the evidence in the proceedings concerning refugee status or asylum.

The above-mentioned articles, together with other provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland, constitute in Kamiński's view (2011, p. 192) a normative confirmation of the realization of the general principles of the administrative procedure, including the principle of informing the parties (Article 9 of the CAP) and the principle of active participation of the parties in administrative proceedings (Article 10 of the CAP). However, the question to be considered now is to what extent the adopted procedural

solutions (both in the CAP and other special regulations) guarantee the enforcement and protection of rights of foreigners in proceedings before public administration bodies. This question will be examined in the following section.

6. The right to communicate in an intelligible language as a guarantee of the enforcement of the majority of the rights and freedoms of the individual

6.1. Introduction

The right to communicate in an intelligible language is one of the rights mentioned in the section on the rights of foreigners in proceedings before institutions of public administration. We also gave this right the rank of a superior law, being simultanuously a guarantor of other rights. In this context, it is worth noting that this right is not directly expressed either in the Constitution nor in any of the specific acts of Polish law[22]. It is certain that the right to communicate in intelligible language is expressed in EU law, however, it is contained within the so-called right to good administration (Mańko, 2017, p. 2).

The issue of using a particular language as the issue going beyond the framework of the constitutional principles of the state were already mentioned by J. Trzciński, M. Wiącek and A. Wiltos[23]. The authors noted that this issue should also be considered in the mark of individual rights and freedoms. In the Constitution we find many provisions that, although not directly, are related to the use of language in public and private life. Examples include Article 49 of the Constitution guaranteeing freedom of communication, Article 54 of the Constitution providing freedom of expression and the acquisition and dissemination of information, as

[22] See Wencel K., „Prawa cudzoziemców w postępowaniu przed organami administracji publicznej", *Analizy Raporty Ekspertyzy Stowarzyszenia Interwencji Prawnej*, 4, 2009.

[23] See Trzciński J., Wiącek M., „Znaczenie art. 27 Konstytucji dla statusu jednostki w RP", *Państwo Prawa – Parlamentaryzm – Sądownictwo Konstytucyjne. Pamięci Profesora Zdzisława Czeszejki-Sochackiego,* (red. A. Jamróz), Białystok 2012; Wiltos A., „Znaczenie art. 27 Konstytucji dla ochrony praw i wolności jednostki", *Przegląd Prawa Konstytucyjnego*, 4 (16), 2013.

well as Article 73 of the Constitution on the freedom of artistic creativity, scientific research and publication of their results, freedom of teaching, and the freedom to use cultural goods. All the aforementioned provisions take into account not only the content of any given statement or expression but also their form. In this way, they can be seen as a guarantee of communicating information in a language of one's own choice and presenting one's own views in it. Additionally, we should make a reference to a number of political rights and freedoms, and to the right to public information (Article 61 (1) of the Constitution) and the right to issue petitions and complaints in particular (Article 63 of the Constitution) as they appear to be exceptionally related to linguistic issues.

The protection of the language as a certain value, as a part of the national heritage, is mentioned explicitly only in Article 35 (1) of the Constitution, according to which the Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. The importance of this regulation as the right of the individual is emphasized by the fact that, according to Article 233 (2) of the Constitution, even during the state of emergency limitation of the freedoms and rights of persons and citizens only by reason of, inter alia, language shall be prohibited. Such strong protection of the freedom of use of any language of choice results from the general rule set out in Article 32 of the Constitution, prohibiting discrimination in political, social or economic life for any reason whatsoever, and the cited provision of Article 233 (2) seems to detail the aforementioned provision (Trzciński, Wiącek, 2012, p. 305). The wide range of rights and freedoms that relate to the use of language in public and private life points to the role that language plays in our lives, not only as a means of communication but also as an element of our culture, and of individual and national identity (Wiltos, 2013, p.169-171).

Bearing in mind how important the right to communicate in intelligible language is to the protection of the rights and freedoms of individuals, we are going to analyze the already mentioned language-related solutions that one employes before public administration bodies. In the first place, we will refer to those provisions which allow the direct use of language other than the official language. In the second place, we will analyze those solutions which secure the assistance of an interpreter. Finally, we

will present selected case law of the Administrative Courts and of the Constitutional Tribunal related to linguistic matters in the administrative procedure where one of the parties is a foreign national.

6.2. Possibility to use a language other than the official in proceedings before a public administration body

In accordance with the rule stemming from Article 4 of the Act on the Polish Language the official language of all institutions of public administration is Polish. Some exceptions to this rule were shaped by specific acts due to the exceptional nature of the issues they dealt with. We have distinguished some of the rules that shape the deviation from the rule of using Polish language, among others, Article 7 (1) point 2 of the Act on Foreigners according to which the Administrative Body taking any action of control of a foreigner shall inform them in writing in a language which the foreigner understands of the rules and procedure and of one's rights and obligations. Similar regulations which prescribe the rules for giving instructions to foreigners or conducting a hearing in a language comprehensible to them can be found in Articles 173, 311, 314 (3), 327 (2), 402 (2) or 411 of the Act on Foreigners, or Articles 26 (3) item 2, 28 (1), 29 (1), 30 (1) item 5, 32 (3), 54 (5), 68 (2), 80a, 82a item 7, 88 (4), 89ca, 89d, 111, 118 of the Act on granting protection to foreigners within the territory of the Republic of Poland. It is worth noting that in the first group of situations the right to use a language other than the official one appertains only to an institution of public administration. It is the administrative institution that is vested with the power to pass on strictly defined information to a second party in a language intelligible to the other party. Moreover, there is a specified limit on the information that are to be given in a language other than the official one: information concerning the actions taken against an individual, issued orders, and certain rights of the parties to proceedings such as the right to appeal against a decision or the right to file a complaint against a court order. A foreigner must undertake all actions before a public administration body, in principle, in the official language, and thus in the Polish language[24].

[24] Leaving aside the issue of the use of a supporting language.

Any deviation from the principle of the officialdom of the Polish language introduced in the selected provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland is therefore a passive right from the point of view of the foreigner. A public administration authority offers a very narrow range of information in a language other than the official language, and such information is limited to a strictly defined category of administrative matters (rules governing the entry, transit, stay and departure of foreigners from the territory of the Republic of Poland and the principles of granting protection to foreigners within the territory of the Republic of Poland), which seems to stand in stark opposition to the right to communicate in intelligible language. This kind of administrative procedure may restrict access to an active participation of foreigners in the proceedings and to the full exercise of their rights. Let us note that within the provisions contained in the analyzed acts, we find an implementation of the possibility of active use by a foreigner of the derogation from the principle of the officialdom of the Polish language only in Article 8 (3) of the Act on Foreigners and Article 82a item 7 of the Act on granting protection to foreigners within the territory of the Republic of Poland. For the former it is possible by submitting an application to the consul in the Polish language or the language indicated by the consul. As for the latter the right to active communication in the mother tongue with a public administration body is granted to foreigners who stay in guarded centers for foreigners. They can file complaints and motions concerning the functioning of the center and the conditions of stay therein submitted to the Head of the Office in their mother tongue (Article 82a item 7).

6.3. Possibility to use an interpreter in proceedings before public administration bodies

The regulation concerning the participation of the translator in proceedings before the public administration bodies and the possibility of presenting documents prepared in a foreign language, together with their translation into Polish, consist a separate group of regulations. The CAP mentions the language only once and it is precisely in the context of interpreter's involvement in proceedings before the public

administration. According to Article 69 (2) in minutes of hearings where the person giving evidence has done so in a foreign language, the Polish-language translation shall be recorded together with the name and address of the translator involved and the translator should sign the minutes of the hearing. The given provision therefore entitles the foreigner to use the help of an interpreter. However, it does not introduce any guarantee of the free provision of such assistance, suggesting that the aid in question is limited exclusively to the question of hearings. The issue of relevant regulations at the stage of judicial review of public administration activities is different, where, under Article 29 (1) of the Law on the Organisation of Administrative Courts where in matters not covered by the aforementioned law, there are applicable certain provisions of the Law on the Organisation of Common Courts, especially Article 5 (1). According to this provision the official language of proceedings before courts is the Polish language. A person who does not sufficiently speak the Polish language has the right to appear in court in a language of his / her choice, and be provided a free of charge interpreter (2). The granting of an interpreter to the person referred to in (2) shall be decided by the court competent to hear the case in the first instance. An application for an interpreter filed in the course of a case shall be presented to the court of the instance in which the case is pending (3). It was therefore necessary to introduce appropriate regulations on the free assistance of translators and interpreters to persons who do not speak nor understand sufficiently the official language at the stage of judicial proceedings. This seems to be the result of the need for the most complete realization of the content of Article 45 of the Constitution that guarantees that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Regarding the problem of free interpreter assistance, it should be noted that although this right was not guaranteed directly in the Constitution, it stems from many constitutional rights and freedoms. According to Article 32 (1) all persons shall be equal before the law and all persons have the right to equal treatment by public authorities. Moreover, according to section 2 of the cited provision, no one shall be discriminated against in political, social or economic life for whatever reason. The absolute prohibition of discrimination, including the prohibition of discrimination on the grounds

of language, imposes on the public authorities the obligation to protect specifically those belonging to national minorities and those whose first language is not the official language of the Republic of Poland. Therefore language cannot be a relevant feature to limit any of the constitutionally guaranteed rights.

The Legislator shapes the issue of the interpreter's participation in administrative proceedings and the rules of using documents prepared in a foreign language together with their translations into the official language in a non-uniform manner. For example, the selected provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland guarantee the free assistance of an interpreter, both in the scope of oral help and in the preparation of written translations. According to Article 179 and 327 (1) of the Act on Foreigners public authority conducting the proceedings with regards to the granting of a temporary residence permit for victims of human trafficking (Article 179) and on the issue of the decision on imposing the return obligation (Article 327 § 1) provide the foreigner who does not speak Polish sufficiently well with the help of an interpreter. According to Articles 11 (1), 44 (4) item 3 and 65 (2) of the Act on granting protection to foreigners within the territory of the Republic of Poland, the authority provides a translation into Polish of documents issued in a foreign language admitted as evidence in proceedings (11 (1)), as well as free assistance of an interpreter in a language understood by the applicant (44 (4) item 3) during the procedure for granting international protection or asylum. This provision is specially emphasised in the case of hearings involving an unaccompanied minor (65 (2)). In cases other than the ones already mentioned, the burden of professional translator assistance and the preparation of translations into the official language rests on the party that does not speak Polish sufficiently or which lacks the necessary documentation in that language. This is due to the general principle the officialdom of the Polish language. It also stems from a number of specific regulations, such Article 8 of the Act on Foreigners, according to which applications relating to procedures regulated by the Act on Foreigners shall be drawn up in the Polish language ((1)). In addition to that documents drawn up in a foreign language, used as evidence in proceedings conducted under the Act on Foreigners, shall be submitted together with

their translation into the Polish language made by a sworn interpreter ((2)). At this point, the question arises whether such a configuration of the administrative procedure does not violate the constitutional principle of fair and efficient functioning of public institutions, as well as the aforementioned constitutional rights and freedoms, which can be drawn, for example, from article 32 of the Constitution.

6.4. Selected case law of the Administrative Courts and of the Constitutional Tribunal related to linguistic matters in the administrative proceedings where one of the parties is a foreign national

It is possible to observe the importance of protecting the rights and freedoms of individuals under the right to communicate in intelligible language on the basis of the case law of the Polish Administrative Courts and the Constitutional Tribunal.

In the resolution of 14 May 1997 the Constitutional Tribunal[25], referring to a regulation granting non-Polish speakers the right to speak in court in their mother tongue and to use an interpreter free of charge, noted that:

> "[…] the realisation of this provision is a prerequisite for the correctness and the fairness of the trial wherein all participants are granted the opportunity to participate in it fully and consciously. […]"

Similarly, the Voivodeship Administrative Court in Warsaw noted in judgment of 29 September 2009[26], in which the regulation resulting from Article 5 of the Law on the Organisation of Common Courts was defined as the procedural right pertaining to the party. On the other hand, the Supreme Administrative Court in judgment of 30 October 2008[27] stated that

> "[…] the right to a free use of the interpreter's assistance [...] the administrative court should inform the foreigner about this right according to Article 6 of the Law on the Procedure Before Administrative Courts [...] whenever there may be a reasonable doubt as to the extent of the foreigner's Polish language mastery

[25] Resolution of the Constitutional Tribunal of 13 May 1997, W 7/96.

[26] Judgment of the Voivodeship Administrative Court in Warsaw of 29 September 2009, V SA/Wa 697/09.

[27] Judgment of the Supreme Administrative Court of 30 October 2008, II OSK 1097/07.

> and knowledge. [...] Inadequate knowledge of the Polish language can lead to limitation of the possibility of defending oneself before an administrative court, thus violating the right to a fair trial."

The fact that the lack of knowledge of the official language may actually affect the limitation of the rights of the parties during the administrative procedure has been pointed out by the Voivodeship Administrative Court in Warsaw in judgment of 23 February 2012[28], noting that:

> "[…] It is not sufficient to instruct a party concerning the application [...], as there is no caution of the time and means of appellation available in the language understood by the foreigner. The obligation stemming from Article [7 (1) item 2] of the Act on Foreigners concerning the necessity to instruct the foreigner about the rules and procedure, and the rights, and responsibilities the foreigner has, should be understood more broadly as a means of instructing them about the possibilities of appealing against the court's decision in the case of a unfavourable sentence for the foreigner. The possibility to challenge an unfavourable decision is part of the procedure and the application of such possibility is provided for by law. [...] Failure by the authority to comply with Article [7 (1) item 2] is a breach that should be taken into account during the appeal proceedings. Had we accepted that it would be sufficient to instruct a foreigner at the moment of application without instruction in a language understandable to that foreigner, it would form a legal illusion and the foreigner would not be able to benefit from the right to appeal the decision".

Moreover, the Voivodeship Administrative Court in Warsaw stated in sentence of 20 March 2014[29] that:

> „[...] there is no justification for excluding the foreigner's right to receive the content of the decision in a language the foreigner understands [...] dealing with the suspension of the execution of the decision of expulsi
> on, as well as information on the procedure and time-limit for appealing such decision. The effect of adopting a restrictive literal interpretation […] would be to limit the right to court guaranteed to them in Article 45 (1) of the

[28] Judgment of the Voivodeship Administrative Court in Warsaw of 23 February 2012, V SA/Wa 2402/11.

[29] Judgment of the Voivodeship Administrative Court in Warsaw of 20 March 2014, IV SA/Wa 2750/13.

> Constitution of the Republic of Poland concerning the control of decisions settling the accidental issues that were issued in the course of proceedings on the granting of refugee status, and their legitimation specified in the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland would be illusory in this regard".

7. Conclusions

In view of the foregoing considerations, it should be noted that in today's diverse and multicultural society the issue of communication in an intelligible language constitutes a major challenge for both parties of this process. Full and conscious participation in the process of communication is even more important when it influences the enforcement of our rights and freedoms. The realization of the above-mentioned rights is very often dependant on the actions taken before the public administration bodies which operate, under the applicable national rules, in the official language. Therefore, a foreigner who is a party to the administrative proceeding is confronted by a challenge of communicating in a language that he or she either does not know or know inadequately.

In accordance with the provisions in force, Polish is the official language in the Republic of Poland (Article 27 (1) of the Constitution) and any deviation from this principle must be clearly stated in the specific act. We have already distinguished three acts that shape the deviation from the principle of the officialdom of the Polish language – the Act on National and Ethnic Minorities and on the Regional Languages, the Act on Foreigners and the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland. The former introduces a possibility of using the supporting language alongside the official language while the other two provide for that strictly defined category of administrative actions can be taken in a language intelligible to a foreigner. The aim of such a configuration of the administrative procedure was, as Kamiński points out (2011, p. 192), to confirm normatively the realization of the general principles of the administrative procedure.

However, the detailed analysis of the provisions of the CAP, specific legislative acts and the case law of the Administrative Courts and the Constitutional Tribunal revealed a number of problems arising from the adopted legal and procedural solutions.

In the first place, it should be observed that the scope of the regulations imposing the obligation to instruct a party that does not speak Polish sufficiently about his rights and obligations appears to be insufficient. The instructions given by public administration bodies tend to be formulated in a negligent manner, missing a lot of key information for a foreigner. Furthermore, the formal requirements concerning the discussed instructions are quite restrictive and shaped in a non-uniform manner which makes the protection resulting from the instructions illusory. Moreover, it follows from the case law of the Administrative Courts that special provisions concerning the obligation to instruct a foreigner about his rights do not apply to decisions settling the accidental issues.

It is also worth noting that within the legal framework which allows a foreigner to use the help of a translator, the burden of professional assistance and the preparation of translations into the official language rests, in general, on the party that does not speak Polish sufficiently or which lacks the necessary documentation in that language. The State provides, under the relevant provisions, the free assistance of translators to persons who do not speak nor understand sufficiently the official language only at the stage of judicial proceedings, completely overlooking administrative procedure in this context.

As Schilling points out (2008, p. 1241), it is difficult to think of a general principle of international law requiring the respect of the right to communicate in an intelligible language. However, it cannot be forgotten that mutual understanding is a prerequisite for the full and conscious participation in both administrative and judicial proceedings. The EU, founded on the values of respect for the rights and freedoms of individuals, sets the standards for communication in diverse and multicultural society. The Republic of Poland, as one of the members of such a society, should endeavour to respect the values common to all Europeans. It seems that among those values we can find certain standards in relations between public administration bodies and individuals. Those standards are expressed through the right to good administration which consists of, inter alia, the right to communicate in an intelligible language as a guarantee of the enforcement of the majority of the rights and freedoms of the individual.

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The quality of law in Poland – selected issues

ABSTRACT

Subject of research: The article deals with the topic of the quality of law in Poland – selected issues. The main constitutional rules related to the correct legislation were discussed. Also the right of legislative *initiative was shortly mentioned. Moreover* the impact of state authorities and other bodies, which don't have a right of legislative initiative, on the quality of law in Poland was presented. In this article a great emphasis was put on the impact of such inspiration on the Polish law and legislative process as well.

Purpose of research: The purpose of the research is to show what factors impact on the quality of law in Poland. Also, the attempt was made to present what constitutional principles are connected with the quality of law and which bodies in Poland can inspire the relevant authorities to introduce legislation. Moreover, the aim of the article is to present the impact of non-government institution, citizens and other bodies on Polish law.

Methods: For the purpose mentioned above, a dogmatic-legal method was used, which consisted in analysis of legal regulations in Poland.

Keywords: constitutional legislative principles, pre-legislative stage, the quality of law, impact on Polish law, legislative inspiration, entities not having a legislative initiative

1. Introduction

The quality of law in Poland is in bad condition and that statement is common known and repeated not only in the legal society but also

by the receivers of that law (Lipowicz, 2012, p. 286; Kalisz, 2012, p. 3; Kochanowski, 2003, p. 77). Polish law is produced fast and in increasing numbers. In 2016, according to the last report of the Grant Thorton,[1] 31,906 pages of the legal acts entered into force and the average period of work on the law – counting from the introduce the project to the Sejm until the date of signature of the President of Poland – lasted only 77 days. For comparison, a year earlier it was 122 days, and in 2000 – 201 days. Those numbers show how fast the problem with insufficient quality of law is growing. Excessive regulation of social and economic development sometimes can become a source of crisis in the country (Kochanowski, 2003, p. 81). German philosopher and sociologist Jürgen Habermas called that phenomenon "Juridification". In general terms, juridification refers to an increase in formal or written law, when law comes to invade more and more areas of social life, turning citizens into clients of bureaucracies (Habermas, 1982, p. 222).

Another problem related to the enormous number of legislation is that the addressees of the legal provision are unable to read the content of the legal norm and therefore they are unable, without the assistance of legal experts, to define the scope of theirs rights and obligations (Zoll, 2014). Experts at Grant Thornton calculated that "the mechanical reading of this collection would take the average Pole half of each working day, and to be exact, 3 hours and 59 minutes. In other words, in order to read the new laws and regulations, you would need to spend up to 983 hours or 41 full days"[2].

In this paper an attempt was made to present what principles described the ideal law – in its construction and meaning. On the basis of the Constitution of the Republic of Poland the most important legislative rules were discussed. The reason of that was to show how the fundamental Act in the country influences all of the legislation. However the main aim of that article is to present the most significant entities, which don't have a right to introduce the bill to the Sejm, but they can inspire the relevant state authorities and bodies, which are able to bring a draft of the bill to the Sejm.

[1] More information on the webpage http://barometrprawa.pl/#p2

[2] More information on the webpage http://www.financialobserver.eu/poland/polish-law-is-the-most-unstable-in-the-european-union/

2. The quality of law in the principles of the Polish Constitution

The Constitution of the Republic of Poland is the fundamental Act – the supreme law in Poland. It contains many crucial legal provisions concerning the character of the state, state authorities, political, social and economic system of the country and describes the main rights and duties of the citizens (Garlicki, 2016, p. 46). The Constitution is also the source of regulations related to the quality of law. The article 2 of the Constitution states that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. That constitutional principle played a significant role in the development of the Polish law (Winczorek, 2008, p. 19). Nowadays, that rule is a fundamental principle of the Polish state and it expresses many rules which are not explicitly mentioned in the Constitution, for example the principle of legal certainty, the principle of legality, the principle of separation and balance of powers, the principle of equality before the law and the principle of correct legislation. Moreover that principle influences the way of interpretation the law (Jędrzejewska, 2011, p. 120.)

The Constitutional Tribunal has frequently stressed the importance of correct legislation in its judgments stating that in a democratic country it is one of the fundamental principles determining the relationship between the state and citizens (see the judgment of the Constitutional Tribunal ref. no. P 3/00). In the light of the Constitutional Tribunal' judgments the principle of correct legislation includes specific rules such as the principle of protection of citizens' trust in the state and its laws, the principle of certainty of the law, the principle of specificity of legal provisions, the principle of protection of interests in progress, the principle of protection of acquired rights, the principle of non-retroactivity *(lex retro non agit)*, the principle of the appropriate *vacatio legis* and the principle of observance of legislative technique (Frankowski and Bodnar, 2005, p. 7).

The constitutional principle, which creates specific obligations in the sphere of activity of public authorities, is the principle of protection of citizens' trust in the state and its laws (also referred to as the principle of loyalty of the state to the individual). That principle is one of the basic principles defining the relationship between the citizen and the state

(Zaleśny, 2009, p. 21). The main aim of that principle is to prohibit the creation by the state the illusory law, which is unfeasible. The Constitutional Tribunal expresses the view that this principle consists in such lawmaking and the application of the law, so as not to become a trap for a citizen who should be able to organise his life in trust to the law. Citizens of the state should make their decision without risking the unforeseeable legal consequences. Citizens have to be sure that their actions, taken in accordance with the applicable law, will also be recognized in the future by the legal order (see judgment of the Constitutional Tribunal K 26/97).

The principle of protection of citizens' trust in the state and its laws is based on the requirement of legal certainty, i.e. such a set of features describing legal regulations that provide individuals with legal security; enable them to decide about their own actions based on the in-depth knowledge of the rationale behind the activities undertaken by the state authorities, and of the legal consequences that the acts of the individuals may bring about (see judgment of the Constitutional Tribunal ref. no. K 13/01). The legal certainty is not only the stability of the law, but is more the ability to anticipate the activities of the state authorities and the related behavior of citizens (Safjan and Bosek, 2016, p. 225). T. Spyra stresses the fact that "the assessment of legal certainty must be of a comprehensive nature and it must embrace a number of additional factors, such as: the actual level of the availability of jurisdiction or professional legal help in the society" (Spyra, 2003, p. 73).

Next rule related to the correct legislation is the principle of specificity of legal provisions. According to this principle the law must be formulated in a clear, precise and correct manner so that the addressees of the legal norm can easily determine the legal consequences of their behavior (Garlicki, 2016, p. 80). In the opinion of the Constitutional Tribunal, the state by formulate unclear legal provisions, cannot leave to the authorities excessive freedom in determining in practice the scope of individual freedoms and rights (see judgment of the Constitutional Tribunal ref. no. K 33/00). In a democratic state, the aim of a particular legal regulation must clearly results from the content of the provision. The addressee of a legal norm must understand its content Moreover receiver of the legal provision should be able to determine without any doubt the scope of rights or obligations contained therein (Koksanowicz, 2014, p. 476).

The principle of protection of interests in progress has also influence on the quality of law. That principle is significant for the individuals because it provides protection of the citizen in situations when the individual has started legal action on the basis of current legal provisions and before the end of that action the new law was passed. This principle cannot be equated with the guarantee of invariability of the law, because variability of the legal provisions is unavoidable.

Another rule connected to the principle of the state of law is the principle of protection of acquired rights. That principle is often and widely analyzed in Polish and international doctrine and jurisprudence. According to the Constitutional Tribunal the principle of protection of acquired rights prohibits arbitrary abolition or limitation of subjective rights held by individuals or other private actors (see judgment of the Constitutional Tribunal ref. no. K 5/99). Moreover the Constitutional Tribunal in its judgments, has pointed out that, when interfering with the properly acquired rights, the legislature should introduce legal arrangements, which reduce the negative effects for those concerned to a minimum, and allow them to adapt to the new regulations. These restrictions on part of the legislature stem from the principle of the democratic rule of law. It has to also stressed that this principle protects only right acquired properly. The principle of the protection of acquired rights does not apply to rights acquired wrongly (Safjan and Bosek, 2016, p. 227).

Next rule which ensure citizen's right is the principle of non-retroactivity – *lex retro non agit* (Czarnota, Krygier and Sadurski, 2005, p. 303). That principle, according to the judicial decision of the Constitutional Tribunal, is "one of the essential elements of the rule of law" (see judgment of the Constitutional Tribunal ref. no. K. 7/90 and K. 9/90, K. 12). That rule means that the law cannot have retroactive power. "The essence of this principle implies that a law's effect does not extend to include past affairs and cannot pass judgment on events which occurred prior to its implementation. Instead, a law only applies to events that occur after its implementation." (Alnowaiser, 2016, p. 4). However, it should be emphasize that this rule refers to regulations which worsen the situation of the addressees. As Prokop states "there are no obstacles in the process of passing regulations, which make the situation better. The prohibition of retroaction is absolute only within criminal law, with the exclusion of actions, which at the moment

of committing have constitutes a crime in the light of international law (article 42 of the Constitution). Also within financial law the prohibition of retroaction is treated quite strictly." (Prokop, 2011, p. 35).

Another principle related to the correct legislation and because of that to the quality of law, is the principle of the appropriate adaptation period *(vacatio legis)*. The Constitutional Tribunal in its judgements mentioned extensively on the obligation to ensure an adequate period of *vacatio legis.* Tribunal stated that "the imperative for a proper *vacatio legis* is one of the standards that makes up the contents of the principle of the democratic rule of law, and stems directly from the principle of trust in the state." (see judgment of the Constitutional Tribunal ref. no. Kp 1/05). The necessity to create an adjustment period relates to all legal regulations addressed to citizens. A *vacatio legis* is considered appropriate if the receivers of the new legal provisions are able to adapt their activities and interests, as well as manage their affairs in accordance with the new requirements. The lack of a real chance to adapt to the new legal provisions proves the insufficiency of *vacatio legis.* An exceptional reduction of the *vacatio legis* period, or even its complete omission can be justified by an important public interest (Garlicki, 2016, p. 79) .

The next rule which is strongly connected with the quality of law is the principle of observance of legislative technique. The legislative technique is the term used by both the legal practice and the discipline referred to as jurisprudence (Giżyńska and Chomoncik, 2012, p. 216). The legislative technique includes not only the skills of drafting the legislative acts and correct organization of the system of such acts, but also the set of rules (directives) indicating how to design the legal acts correctly and how to include them into or eliminate them from the legal system (Wronkowska and Zieliński, 2004, p. 11). The "Principles of Legislative Technique" from 2016 are the official (with the rank of the regulation) sets of the legislative technique directives.

3. The legislative initiative in the legislative process

The legislative initiative consists in the right to bring a bill to the Sejm. According to the article 118 of the Constitution of the Republic of Poland the right to introduce legislation shall belong to Deputies, to the

Senate, to the President of the Republic, to the Council of Ministers and to a group of at least 100,000 citizens having the right to vote in elections to the Sejm.

The legislative initiative is precised in the Standing Orders of the Sejm of the Republic of Poland, which clarify that the minimum number of Deputies who want to bring a bill to the Sejm is 15. Also the Deputies' bills may be introduced by Sejm committees. Moreover, the Standing Orders of the Sejm specifies what kind of documents must be submitted with the bill. Article 32 states that a bill shall be accompanied by an explanatory statement which shall explain the need for and purpose of passing of the bill; present the actual situation within the area to be regulated; indicate differences between the presently existing and the proposed legal position; present an estimate of the social, economic, financial and legal effects thereof; identify sources of finance, in the event that the bill imposes a burden on the State Budget or budgets of local government units; outline drafts on principal executive acts; contain a statement of conformity of the bill to European Union law or a statement that the subject matter of the proposed legislation is not governed by the law of the European Union.

In the Senate article 76 of the Rules and Regulations of the *Senate* determines that the Senate committees or at least 10 senators can bring the legislative initiative to the Marshal of the Senate. Just like in the Sejm the Rules and Regulations of the *Senate* clarifies what kind of documents have to be submitted and which information the justification of the bill should contain. Then, during the sitting of the Senate, all senators voting for or against introduction of a legislative initiative to the Marshal of the Sejm. Although, the legislative initiative can come from number of different sources, in the Sejm the passing law has to be completed.

Bills shall be considered in three readings and according to the Sejm and Senate' rules the author of the bill, up to the end of the second reading, may withdraw his proposal. According to the article 39 of the Standing Orders of the Sejm the first reading of a bill shall consist of justification thereof by its sponsor, a debate on general principles of the bill, as well as Deputies' questions thereon and answers of the sponsor. A first reading at a sitting of the Sejm shall end with the referral of the bill or draft resolution to committees, unless the Sejm, pursuant to a relevant

motion, rejects the draft as a whole. The second reading shall consist of the presentation to the Sejm of a committee report on a bill and the debate and introduction of amendments and motions. The third reading shall consist of the presentation of an additional committee report (if there were amendments) and voting. Nowadays, the legislative process is held only in the Sejm and in the Senate. However, it has to be mentioned that at the end of the legislative process each law has to be sign by the President. President has also the right to use a presidential veto or reference the statute to the Constitutional Tribunal.

4. The impact of state authorities on the quality of Polish law

In Poland legislative authorities are the Sejm and Senate, which constitute the Parliament. The Council of Ministers of the Republic of Poland is, with the President, the executive body. All of mentioned authorities have the constitutional right to introduce legislation. However, there are some bodies, which are not a part of legislative authorities but they have also some rights and powers which results have impact on legislation process. Among entities which according to legal provisions may influence the shape and quality of Polish law are the Supreme Court, the Constitutional Tribunal, the Supreme Audit Office and the Commissioner for Citizens' Rights (called the Ombudsman).

The First President of the Supreme Court of the Republic of Poland is the authority who has impact on relevant entities which has right to introduce the bill to the Sejm. The Supreme Court is a unique judicial body that has been set up to ensure the lawfulness and uniformity of the jurisdiction of the courts. Although the Supreme Court is a representative of the judicial power, it also influences legislative power. The First President of the Supreme Court submits to the competent authorities comments on any irregularities or gaps in law which must be removed to ensure coherence of the legal system of the Republic of Poland (Zbrojewska, 2013, p. 147). Undoubtedly, this competence of Supreme Court is intended to signal irregularities and inspire competent authorities to initiate the legislative process to remove these irregularities and gaps in the law and to improve the quality of Polish law (Wróbel, 2008, p. 75-89).

In addition, the First President of the Supreme Court is required to submit annually information on the activities of the Supreme Court. Since the Supreme Court issues cases belonging to various branches of law, the First President has the widest knowledge about problems related to the functioning of the judiciary. Because of this annual information the First President of the Supreme Court has the opportunity to present these problems and to inspire the President of the Republic of Poland, the Sejm or the Senate to take legislative initiative to improve the quality of Polish law. To sum up, although the Supreme Court does not have a legislative initiative it influences the shape of Polish law and improves its quality through its activity.

Another source of inspiration for the change of Polish law to improve its quality is the Constitutional Tribunal. The President of the Constitutional Tribunal informs the Sejm and the Senate and other bodies, which are entitled to bring the bill to the Sejm, the existence of deficiencies and loopholes in the law which have to be removed to ensure coherence of the legal system. Also the judicial decisions of the Court play a significant role in the process of improving the quality of law. In the Polish system of constitutional control, it is assumed that the consequence of the incompatibility of the whole act or of a specific norm with the Constitution, international agreement or law is not its nullity *ex tunc* but only defectiveness.[3] Although the Constitutional Tribunal cannot bring legislative initiative to the Sejm, but through the content of the rulings can indicate the direction of the necessary changes in legislation to improve the quality of the legal system in Poland.

In addition, the President of the Constitutional Tribunal is obliged to submit to the Sejm and to the Senate an annual report on significant issues arising from the Court's activities and case-law. This is an opportunity for the President of the Constitutional Tribunal to personally present the problems resulting from the irregularities in the law and to propose the Chamber to undertake legislative work to rectify these deficiencies. Taking into account the Constitutional Tribunal' powers, it must be recognized that by its activities the Constitutional Tribunal influences the shape and

[3] See more on http://trybunal.gov.pl/o-trybunale/trybunal-konstytucyjny-w-polsce/nastepcza-kontrola-norm/

quality of Polish legislation. Another public body that have an impact on the Polish legal system is the Supreme Audit Office. The Supreme Audit Office has the broadest powers within its mandate (Safjan and Bosek, 2016, p. 1364). The Polish Constitution and the Act on the Supreme Audit Office impose an obligation on the Supreme Audit Office to submit to the Sejm an annual report on its activities. The Supreme Audit Office presents in its report a complete list of post-inspection proposals and *de lege ferenda* proposals, which constitute abundant information on the state of law and its quality. Undoubtedly, this type of activity is a form of influencing competent authorities to create a high quality law.

In addition the President of the Supreme Audit Office may move to the Marshal of the Sejm to request the Prime Minister to provide a statement on audit conclusions concerning the making and application of law. According to article 11a of the Act on the Supreme Audit Office if the statement provides the need to amend generally applicable legal regulations, it shall define the timeframe for the initiation of legislative work for these amendments and the authority responsible for developing proposals for appropriate regulations. The Supreme Audit Office, by pointing out loopholes in legislation, is trying to influence state authorities – in particular the Sejm, the Senate, the Council of Ministers and individual ministers – to create high quality law (Mazur, 2015, p. 25). Although the Supreme Audit Office has no right to introduce legislation within the meaning of art. 118 of the Constitution of the Republic of Poland, due to its control activities and the *de lege ferenda* proposals, it can be stated that Supreme Audit Office has impact on the shape of Polish law and its quality.

The Commissioner for Citizens' Rights (also called the Ombudsman) is another state authority that has an impact on the shape and quality of law in Poland. According to article 208 of the Polish Constitution the Ombudsman "shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts". The Ombudsman is an independent and politically neutral body. The scope and manner of operation of the Commissioner is defined by the Act, according to which the Ombudsman "may approach the relevant agencies with proposals for legislative initiative, or for issuing or amending other legal acts concerning the liberties and rights of a human and a citizen". In doctrine, such competence is called the indirect legislative initiative (Trociuk, 2014, p. 95).

Complaints directed by citizens to the Ombudsman concern matters from different areas of law, so the Commissioner has information about significant problems throughout the legal system. In situation when, during the examination of complaints, the Ombudsman concludes that the cause of violations of freedoms and rights is not the incorrect application of the law but the poor quality of law itself, the Ombudsman intervention is necessary. Such interference may take the form of alarm about the obligation to issue a new normative act or the need to amend the law in order to clear the gaps in the law and to improve its quality.

The Ombudsman has many means of influencing the legislative process and the way of interpreting the law. The Ombudsman not only responds to complaints, but also informs, suggests and postulates some systemic solutions. He directs speeches to authorities, organizations and institutions that have violated rights and freedoms (Górzyńska, 2005, p. 48). In addition, according to article 19 of the Act on the Commissioner for Human Rights, the Ombudsman "shall annually inform the Sejm and the Senate on his activities and on the observance of the liberties and rights of a human and a citizen". In this information the Commissioner signals the irregularities in the area of lawmaking.

To conclude, the Ombudsman is one of the bodies that can influence the quality of Polish law. Because of his powers the Ombudsman may request the competent authorities to apply for a legislative initiative, which in many cases results in passing a law. The Ombudsman, through his activities, influences the shape of Polish legislation.

Taking everything into consideration, the activities of state bodies that do not have the right to a legislative initiative affect the quality of the Polish law. As demonstrated by the examples discussed above, the form of influencing the shape of Polish law is varies, and may take the form of reports, information, signaling infringements and irregularities.

5. The legislative inspiration of citizens and non--state authorities and theirs impact on the quality of Polish law

At the beginning it is necessary to explain what a legislative inspiration is in the Polish legislation. Legislative inspiration is more political than

legal issue because it is not *expresis verbis* regulated by law. The doctrine of the constitutional law considered legislative inspiration as an action aimed only at introducing the bill into the Sejm. These activities involve, for example, social moods, changing national and international policies and unpredictable events.

Inspiration for initiating a legislative procedure may be long-term emphasis on some issue and the systematic alarm about the need for specific regulation. All sorts of strikes and manifestations very often affect the direction of Polish law.

Inspiration can also be the postulate of one man who is highly revered and respected by others. For example, in 2011, as a result of Mr Bartoszewski' actions, Deputies of the Sejm brought a legislative initiative setting out the purpose and scope of the grant for the Auschwitz-Birkenau Foundation. As a result, the Act of 18 August 2011 on a Subsidy for the Auchwitz-Birkenau Foundation Intended to Supplement the Perpetual Fund, was passed.

Sudden events, unpredictable and independent of human will also affect the content of the law. All kinds of accidents and natural disasters contribute to the creation or change the law. In most cases, the purpose of the amendment is to improve the quality of law, which at the time of the emergency has proved insufficient.

Undoubtedly the quality of law is also influenced by the think tanks. When think tanks, produce different types of reports they have to analyze the legal regulations in a particular field. Very often the conclusions included in such reports are used by the lawmaking authorities. It is worth to support development of think tanks in Poland, because if more independent and well informed research centers we have, then the law of better quality can be passed (Krygiel, 2014).

Legislative inspiration can also refer to already submitted bills. Very often, due to the negative reaction of citizens, we notice a change in direction of legislative work . This reaction can take on a mass character, eg. social protest, aimed at stopping the proceedings of a particular legal regulations. It may also happen that the protesters will seek to change the current law or they will demand to initiate a legislative process to enact a new law.

Also non-state authorities coming from outside the public sector can impact the quality of law by inspire the relevant authorities to introduce

the legislation to the Sejm. For instance, the Social Dialogue Council and professional lobbyists have an impact on Polish law.

The Social Dialogue Council, according to article 2 of the Act on the Social Dialogue Council and other social dialogue institutions, has right to express opinions and takes positions, gives opinions on draft guidelines for draft legal acts and on draft legal acts and initiates legislative process. Council powers do not fulfill the role of the legislative initiative, but only fall into the field of preparatory action and may be considered only as activities related to the legislative process (Męcina, 2016, p. 501). Certainly, the Council's activity in the law-making area has an impact on the shape of law and on its quality (Gubała, 2015).

Lobbyists are also entities that have an impact on the Polish law and the legislative decisions. According to the Act of Law on the Lobbying Activity in the Legislative Process the regular lobbying is any activity conducted by legally allowed means, which leads towards the exertion of influence upon the organs of public authorities in the lawmaking process.

Lobbying activities are not related only to the stage when a bill is already introduced to the Sejm but very often lobbyists activities are associated with the pre-legislative stage, when they inspire relevant authorities to bring a specific legislative initiative to the Sejm (Wołpiuk, 2005, p. 237). Although the Act specifies the scope of lobbyists' influence on public authorities, it is obvious that outside the scope of the law, less formal forms of influencing politicians' decisions are used eg. meetings with parliamentarians, media campaigns etc. (Młynarska-Sobaczewska, 2015, p. 168). Such activity have an impact on the competent authorities to initiate specific legislative actions in order to pass legislation that is desirable by lobbyists.

Taking everything into consideration, the pre-legislative stage always takes place because the legislative activity of the state is always the result of an event, someone's activity or an immediate need to change the legal situation. Legislative inspiration can be termed all the impulses, motivations and incentives that influence on the decision to start the legislative process.

6. Conclusions

The quality of law in Poland has been affected by many factors. The constitutional rules describe the main idea how correct legislation should look like. Also the "Principles of Legislative Technique" from 2016 clarify the legislative technique directives, which have to be used during creating the legal provisions. However, not only the legislative technique influences the quality of law. Beyond the relevant state authorities which according to article 118 of the Constitution have the right to introduce the bill to the Sejm and by that they create the legal system in Poland, also many other authorities influence the shape of the Polish law. Due to the fact that some state bodies have rights and powers to perform specific legal actions, they can impact on the law.

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