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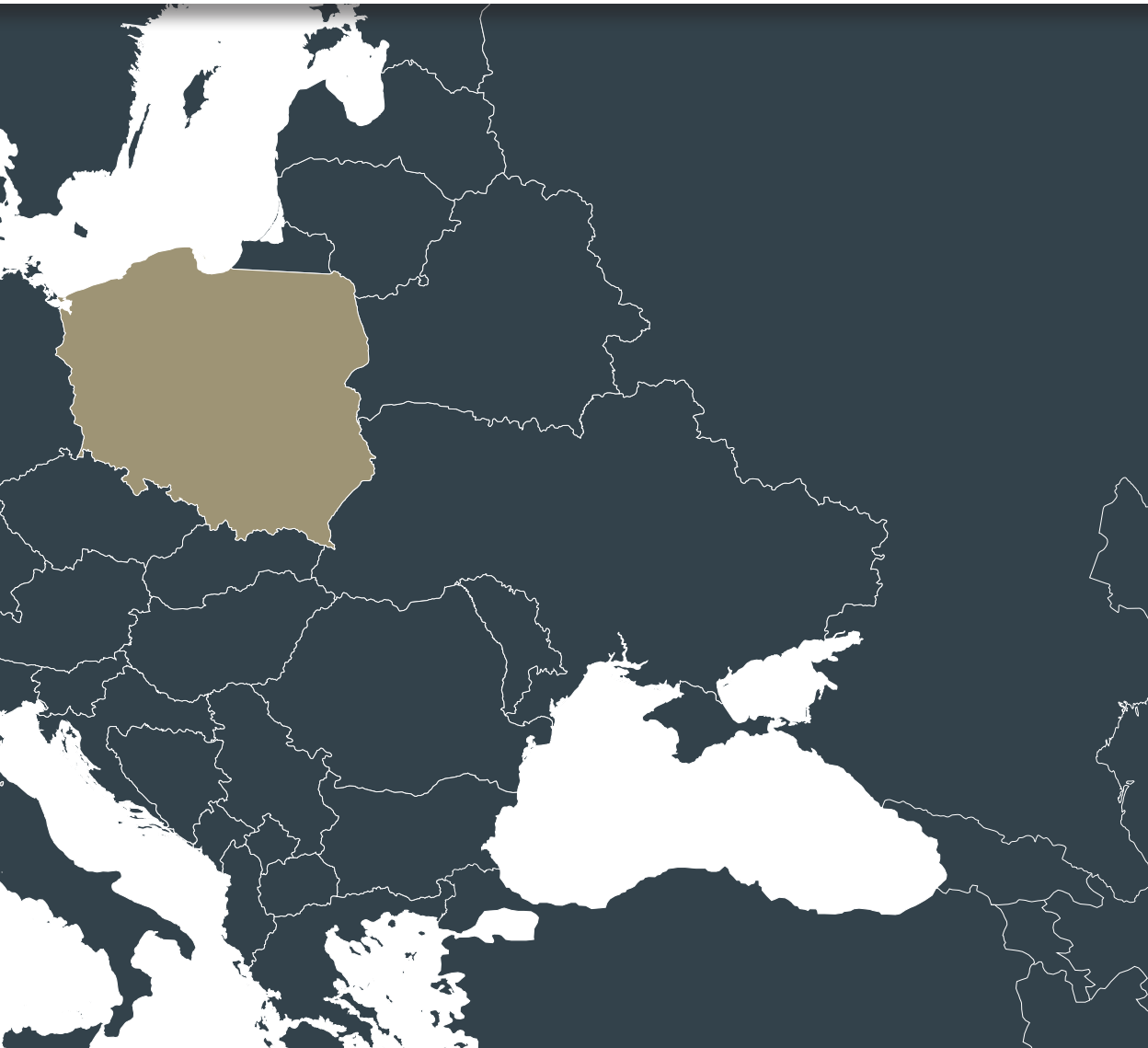

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Contemporary Central and East European Law

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Contemporary Central & East European Law is a scientific journal of the Institute of Law Sciences of the Polish Academy of Sciences, replacing the suspended in 2002 quarterly bilingual journal published since 1964, titled **Droit Polonais Contemporain – Sovremennoe pol'skoe pravo – Polish Contemporary Law**.

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Table of Contents

FOREWORD

We are pleased to present you with the first volume of the journal Contemporary Central & East European Law (CC&EEL), issued by the Institute of Law Studies of the Polish Academy of Sciences. The aim of the journal is to publish the works of outstanding researchers from the region concentrating on current legal issues relevant to Central and Eastern Europe. Papers concerning all areas of law, in particular adopting comparative and interdisciplinary approaches, are welcomed.

The CC&EEL replaces the bilingual journal Droit Polonais Contemporain – Polish Contemporary Law published by the Institute between 1964 and 2002. The ambition of the new editing team is to maintain the high academic level of the CC&EEL's predecessor which will hopefully be an important publication platform for scholars from Central and Eastern Europe.

Bearing in mind the importance of the 'Droit Polonais Contemporain – Polish Contemporary Law' for the community of legal researchers, we would like to announce that we have created an online archive. This was made possible thanks to the funding received from the Ministry of Science and Higher Education of the Republic of Poland as part of the program popularizing science.

The first issue of the CC&EEL has a special meaning, as it also marks the launch of the project "Excellence in Legal Research. Promoting Polish achievements in the area of legal sciences abroad", implemented by the Institute of Law Studies of the PAS and funded by the Ministry of Science and Higher Education. Most of the articles published in this very first volume of the journal present the main objectives of research which will be conducted as part of the project. The ultimate results of the Excellence project will be presented in the form of seven monographs and seven research articles printed by the most distinguished publishing houses and prestigious journals of law.

The articles published in this volume of CC&EEL cover research from various areas of law. The opening article is co-authored by Anna Młynarska-Sobaczewska, Katarzyna Kubuj and Aleksandra Mężykowska, who identify and discuss examples of arguments used by domestic and international courts in cases in which moral issues may play an important role. In the next article, Monika Domańska, Dawid Miąsik and Monika Szwarc examine how the case law of the Court of Justice of the European Union influences Polish legal order. Further, Mateusz Błachucki reviews the issue of soft law and its role in the functioning of supranational competition networks, concluding that supranational soft law may easily respond to the changing needs of authorities and stakeholders, as well as adapting to the evolution of the economic and regulatory environment. Lavinia Brancusi discusses the necessity of preparing a comprehensive study, against refusal pertaining to functional signs set in the EU trademark law, which would meet the business community's need to register non-traditional trademarks. In her article, Alina Sperka-Cieciura examines the change of the ownership structures of European airports and its impact on their proper

functioning. Also in the field of law of intellectual property, Marlena Jankowska discusses the background of protection of creative work in the fashion industry, including examples of both strong and relaxed approaches by industry players.

The subsequent article, authored by Agata Kleczkowska, changes the subject matter to the problem of 'grey zones' in public international law exploited by Russia's activities during the conflict in Ukraine. Łukasz Czarnecki discusses the new foreign investment law in China in the face of social development in that State. Moving from foreign to domestic law, Aleksander Mazan presents the question of representation in the Polish legal system from the perspective of attorneys and authorized agents, as well as investigating its role in the Polish legal system. In her article, Ewa Suknarowska-Drzewiecka examines the impact of digitization and new technologies on the employment relationship in Polish labour law. Then, Witold Klaus analyses the problem of criminalization of beggars throughout Polish history and presents its impact on the lives of the poorest and the most excluded members of Polish society. The following paper, authored by Hanna Kuczyńska, examines international criminal law, reflecting on the standard for prosecuting Nazi crimes committed in Poland in the light of the model presently used in international criminal law. The closing article, by Konrad Buczkowski and Paulina Wiktorska, deals with the technological advancements and the mobility of societies in the context of changes in crime, using the example of Poland.

Wishing you an interesting and inspiring read,
Professor Celina Nowak
Editor-in-Chief
Contemporary Central & East European Law

ABBREVIATIONS

JOURNAL AND LEGAL SERIES TITLE ABBREVIATIONS

AJDA	Actualité juridique. Droit administratif
Am J Juris	The American Journal of Jurisprudence
BGH	Germany Federal Court of Justice (Bundesgerichtshof)
C & R	Revista de Concorrência e Regulação
CCEEL	Contemporary Central & East European Law
CETS	Council of Europe Treaty Series
CJIL	Chicago Journal of International Law
Comp L Rev (Nicolaus Copernicus Univ)	Comparative Law Review (Nicolaus Copernicus University)
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
EJC	European Journal of Criminology
EPS	Europejski Przegląd Sądowy
Eur J Crime Cr L Cr J	European Journal of Crime, Criminal Law and Criminal Justice
GlobCon	Global Constitutionalism
GRUR	GRUR International
Harv J L & Pub Pol'y	Harvard Journal of Law and Public Policy
HR L Rev	Human Rights Law Review
HRQ	Human Rights Quarterly
ICJ Reports	International Court of Justice Reports
ICON	International Journal of Constitutional Law
IIC	International Review of Intellectual Property and Com petition Law
ILM	International Legal Materials
ILS	International Law Studies
Int'l Lab Rev	International Labour Review
Int'l Org	International Organization
IPQ	Intellectual Property Quarterly
Israel L Rev	Israel Law Review
JICL	Cardozo Journal International & Comparative Law
JIPLP	Journal of Intellectual Property Law & Practice
JOFR	Journaux Officiels de la République Française
JoL	Journal of Law [Dziennik Ustaw]
JSS	Journal of Strategic Security
JUFIL	Journal on the Use of Force and International Law
Lith Annu Strateg Rev	Lithuanian Annual Strategic Review
MIT SMR	MIT Sloan Management Review
MLLWR	Military Law and the Law of War Review
MPHiW	Miesięcznik Prawa Handlowego i Wesklowego
MPP	Monitor Prawa Pracy
NILR	Netherlands International Law Review
OEZK	Österreichische Zeitschrift für Kartellrecht
OJ	Official Journal (of the European Communities)
OSA	Orzecznictwo Sądów Administracyjnych
OSN	Orzecznictwo Sądu Najwyższego
OSNAPiUS	Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych
OSNC	Orzecznictwo Sądu Najwyższego Izba Cywilna

OSP ..... Orzecznictwo Sądów Polskich
PiZS ..... Praca i Zabezpieczenie Społeczne
PME ..... Prawo Mediów Elektronicznych
PPH ..... Przegląd Prawa Handlowego
RIPL ..... UIC Review of Intellectual Property Law
RPEiS ..... Ruch Prawniczy, Ekonomiczny i Socjologiczny
S Ct ..... Supreme Court Reporter Series
S Treaty Doc ..... Senate Treaty Document
SCR ..... Supreme Court of Canada Reports
SPP ..... System Prawa Prywatnego
Stan L Rev ..... Stanford Law Review
T Jefferson L Rev ..... Thomas Jefferson Law Review
Tul J Int'l & Comp L ..... Tulane Journal of International and Comparative Law
UNTS ..... United Nations Treaty Series
UST ..... United States Treaties and Other International Agreements
Va L Rev ..... Virginia Annual Law Review
Wld Pol ..... World Politics
ZaoRV ..... Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht
ZU OTK-A ..... Zbór Urzędowy Orzecznictwa Trybunału Konstytucyjnego - Seria A

PUBLISHING HOUSE ABBREVIATIONS

CUP ..... Cambridge University Press
GKBZH ..... Commission for Investigation of Hitlerite Crimes in Poland
INE PAN ..... Institute of Economics, Polish Academy of Sciences
IPN ..... Institute of National Remembrance
IPN-GKBZpNP ..... Institute of National Remembrance - Central Commission for the Prosecution of Crimes against the Polish Nation
IZ ..... Institute for Western Affairs
OUP ..... Oxford University Press
PIW ..... Państwowy Instytut Wydawniczy
PWN ..... Państwowe Wydawnictwo Naukowe
UBC Press ..... University of British Columbia Press
UJ ..... Jagielonian University
UW ..... Warsaw University
WSE ..... Bialystok School of Economics
WUJ ..... Jagiellonian University Press
WUŁ ..... University of Lodz Publishing House

LEGAL ABBREVIATIONS

CC ..... Polish Criminal Code
CCC ..... Polish Commercial Companies Code
CCP ..... Polish Code of Criminal Procedure
CJEU ..... Court of Justice of European Union
ECHR ..... European Convention on Human Rights
ECtHR ..... European Court of Human Rights
EU ..... European Union
FCC ..... French Constitutional Council
GDPR ..... General Data Protection Regulation

ICAO.....International Civil Aviation Organisation
ICC..... International Criminal Court
ICJ ..... International Court of Justice
ICTY.....International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991
IMT ..... International Military Tribunal at Nuremberg
OCCP..... Poland's Office of Competition and Consumer Protection
OECD ..... Organisation for Economic Cooperation and Development
QPC..... question prioritaire de constitutionnalité
PSC .....Polish Supreme Court
RIP.....référendum d'initiative partagée
CCC ..... Polish Commercial Companies Code
SNT .....Polish Supreme National Tribunal
TFEU..... Treaty on the Functioning of the European Union
TRIPS.....Agreement on Trade-Related Aspects of Intellectual Property Right
UN.....United Nation
UNGA.....United Nations General Assembly
UNSC.....United Nation Security Council
USSOCOM.....United Nations Special Operation Command
WTO ..... World Trade Organisation

OTHER ABBREVIATIONS

ADP..... Aéroports de Paris
BBC .....British Broadcasting Company
DGAC ..... Direction générale de l'aviation civile
EJIL: Talk! .....Blog: European Journal of International Law: Talk!
NPR.....National Public Radio

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Public Morality as a Legitimate Aim to Limit Rights and Freedoms in the National and International Legal Order

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Abstract

Domestic legislation and international instruments designed for the protection of human rights provide for general clauses allowing limitations of rights and freedoms, e.g. public morals. A preliminary analysis of the case-law leads to the observation that both national courts and the European Court of Human Rights, when dealing with cases concerning sensitive moral issues, introduce varied argumentation methods allowing them to avoid making direct moral judgments and relying on the legitimate aim of protecting morality. In the article the Authors analyse selected judicial rulings in which moral issues may have played an important role. The scrutiny is done in order to identify and briefly discuss some examples of ways of argumentation used in the area under discussion by domestic and international courts. The identification of the courts' methods of reasoning enables us in turn to make a preliminary assessment of the real role that the morality plays in the interpretation of human rights standards. It also constitutes a starting point for further consideration of the impact of ideological and cultural connotations on moral judgments, and on the

establishment of a common moral standard to be applied in cases in which restriction on human rights and freedoms are considered.

Keywords

public morality, morals, legitimate aim, constitutional courts, European Court of Human Rights, methods of argumentation

Introduction

The possibilities of limiting the rights and freedoms of individuals have become the main matter of public law[1] and are the most actively developing field within statutory and case law. The admissibility of restrictions on the exercise of guaranteed rights and freedoms, restrictions which affect their actual scope and content, is shaped in the paradigm of the principle of proportionality. According to this principle, restrictions can only occur to that extent in which they are necessary in a democratic community for the protection of clearly indicated values, established as legitimate aims.[2]

The principle of proportionality, consistently developed in the jurisprudence of constitutional courts and the European Court of Human Rights, has been proclaimed the 'new method of constitutional law'[3] and certainly deserves the title of one of the most successful legal transplants that have ever been made.[4] It has become the foundation for the protection of human rights in the legal order of European countries. The current and most interesting issue is whether the legitimate aims, i.e. the values indicated as the basis for the possibility of limiting human rights, may also gain a universal dimension. It is also worth seeking an answer to the question of whether the protection guaranteed at an European level lead to establishment of a common standard of content and scope of those values restricting rights and freedoms.[5] Among the values indicated in the European Convention on Human Rights[6] as legitimate aims, the public morals deserve special attention.

The relationship between law and morals – the question of whether law can formulate moral standards, and to what extent moral and legal order is related – is one of the oldest and most fascinating problems in public philosophy and jurisprudence.[7] Although it is

1 M Loughlin, *The Idea of Public Law* (OUP 2003) 114–115, 128–130; R Bellamy, 'Public Law as Democracy' in C Mac Armlaigh, C Michelon, N Walker (eds), *After Public Law* (OUP 2013) 132 .

2 VC Jackson, M Tushnet (eds), *Paradigms of Proportionality* (CUP 2017) 1–10.

3 V Perju, 'Proportionality and Freedom: An Essay on Method in Constitutional Law' (2012) GlobCon 1–2, 334–367, <http://www.doi.org/10.1017/S2045381712000044>.

4 Ibid.

5 Ch Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) HRQ 24, 278 et subseq.; R Perrone, 'Public Morals and the European Convention on Human Rights' (2014) Israel L Rev 47(3), 362 et subseq.; K Plouffe-Malette, *Moralité publique des droits de la personne au droit de l'OMC* (Bruylant Larcier 2019).

6 Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 Nov 1950, entered into force 3 Sep 1953) CETS No. 005.

7 D Lyons, *Etyka i rządy prawa* [Ethics and the Rule of Law] (Dom Wydawniczy ABC 2000).

impossible to ignore that introducing morals (public morals) as a legitimate aim which restricts the guaranteed human rights constitutes an openness to the ethical order and goes beyond legal criteria.

The subject of this article is the scrutiny of national and international courts decisions, in which moral issues may play an important role. A preliminary analysis of case-law leads to the observation that both the ECtHR and national courts extremely rarely use public morals as a legitimate aim to limit the scope of human rights.

The authors, noticing its very restrained use, make the assumption that courts and tribunals rarely invoke public morality to assess the legitimacy of public authorities applying restrictions, due to the fear of alleged arbitrariness of assessment.[8] However morals (public morals) as referred to in the ECHR and internal law are nonetheless an important, though not always explicitly indicated reason for the restriction of rights and freedoms. Therefore, this article attempts to indicate, on the basis of selected examples, some methods and types of arguments that are used by the courts instead of referring to the premise of public morals in the process of application of law. The identification of the courts' methods of reasoning allows for making a preliminary assessment of the real role that the premise of morality plays in the interpretation of human rights standards.

1. Legal basis for restrictions of rights and freedoms

Relatively often, acts of national law and international law regarding the protection of human rights provide for the possibility of limiting their implementation on the basis of a condition relating to ethical criteria, called 'morality' or 'public morality'.

The International Covenant on Civil and Political Rights allows for the limitation of many freedoms and rights due to public morality, including the freedom to manifest one's religion or beliefs [Art. 18(3)], freedom of expression [Art. 19(3b)] or the right to peaceful assemblies (Art. 21). The principle of morality as the reason for limitations is indicated by the Covenant with regard to the restriction of the public hearing, which is part of the right to a court [Art. 14(1)].

The European Convention on Human Rights provides that *the public may be excluded from all or part of the trial in the interest of morals* [Art. 6(1)]. The Convention also uses the concept of morality to limit the right to privacy [Art.8(2)]], freedom of thought, conscience and religion [Art. 9(2)], freedom of expression [Art. 10(2)], freedom of assembly and association [Art. 11(2)] and the freedom of movement [art. 2(3) of the Protocol No 4].

The legitimate aim allowing for morality-based limitations of rights and freedom is also formulated in many European constitutional acts. It is enumerated among general limitation clauses of the exercise of rights and freedoms, or in regard to each particular provision. The first of these solutions was adopted by the Polish Constitution of 1997.

8 More about the role of national judges in the development of the rights and freedoms and limits of their judicial activism see S Dijkstra, 'The Freedom of the Judges to Express His Personal Opinions and Convictions under the ECHR' (2017) Utrecht Law Review 13 (1), 14; E Bjorge, 'National Supreme Courts and the Development of the ECHR Rights' (2011) ICON 1, 29–31.

Article 31(3) allows the limitation of the exercise of constitutional freedoms and rights 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.

Many European constitutions recognize morality as a condition for the restriction of individual freedoms, in particular freedom of religion; e.g. the Constitution of Denmark of 1953 (Art. 18), the Constitution of Lithuania of 1992 (Art. 26), and the Constitution of Ireland of 1937 (Art. 44). The Czech Charter of Fundamental Rights and Freedoms of 1992 points to the possibility of its limitation on the grounds of 'morality' (Art. 16) and the Spanish Constitution of 1978 'if necessary to maintain public order' (Art. 16).

In several countries, the protection of morality is a condition for restricting freedom of expression [e.g. Constitution of Ireland – Art. 40(6); Constitution of Lithuania – Art. 25]. The Constitution of the Netherlands indicates 'good morals' with regard to freedom of the media [Art. 7(3)]. The Constitution of Estonia provides for the possibility of interfering with the inviolability of private and family life for the protection of morality (§ 26).

Many constitutional regulations avoid wording directly related to the ethical system of value of behaviour, citing neutral considerations. And so, for example, the Basic Law for the Federal Republic of Germany, with regard to the freedom of associations and unions, indicates a 'constitutional order' (Art. 9), or, elsewhere, the protection of young people. The French Declaration of Human and Civic Rights of 1789 states that *the Law has the right to forbid only those actions that are injurious to society* (Art. V).

These examples are not exhaustive. A morality clause appears quite often and in similar normative contexts, but is not always the same. For the purposes of this study, it will be referred to as public morality. This concept is used directly in a few acts (as in the ICCPR), but more often appears in jurisprudence and courts case-law. The morality clause referred to in the legislation and in the judgments is intended to draw attention to its specific dimension, namely the impact of ethical standards on the life of the social and political community.

2. Jurisprudence of constitutional tribunals and European Court of Human Rights

Assessments of moral issues by national judicial bodies and the ECtHR are present in case-law more often than is *explicitly* apparent from the justifications of their decisions. It is also worth noting that in the jurisprudence of the ECtHR, attempts are made not so much to look for solutions common to States Parties, but to indicate guidelines enabling them to achieve a specific goal (or good)[9] in particular circumstances,

9 The ECtHR made such a conclusion, e.g. in an advisory opinion (avis consultatif) of 10 April 2019 issued under Protocol No. 16 to the ECHR at the request of the French Court of Cassation regarding recognition in domestic law of a family bond between a child born of a surrogate mother abroad and the raising mother. The ECtHR, although it admitted that states have a wide margin of assessment, stated that they must apply measures in internal law to ensure the effectiveness and speed of actions pursuing the child's overriding interest.

separating the solution from the moral grounds and avoiding making any generalisation on this basis.

2.1. Polish Constitutional Tribunal

The first example of a ruling in which the constitutional court explicitly avoided the use of public morality as an legitimate aim is the decision of the Polish Constitutional Tribunal of 10 December 2014 (K 52/13)[10], which ruled on the non-compliance of law with the standard of freedom of religion[11] in which it did not allow animals to be subjected to the ritual slaughter method.[12]

In seeking a resolution of the conflict between the protection of animals from suffering, related to slaughter without prior stunning (required under Polish law) and the freedom of religion, the Tribunal has broadly referred to the content of this freedom and its relationship with the protection of human dignity.[13] The Tribunal also referred to the religious significance and tradition of ritual slaughter, using the findings of the ECtHR's judgment in the case of Cha'are Shalom Ve Tsedek v. France.[14] The Tribunal expressed the view that ritual slaughter of animals is protected under the freedom of religion guaranteed by Art. 53 sec. 1 and 2 of the Constitution. According to the content of Art. 53 section 5 of the Constitution, the freedom to manifest religion can be limited only by statute, and when it is necessary to protect the security of the state, public order, health, morality or the freedom and rights of others. The requirement of the protection of morality, identified by the Tribunal as a set of moral norms recognized in a given society and relating to interpersonal relations,[15] was made in light of the principle of proportionality. The Tribunal found that a ban on ritual slaughter of animals is not necessary in order to protect morals, because other methods of killing animals may also bring suffering and pain, and all slaughter, including ritual slaughter, is subject to specific requirements to

10 Decision of the Polish Constitutional Tribunal of 10 December 2014, K 52/13 (2014) ZU OTK-A 11, item 118.

11 Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 21 maja 2003 r. w sprawie ogłoszenia jednolitego tekstu ustawy o ochronie zwierząt Act on protection of animals of August 21st 1997 [2003] JoL 106, 1002 [Announcement of the Marshal of the Sejm of the Republic of Poland of May 21, 2003 on the announcement of the uniform text of the Act on protection of animals].

12 The problem appeared in the context of the content of Article 34 (1) and (3) of the Act, according to which an animal can be killed only after de-awareness; while in accordance to Article 35 slaughtering an animal in another way is a crime.

13 The Tribunal particularly referred to L Garlicki, 'Komentarz do art. 30' [Commentary to Art. 30] in L Garlicki (ed) Konstytucja Rzeczypospolitej Polskiej. Komentarz, vol. 3 [The Constitution of the Republic of Poland, Vol. 3] (Wydawnictwo Sejmowe 2003) 2–3.

14 Case 27417/95 *Cha'are Shalom Ve Tsedek v France* [2000] ECtHR 2000-VII ECtHR stated that the slaughter of animals according to a special method required by Judaism is a ritual that is protected under the freedom of religion guaranteed by Article 9 of the Convention.

15 Statement of CT after K Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [The Boundaries of Legislative Interference in the Field of Human Rights in the Constitution] (Zakamycze 1999) 196.

minimize such elements. As the Tribunal stated, the restriction of freedom of religion based on morals allows interference *only on such actions or behaviours that are commonly considered to cause social harm*. Although the Tribunal discerned that the aim of the ban on slaughter was animal welfare; a desire to spare animals unnecessary suffering and pain; but they considered that this is not a value which the constitutional order of rights and freedoms allows for inclusion as a legitimate aim of restricting freedom of religion. The Tribunal stated that freedom of religion is one of the basic moral values in Polish society, which is why it should instead be assumed that, in accordance with the moral standard of 'the widest respect for freedom of religion', this morality includes protection of rituals. According to the Tribunal, an absolute ban on ritual slaughter by minority groups is not necessary to protect the public morals of the majority.

In the Tribunal's argumentation there are at least three threads concerning the treatment of public morality. First of all, public morals come about as a consequence of religious life, without acquiring an autonomous character – due to which, the relationship becomes much less clear and the boundaries of both become difficult to define. Also, the line concerning the social effects of behaviours that are assessed in terms of constitutionality is marked in the Tribunal's arguments. The Tribunal directly stated the absence of negative social effects of ritual slaughter, indicating cases of permitted killing of animals without stunning (experiments, hunting, slaughter for domestic needs). Thirdly, the Tribunal identified the welfare of animals as the only protected good, thus avoiding the question of whether ethical standards exist regarding the cruelty of killing them. Only such a question could lead to a confrontation of morality with the practice being the object of assessment.

2.2. The French Constitutional Council

Neither the public morality clause nor the general morality references are directly expressed in the constitutional acts of the Fifth French Republic. It does not, however, mean that public morality does not appear on a statutory level and in case-law concerning constitutional matters. The French Constitutional Council has been confronted with public morality several times in preliminary reference proceedings (*question prioritaire de constitutionnalité*). That proceeding is initiated by courts of general jurisdiction when there is a need for the FCC to assess the constitutionality of a provision applied in a particular case. The decision of the FCC, delivered 5th October 2012 (No 2012-278 QPC), considered the constitutionality of an organic law (ordonnance No 58-1270 of 22 December 1958) that provided criteria for appointment of judges. According to that provision, a candidate to a judge's position was required to fulfil high moral standards (*bonne moralité*).[16] It had been applied to the situation of an applicant, whose candidacy was refused in a proceeding before the National School of Judiciary. The refused applicant

16 See V Planchet, 'Les garanties morales requises des candidats à la fonction publique' (2005) AJDA 1, 1016; L Belfanti, 'Qu'est-ce que «la bonne moralité» du magistrat? Le clair-obscur de la notion de «bonne moralité» comme condition d'accès aux fonctions de magistrat' (2013) Les Cahiers de la Justice 2, 163.

claimed the provision is unclear and vague because of its open nature and the vast scope of possible associations. According to her opinion, it left space for arbitrariness by the National School of Judiciary and other bodies in selection of candidates for a judicial position. She referred to Article 6 of the European Convention on Human Rights, which is a part of French constitutional law, and claimed that the application of the *bonne moralité* clause violated her right to equal access to positions in the judiciary system. Taking into account that there is no legal definition of the *bonne moralité* clause, the FCC did not deliver a binding interpretation and left space for public bodies involved in candidates selections for a judicial position. At the same time, the FCC distinguished the constitutional requirement of strict certainty (applicable to criminal and penal law provisions) from the general requirement of intelligibility and clarity of law (applicable to different legal provisions). According to the FCC opinion, the *bonne moralité* clause did not have to fulfil the first – mentioned above – requirement. Moreover, taking into account the public responsibility, high position and power of judges, the FCC pointed out that it was constitutionally justified to give public administration bodies the power to assess the morality of candidates.

The decision of the FCC, delivered 1 February 2019 (No 2018-761 QPC), considered the constitutionality of the law of 13 April 2016 (No 2016-444) that allowed for the imposition of penalties on a client of a prostitute.[17] The case aroused public interest and high expectations of many observers due to the public morality references made by both parties. The applicants claimed that the questioned provisions violated constitutional guarantees of private life and personal freedom. Nevertheless, the provisions were recognised as a constitutionally justified limitation of human rights and state interference. On the one hand, the FCC underlined the constitutional need for the protection of public health and public order, as well as prevention of crime. On the other hand, adopted a classical paternalistic type of argument that such provisions were to help protect prostitutes and their clients 'against themselves'. The FCC reasoning and final ruling is based on a very particular public morality preference. It may be seen in the proportionality test, where the FCC had to balance different constitutional values, protected by the public order and the privacy principle.

The FCC did avoid defining public morality in a general and abstract way in both the aforementioned cases. Instead of delivering a constitutional definition or criteria for a reconstruction of public morality, the FCC preferred to refer to other constitutional values, including the public order or common good. It seems to be a justified judicial strategy that is also reflected in a different constitutional court's decisions.

17 See C Richaud, 'Pénalisation des clients de personnes se livrant à la prostitution: la schizophrénie juridique' (2019) La Gazette du Palais 10, 30; É Buge, 'Pénalisation des clients de la prostitution: le Conseil constitutionnel face aux choix de société' (2019) AJDA 17, 969.

2.3. European Court of Human Rights

An example of a ruling of the ECtHR concerning sensitive moral and ethical issues was the judgment in the case *Lambert and Others v France*.[18] It started an intense discussion about judicial standards in relation to so-called end-of-life situations, including in particular the question of the possibility of discontinuation of treatment (artificial nutrition and hydration) of a patient who was unconscious and unable to express his wishes.[19] In its ruling, the Court made use of certain interpretative measures that narrowed the material scope of the decision, eliminating from consideration some threads raised by the applicants.

Although the applicants in the proceedings were close relatives who opposed to the withdrawal of treatment of Vincent Lambert, the Court rejected their complaints based on Articles 2 (violation of the right to life), 3 (ill-treatment amounting to torture) and 8 (infringement of personal integrity) of the Convention insofar as they lodged them on behalf and in the name of their relative. Referring to the lack of convergence of interests between the applicants' assertions and what Vincent Lambert would have wished, it found admissible only the complaint raised by the applicants in their own name.[20] In this way the Court avoided examination of some sensitive issues related to the patients' autonomy,[21] such as whether the patients' right extends to decisions as to how or when to die, or whether it covers the right to refuse treatment.

While examining substantive allegations raised on the basis of Art. 2 of the Convention by the relatives of Vincent Lambert in their own capacity, the Court, using the argument of a lack of consensus between Parties-States in the discussed matter, applied the doctrine of the margin of appreciation to assess regulations concerning the decision-making process of discontinuation of treatment. In conclusion it considered that the State had provided an appropriate legal framework for the procedure to withdraw the administered treatment. In relation to the decision-making process, it assessed that, although the procedure was lengthy, it was also meticulous, and exceeded the requirements laid down by law at

18 Appl. 46043/14 *Lambert and Others v France* [2015] <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-155264%22]> accessed 30 Dec 2019; see also Appl. 39793/17 *Charles Gard and Others v United Kingdom* [2017] <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-175359%22]> accessed 30 Dec 2019; and a previous decision in Appl. 55185/08 *Ada Rossi and Others v Italy* [2008] <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2597660-2816175%22]> accessed 30 Dec 2019. For more information about the fields in which the concept of morality should be used under the ECHR see Ch Nowlin 278–285.

19 For discussions concerning other cases raising sensitive issues see Ch Cosentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute with State Sovereignty in ECHR Jurisprudence' (2015) HR L Rev 15, 569–589; M Eder, 'Parillo v. Italy: ECHR Allows States to Interfere with Individuals' Admittedly Private Lives' (2016) Tul J Int'l & Comp L 24, 376–378.

20 Appl. 46043/14 [103]-[104].

21 J Kapelańska-Pręgowska, 'European Court of Human Rights (GC), Case of Lambert and Others v. France, judgment of 5 June 2015, application no. 46043/14' (2016) Comp L Rev (Nicolaus Copernicus Univ) 21, 164.

every stage of its implementation. Therefore – although the applicants disagreed with its outcome – the procedure met the requirements flowing from Art. 2 of the Convention.[22]

As a consequence of the application of the wide margin of appreciation, the Court significantly confined its own assessment of compliance with Art. 2 of the Convention of the procedural solutions applied by domestic authorities. What's more, to an even greater extent it limited the examination of premises constituting a basis for making the decision by individual persons and institutions within the national system. In this way, it *de facto* ceded to the national authorities the whole responsibility for defining and construing rules applicable in the material area, including those which may cause the most doubt from the ethical point of view. The Court neither referred to the criteria of fair balance or necessity and proportionality.[23] It is worth noting that when ruling on the basis of Art. 2 of the Convention it made use of the principle of the margin of appreciation, usually applied in the context of Art. 8 of the Convention.

Conclusions

The process of opening the legal order to ethical issues always creates a significant risk, both for the legislator and national courts, and even more so for international tribunals. Public morality should be read as a standard developed by, and interpreted in, the jurisprudence concerning the implementation of legal rules that define behaviour allowed by public legal order.[24] However, the courts and tribunals shape this standard, by largely avoiding direct reference to the legitimate aim of protecting morality, and by introducing varied measures of argumentation. Among these methods one can distinguish above all a) the application of other legitimate aims defined in appropriate legal acts, such as protection of public health or the protection of rights and freedoms of others, b) the application of the concept of margin of appreciation, c) assessment of cases on the basis of material provisions not enumerating legitimate aims which may justify an infringement upon the protected rights, e.g. provisions protecting life or introducing prohibition of ill-treatment and torture and d) examination and assessment of secondary effects, i.e. socially unfavourable outcomes that are a consequence of exercising rights or freedoms.[25] All these methods and types of arguments can be recognized in the mentioned judgments, in which courts consistently avoid making any decision on moral background, and thus having to provide justification using the category of morals.

The scepticism of judicial bodies in referring to the legitimate aim of protection of morality as a justification for the interference into the rights and freedoms of individuals, even in matters that *prima facie* require some sort of moral judgment, is a circumstance that encourages more extensive research into the types of arguments used by the courts

22 Appl. 46043/14 [166]-[168].

23 J Kapelańska-Pręgowska 173.

24 More about the limits of the notion of public morality see Ch Wolfe, 'Public Morality and the Modern Supreme Court' (2002) Am J Juris 45 (1), 65–92.

25 S Legarre, GJ Mitchell, 'Secondary Effects and Public Morality' (2017) Harv J L & Pub Pol'y 40, 320.

to replace or rationalize ethical judgments. The analysis of the above indicated ways of legal reasoning may lead to an answer of a question about the possibility of creation of a universal, supranational standard of public morality in the system of protection of human rights, relevant to principle of proportionality.

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Contemporary Central & East European Law

The Application of EU Law by Polish Courts: General Remarks on 15 Years of Experience

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Abstract

The Court of Justice of the European Union operates on a case-by-case basis. This means that its decisions normally relate to specific problems occurring in a specific Member State. Consequently it is often hard to 'translate' this case law into the national legal system of a different Member State. Nevertheless the case law of the Court of Justice has consequences not only for the individual Member States. It also has harmonising effects. In this sense, the principles of primacy and of direct effect of EU provisions, as well as the obligation to interpret domestic law in conformity with EU law, operate as the minimum requirements which the legal systems of Member States must fulfil. Poland joined the European Union in May 2004. At that time the number of Member States increased to 25. The existence of avenues of judicial protection in the EU raised a number of questions from the very beginning. Now, after 15 years of experience it is time to consider the standard of application of EU law by Polish courts.

Keywords

national courts, application of EU law, principle of primacy, direct effect, consistent interpretation, preliminary rulings

Introduction

The application of EU law by national courts in their day-by-day judicial activities is crucial for ensuring full effectiveness of EU law in the EU Member States. This effectiveness rests on a decentralised judicial system, where the rights that individuals derive from EU law are protected by each and every court of each Member State, regardless of its level or jurisdiction. For that reason, national courts play a decisive role in the effective application of EU law. This role has been created and constantly shaped in the course of their cooperation with the Court of Justice of European Union. The CJEU in the course of 50 years of its functioning has developed several principles which enable national courts to ensure effective application of EU law. These are in particular the principles of primacy and of direct effect of EU provisions, as well as the obligation to interpret domestic law in conformity with EU law. The jurisprudence of the CJEU in this respect has been already a subject of constant interest and analysis in Polish academic literature.[1]

The Polish judicial system rests on two pillars: the common courts, which decide in civil and criminal matters, and the administrative courts, which provide for judicial control of administrative decisions. The administration of justice in civil and criminal matters is also exercised by the Supreme Court, which (*inter alia*) ensures the conformity of law and coherence of jurisprudence of the common courts (and military courts) when deciding in review procedures, and adopting resolutions concerning legal issues fundamental for the system of justice in general. The judicial control of administrative decisions is exercised by the courts of two instances: Voivodeship Administrative Courts (first instance)

1 See in particular K Kowalik-Bańczyk, M Szwarc (eds), *Stosowanie prawa Unii Europejskiej przez sądy, vol. 2 Zasady – orzecznictwo – piśmiennictwo* [Application of EU Law by National Courts, vol. 2 Principles – Jurisprudence – Legal Doctrine] (Wolters Kluwer 2007); D Kornobis-Romanowska, *Sąd krajowy w prawie wspólnotowym* [National Court as an EU Court] (Wolters Kluwer 2007); A Wróbel (ed), *Stosowanie prawa Unii Europejskiej przez sądy* [Application of EU Law by National Courts] (2 ed Wolters Kluwer 2010); A Wróbel (ed), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* [Ensuring Effectiveness to Judgments of International Courts in the Polish Legal Order] (Wolters Kluwer 2011); N Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych* [Protection of EU Rights in National Proceedings] (Wolters Kluwer 2010); P Brzeziński, *Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej* [EU Duty to Disapply National Act of Parliament Incompatible with an EU Directive] (Wolters Kluwer 2010); D Miąsik, Podstawowe zasady stosowania prawa UE przez sądy powszechne w świetle orzecznictwa Sądu Najwyższego [Fundamental Principles of Application of EU Law by Common Courts in the light of the Supreme Court's Jurisprudence] (2014) EPS 1, 66–70; M Domańska, *Implementacja dyrektyw unijnych przez sądy krajowe* [Implementation of EU Directives by National Courts] (Lex a Wolters Kluwer Business 2014); A Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym* [The Duty of Consistent Interpretation of National Law] (Wolters Kluwer 2015).

and the Supreme Administrative Court (second instance). The third jurisdiction is the Constitutional Court, which is responsible for constitutional control as provided for in the Polish Constitution.

The Polish courts of all jurisdictions have already a long-standing and abundant tradition of applying EU law in their judicial activities – as Poland has been a Member State of EU since 1 May 2004. Since Poland's accession to the EU, the courts actively serve their duties as Union courts – courts which are entrusted with the duty to apply the law, to ensure the effectiveness of the law, and to provide individuals with legal protection and enforcement of the rights granted to them by the Union, under the principle of loyal cooperation. In their jurisprudence, Polish courts refer to primary and secondary law, and the case-law of the CJEU. When resolving disputes, Polish courts also invoke provisions of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. They do so to indicate that particular rights of an individual are protected not only by the Polish Constitution, but also within supra-national systems of law.

Polish courts take also the opportunity to maintain a judicial dialogue with the Court of Justice by way of the preliminary rulings procedure, as enshrined in Article 267 of the Treaty on the Functioning of the European Union. The first preliminary question was referred by the Voivodship Administrative Court as early as 2005. As a result, the ruling of the Court of Justice in case *Brzeziński v Dyrektor Izby Celnej w Warszawie*[2] helped to establish a legal standard applicable in a significant number of administrative and judicial proceedings concerning taxation of imported cars. Since then, the Court of Justice has significantly contributed to the development and uniformization of the jurisprudence of the Polish courts. This is the experience not only of these Polish court which issued judgments directly after the CJEU's judgment was delivered in reply to their preliminary references, but also of many other cases where Polish courts relied on CJEU's rulings (in 'Polish' cases and others). In particular, the resolution of 16 October 2017 of the Supreme Administrative Court is worth noticing, as the court ruled that even a tax payer whose matter was not directly affected by the judgment of CJEU, may move to reopen the proceedings before a Polish court following the CJEU's judgment.[3]

The impact of preliminary references made by Polish courts on the development of the EU law is significant. The references made so far concerned different pieces of EU legislation, ranging from EU Treaties, the Charter of Fundamental Rights, general principles of EU law, through to regulations, mostly directives, decisions and acts of soft law. Preliminary references have also been used by Polish courts to develop EU law in various areas, ranging from very traditional areas such as criminal law,[4] copyright;[5] commercial

2 Judgment of the CJEU C-313/05 EU:C:2007:33.
3 Judgment of the Supreme Administrative Court I FPS 1/17 [2017] .
4 Resolution of the PSC V KK 179/10 [2010].
5 Resolution of the PSC V CSK 41/14 [2015].

law;[6] tax law;[7] consumer law;[8] competition law;[9] and state aid[10] through to EU specific rules on judicial cooperation in civil matters,[11] coordination of social security systems,[12] damages for breach of EU law,[13] and then from novel areas of EU law such as telecommunications law[14] to – finally – the core values of the EU and the division of competences. In this last area, the references made by Polish courts, led by the PSC,[15] may encourage the ECJ to develop through its caselaw a series of EU measures allowing national courts to defend the rule of law. The references made so far have allowed the Court of Justice to develop legal standards concerning the essence of the rule of law and judicial protection,[16] interactions between EU and national competition rules,[17] the powers of the national communication regulator;[18] coordination of national social security schemes;[19] state aid in the energy sector;[20] and consumer protection.[21] The references made so far have covered both issues of interpretation of EU law, and the compatibility of national legislation with EU rules. The Supreme Administrative Court has also a long-standing tradition in particular of addressing preliminary rulings in cases concerning interpretation of EU directives harmonizing VAT and other indirect taxes.

It must also be emphasized that, at the urging of Polish courts, the CJEU has ruled on a couple of issues concerning the preliminary ruling procedure itself, such as the issue of referring questions concerning EU law to the CJEU or to the constitutional courts,[22] the issue of what counts as a court in the meaning of Article 267 of the TFEU (whether the

6 Resolution of the PSC IV CSK 664/14 [2015].
7 Resolution of the PSC I CSK 543/17 [2018].
8 Ibid.
9 Resolution of the PSC III SK 2/09 [2009]; Resolution of the PSC III SK 39/16 [2017].
10 Resolution of the PSC III SK 53/13 [2014]; Resolution of the PSC III SK 30/14 [2015].
11 Resolution of the PSC V CSK 487/13 [2014].
12 Resolution of the PSC I UK 344/08 [2009]; Resolution of the PSC II UK 241/18 [2019]; Resolution of the PSC II UK 81/18 [2019].
13 Resolution of the PSC I CSK 435/18 [2019].
14 Resolution of the PSC III SK 27/08 [2008]; Resolution of the PSC III SK 16/09 [2009]; Resolution of the PSC III SK 59/12 [2013]; Resolution of the PSC III SK 66/12 [2013]; Resolution of the PSC III SK 28/13 [2013]; Resolution of the PSC III SK 18/14 [2015]; Resolution of the PSC III SK 51/14 [2016].
15 Resolution of the PSC III UZP 4/18 [2018]; Resolution of the PSC III CZP 25/19 [2019]; Resolution of the PSC III PO 6/18 [2018]; Resolution of the PSC III PO 7/18 [2018]; Resolution of the PSC III PO 8/18 [2018]; Resolution of the PSC III PO 9/18 [2019]; Resolution of the PSC II PK 153/17 [2018]; Resolution of the PSC II PO 3/19 [2019].
16 Judgment of the CJEU C-231/15 EU:C:2016:769.
17 Judgment of the CJEU C-375/09 EU:C:2011:270.
18 Judgment of the CJEU C-277/16 EU:C:2017:989; judgment of the CJEU C-397/14 EU:C:2016:256.
19 Judgment of the CJEU C-440/09 EU:C:2011:114; judgment of the CJEU C-115/11 EU:C:2012:606.
20 Judgment of the CJEU C-329/15 EU:C:2017:671; judgment of the CJEU C-574/14 EU:C:2016:686.
21 Judgment of the CJEU C-628/17 EU:C:2019:480; judgmentof the CJEU C-260/18 EU:C:2019:819.
22 Judgment of the CJEU C-314/08 EU:C:2009:719.

National Appeals Chamber is a court within the meaning of Article 267 of the TFEU).[23] Moreover, the CJEU provided an interpretation of the notion of a court whose rulings may not be challenged, as a court obligated to refer questions for preliminary rulings on the grounds of the Polish civil procedure,[24] as well as the requirements for a national court to be considered as a court within the meaning of the EU law.[25]

Despite the rich experience of Polish courts in the application of EU law in the domestic legal order, the analyses of their jurisprudence in this particular context are scarce and mostly in Polish.[26] For this reason the judicial experience of Polish courts, which is of high intellectual value, deserves comprehensive and systematic analysis.

1. Practical application of the principles ensuring the effectiveness of EU law

The methodology of judicial application of EU law in the domestic legal order – with the aim to ensure its *effet utile* – consists of several steps to be taken consecutively, namely:

- identification of whether the court deciding a particular case is obliged to take EU law into consideration (a case with an EU law element);
- a decision whether interpretation of domestic law in conformity with EU law is possible (consistent interpretation);
- a decision on the direct effect of EU legal provisions in particular proceedings;
- a decision on the use of the principle of primacy of EU legal provisions over Polish provisions;
- a decision whether to use Article 267 TFEU and to address a preliminary reference to the Court of Justice.

While the jurisprudence of the CJEU has already been extensively commented on in European and Polish literature, the practice of national courts in their day-to-day activities concerning the application of the principles listed above has been scarcely reported.

1.1. 'A case with an EU law element'

The first preliminary issue necessary in the process of applying EU law in the domestic legal order is the identification of whether a particular case to be decided by the court involves the application of EU law at all. In other words, it is crucial to first answer the question of whether the facts which resulted in proceedings before the court fall within the temporal, personal and material scope of EU law.[27] Even if such a definition of 'a case

23 Judgment of the CJEU C-465/11 EU:C:2012:801.
24 Judgment of the CJEU C-119/15 EU:C:2016:987.
25 Judgment of the CJEU C-585/18 EU:C:2019:982.
26 See in particular D Miąsik, M Szwarc, *Stosowanie prawa Unii Europejskiej przez sędziów sądów powszechnych i prokuratorów* [Application of EU Law by Common Courts' Judges and Prosecutors] (Krajowa Szkoła Sądownictwa i Prokuratury 2012).
27 Ibid 17 .

with an EU law element' is not a legal one, it still gives the idea of proceedings in which the national court acts as an EU court in the functional meaning. From the established jurisdiction of the CJEU it may be inferred that the notion covers those proceedings, the subject matter of which falls within the scope of EC law, as defined by: 1) a cross-border element, 2) claims based on directly effective provisions of EC law, 3) secondary EC legislation, implemented by national law applied by the court, 4) reverse discrimination, 5) referral to EC law.[28] From the moment of Poland's accession to the EU, Polish courts had no difficulties with identifying the necessity of taking into consideration an EU law element in cases brought before them. As an example the practice of the Supreme Court can be brought up, which, when assessing that a pending case has an EU law element, concludes that 'the EU law contains regulations concerning the subject of the present case'[29], or that 'having regard to the EU character of the present case, which stems from the fact that the applicable law implements the provisions of the EU directive'[30] or that 'the facts of the case fall into the scope of application of directive 97/7'.[31] However from time to time it happens that a community character of judicial proceedings, which opens the possibility for the injured party to seek damages after challenging the legality of a judgment of a national court as incompatible with EU law. A fine example is provided by a case in which lower courts had overlooked the ECJ's judgment in Nerkowska,[32] which in turn resulted in the Supreme Court's ruling that the judgment of the lower court is contrary to the law.[33] On the other hand, it may also happen that a court sees an EU case where it is not present, because the subject matter falls outside the scope of application of EU law.[34]

1.2. Interpretation of Polish law in conformity with EU law

The obligation of consistent (conforming) interpretation as a tool designed for national courts to apply EU law effectively has been extensively used by Polish courts. In most cases the use of this tool has been exercised as follows. First, the court searched for a judgment of the Court of Justice or a particular line of its case-law concerning the particular issue and the specific provisions of EU law. Having established the position of the Court of Justice regarding the exact meaning of the EU legal provision, the Polish court tried to achieve the same result by interpreting Polish law in conformity with EU law. When a Polish provision was drafted in an unclear, ambiguous or general manner, there was always plenty of room for judicial interpretation that would lead to a result compatible with EU law.

28 D Miąsik, Sprawa wspólnotowa przed sądem krajowym [EU case before a national court] 2008 EPS 9, 16–22.

29 Judgment of the PSC I UK 68/07 [2007].

30 Resolution of the PSC III SP 2/10 [2010].

31 Judgment of the PSC I UK 182/07 [2008].

32 Judgment of the CJUE C-499/06 EU:C:2008:300.

33 Judgment of the PSC I BU 6/09 [2009].

34 Judgment of the PSC I UK 59/11 [2011] pointing improper adjudication by the lower court by recourse to the EU law, which application was excluded in the circumstances of the case by virtue of an opt-out declaration of the Polish government in the field of coordination of social security systems.

However, when a provision was drafted in a straightforward and extremely clear manner, there was no room to make a consistent interpretation, and the courts had to resort to the principle of primacy of EU law.[35] Polish courts have generally respected the limits of consistent interpretation as drafted by the Court of Justice, which are the prohibition of an interpretation *contra legem* of the national provision, and of interpretation leading to the imposition of criminal liability.[36] However at least on two occasions Polish courts have adopted a more 'adventurous' approach to the principle of consistent interpretation.[37]

Polish courts take into consideration that every EU citizen is entitled to the same rights and it is of paramount importance that national courts apply EU law in a uniform way. For example, in case II CSK 302/07[38] the Supreme Court assumed that it was obliged to apply EU law, because the national provisions which were the legal standard for pending case were implementing an EU directive, while the terms used in the directive where not defined in the national legislation. Consequently, in order to refer to the objections raised in the course of an appeal, the Supreme Court had to determine the interpretation of the following terms: 'informed user', 'overall impression', 'degree of freedom of the designer in developing the design', which – as new notions in the Polish legal system – had to be interpreted with regard to existing case law of the Court of Justice.

Polish courts also respect the conceptual autonomy of EU law in the cases they examine. Examples include judgments concerning such issues as: transfer of undertakings, businesses or parts of undertakings;[39] the working time of doctors performing on-call duty;[40] and determining the meaning of 'damage' in case of wasted holidays of a tour operator's customer.[41]

An important line of reasoning in Polish courts is the application of the principle of equal authenticity of different language versions, and, following the guidelines provided in such rulings of the Court of Justice as: Motor Industry, Van der Vecht, Ferriere Nold, the courts have expressed the view that the provisions of EU law should be interpreted while taking into account all language versions, not only the Polish one. For example, the Supreme Court stated that the correct interpretation of a provision of EU law should include comparing the wording of an article of the directive in Polish, French and English.[42]

An important input of Polish jurisprudence into the development of the doctrine of consistent interpretation is provided by the Pawlak litigation. Following the preliminary ruling of the ECJ,[43] the Supreme Court finally (after having set aside their initial reservations) decided that a an element of the Polish civil procedure code can be interpreted

35 Judgment of the PSC I PK 64/09 [2009].
36 For example judgment of the PSC II PK 143/07 [2008].
37 Judgment of the PSC III UZP 3/17 [2019].
38 Judgment of the PSC II CSK 302/07 [2007] (2009) OSP 6, item 66.
39 Judgment of the PSC I BP 8/13 [2015] OSP 8, item 110.
40 Resolution of the PSC I PZP 11/07 [2008].
41 Resolution of the PSC III CZP 79/10 [2010] (2011) OSNC 4, item 41.
42 Judgment of the PSC III PK 30/06 [2006] (2008) OSP 7-8, item 82.
43 Judgment of the CJEU C-545/17 EU:C:2019:260.

consistent with directive 97/67.[44] What is even more important, the Supreme Court provided Polish courts with a comprehensive set of arguments, resulting in the use of different interpretative tools which may allow national courts to adopt a conforming interpretation of a national rule that otherwise would be considered as *contra legem*.

1.3. Direct effect of EU law provisions

The direct effect of EU law provisions has been recognised by Polish courts, mostly in close relation to the principle of primacy. For example the Supreme Court has ruled that the former article 18(1) of the Treaty establishing the European Community (which is now article 21 TFEU) is – according to article 91(1) of the Polish Constitution – directly applicable, and as a consequence takes precedence above the provision of Polish law. It resulted in the conclusion that provisions of Polish law which were incompatible with Article 18(1) TFEU could not be a legal basis for the suspension of an allowance, which was granted to a Polish citizen, who resided in a Member State other than Poland.[45]

There are also a considerable number of cases in which Polish courts have applied the rules of direct effect of EU directives. In particular, it has already been recognized that directives are binding on the Member States to which they are addressed, and so they cannot impose obligations on individuals. As a consequence, the provisions of EU directives have no direct effect in disputes between individuals.[46] It has also been recognized that provision of an EU directive may be directly effective only when invoked by an individual in a dispute with the 'state',[47] and that this notion has to be interpreted widely as encompassing not only public administration bodies, but also any other public entity under the control of the State.[48]

The recognition of the direct effect of EU law provisions is present also in the jurisprudence of administrative courts.[49] The Voivodship Administrative Courts have also recognized that not only courts are obliged to apply EU law provisions, as this obligation also rests on public administration bodies.[50]

44 Resolution of the PSC III UZP 3/17 [2019].
45 Judgment of the PSC I BU 6/09 [2009].
46 For example judgment of the PSC IV CSK 133/11 [2011].
47 Judgment of the PSC II PZP 10/09 [2009].
48 Judgment of the PSC II PK 17/06 [2006]; judgment of the PSC II PK 228/09 [2010]; judgment of the PSC I PZP 11/07 [2008].
49 Judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 2219/05 [2005]; judgment of the Voivodship Administrative Court in Białystok I SA/Bk 411/06 [2007]; judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 4330/06 [2007].
50 Judgment of the Voivodship Administrative Courts in Białystok I SA/Bk 411/06 [2007]; judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 4330/06 [2007].

1.4. Primacy of EU provisions over Polish provisions

In general, the principle of primacy of EU law and its consequences (in case of a conflict between domestic and EU norms), as it stands in the jurisprudence of the CJEU, is commonly accepted by Polish courts. The Supreme Court has accepted that

> *establishing that a provision of national law is contrary to EU law provisions results in conclusion that – according to the principles of primacy and direct effect of EU law – such a national provision may not be applied by Polish courts* [...] *The obligation to ensure the primacy of EU law is binding for each and every national court, deciding a case pending before it, without it being necessary to await the elimination of such a provision from the domestic legal system. For that reason decisions of national constitutional courts of Member States concerning conformity or non-conformity of domestic provisions with the national Constitution are not relevant for the obligation of national court to refuse to apply domestic provisions non-conform with EU law.*[51]

It further concluded that

> *it is necessary to remember about the primacy of EU law over the laws, which means that the appellate court may by itself refuse to apply Polish provision (when it has no doubts on this point) or – when it may have doubts on this point – to refer the case to the Court of Justice of the EU.*[52]

The most recent example is provided by the judgment of the Supreme Court of December 5th 2019,[53] in which the Simmenthal rule was explicitly and definitively used by the Labour and Social Security Chamber of the Supreme Court to disapply the provisions of the national act which excluded its jurisdiction to hear the case and withheld this jurisdiction to the newly created unit within the Supreme Court which is not a court within the meaning of EU law.

The Constitutional Court has confirmed the acceptance of the primacy of EU law in the context of the Polish Constitution,[54] but there are still many interesting nuances of the consequences of primacy in particular cases.[55] This jurisprudence should also be subject to a thorough analysis, in order to synthesize and present the CC position on the matter.

51 Judgment of the PSC III CSK 112/05 [2006].
52 Resolution of the PSC III CZP 3/10 [2010].
53 Judgment of the PSC II PO 7/18 [2019].
54 In particular judgment of the Constitutional Court K 18/04 [2005]; judgment of the Constitutional Court K 32/09 [2010].
55 Judgment of the Constitutional Court SK 45/09 [2011].

The administrative courts also accept the primacy of EU law. The Supreme Administrative Court has confirmed that the refusal to apply a domestic legal provision, which was contrary to the EU law (which in turn was confirmed in the judgment of CJEU in case C-134/07 *Kawala v Gmina Miasta Jaworzna*), was justified on the grounds of the principle of primacy of EU law. According to the SAC, this applies not only to courts, but also to the application of law by public administration bodies.[56]

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56 Judgment of the Supreme Administrative Court I OSK 842/09 [2010].

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Judgment of the CJEU C-115/11 EU:C:2012:606.
Judgment of the CJEU C-465/11 EU:C:2012:801.
Judgment of the CJEU C-397/14 EU:C:2016:256.
Judgment of the CJEU C-574/14 EU:C:2016:686.
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Judgment of the CJEU C-545/17 EU:C:2019:260.
Judgment of the CJEU C-628/17 EU:C:2019:480.
Judgment of the CJUE C-260/18 EU:C:2019:819.
Judgment of the CJEU C-585/18 EU:C:2019:982.
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Resolution of the PSC III CZP 79/10 [2010] (2011) OSNC 4, item 41.
Resolution of the PSC III CZP 25/19 [2019].
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The Role of Soft Law in Functioning of Supranational Competition Networks

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Abstract

The article discusses the issue of soft law and its role in the functioning of supranational competition networks. It draws from the assumption that international cooperation is crucial for competition authorities around the world and that the most efficient and comprehensive form of such cooperation takes the form of supranational competition networks. For networks, establishing common standards in the form of soft law is essential for development of the network and the deepening of cooperation between network members. The article concludes that supranational soft law has its eminent advantages like informality, flexibility, and accessibility which allow it easily to respond to the changing needs of authorities and stakeholders, and to adapt to evolution of the economic and regulatory environment. However, the problems of legitimacy and transparency in the process of establishing soft law rules are yet to be resolved.

Keywords

supranational networks, soft law, competition law, competition authority, international cooperation

Introduction

National competition authorities (NCAs) have been cooperating closely for a long time. However this international cooperation of NCAs has been flourishing in recent years. It takes various forms, depending on the needs and goals of participating authorities. The significant propagation of fora devoted to the development of competition law cooperation at an international level – such as the International Competition Network (ICN) or UNCTAD, and at a regional level – such as the European Competition Network (ECN), European Competition Authorities (ECA) or Nordic Co-operation, is an

undeniable fact. Furthermore, bilateral cooperation in this area is also booming. Such an upsurge of supranational administrative networks is not unique to antitrust field, but international cooperation in the area of enforcement of competition law is especially well situated to allow study of these phenomena. As one researcher put it, *if networking is the new world order – antitrust is the provocative example.*[1] Soft law plays a crucial role in the functioning of competition networks and in many situations it is the most distinguished result of networks of competition authorities cooperating internationally. Therefore, it is more than justified to analyse this issue more closely.

The aim of the article is to briefly discuss the problem of soft law and its role in the functioning of supranational competition networks. First, a general definition of supranational administrative network is introduced. Second, some observations on the development of forms of international cooperation between competition authorities are offered. It is followed by a presentation of the issue of soft law in the practice of supranational competition networks. Furthermore, the significance and functions of soft law in the functioning of supranational competition networks are discussed. Afterwards the article shows the impact of supranational soft law on domestic legal systems. Considerations are concluded with a presentation of the risks associated with supranational soft law.

What are supranational competition networks?

Supranational competition networks may take various forms and are not a homogenous phenomena[2]. The classical definition of transgovernmental networks describes them as sets of direct interactions among sub-units of various governments, which are not controlled by the policies of the cabinets or chief executives of those governments.[3] This definition forms a part of the wider concept of transgovernmentalism in international relations. Under this concept, states are no longer the only participants in international relations, but there are several other new participants, namely networks. However, for the purpose of this article, a more workable definition is used. Therefore, the term network primarily describes non-hierarchical or barely-hierarchical forms of cooperation that are located outside of the usual forms of administrative cooperation.[4] Networks offer a more flexible form of achieving common goals than international organisations or completely decentralised structures. They involve technocrats who are experts in a given field and are capable of resolving common problems without any involvement from their governments.[5]

1 EM Fox, 'Linked-in: Antitrust and the Virtues of a Virtual Network' in P Lugard (ed), *The International Competition Network At Ten: Origins, Accomplishments and Aspirations* (Intersentia 2011) 105.

2 M Błachucki, 'The Evolution of Competition Authorities Networks and the Future of Cooperation between NCA's in Europe' (2018) OEZK 11(4), 119–120.

3 RO Keohane, JS Nye, 'Transgovernmental Relations and International Organizations' (1974) Wld Pol 27(1), 43.

4 JP Terhechte, International Competition Enforcement Law Between Cooperation and Convergence (Springer 2011) 14.

5 K Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) Virginia Journal of International Law 43(1) 23–25.

This form of cooperation is typical for competition authorities around the world. It is especially well developed in Europe. The European Union eagerly promotes the establishment and development of networks among European national authorities in various areas (energy, telecommunications, railways etc.) forming a composite European administration.[6]

Soft law as the next step of deepening of international cooperation of NCAs

The cooperation between competition authorities within supranational networks has now become more intense, which has had a direct impact on other networks. Creating institutionalised forms of cooperation, by setting up official or unofficial networks and concluding bilateral or multilateral agreements, lends a sense of permanence to such cooperation and provides opportunities to deepen it. Several stages can be discerned from the evolution of these forms. The second step, after becoming acquainted and exchanging experience and expertise, most often involves negotiating broad cooperative frameworks and ground rules acceptable to all the participating agencies (e.g. ICN, ECA, CECI and MWG), and laying the foundations for further activity. Compiling reports, commissioning studies, and comparing domestic administrative regulations and practices is typically the next stage. Those that have been created in an orderly manner can be distinguished from simple exchanges of experience and expertise in that they highlight areas of disagreement and encourage more detailed joint documents in selected areas. These can differ in nature, i.e. ICN has produced numerous manuals and handbooks to assist in administration (e.g. procedural manuals, workbooks, market surveys, templates, and toolkits) and model documents (e.g. waivers of confidentiality and agreements with trustees and other fiduciaries).

The soft law in the practice of supranational competition networks

Soft law documents, e.g. recommendations, best practice handbooks, standards and guidelines, and other agreed principles, are produced in addition to documents that directly support administrative practice under the umbrella of international cooperation between competition agencies. It would be difficult to overestimate the value of these documents. Although they are not officially binding, their relevance and persuasive authority are crucial for the development of the administrative practices of many competition agencies, and for subsequent amendments to domestic regulations. Soft law documents created through international cooperation enable national authorities to learn new tools, principles and principles. They can then seek to apply them in order to remain fully-fledged

6 P Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory' in HCH Hofmann, AH Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Edward Elgar 2009) 34–36.

participants. Furthermore, mutual principles that have been agreed to at an international forum constitute a compelling argument for legislative amendments at the national level. At the same time, soft law is a broader topic that assumes particular importance in the context of transnational competition authorities and their activities.

The soft law regulations laid down by transnational competition networks play a dominant role in international competition law. The universality of these regulations is such that other soft law policies and principles, e.g. those determined by private entities, only play a marginal role (as opposed to other regulatory areas and the evolving detailed transnational soft law conventions / acts described in Codes of Good Practice).[7] Soft law is a practical and theoretical challenge for jurisprudence. The sheer wealth and heterogeneity of material available makes it inordinately difficult to formulate a uniform and comprehensive definition. Soft law is most commonly understood as informal rules that can generate certain practical results despite not having the force of law.[8] Soft law is often created by transnational networks without any direct legal basis. It should be noted that informally created transnational law, including soft law, depends on cross-border cooperation on the part of national administrative authorities, as well as the possible contribution of non-governmental entities and NGOs (this is an aspect of the informality of creating law) for its effectiveness. Moreover, this has to take place in fora other than conventional international organisations and / or between entities other than those concerned with conventional diplomatic relations, e.g. regulatory authorities or government agencies (this is an aspect of the informality of the contributing entities). Finally, this cooperation does not result in adopting formal conventions, agreements or other legally binding obligations (the informality of the results of cooperation).[9] Soft law appears in many branches and fields of law, although its development has been particularly strong in public international law, especially on issues related to disarmament, the international economic order, the international monetary order, environmental protection, and human rights.[10] Soft law is also considered typical of the development of competition law.[11]

7 DM Bowman, GA Hodge, 'Counting on Codes: An Examination of Transnational Codes as a Regulatory Governance Mechanism for Nanotechnologies' (2009) Regulation & Governance 3(2) 159 et subseq.

8 A Jurcewicz, 'Rola «miękkiego prawa» w praktyce instytucjonalnej Wspólnoty Europejskiej' [The Role of «Soft Law» in the Institutional Practice of the European Community] in C Mik (ed), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of the Law of European Integration in National Legal Orders] (TNOiK 1998) 111.

9 J Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Rresearch Questions' in J Pauwelyn, R Wessel, J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 22.

10 P Skuczyński, Soft law w perspektywie teorii prawa' [Soft Law from the Perspective of the Theory of Law] in O Bogucki, S Czepita (eds), *System prawny a porządek prawny* [Legal System vs Legal Order] (Wydawnictwo Naukowe Uniwersytetu Szczecińskiego 2008) 326.

11 M Błachucki, 'Stanowienie aktów tzw. prawa miękkiego przez organy administracji publicznej na przykładzie prawa antymonopolowego' [Establishing so-called Soft Law by Public Administration Bodies on the Example of Antitrust Law] in M Stahl, Z Duniewska (eds), *Legislacja administracyjna. Teoria, orzecznictwo, praktyka* [Administrative Legislation. Theory, Jurisprudence, Practice]

Soft law has featured in international trade, when countries have acknowledged the advantage of informal soft agreements over those that create rigid obligations and require formal ratification.[12] The fact that soft law is now used in international and transnational trade to obviate the role of national governments and circumvent their exclusive authority to establish legal regulations may seem ironic. Transnational competition networks have largely supplanted national governments in this sphere of legislative activity by creating their own procedural regulations. As a result, the boundary between public and private sphere has become blurred in many places.[13]

The significance and role of soft law in the functioning of supranational competition networks

Soft law is used to strengthen the role of supranational organisations and networks. Transnational competition networks can substantially contribute to the escalation of this process. The example of EU law shows that it has developed when the countries sitting on the European Council could not bring themselves to accept inflexible regulations. The road to embracing EC soft law guided the development of this branch of law, and in so doing, forced it to become harmonised.[14] The EC's practical utilisation of soft law advances soft harmonisation, and with the assistance of the way(s) in which it has been interpreted, additionally enables the appropriation of areas hitherto considered the preserve of EU legislative bodies. Loosely-worded treaty provisions, together with the conflicting interests of member states, have proved decisive in the success of the EC.[15] The adoption of soft law precedes the adoption of law. European state aid law is a case in point. Crucially, this is an example of how soft instruments are gradually supplanted by hard ones.[16] An analysis of selected transnational competition networks reveals that the involvement of national administrative bodies considerably shortens the odds of adoption of legal regulations drawn up or deemed essential in the network forum. The additional conclusion of bilateral agreements between national administrative bodies and those from leading jurisdictions further increases the probability of foreign standards being incorporated into the domestic legal framework.[17] Similar observations apply to soft law created within the European Competition Network (ECN). ECN resolutions (including those

(Wolters Kluwer 2012) 236–237.

12 M Cini, *From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime* (European University Institute 2000) 4.

13 K Sahlin-Andersson, 'Emergent cross-sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative' in: U Morth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar 2004) 130–131.

14 M Blauberger, *From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law* (MaxPlanck-Institut für Gesellschaftsforschung 2008) 13.

15 Ibid 22.

16 M Cini 26.

17 D Bach, A Newman, 'Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation' (2010) Int'l Org 64(3), 507.

concerning independence and 'appropriate measures') and recommendations (including those concerning leniency and priorities) have become the basis for their codification and development into ECN+ directives. The ECN has come to advocate 'soft harmonisation', and the results have been very positive. The EC acknowledges, however, that the next stage involves transferring these consensual standards to the legal system as hard law. The strengthening of national, ECN, and especially EU, competition authorities is the intended end result of these changes. The position of national competition authorities is strengthened *vis-à-vis* that of national governments to the extent that the ECN, and especially the EC, can expand their influence on not only the jurisdiction, but also the makeup, of a national competition administration for EU countries.

Soft law instruments have a multiplicity of forms and can therefore fulfil a variety of functions. Three basic functions can be identified under EU law:

- The pre-law function can be understood two ways: (i) a soft law act that is consultative in nature, published with a view to canvassing the opinions of interested parties, and subsequently enacted as a universally binding law on that basis; and (ii) more broadly as a soft law instrument adopted to possibly pave the way for the future enactment of hard law;
- Supplementing the post-law function, i.e. soft law is negotiated after universally binding regulations have been adopted with a view to supplementing and consolidating them. In this situation, the universally binding regulations anticipate the drafting of soft law documents;
- Supplanting the para-law function, i.e. soft law can be an alternative to conventional legislation. One example of this might be programmatic documents of a prospective nature, e.g. policies of various kinds.[18]

The soft law documents negotiated in the forums of transgovernmental networks provide a clear example of these functions being fulfilled. The soft law instruments adopted in these forums frequently serve as templates for national and even supranational (especially the EU) legislatures. The soft law of these networks additionally supplements national hard law. Indeed, many of them contain recommendations and other guidelines that regulate certain issues in a more detailed manner than national statutes, where they are often defined in very general terms. This is certainly the case with competition law, where soft law can be applied at both the national (where it is adopted by antitrust authorities) and the transnational (where it is adopted by transnational networks) levels. Moreover, the soft law of transnational competition networks can replace hard law in some cases, especially when a given country lacks the political will to regulate a particular issue. The 2014 OECD recommendation concerning international cooperation in competition matters may be a case in point. Faced with a lack of political will to create a binding international convention along the lines of the OECD taxation conventions, the

18 L Senden, *Soft Law in European Community Law* (Hart 2004) 120.

relevant transnational network members decided to accept this 2014 recommendation. This demonstrates that soft law enacted by transnational competition networks can complement, or even supplant, binding national legal standards, as well as international public law, in some situations.

The impact of supranational soft law on domestic legal systems

It is also worth considering the ways in which soft law instruments negotiated by transnational competition networks can be reflected in a national legal system, and how they can guide a public administrative body in exercising its administrative jurisdiction. As noted above, although unofficial transnational standards are not binding, they nevertheless bring about practical results and influence universally binding national and international law. It is emphasised in the literature that unofficial transnational standards (i.e. soft law negotiated by networks) can be included in national law through:

- being incorporated into transnational standards in toto without any special oversight;
- specific references to specific transnational standards in legal documents;
- transnational standards being commonly referenced or treated as general principles, e.g. as good industry practices or the best available technologies (BAT);
- applying designated provisions to make transnational standards one of the (non-binding) bases of published decisions;
- employing transnational standards as guidelines for interpreting national regulations governing ill-defined concepts;
- having private parties apply transnational standards directly in civil law relationships.[19]

Polish law provides some excellent examples as to how the influences enumerated above are reflected in administrative practice and the judgements of civil and administrative courts. The Telecommunications Law [Art. 3 (3)] directly refers to the application of soft law on the part of antitrust authorities, and civil courts competent in competition cases cite mutually agreed-upon transnational practices in their judgements.[20]

Risks associated with supranational soft law

Instituting soft law may be a sign that the law is being modernised, but it can also be an attempt to circumvent conventional and official legislative processes. Soft law is associated with the following risks:

19 O Dilling, M Herberg, G Winter, 'Introduction: Exploring Transnational Administrative Rule-Making' in O Dilling, M Herberg, G Winter (eds), *Transnational Administrative Rule-Making. Performance, Legal Effects, and Legitimacy* (Hart 2011) 5–6.

20 M Błachucki, 'Judicial control of guidelines on antimonopoly fines in Poland' (2016) C & R 25, 57 et subseq.

- it can encroach on established lawmaking processes;
- it can bypass legislatures;
- its substance can be imprecise and unwarranted;
- it is not fully embedded in positive law;
- it does not readily lend itself to judicial evaluation;
- very little soft law is publicly available and its creation is not influenced by public opinion;
- it enables judges and administrators to assume a dominant role in creating public policy.[21]

These risks vary in nature and extent, but they mostly result from soft law being embedded in the legal system before universally binding legal regulations have been created to govern it. Most of these risks can be avoided by adopting explicit procedures to create and monitor soft law instruments. The emergence and development of soft law is incontrovertible evidence that public administrative authorities have exceeded their remit to apply the law, and have begun to create it in certain areas. These risks are increasing in the case of soft law established by transnational competition networks. The practice of Poland's Office of Competition and Consumer Protection (OCCP) proves that it is acting independently of other Polish public administrative agencies and ministries by participating in the creation of soft law as part of a competition network. Its operations in this domain are neither specified anywhere in the law nor subject to any judicial or administrative oversight whatsoever. Moreover, when they create soft law instruments, competition networks generally define the adoption procedures themselves, and do not as a rule subject them to any external oversight. Adopting soft law instruments as part of a competition network can impact, and even go beyond, statutory matters governed by Polish law. While the documents are generally accessible online, only a meagre portion of them are available on the OCCP website, even though it was involved in drafting them.

Soft law created by transnational competition networks has sparked a great deal of controversy, especially over the legitimacy of these bodies to create such regulations and having this kind of quasi-normative legislative act inserted into national legal systems. Soft law instruments are rarely created by competition networks in accordance with any clear rules. At times, there is only a 'recognised standard of competence' (e.g. that accorded to the OECD) to warrant their adoption. They are very rarely adopted pursuant to a regulated procedure. These instruments are almost never overseen by independent courts or even other national administrative bodies. This lack of legitimacy and oversight can be resolved by having third parties involved in adoption of soft law instruments (in respect of which the rules agreed to will be applied). In principle, this involvement should lend these documents a certain degree of legitimacy and ensure that both government agencies and third parties act in accordance with them. This practice is employed by the ICN, which involves NGO advisers in its activities. This gives them an opportunity to

21 M Cini 5.

influence the substance of soft law instruments adopted by transnational competition networks associated with the ICN. The OECD likewise allows third parties to articulate their requirements when drawing up its recommendations. However, a lot of networks, especially in Europe, make use of highly opaque procedures to create soft law instruments.

Conclusions

The undertaken analysis leads to the conclusion that the soft law plays a crucial role in the international cooperation of NCAs within supranational competition networks. Adopting soft law is the next step in the development and broadening of international cooperation of NCAs. It serves as a basis for further steps in strengthening the cooperation and networks. NCAs establish legislative aims and standards of operation, and coordinating administrative practice in the form of soft law. Soft law functions as a basis for creation of a level playing field for NCAs where the same or similar rules apply to all members of the network. Supranational soft law has its obvious advantages like informality, flexibility, and accessibility, which allow it to easily respond to the changing needs of authorities and stakeholders and to adapt to the evolving economic and regulatory environment. On the other hand, the lack of legitimacy and accountability in the preparing of supranational soft law is especially visible. It leads to undermining of the role of the state and national laws. These risks are deepened by the real impact that supranational soft law has on the administrative practice of NCAs and its indirect influence on national laws.

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Why is the Functionality Doctrine in Trade Mark Law worth Advanced (Re)Consideration?

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Abstract

This article considers the necessity of preparing a comprehensive study, over absolute refusal grounds pertaining to functional signs set in the EU trademark law, which would meet the business community's need to register non-traditional trade marks. The study aims to define the exact scope of the aforementioned exclusions through objective criteria that can render them a workable tool, distinct from refusal grounds pertaining to distinctiveness, and able to solve problems of overlapping rights. As its specific research methodology, the study adopts comparative results coming from the US trade dress functionality doctrine, and a specific input offered from a 'law and economics' perspective, including competition rules related to market definition and substitutability of products.

Keywords

trade marks, functionality, public interest, US law, competition, products' substitutability

Intellectual property (IP) is an area of law that is strongly harmonized at the European Union level and subject to important international treaties. It is also the field most susceptible to the impact of new technologies that challenge the current legal framework. Such changes have a pace that any legislator can barely keep up with. One visible effect of this changing landscape concerns the situation when certain legal instruments are suddenly attaining new significance. This is the case of the functionality doctrine in trade mark law, also with relevance for other IP rights such as designs and copyright, which the Court of Justice of the European Union 's judiciary has recently moved from a quasi-dormant status to a vividly debated one. The following remarks present some factors that have stimulated this development and identify major problems entangled by

the functionality doctrine, while discussing reasons to adopt a comparative approach to find flexible, market-tailored solutions.

1. Seizing functionality in a 1 minute read

'Functionality' in trade mark law is a term designating a set of legal provisions that deny trade mark protection to signs consisting of certain product features that are technically or aesthetically important for competitors and consumers, for reasons pertaining to a risk of impeding effective competition on the market. In other words, granting legal exclusivity via trade mark registration on such a 'functional' sign on behalf of one undertaking would necessarily restrain competitors' ability to trade in products with identical or similar features that could also be important for consumers. From an entrepreneurial perspective, trademarks play a paramount role.[1] Unlike other IP rights – considering here patents, utility models, designs, and even copyright – a trade mark registration, under the requirement of continuous use and payment of fees, may be renewed without time limits. This can make a successful product the object of a permanent exclusivity. This concept lays at the core of any competition concern.

2. Functionality: legal status and challenges – a view into the law

From the very beginning of the EU trade mark harmonization process, functional provisions have constituted absolute grounds for refusal of registration.[2] They address the hypothetical situation of a sign, consisting of product features determined by the nature of such goods, or those features necessary to obtain a technical result or that give substantial value to the goods. The first and the last category of signs may be referred to under the notion of aesthetic functionality, whereas the second fits the term of technical/utilitarian functionality.

Speaking about product features, it appears obvious that functionality provisions have been targeting three-dimensional signs, but also two-dimensional representations of product shapes. High-profile judgements were delivered in cases such as the Philips

1 See recently R Skubisz, 'Znaki towarowe i ich ochrona (refleksje ogólne)' [Trade Marks and Their Protection (General Considerations)] in R Skubisz (ed), *Znaki towarowe i ich ochrona* [Trade Marks and Their Protection] (CH Beck 2019) 1–4; for a seminal study see R Skubisz, *Prawo z rejestracji znaku towarowego i jego ochrona. Studium z zakresu prawa polskiego na tle prawnoporównawczym* [Trade Mark Rights and Their Protection. Study of the Polish Law against Comparative Legal Background] (Stowarzyszenie Naukowe Pro Scientia Iuridica 2018) 17–33.

2 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L 40/1, art. 3(1)(e) (i)-(iii); Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L 11/1, art. 7(1)(e)(i)–(iii) accordingly, followed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299/25, art. 3(1)(e) (i)–(iii) and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L 78/1.

rotary shaver, LEGO brick and Stokke Tripp Trapp chair.[3] This situation may change, however, because the latest amendments to EU trade mark law have broadened the scope of functional exclusions, extending beyond shapes to any other characteristic of goods (such as colours, texture, etc.).[4] Challenges have already arisen from assessing the positioning of red colouring on a shoe sole, or two-dimensional decorative motifs affixed on fabric.[5] Legal interpretation is needed to define the exact scope of the aforementioned exclusions, first identifying the category of signs that may fall under these provisions, and then finding objective, relevant criteria which can render these absolute refusal grounds a workable legal instrument, with foreseeable outcomes that are not detrimental to business practice.[6]

Such registration obstacles go against what the business community really wants to protect. A noticeable market trend consists of increased development of sophisticated branding strategies that are built upon appealing product features, addressing different human senses. The fastest way to make an impression on a consumer is not necessarily with words, as traditional trade marks used to do, but through shapes, colours, audio, moving icons and any combination thereof. This is the domain of so-called non-traditional marks, nowadays in full bloom. New technological means of communicating (product) information to consumers stimulate business interest in registering non-traditional signs.[7] This trend is facilitated by the EU amendments which adopted a new definition of trade mark, departing from the problematic requirement of graphic representation, and enabling the filing of new types of marks.

3 Judgement of the CJUE C-299/99 EU:C:2002:377; Judgement of the CJUE C–48/09 EU:C:2010:516; Opinion in case C–205/13 EU:C:2014:322.

4 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1, art. 4 (1) (e) (i)–(iii) and Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) and Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1, art. 7(1)(e)(i)–(iii) (which came finally into force on October 1, 2017 and replaced Regulation No 2015/2424).

5 Judgement of CJUE C-163/16 EU:C:2018:423; Judgement of CJUE C-21/18 EU:C:2019:199.

6 For recent analyses see E Rosati, 'The Absolute Ground for Refusal or Invalidity in Article 7(1)(e)(iii) EUTMR/4(1)(e)(iii) EUTMD: In Search of the Exclusion's Own Substantial Value' (2020) JIPLP 15(2), 103–122 <https://doi.org/10.1093/jiplp/jpz157>; CJ Ramirez-Montes, 'Louboutin Heels and the Competition Goals of EU Trade Mark Law' (2019) RIPL 19(1) 38–63 <https://repository.jmls.edu/ripl/vol19/iss1/2/> accessed 25 Feb 2020; L Brancusi, 'Funkcjonalność techniczna i estetyczna jako przeszkoda rejestracji' [Technical and Aesthetic Functionality as a Registration Impediment] in R Skubisz (ed), *Znaki towarowe i ich ochrona* [Trade Marks and Their Protection] (CH Beck 2019) 26–36.

7 For a recent overall perspective see I Calboli, M Senftleben (eds), *The Protection of Non-Traditional Marks: Critical Perspectives* (OUP 2018) <https://global.oup.com/academic/product/the-protection-of-non-traditional-trademarks-9780198826576?cc=pl&lang=en&>accessed 25 Feb 2020.

This possible dissonance between welcoming the filing of non-traditional trade marks and then immediately treating them to a chilling functionality test is strengthened by the interplay of another set of legal provisions, i.e. these related to distinctiveness. In many circumstances, a functional sign may also lack distinctive character, be descriptive or even customary, which form the object of distinct absolute refusal grounds.[8] In contrast to functional prohibitions, these refusal grounds may be overpassed by proving acquired distinctiveness by the effect of use – so, registration remains a matter of time. Internationally, neither the Paris Convention[9] or TRIPS[10] formulated autonomous grounds for functional signs – there are doubts whether these acts were even meant to cover any non-traditional sign – with the effect that a strong legacy of national practices from a pre-harmonized EU landscape has blurred the relationship between distinctiveness and functionality issues.

From a practical point of view, it is vital that assessing functionality should permit a proper delineation of the scope of refusal grounds pertaining to distinctiveness issues. Distinctiveness has been already comprehensively analysed by the doctrine. Functionality stays within the ambit of this book.

3. Functionality as a public interest policy at the crossroads of overlapping rights

An important input of the CJEU practice is the requirement to interpret functional provisions, and also the aforementioned refusal grounds linked to distinctiveness, through a 'public interest' rationale. The doctrine has been struggling to confer a sensible understating of this open-ended notion for a long period, adopting a fine-tuning method which leads to systemic, clear interpretation, though debates still remain.[11]

As to functionality rules, two approaches, not necessarily mutually exclusive, may come into play. One reads functionality as a 'channelling' instrument aiming at delineating the scope of trade mark protection from other, time-limited, IP regimes. Functionality would ultimately act as a tool against simultaneous or sequential cumulation of rights on two frontlines: technical functionality would put trade marks aside from patents/utility models, and aesthetic functionality from design and copyright protection. Another approach recognizes the reasons of functionality as preventing negative effects on market competition, so that trade mark protection would only be denied in specific circumstances, namely when monopolization of essential product features may create disadvantages /

8 A Kur, 'Absolute Grounds for Refusal' in A Kur, M. Senftleben, with a contribution by V. von Bomhard, *European Trade Mark Law: A Commentary* (OUP 2017) 106–116; K Szczepanowska-Kozłowska, 'Bezwzględne przeszkody rejestracji znaku towarowego' [Absolute Refusal Grounds to a Trade Mark Registration] in R Skubisz (ed), *Prawo własności przemysłowej* [Industrial Property Law] (CH Beck 2017) 651–674.

9 Paris Convention for the Protection of Industrial Property of March 20, 1883, 21 UST 1583, 828 UNTS 305.

10 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM, 1197.

11 I Fhima, 'The Public Interest in European Trade Mark Law' (2017) IPQ 4, 311 et subseq.

difficulties to competitors. At numerous times, CJEU has emphasized the effective competition rationale, although arguably without providing sufficient methods and criteria of assessment. This constitutes another good reason to deal with in a monograph.

Nowadays one of the critical situations that practice and doctrine have to face is the overlapping of IP rights. It is true that as a strategic means of growth, business entities are seeking to develop IP portfolios, which gather multifaceted forms of protection on the same asset. By way of example, in the pharma industry an innovative drug tends to exploit all the advantages given by patents, supplementary protection certificates and data exclusivity, but in addition, design, and especially trade mark protection, would come into play to cover important elements of the appearance of the product, such as the shape and colour of a pill.[12] Multiple concerns are formulated against the negative impact of 'artificially' prolonged legal exclusivity upon the scope of the public domain by reducing free access and thus obstructing follow-on creation and innovation.[13]

The functionality doctrine represents one of the possible instruments capable of creating order in what the doctrine calls the 'eco-system'[14] of rights. In design law, similar functional exclusions attack features solely dictated by product's technical function and must-fit features enabling a mechanical connection (and resulting interoperability) of two products. There are multiple interactions between functionality rules in design and trade mark law, as CJEU guidelines for assessing functionality in trade mark law penetrate *mutatis mutandis* also into design matters. After a recent CJEU judgement in design law declaring 'technical function' an autonomous notion of EU law,[15] Uma Suthersanen, an important voice of the doctrine, has noticed that CJEU tends to create a 'harmonised exclusion' for three-dimensional objects underlining 'an aligned supra-rationale' that

12 H Moir, L Palombi, 'Patents and Trademarks: Empirical Evidence on 'Evergreening' from Australia' (paper presented at 4th Asia-Pacific Innovation Conference at National Taiwan University in 2013) <https://openresearch-repository.anu.edu.au/handle/1885/11418?mode=full> accessed 25 Feb 2020; M Reitzig, 'Strategic Management of Intellectual Property' (2004) MIT SMR <https://sloanreview.mit.edu/article/strategic-management-of-intellectual-property/> accessed 25 Feb 2020.

13 A Tischner, *Kumulatywna ochrona wzornictwa przemysłowego w prawie własności intelektualnej* [The Cumulative Protection of Industrial Design in the Intellectual Property Law] (CH Beck 2015), 58–64. This concern was raised at numerous times by M Senftleben, 'A Clash of Culture and Commerce: Non-Traditional Marks and the Impediment of Cyclic Cultural Innovation' in I Calboli, M Senftleben (eds), *The Protection of Non-Traditional Marks: Critical Perspectives* (OUP 2018) 309 <https://global.oup.com/academic/product/the-protection-of-non-traditional-trademarks-9780198826576?cc=pl&lang=en&>accessed 25 Feb 2020; M Senftleben, 'Impact on Competition Law: Monolithic Copyright, Market Power and Market Definition' in KC Liu, RM Hilty (eds), *Remuneration of Copyright Owners: Regulatory Challenges of New Business*, (Springer 2017) 257.

14 A Tischner, 'W ekosystemie ochrony własności intelektualnej' [Within the Ecosystem of the Intellectual Property Protection] in A Adamczak (ed), *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego* [100 Years of Industrial Property Protection in Poland. Liber amicorum of the Patent Office] (Wolters Kluwer 2018) 1071–1085 discusses this notion in relation to cumulation of trade mark and copyright protection.

15 Judgement of CJUE C-395/16 EU:C:2018:172.

safeguards against conferring trade mark and / or design protection in cases restricting market competition.[16] In addition, CJEU has currently also been asked to investigate the relevance of features dictated by technical function for the scope of copyright protection.[17] From this perspective, functionality becomes an important legal doctrine transgressing several IP regimes which definitely calls for attention about its specific purposes in each IP right, and the means to adequately achieve those purposes.

4. Functionality within the realm of comparative research with US law

Intellectual property law is an area in which many scholars have adopted comparative legal analysis as a prime research methodology.[18] A reason for this is the fundamental role that intellectual property plays in international trade, because any IP territorial right may ultimately act as a barrier to trade. In a globalized world, goods and services travel fast, but frequently together with intangibles covered by legal 'monopolies' on behalf of particular undertakings. Comparative legal research is encouraged because it brings beneficial effects not only in 'transposing' some feasible solutions to legal issues arising within one national/regional system (here, specifically the EU) but, generally, for fostering more coherent solutions at an international level.

From this perspective, working on suitable methods of assessing functional trade marks on European grounds may noticeably benefit from a comparative insight into the US functionality doctrine. The latter consists of a vast body of law, judiciary and doctrinal guidelines which have been applied for more than a hundred years in relation to the protection of trade dress, first on the basis of unfair competition grounds, and later within the realm of registered trade marks.[19] The interplay of distinctiveness requirement combined together with utilitarian or aesthetic aspects has led to important 'tests' to deal with the categories of 'product packaging' and 'product configuration'.

It is true that US functionality practice may seem too wide, and perhaps sometimes ambiguous, which makes it difficult to manage for comparative purposes. But this is precisely why it may also turn out to be useful. A vast US corpus of case-law concerning myriad 'functional' product features, from different economic sectors, advocates to adjust

16 U Suthersanen, 'Excluding Designs (and Shape Marks): Where is the EU Court of Justice Going?' (2019) IIC 50, 160.

17 See case C-833/18 Brompton Bicycle, EU:C:2020:461. For an in-depth analysis of standards and challenges of copyright protection to designs post Cofemel judgement, see A Kur, 'Unité de l'Art is Here to Stay – Cofemel and its Consequences' (2019) Max Planck Institute for Innovation and Competition Research Paper 19-06 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500845> accessed 25 Feb 2020.

18 I Calboli, 'The Role of Comparative Legal Analysis in Intellectual Property Law: From Good to Great?' in G Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 3–27 with further references.

19 Instead of many G Dinwoodie, M Janis, Trade Dress and Design Law (Aspen Publishers, Wolters Kluwer 2010).

any legal solution to the diverse necessities of business. This could be a valuable input for the EU practice, as it might help to foster flexible assessments and outcomes, suitable to meet the expectations and legal challenges associated with new categories of non-traditional marks.

Additional reasons in support of a comparative approach to the US law come from similarities over the public interest policy of denying protection to functional trade marks.[20] In US functionality cases, two schools of thought have been advanced: a 'right to copy' rationale (i.e. functionality as means of obstructing cumulation of rights and protecting public domain) in contrast to a 'need to copy' rationale (i.e. functionality as dealing with particular cases when the effective competition is impaired). The latter focusses on the availability of substitutable goods. In other words, if consumers have access to alternative products considered satisfactory substitutes, then functional features of a product may be trademarked on behalf of one entity without the risk of impairing competitors. A deeper insight into these approaches and the legal tests built upon them also seems useful for EU functionality cases.

5. A COMPLEMENTARY COMPARATIVE VIEW: FUNCTIONALITY WITHIN THE PARADIGM OF 'LAW AND ECONOMICS' AND PRODUCTS' SUBSTITUTABILITY

Emphasizing an incentivizing aspect, intellectual property rights are said to reduce competition by imitation (i.e. legal exclusivity gives a right's owner control over an asset and safeguards against its copying) but, in exchange, to enhance competition by substitution. Undertakings are encouraged to differentiate products and product information. This is acceptable according to competition law goals and welfare efficiency standards set by 'law and economics'. Problems arise when competition by substitution is curtailed and consumers' choice of price / quality / innovative products is narrowed. Such effects may result from granting trade mark protection to a functional sign. As previously noted, the functionality rationale touches upon the need to balance public interests against the private interests of trade mark owners, and this calls for finding some positive methods of evaluating cases of the negative impact of registrations on market competition.

Assuming that the core issue of functionality trade mark cases lies in assessing the availability of substitutable goods, an avenue of exploring such matters could constitute a competition law perspective on market definition and products' substitutability.[21]

20 Such possibilities were explored in L Brancusi, 'Alternative Products as a Factor to Determine the Functionality of Trade Marks – How the Criteria from the US Functionality Doctrine Could be Applied in the EU Law?' in S Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar Publishing 2019) 180-200.

21 See L Brancusi, 'Assessing the Impact of Registering Non-Traditional Marks in the EU Law: A Competition Law Analysis' in I Calboli, M Senftleben (eds), *The Protection of Non-Traditional Marks: Critical Perspectives* (OUP 2018) 248–256, <https://global.oup.com/academic/product/the-protection-of-non-traditional-trademarks-9780198826576?cc=pl&lang=en&>accessed 25 Feb 2020.

Market definition is a key concept of competition law (antitrust in the US) proceedings for assessing market dominance / power. It focuses on the possibility of customers switching to alternative products in the event of a price increase or other modifications of product' qualities.[22] For trade mark purposes, an interesting situation relates to narrowly defined markets restricted to one product, especially because of long-term branding strategies. There is a growing interest in competition law practice to take into account branding as an essential factor to induce consumers' insensitiveness to price changes and therefore negatively affect products' substitutability.[23] This calls for analysing here the extent to which 'product delineation' (i.e. defining the relevant product and its alternatives) may be useful for functionality cases.

In a more general manner, an interesting query can be posed on how functional trade marks are challenging the traditional view of trade marks' performing a pro-competitive role. It is quite known that trade mark rights help maintain supra-competitive prices after the lapse of patents, which is a significant circumstance for technical functionality. In addition, branding strategies are built on the loyalty of emotionally involved consumers, which ultimately affects the value of goods and is relevant for matters of aesthetic functionality too.

Summing up these aspects, it is the author's contention that a comparative view into the 'law and economics' perspective over trade marks and its direct link with competition law, and some specific methods of assessment, would be instrumental for finding appropriate solutions to functionality cases. An encouraging sign supporting such a research attitude comes from a recent conclusion by a leading IP scholar about functionality in design and trade mark law, that *the only real consideration is whether* [...] *protection will threaten the competitive practices within an identified product market*.[24]

6. Conclusions

Circling back to the question initially set out, the author sees the need for a comprehensive study over the functional exclusions set in EU trade mark law, which would bridge comparative results originating from the US trade dress functionality doctrine, and specific input offered by a 'law and economics' perspective, including competition rules pertaining to market definition. The book prepared within the framework of the project 'Excellence in Legal Research. Promoting Polish achievements in the area of

22 P Podrecki, 'Porozumienia ograniczające konkurencję' [Agreements Restricting Competition] in M Kępiński (ed), *Prawo konkurencji* [Competition Law] (CH Beck 2014) 783–786; M Bernatt, A Jurkowska-Gomułka, T Skoczny, 'Zakaz nadużywania pozycji dominującej' [Prohibition of abuse of Dominant Position] in M Kępiński (ed) 976–981; D Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej* [The Relationship Between Competition Law and Intellectual Property Law] (Wolters Kluwer 2012) 109–116.

23 For a multifaceted analysis see D Desai, I Lianos, S Waller (eds), *Brands, Competition Law and IP* (CUP 2015).

24 U Suthersanen 157–160.

legal sciences abroad' will have the following structure. Chapter one will introduce the EU legal framework and discuss the notion of public interest across different absolute refusal grounds. Chapter two will touch upon functionality doctrine in the US law, with an aim of emphasizing common points. Chapter three will take an approach of 'law and economics' to discuss competition reasons for denying trade mark protection to functional signs. Special attention will be paid to the issue of market-definition and access to alternative products. The chapters that follow will focus on aspects of legal interpretation of the category of signs that are caught by the EU functional provisions and consist of product features determined by technical/utilitarian and aesthetic considerations. An important objective is to find sensible solutions to the problem of overlapping rights. The conclusions will sum up with practical tips and *de lege ferenda* suggestions.

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Contemporary Central & East European Law

The Impact of the Ownership Structure of the Company Managing an Airport on its Functioning

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Abstract

This article tackles the problem of the ownership structure of the enterprises managing airports. The process of privatization of certain airports that has recently been conducted in France provoked a discussion about the possible effects of this process. The critical report of the Court of Auditors (Cour des Comptes), published after the privatization of the airports in Toulouse, Nice and Lyon, as well as the strong opposition to the privatization of Group ADP (managing the airports in Paris), leads to the conclusion that it is necessary to verify if the legal measures adopted in European Union's and national legal systems are efficient and adequate to ensure the proper functioning of airports after privatization.

Keywords

fair competition, ownership structure, privatization, airport infrastructure, national public service

INTRODUCTION

The changes in the ownership structure of enterprises owned by state or public entities always provoke a rich political and social debate. The discussion is even more intense when it comes to companies managing the important infrastructure of national or local character, and it is surely the case of the privatization of companies managing the airports. This is the reason why it is crucial to conduct a profound legal research to analyse if the changes to the ownership structures of the aforementioned companies pose a risk of creating the infringements mentioned in these discussions (safety hazards, non-realisation of public interest, violation of fair competition rules). Currently, the aviation market is changing

dramatically, there are several parallel processes of privatization ongoing in Europe, and the latest literature in this field is insufficient.

1. PRIVATIZATION OF GROUP ADP IN FRANCE

Recently in France, we can observe a firestorm of debate about the privatization of Group ADP (ex-Aéroports de Paris), which in 2018 was the world's biggest aviation enterprise (with 281 million passengers and profits of 610 million Euros). The main French airports (Roissy-Charles-de-Gaulle, Orly, Le Bourget) belong to this group, as well as many other airports throughout the world (in Zagreb, Santiago, Amman, Maurice etc.). It has also shares in Group TAV, which owns airports in Istanbul, Antalya, Izmir and many others. When, in May 2019 the Parliament adopted the act providing for its privatization[1] the storm began.

1.1. THE MAIN ARGUMENTS AGAINST THE PRIVATIZATION OF GROUP ADP

The discussion is so tempestuous because of a few reasons. First of all, Group ADP is a major player in the aviation sector and contributes its high profits to the budget. Even the infrastructure connected with the airports, such as boutiques and other services, brought in profit of 1 billion Euros in 2018. It has also extended into digital technologies through Hub One. Secondly, it is the biggest real estate owner in France, with 6686 hectares of grounds and more than one million square meters of buildings.[2] Moreover, it is claimed that Group ADP operates under natural monopoly conditions, which pose a risk of creating a cartel. This may also lead to discrimination against certain air carriers and pose a threat to fair competition rules. Considering the fact that Paris' airports, attended yearly by 100 million passengers, are the first border of France, it is claimed that international migration's control processes may be influenced by this privatization.

1.2. THE QUESTION OF THE NATIONAL PUBLIC SERVICE PROVIDED BY GROUP ADP

Question of the national public service provided by state owned enterprises is also part of a broader discussion, which takes place whenever a government decides to pursue a process of privatization. From both sides of the political divide they will be accused of 'selling the crown jewels'. But actually, when it comes to Group ADP, it was created as public establishment (*établissement public*) Aéroports de Paris and was transformed into a public

1 Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises [Act n° 2019-486 of 22 May 2019 relating to the growth and transformation of companies] [2019] JORF n°0119.

2 More information on the webpage of ADP group: <https://www.parisaeroport.fr/groupe/groupe-et-strategie/notre-groupe/parisvousaime> accessed 1 Dec 2019.

limited liability company (*société anonyme*) in 2005 and as such, its shares began trading on the Paris Bourse in 2006, so in fact it has been partially privatized for many years.[3]

The legal act providing for the privatization of Group ADP was the subject of an examination by the Constitutional Court (Conseil Constitutionnel) due to the argument that it was incompatible with the 9th paragraph of the Preamble to the 1946 French Constitution which states: *All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society*.

The Constitutional Court ruled that Group ADP does not have the characteristics of a national public service within the meaning of the 9th paragraph of the Preamble to the 1946 French Constitution. Moreover, the Constitutional Court referred to its consistent case-law that even though the need for certain national public services derives from constitutional principles or rules, the determination of status for others is left to the discretion of the legislator or the regulatory authority, who can determine their relevance at a national level. The Constitutional Court highlighted that no provision currently in force quali fies Group ADP as a national public service.[4] Given these reasons, the Constitutional Court considered that the provisions of the 9th paragraph of the Preamble to the 1946 French Constitution do not prevent the transfer to the private sector of the majority of the shareholding of Group ADP.

1.3. THE QUESTION OF OPERATING IN THE CONDITION OF A DE FACTO MONOPOLY

The Constitutional Court's decision claimed that the act is compatible with the 9th paragraph of the Preamble to the 1946 French Constitution[5] and called into question that Group ADP is operating in conditions of a monopoly. According to the Court's decision, although Group ADP largely dominates the French airport sector, it faces increasing competition from the main regional airports and the major European airport connection hubs. Importantly, the transport market in which Group ADP operates includes routes which could be substituted by several modes of transport, and on certain routes it competes with road and railway transport, particularly the latter due to the development of high-speed train lines.

1.4. THE PROPOSITION OF A REFERENDUM

Finally, the opponents of the privatization of Group ADP (248 parliamentarians - 130 deputes and 118 senators) voted in favour of a referendum on the adoption of a legal

3 Ibid.

4 Décision n°2019-781 DC Loi relative à la croissance et la transformation numérique des entreprises Dossier documentaire [Decision n° 2019-781 DC Act relating to the growth and digital transformation of companies Documentary file], points 49-51 <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2019781dc/2019781dc_doc.pdf> accessed 1 Dec 2019.

5 G Teboul, G Conac, X Prétot, *Le préambule de la Constitution de 1946. Histoire, analyse et commentaires* [The preamble to the Constitution of 1946. History, analysis and comments] (Dalloz-Sirey 2001) 22.

act (*référendum d'initiative partagée*, called RIP) guaranteeing that the service provided by certain airports managed by ADP (Paris-Charles-de-Gaulle, Paris-Orly et de Paris-Le Bourget) will be considered as national public services.[6]

2. NEGATIVE EXPERIENCES WITH PREVIOUSLY CONDUCTED PRIVATIZATIONS

This discussion may be a negative side-effect from the privatization of the enterprises managing the airports in Toulouse, Niece and Lyon, which was harshly criticised by the Court of Auditors (Cour des Comptes) in its report[7]. The report was adopted three years after the transfer of 49.9% of the shares of the Toulouse-Blagnac airport to the Chinese Consortium Symbiose, and two years after the sale of 60% of Nice-Côte d'Azur and Lyon airports to Consortiums managed by Vinci and the Italian Group Atlantia. Selling a majority of shares to the Chinese-controlled Consortium Symbiose was especially controversial, due to the lack of financial transparency and its links with Chinese public authorities[8]. The report also highlighted the influence the minister of economy and French Civil Aviation Authority (Direction générale de l'aviation civile, DGAC) were put under by the United Arab Emirates[9] after the privatization of the airports in Nice and Lyon.

3. LEGAL FRAMEWORKS AND THE MECHANISM FOR ENSURING THE PROPER FUNCTIONING OF THE AIRPORTS

The arguments raised in this discussion, especially the question of public national service provided by certain airports lead us to a broader problem of the legal frameworks in which the airports are functioning. It raises the question of whether provisions in European and national laws give an effective and sufficient mechanism for ensuring the realisation of public national service and other critical missions carried out by the airports. Moreover, it should be analysed which means, in law or in fact, are at the disposal of local and national authorities in case of infringement of the previously mentioned obligations.

6 Proposition de loi présentée en application de l'article 11 de la Constitution visant à affirmer le caractère de service public national de l'exploitation des aérodromes de Paris, [Proposal presented in application of article 11 of the Constitution aiming at affirming the character of national public service of the operation of the aerodromes of Paris], Assemblée Nationale n°1867. Constitution du 4 Octobre 1958 Quinzième Législature. Enregistré à la Présidence de l'Assemblée nationale le 10 avril 2019 <http://www.assemblee-nationale.fr/dyn/15/textes/l15b1867_proposition-loi> accessed 1 Dec 2019.

7 Cour des comptes, Le processus de privatisation des aéroports de Toulouse, Lyon et Nice, Communication à la commission des finances, de l'économie générale et du contrôle budgétaire de l'Assemblée nationale, Cour des Comptes, Octobre 2018 [The privatization process of the airports of Toulouse, Lyon and Nice. Communication to the Committee on Finance, General Economy and Budgetary Control of the National Assembly, Court of Auditors, October 2018] <https://www.ccomptes.fr/system/files/2018-11/20181113-processus-privatisation-aeroports-Toulouse-Lyon-Nice.pdf> accessed 1 Dec 2019.

8 Ibid 8.

9 Ibid 60.

3.1. INTERNATIONAL REGULATION OF THE AVIATION MARKET

The development of a complex structure of international economic regulations, caused by more and more intensive international relations in aviation, resulted in many multilateral and thousands of bilateral agreements in that field. However uniformity across the laws on commercial air transport has not yet been obtained. There is currently no international framework, either under the World Trade Organisation or under the International Civil Aviation Organisation which governs competition among air carriers. The harmonization of international aviation law has generally embraced the problems of air safety, but is still very limited when it comes to economic issues and competition. European Union Member States rely mostly on bilateral and multilateral air service agreements (ASAs) which regulate the operation of international air services. However, they are not homogeneous in their content, and not all of them contain a so-called fair competition clause.

3.2. EUROPEAN UNION REGULATION OF AVIATION MARKET

The European Union is taking steps to promote common rules on aviation, and in 2017 the 'Open and Connected Aviation' package was adopted.[10]

When it comes to aviation law and the question of aviation infrastructure, the European Union perspective focuses strongly on competition law and the question of equal access to the aviation market. Due to the growing imbalance between expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand, the question of availability of neutral, transparent and non-discriminatory rules seems to dominate the discussion. The second important point of the discussion is providing protection for the European Union's undertakings against unfair competition from air carriers operating from third countries.

3.2.1. ENSURING ACCESS TO THE AVIATION MARKET FOR NEW AIR CARRIERS

The liberalization of air transport caused an increase in new air carriers. The dominance of national carriers, whose position was strengthened for a long time by their monopolistic status, had restricted access to the main airports' infrastructure. This growing imbalance between the expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand resulted in an increasing number of congested airports within the European Community and finally led to the adoption of Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.[11]

10 More information: 'An Aviation Strategy for Europe' (European Commission 2015-2018) <https://ec.europa.eu/transport/modes/air/aviation-strategy_en> accessed 1 Dec 2019.

11 Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports [1993] OJ UE L 14/1.

According to its provisions, the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules. The aim of this regulation was to allow new entrants into the Community market, without infringement of existing rights, and with the maintenance of adequate domestic air services to regions of the Member State concerned.[12]

3.2.2. LICENCES AS A WAY TO ENSURE THE PROPER FUNCTIONING OF THE AVIATION MARKET

According to Art. 3 of Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)[13], every undertaking established in the Community has to obtain the appropriate operating licence in order to provide a service carrying passengers, mail and/or cargo by air for remuneration.[14] According to Art. 4 of the aforementioned regulation, to obtain a licence, the undertaking has to be owned and effectively controlled, whether directly or indirectly through one or more intermediate undertakings, by a Member State or nationals of Member States holding more than 50% of the controlling interest, and shall be effectively controlled by it. Exceptionally, other undertakings (from a third country) can be granted a licence, according to the agreement of which the Community is a party.[15]

It is advisable to check the functioning of this kind of agreement in order to answer the question of how the ownership structure of an airport may influence the realization of the given provisions, and in what way.

3.2.3. TRANSPARENCY OF FUNCTIONING OF GROUND HANDLING SERVICES

When it comes to the ground handling services which are an essential element of the proper functioning of air transport, there are regulations adopted to provide transparency. The managing body of the airport is restricted in its actions by provisions of Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at airports within the Community. The aim of this act was to provide for opening up access to the ground handling market, which was bound to reduce the operating costs of airline companies and improve the quality of service provided to airport users. In order to make sure that the ground handling undertaking is independent from the managing body of the airport and from the dominant carrier, Directive 96/67/EC states that at least one of the suppliers should ultimately be independent of both the managing body of the airport and the dominant carrier.[16]

12 Ibid.

13 Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ UE L 293/3.

14 Ibid.

15 Ibid.

16 Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community

3.2.4. THE EUROPEAN UNION'S REGULATIONS AND THIRD-COUNTRIES UNDERTAKINGS

The rights recognized by Directive 96/67/EC and by the Regulation 1008/2008 should only apply to third-country undertakings if the rule of strict reciprocity is respected. If there is no such reciprocity, the Member State should be able to suspend these rights with regard to those undertakings. The similar treatment of the entities from third countries was also provided by other regulations and is also visible in foreign transport policy realized by the European Commission.[17]

3.2.5. PROTECTION OF INTRA-COMMUNITY ENTERPRISES AGAINST THE UNFAIR PRACTICES OF NON-COMMUNITY ENTERPRISES OPERATING IN THE AVIATION MARKET

To avoid the threat that the competitive position of Community air carriers, constrained by the competition rules of the single market, could be adversely affected by unfair and discriminatory practices of non-Community air carriers providing similar services, Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004[18] which was introduced in place of Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community was introduced.[19]

This Regulation aims to provide efficient protection of all European Union air carriers (equal and based on uniform criteria and procedures) against injury or threat of injury caused by practices distorting competition, adopted by third countries or third-country entities.

FINAL REMARKS

It is essential to identify what kind of services provided by airports can, and should, be regarded as these of public and national interest. What is more, it should be specified if it is possible to define a universal catalogue of public national services provided by

airports [1996] OJ UE L 272/36.

17 A Kunert-Diallo, *Dostęp do rynku i konkurencja w transporcie lotniczym w UE i regulacjach krajowych* [Market access and competition in air transport in the EU law and national regulations] (Wolters Kluwer 2018) 215.

18 Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 [2019] OJ UE L 123/4.

19 Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community [2004] OJ UE L 162/1.

airports, or should it be considered *ad casum*. Finally, the means at the disposal of local, national and European authorities should be analysed as a way of providing an effective and efficient mechanism for dealing with a case of infringement of the aforementioned rules. The last issue that should be taken into consideration is the origin of the entity that acquires share control package the company managing the airport. May the country of origin of this entity be considered essential for further management and functioning of the transferred airport, as it was in case of the Chinese Consortium Symbiose which had taken over control of Toulouse-Blagnac airport? We should pay special attention to the investors from Middle and Far East Countries, since in those countries the links between businesses and public authorities are very tight. The European Union's law focuses on the issues of fair competition rules, and most of the legal provisions regulating the relations between public and private enterprises emphasise compliance with the transparency rules which aim to prevent violation of competition law. It should be confirmed if the regulation provided by these legal acts ensures there are effective and sufficient measures at the disposal of local, national and European Union authorities when they deal with extra-Community entities.

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Copyright – an Ally for Fashion in the Intellectual Property Rights System?

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Abstract

In the Internet society, we are accustomed to the originators of creative works asserting strong protection of their output. Similarly, we witness extremely casual appropriation of works that is easier than ever to discover. Fashion products are an interesting case in this regard – through the relatively short history of the industry, protection of works has tended to be quite loose. Until recently, the consequences of copying in the fashion sector were not particularly serious, but the emergence of the connected society and the increased speed and scale of this copying threaten to cause more noticeable damage. The awareness that new threats call for a more serious approach to protection of creations requires examination of how and whether the familiar principles of copyright law can be applied to fashion designs and products, and to what extent. This paper outlines the background to such protections in the fashion industry, including examples of both strong and relaxed approaches by industry players. There is a brief presentation of case law that demonstrates how copyright principles can be applied to fashion, while also noting the role of society in applying the norms that determine the extent to which laws, once written, can actually be applied.

Keywords

fashion law, copyrightability, fast fashion, fashion design

1. Fashion as a butterfly. At the heart of the conundrum

What is fashion, or the fashion industry? As noted by C. Breward, *Fashion is taken to mean clothing designed primarily for its expressive and decorative qualities, related closely to the current short-term dictates of the market*.[1] Just as butterflies are beautiful but short-lived, only a few fashion designs are simultaneously so graceful, genuinely beautiful and whimsical,[2] that they earn a place in fashion history, gaining masterpiece status and making the creator or fashion house a household name. On the contrary, today's global brands, such as H&M, Zara, Uniqlo or Topshop apply the strategy of introducing new collections every three weeks. According to a Goldman Sachs report, the ASOS brand reported a 30-percent rise in sales after applying the policy of short-term collections. This phenomenon became a cause for concern, mostly from the points of view of ethics, ecology and the planet's ability to sustain growth, but one has to note that fashion is also a manifestation of creativity, whether genuine or stolen. And here's the niggling question: is it possible that 'fast collections' are copyrightable at every turn, or is the creative spark instead so small that the 'fast garment' does not even come close to being a work of authorship? What may not seem obvious at first glance is that the sustainable fashion movement will at some point converge with copyright law, especially if a fashion design is to be perceived not only as a fast and cheap product, but also as a valuable part of a consumer's outfit, through which she expresses her style or respect for the designer's work. The fast fashion strategy triggers limit-testing with a view to identifying the boundaries of acceptable copying, the limits of inspiration and the reasons for imitations; it also prompts a similar search for the line between unauthorized use and quoting, within the scope justified by 'rights governing a given kind of creative activity'.[3]

The question as to whether, and to what extent, fashion design may be copyrightable, has so far only sporadically arisen in the legal literature, though with no firm answer and without triggering any in-depth analysis by way of follow-up. Also, if 'fashion' as a whole is to be defined *simply as the style or styles of clothing and accessories worn at any given time by groups of people*[4] the concern arises as to whether it can be subject to copyright law in order to gain widely desired protection. Therefore, there is a need to re-examine both the scope of the protection for a fashion design and the copyright premises and concepts (including *ratio legis*) that underlie the protection of that work.

1 C Breward, *The Culture of Fashion: A New History of Fashionable Dress,* (Manchester University Press, Palgrave Macmillan 1995) 5.

2 N Taylor, 'From Insect-Covered Fashion Spreads to Whimsical Winged Monocles' (Trendhunter, 17 Oct 2012) <https://www.trendhunter.com/slideshow/butterfly-fashion-editorials> accessed 6 Dec 2019.

3 Compare Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 6 czerwca 2019 r. w sprawie ogłoszenia jednolitego tekstu ustawy o prawie autorskim i prawach pokrewnych [the Act on Copyright and Related Rights which has been adopted on 4 February 1994] [2019] JoL 1231, art 29.

4 JS Major, V Steele, 'Fashion Industry' (Encyclopaedia Britannica) <https://www.britannica.com/art/fashion-industry> accessed 6 Dec 2019.

2. Fashion design and the sprint for the finish line

2.1. Overview

The fashion industry, which is valued at USD 3,000 billion, is in large part fuelled by the European market, which is home to most of the distinguished design houses, and for hosting three out of four – the fourth is New York City – major global fashion weeks (London, Paris and Milan).[5] It is noteworthy that the fashion industry, at the manufacturing level, encompasses: 1) raw materials – in other words, fibres and textiles, 2) clothing, 3) footwear and 4) leather and fur.[6] In this way it consists of 'many but interdependent sectors' that 'operate at a profit'.[7]

For centuries, fashion served as a symbol of status and wealth. Only by the 1980s and 1990s had the fashion sector expanded such that voguish garments became available to people from all walks of life. Luxury – in other words, 'slow fashion' – surrendered to pressure for the democratisation of goods,[8] which exacerbated the rise of 'fast fashion'. The defining features of 'fast fashion' are: low prices, mass availability and frequently changing trends. At the beginning of the 20th century, people used to spend more than half their income on food and clothing, whereas today they spend less than one fifth. It led to a situation where an average consumer spends 400% more on clothing than 20 years ago.[9] In effect, during the last 100 years, the fashion industry became one of the fastest-growing global businesses.

2.2. Fashion design forms

Fashion comes in a variety of forms – from sublime and thought-out designs to those stitched together for a quick profit. With a closer look, many variants can be distinguished. According to A. Devore, we can distinguish between artistic fashion (less practical, with an emphasis on artistic expression) and non-artistic fashion, which is further divided into five categories: avant-garde/wearable art, costumes, haute couture, ready-to-wear and mass market. A further issue that requires clarification is the scope of the definition of a fashion design, in order to determine which forms may be discussed as subject to copyright protection.[10] It should be considered whether extrapolating between artistic

5 R Burbidge, *European Fashion Law: A Practical Guide from Start-up to Global Success* (Edward Elgar 2019) 5.

6 A Oleksyn-Wajda, *Rynek mody w Polsce. Wyzwania* [Fashion Market in Poland. Challenges] (KPMG 2019) 45.

7 JS Major, V Steele.

8 S Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press, New Brunswick 2005) 5–6.

9 A Oleksyn-Wajda 46; S Somers, 'Fashion Revolution written evidence to the «Sustainability of the fashion industry» inquiry, U.K. Environmental Audit Committee' (Fashion Revolution) <https://www.fashionrevolution.org/fashion-revolution-written-evidence-to-the-sustainability-of-the-fashion-industry-inquiry-u-k-environmental-audit-committee/> accessed 7 Dec 2019.

10 A Devore, 'The Battle Between the Courthouse and the Fashion House: Creating a Tailored Solution

and non-artistic fashion is of any help in this regard, or whether this just confuses any potential attempt to classify fashion design as creative and individual.

From the perspective of quality and hand-made products, the fashion industry is divided into high fashion (*haute couture*) and the apparel industry (*prêt-à-porter* and *mass collections*).[11] *Haute couture* is, in other words, *couture creation*, which is characterized by handmade elements, the creation of individually ordered designs, an artistic approach to work, and singular items. The very concept is subject to legal regulation in France since 1945, meaning that a fashion house needs to meet specified criteria in order to be allowed to use the term.[12] On the other hand, *prêt-à-porter*, also referred to as 'ready-to-wear', covers serial collections, prepared mechanically, without taking client measurements, but still high in quality. Part of this genre is also so-called half-measured design, meaning that a client is able to pick patterns and elements and have influence on the final look of his garment. It was popularised in the USA in the mid-19th century, alongside the invention of the sewing machine. The concept of the *Mass collection* refers to clothes of standard sizes and patterns, sewn cheaply from downmarket fabrics.

2.3. Back to the 20th century

As pointed out by Nancy Green, the apparel sector has never fully accepted the notion of a division between art and their industry.[13] Therefore, the two kinds of fashion need to be examined in a search for the common features and differences, as well as the scope for originality and the infringement spectrum. But in order to understand the core of the issue here, we need to go back to the origins of fashion and to the relationship between Paris and New York at the early stage of *couturier* operations. Paris had become not only a Mecca for French designers, but also the new spiritual homeland for many foreigners, who became French designers by choice.[14] Low rents, and even lower salaries for seamstresses made it possible to refine a fashion design for countless hours and still make a profit.[15] On the other hand, the designs were subjects of trade with the USA, which ordered selected designs in order to reproduce them commercially at greater scale. Charles Frederick Worth was aware that, against this backdrop, without the help of lawyers and financial advisors, he could not defend his own interests, being exposed – as was the whole Parisian fashion world – to constant prying and copying. He was the very first to conclude

for Copyright Protection of Artistic Fashion Designs' (2013) T Jefferson L Rev 35(2), 197.

11 M Jankowska, M Pawełczyk, A Warmuzińska, *Prawo designu i mody. Kreowanie produktu* [Design and Fashion Law. Product Creation] (Ius Publicum 2020) 50.

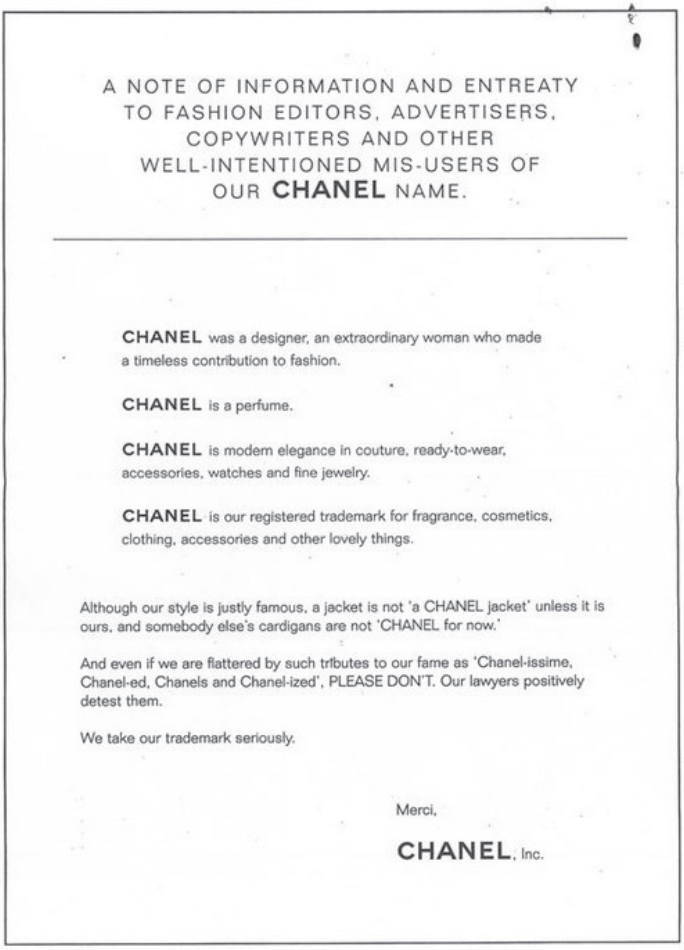
12 A Manfredi, 'Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs' (2012) JICL 21, 116.

13 NL Green, 'Art and Industry: Language of Modernization in the Production of Fashion' (1994) French Historical Studies 18(3), 725; cp. A Raciniewska, 'Prawo własności intelektualnej w modzie. Historyczny rozwój prawnej ochrony producentów mody' [Intellectual Property Rights in Fashion. Historical Development of the Legal Protection for Fashion Producers] (2015) RPEiS 77(2), 195.

14 E Hawes, *Fashion is Spinach* (Random House 1938) 6.

15 Ibid 17–18.

very detailed agreements regarding permission for mass production of his works in the United States, which contained clauses relating to such matters as, for example: templates for duplicating fashion projects, delivery of exclusive fabrics, and delivery of catalogues showing upcoming trends.[16] The importance of controlling the flow of ideas and the use of a brand name or fashion design is plain to see from the example of the Chanel fashion house, whose name 'Chanel' was misused by constant reference to 'Chanel-like products' by most prestigious magazines, like 'Vogue'. Beginning in 2009, the Karl Lagerfeld fashion house started to make public statements about how seriously they take and exercise their intellectual property rights.



A NOTE OF INFORMATION AND ENTREATY
TO FASHION EDITORS, ADVERTISERS,
COPYWRITERS AND OTHER
WELL-INTENTIONED MIS-USERS OF
OUR **CHANEL** NAME.

CHANEL was a designer, an extraordinary woman who made a timeless contribution to fashion.

CHANEL is a perfume.

CHANEL is modern elegance in couture, ready-to-wear, accessories, watches and fine jewelry.

CHANEL is our registered trademark for fragrance, cosmetics, clothing, accessories and other lovely things.

Although our style is justly famous, a jacket is not 'a CHANEL jacket' unless it is ours, and somebody else's cardigans are not 'CHANEL for now.'

And even if we are flattered by such tributes to our fame as 'Chanel-issime, Chanel-ed, Chanels and Chanel-ized', PLEASE DON'T. Our lawyers positively detest them.

We take our trademark seriously.

Merci,

CHANEL, Inc.

Source: ‚This is How Chanel Does Not Want You to Use its Name/Trademark' (The Fashion Law 8 May 2017) <https://www.thefashionlaw.com/home/this-is-how-chanel-does-not-want-you-using-its-name> accessed 10 Dec .2019.[17]

16 Y Kerlau, *Sekrety mody* [Secrets of Fashion] (Bukowy Las 2014) 33.

17 K Grzybczyk, *Ikony popkultury a prawo własności intelektualnej. Jak znani i sławni chronią swoje prawa* [Icons of Pop Culture vs. Intellectual Property Law. How Reputable and Famous People Protect Their Rights] (Wolters Kluwer 2018) 214.

3. Fashion design – a test for copyrightability

3.1. Why is copyright an important ally for fashion in the intellectual property rights system? Fashion design as a work of authorship

According to the globally acknowledged definition, a 'work of authorship' has to fulfil four criteria in order to fall under copyright protection.[18] As it is often not simple to qualify a work as a 'work of authorship', in the literature of copyright law there is a variety of copyrightability tests: 1) statistical uniqueness, 2) stamp of personality, 3) C. Shannon's communication theory.[19] Without doubt, a work of applied art may meet the criteria of a work of authorship, but this has rarely been subjected to a detailed analysis. Some examples of creative works of applied art are a candle or a bathroom sink. Using the example of a candle, a Polish court found that *neither the utilitarian nature nor purpose of the work deprive it of the character of a work of authorship*[20] and that *From expert opinion it resulted that the creative and individual nature of the evaluated product was not limited only to constructional and functional features or new technical solutions*.[21] In relation to products of a utilitarian nature, it was assumed in the jurisprudence that the achieved result – which is not determined by the utility functions – must be significantly (sufficiently, clearly, particularly visibly, clearly, momentarily, characteristically) distinguished from other similar types of product.[22] Also, in the example of the bathroom sink, the court noted that *due to the utilitarian nature of the product, the room left for the designer to design is scarce. Hence the judgment of the individual nature of the design is of necessity limited to this space*.[23]

What needs to be examined in this regard is the realm of potentially copyrightable fashion works, such as fashion designs, buttons, perfumes,[24] patterns, fashion shows[25] and shop displays, in addition to the relevant case law and literature in France, Germany[26]

18 Compare Art 1 s 1 of PCA also Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 (1986) S Treaty Doc 99-27.

19 M Jankowska, *Autor i prawo do autorstwa* [Author and Right of Authorship] (Lex a Wolters Kluwer Business 2011).

20 Judgment of the PSC V CSK 202/13 [2014] Lex 1486990.

21 Ibid.

22 Ibid; Judgment of the PSC V CSK 337/08 [2009].

23 Judgment of the Court of Appeals in Szczecin I Acz 1129/06 [2016] Lex 516576.

24 M Jankowska, 'Perfumy – czy nowy utwór w świetle najnowszego orzecznictwa w zakresie prawa autorskiego?' [Perfume – a New Work of Authorship under the Current Copyright Law Jurisprudence?] (2007) MP 23, 1328–1332.

25 E Derclaye, 'French Supreme Court Rules Fashion Shows Protected by Copyright: What about the UK? Roberts A.D. et al. v. Chanel et al., French Court of Cassation, 5.02.2008' (2008) JIPLP 3(5), 286.

26 Compare Judgment of the Leipzig Regional Court 5 O 5288/01 [2001] (2002) GRUR, 424; Judgment of BGH I ZR 65/53 [1954] (1995) GRUR, 445; Judgment of BGH I ZR 158/81 [1983] (1984) GRUR, 453; JV Ahnefeld, Rechtsprobleme der Mode- und Textilbranche (Kohlhammer 2006) 31; G Schulze,

and the USA, in order to paint a detailed picture of the copyrightable elements. It is worthy of note that even the USA, which for a long time denied copyright protection to garments due to the functional character of the works, changed this view in 2017 in the *Star Athletica v Varsity Brands*. The Supreme Court of the USA concluded that the 'design of a useful article' is eligible for copyright protection as an artistic work if its features *can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article*.[27]

Research can therefore be undertaken, which will reveal the existing Polish copyright jurisprudence related to fashion design, as well as the scholarship of works devoted to many forms of creativity that also exist in fashion: inspiration, derivative works, co-authored works, and works with borrowings. It should be noted that the Polish doctrine of copyright law is very extensive and comprehensive, though hardly ever cited in the international literature. It seems high time to add the Polish perspective to our consideration of potential fashion copyright issues. A further reason for taking Polish copyright seriously in the fashion sector, is the growing number of globally recognized Polish-based designers, including: Paweł Węgrzyn, who was the main designer at Mister Supranational 2019 held in Katowice, Ewa Stepaniuk, who participated in the project 'Polskie Mosty Technologiczne' (Polish Technological Bridges) thanks to which she was able to produce a collection for the United Arab Emirates. Polish brands sell globally, not only via the Internet, but through brick and mortar shops in Berlin, Paris, Prague and Budapest, not to mention bags and shoes made by Chylak and Kazar.

These are just a few reasons why it is worth investigating a particular unreported Polish case law of importance to the fashion sector.[28] One of the Polish courts noted in 2016, with regard to a show, that:

> *The following armaments were exhibited: armor, swords, axes and other items from the Middle Ages (including archery target shooting, a spear and horseshoe).* [...] *The specific skills and predispositions of the person concerned gave the staged presentation creative character, it was not about the «performance itself»* [...] *but about showing the right technique of use of appropriate techniques and tools combined with arousing the interest of the show's audience by creating a unique atmosphere affecting participants' emotional experiences*.[29]

'Werke der angewandten Kunst' in H Eichmann, A Kur (eds), *Designrecht. Praxishandbuch* (Nomos 2016) 179; A von Essen, 'Frankreich' in T Hoeren (ed), *Moderecht. Handbuch* (CH Beck 2019) 640 and ff.

27 Judgment of US Supreme Court 15-866 [2017] (2017) S Ct 137, 1002.

28 Such as Judgment of Court of Appeals in Poznań I Aca 211/13 [2013] unreported.

29 Judgment of Court of Appeals in Białystok III AUa 1115/15 [2016] Lex 2032390.

4. The piracy paradox. Tribute. Trade-off. Parasitic behaviour

From the very outset, *haute couture* designers presented an ambivalent approach to copying, which was noted by Alicja Raciniewska.[30] On the one hand, they were selling licenses authorising others to reproduce their works, while also tolerating the fact that small sewing houses kept making imitations of their garments for individual clients. On the other hand, they were very concerned with the popularisation of fashion, with masses of fashion journals showing their works, and with freeloaders reproducing luxurious goods at great scale. Fashion is a creative sector, where this paradox arises as a result of many factors, including: the rules of sales of *haute couture* for foreign sellers, the intense promotion of fashion, the influence of the fashion press, the various aspects of copying indulged in by the designers themselves, and unclear intellectual property law rules for fashion.[31] Some scholars argue that fashion does not need to be protected, invoking the so-called piracy paradox. According to Karl Raustiala and Christopher Sprigman, piracy works in favour of the fashion sector for at least two reasons: the faster flow of styles, and faster consumption.[32] This tenet assumes that the best fashion design will be anchored, while the fast fashion design will be diffused, a setup for which comparatively weak IP rules are essential. According to Xinbo Li, this theory was sustainable before the emergence of today's real-time information systems. He argues that the 'perfect innovation-diffusion circle is destroyed by the FAST-fashion infringers'.[33] Raustiala and Sprigman differentiate between two kinds of appropriation 'line-by-line copying' and 'the creation of derivative works'. At the same time, it is argued in the literature that 'line-by-line copying' is nothing but stealing.[34] The question at stake is whether fashion should be covered by regular copyright norms, including the premises and period of protection.

The other burning question is the relationship between legal and social norms in fashion law. The interaction between law and social norms is indisputable. As pointed out by Giulia Dore, *While the former influences or enforces the latter, the impact of social norms may also extend to their sway to foster the observation or violation of a given legal rule*.[35] With regard to copyright law, an example of bypassing the law because of social

30 A Raciniewska 196.

31 Ibid; ML Stewart, 'Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900–1930s' (2005) French Historical Studies 28(1) 108 and ff.

32 K Raustiala, CJ Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) Va L Rev 92(8), 1721; K Raustiala, CJ Sprigman, 'The Piracy Paradox Revisited' (2009) Stan L Rev 61(5), 1201.

33 X Li, 'IP Protection of Fashion Design: To Be or Not to Be, that is the Question' (2012) IP Theory 3(1), 16 and ff.

34 Ibid 23–24.

35 MF Schultz, 'Copynorms: Copyright and Social Norms' in PK Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol. 1 *Copyright and Related Rights* (Praeger Publishers 2007) 8–9, 10–11; G Dore, *Plagiarism as an Axiom of Legal Similarity: a Critical and Interdisciplinary Study of the Italian Author's Right and the UK Copyright System on the Moral Right*

norms and social expectations of the use of a work is fan-fiction, as new 'rights governing a given kind of creative activity'.[36] The question is whether fashion law should allow new concepts and ideas to reform copyright norms ('copynorms'). One possible tool to help understand social expectations is a survey conducted among Polish fashion designers, sent both to individual designers and to big fashion companies. It will be also investigated which designers seek protection through border control agencies in Poland, and which intellectual property tools they take advantage of.

5. Conclusion

Slow fashion or fast fashion? This is the key question when considering copyright protection. How does a copynorm behave in the spectrum of social fashion norms, social expectation of cheap and fashionable products, and designers' expectations of fame and admiration? Or, in this creative business, is the act of copying in fact a tribute? First of all, we must establish the boundaries of 'fashion design' along with surrounding elements like buttons, incrustations, shapes, trends, styles. Alongside 'fashion design' itself, there is room for works such as fashion shows, shop expositions or perfumes. An important part of the research is the search for a copyrightability test, enabling the establishment of a simple pattern to solve copyright issues in fashion regarding plagiarism ('line-by-line copying'). This will require explanation of the boundary between inspiration, derivative works, works with borrowing, and plagiarism. In addition to this, there will be an attempt to explain the role of citation in fashion, whether it is possible and to what extent. In order to make the thesis touch on practical aspects and expectations, the author will also examine unreported Polish case law and conduct a survey of Polish fashion designers, in order to determine the true needs of the creators.

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36 Compare Art. 29 of Polish Copyright Law.

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Contemporary Central & East European Law

Explaining the Meaning of 'Grey Zones' in Public International Law Based on the Example of the Conflict in Ukraine

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Abstract

The aim of this paper is to analyse four domains of 'grey zones' in public international law exploited by Russia's activities during the conflict in Ukraine – acknowledgement of Russia's involvement in the conflict; the use of force against Ukraine; the application of the right to self-determination; and passportisation carried out in Donbass. As this paper will demonstrate, legal assessment of the Russian actions is not impossible, although also not straightforward. It is only the resilience of public international law that may allow for the declaration of Russian actions as illegal, and the bringing of Russia to justice. The paper is divided into five parts: the first part defines the term 'grey zone' with regard to international law. The four sections following this are focused on the analysis of particular Russian actions as examples of conduct undertaken in the grey zones of international law, namely the Russian involvement in the conflict in Ukraine, the legal classification of Russian actions, the right to self-determination and passportisation.

Keywords

grey zone, passportisation, public international law, responsibility, Russian Federation, self-determination, Ukraine, use of force

Introduction

In May 2019, the White Paper titled 'Russian Strategic Intentions' was published under the auspices of the US Department of Defense Strategic Multilayer Assessment program. The authors of the report wrote *inter alia*, that

> *Russian strategists are adept in selecting gray zone tools optimized to their target.* [...] *Russia has a propensity to act in the gray zone between peace and war, where they can deny involvement and quite often get away with actions that violate international norms, if not international law.*[1]

This propensity is especially visible in the example of Russian involvement in the conflict in Ukraine – the submission of facts and interpretation of international law presented by Russia are an attempt to mislead the international community as to the legality of Russian conduct, and complicate the imposition of international responsibility upon Russia.

The aim of this paper is to analyse four domains of 'grey zones' in public international law exploited by Russia's activities during the conflict in Ukraine – acknowledgement of Russia's involvement in the conflict; the use of force against Ukraine; the application of the right to self-determination; and passportisation carried out in Donbass.[2] As this paper will demonstrate, legal assessment of the Russian actions is not impossible, although also not straightforward. It is only the resilience of public international law that may allow for the declaration of Russian actions as illegal, and the bringing of Russia to justice.

The paper is divided into five parts: the first part defines the term 'grey zone' with regard to international law. The four sections following this are focused on the analysis of particular Russian actions as examples of conduct undertaken in the grey zone of international law, namely the Russian involvement in the conflict in Ukraine, the legal classification of Russian actions, the right to self-determination and passportisation.

1. The term 'grey zone'

The term 'grey zone' has become more and more popular in recent years, although it is not a new invention.[3] In general, one may conclude that it refers to any situation wherein States deliberately attempt to impede the legal assessment of their actions, referring to legal rules which are subject to divergent interpretations or using lacunae in international law; as a result, the rest of the international community may face difficulties in imposing

1 'Russian Strategic Intentions. A Strategic Multilayer Assessment (SMA) White Paper' (Politico, May 2019) 21, 30 <https://www.politico.com/f/?id=0000016b-a5a1-d241-adff-fdf908e00001> accessed 22 Feb 2020.

2 The term Donbass refers to southeastern region of Ukraine, mostly the Donetsk and Luhansk oblasts..

3 See e.g. W Curtis, 'Maneuvering in the Gray Zone: The Gap Between Traditional Peacekeeping and War Fighting, Peacemaking, Peace-Enforcement, and Post-Conflict Peace-Building' in FL Mokhtari (ed), *Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations* (National Defense University 2014) 175.

international responsibility on the wrongdoer. This overall definition prompts that 'grey zones' may be found within virtually any domain of public international law. To refer just to a few examples from legal scholarship, grey zones may emerge in international economic law,[4] with regard to the protection of individuals during armed conflicts,[5] or in situations when one State uses cyberspace to interfere into internal affairs of another.[6] The most dangerous cases are nevertheless when a State exploits the grey zones 'between the traditional war and peace duality'.[7] This ambiguity raises questions *about the nature of the conflict and the status of the parties, which in turn generates uncertainty about the applicable law*.[8] Thus, the international community, instead of being focused on solving the hostile tensions between States and preventing further aggravation of the situation, becomes entangled in debates as to the applicable law and the credibility of legal arguments presented by both sides. That is precisely the aim of exploiting the 'grey zones' in public international law – a State that decides to make use of a lack of clarity in legal regulations expects that before the international community can judge its actions as illegal and take action to stop them, it will gain the political, military or other goals that it hoped to achieve by using the 'grey zones'.

The conflict in Ukraine undoubtedly contributed to the dissemination of the term 'grey zone', as it is used now not only by scholars,[9] but also by the media.[10] It has become so

4 D Drache, LA Jacobs, *Grey Zones in International Economic Law and Global Governance* (UBC Press 2018).

5 See in general M Lattimer, P Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart 2018).

6 MN Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) CJIL 19(1), 30–67.

7 UNSOCOM, 'White paper: Grey Zone' (9 Sep 2015) 1, <https://info.publicintelligence.net/USSOCOM-GrayZones.pdf> accessed 22 Feb 2020.

8 A Sari, *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats* (Exeter Centre for International Law 2019) 1, 13 <https://dx.doi.org/10.2139/ssrn.3315682>.

9 See e.g. Ibid 13; J Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?' (EJIL: Talk! 3 Dec 2018) <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/> accessed 20 Feb 2020; D Carment, M Nikolko, D Belo, 'Gray Zone Mediation in the Ukraine Crisis: Comparing Crimea and Donbas' in J Wilkenfeld, K Beardsley, D Quinn (eds), *Research Handbook on Mediating International Crises* (Edward Elgar Publishing 2019) 124; SL Pettyjohn, B Wasser, *Competing in the Gray Zone: Russian Tactics and Western Responses* (RAND Corporation 2019) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2791/RAND_RR2791.pdf> accessed 20 Feb 2020; JW Matisek, 'Shades of Gray Deterrence: Issues of Fighting in the Gray Zone' (2017) JSS 10(3), 18–19.

10 'Russia's Grey War in Ukraine Prompts Fatigue' (EU Observer 6 Feb 2019) <https://euobserver.com/foreign/144084> accessed 20 Feb 2020; 'Shades of Grey. Neither War Nor Peace. The Uses of Constructive Ambiguity' (The Economist 25 Jan 2018) <https://www.economist.com/special-report/2018/01/25/neither-war-nor-peace> accessed 20 Feb 2020. Nevertheless, media tends to use the term 'grey zone' also in different context, i.e. referring literally to a certain space, that it is unclear who controls it (e.g. 'Thousands Protest in Ukraine Against a Troop Pullback' (France24 14 Oct 2019) <https://www.france24.com/en/20191014-thousands-protest-in-ukraine-against-a-troop-pullback> accessed 20 Feb 2020.

since this conflict constitutes the most striking example so far of exploiting international law grey zones: on one hand, Russia denies any involvement in the events in Ukraine, while on the other hand there are clear proofs of Russian engagement in the conflict. At the same time, Russia justifies all its actions with regard to Ukraine by international legal arguments, which nevertheless constitute abuses of international law and not proper justification for its actions. If you add that, due to the information chaos and deliberate Russian actions, it is hard to verify the credibility of information coming from the areas affected by military operations, the application of the term 'grey zone' to the conflict in Ukraine becomes fully justified.

The following part of this paper discusses four domains of Russian actions undertaken in Ukraine that obscure the legal assessment of the Russia's conduct, and thus constitute acts carried out in the 'grey zones' of public international law.

2. Russian involvement in the events in Ukraine

Russia initially denied any involvement in Ukraine. Instead, Russian president Vladimir Putin claimed that it was 'local self-defense forces' that were acting in Crimea.[11] However, at the same time, Russian representatives made statements which in fact resembled the legal positions presented by States in case of the use of force. On 1 March 2014, the Russian representative in the UN Security Council (UN SC) stated that due to the tensions in Crimea Sergey Aksyonov, Prime Minister of Crimea, 'went to the President of Russia with a request for assistance to restore peace in Crimea'.[12] As a result of that appeal, President Putin informed the Federation Council that the Autonomous Republic of Crimea 'has requested the deployment of the armed forces of the Russian Federation on the territory of Ukraine until the civic and political situation in Ukraine can be normalized'. However, the Russian representative highlighted that the request concerned the deployment of Russian troops 'on the territory of Ukraine' – not 'against Ukraine', while the final decision about the deployment of forces had not yet been taken.[13] Moreover, it was not only the authorities of Crimea, but also former Ukrainian president Viktor Yanukovich, recognized by Russia as the legitimate president of Ukraine, that requested president Putin 'to use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine'.[14]

On 16 March 2014 the authorities of Crimea organized a referendum on reunification with Russia. Over 90% of voters who took part in the referendum supported Crimea's

11 'Putin Says Those Aren't Russian Forces in Crimea' (NPR 4 March 2014), <https://www.npr.org/sections/thetwoway/2014/03/04/285653335/putin-says-those-arent-russian-forces-in-crimea> accessed 20 Feb 2020.

12 UNSC, Provisional Records, 96th year, 7124th meeting (1 March 2014) S/PV.7124, 5.

13 Address by President of the Russian Federation, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603> accessed 20 Feb 2020.

14 UNSC, Provisional Records, 69th year, 7125th meeting (3 March 2014) S/PV.7125, 3–4.

accession to the Russian Federation.[15] As a result, the Crimean authorities issued a declaration of independence, and on 18 March 2014 the Russian Federation and the Republic of Crimea signed an Agreement on the Accession of the Republic of Crimea into the Russian Federation and on Forming New Constituent Entities within the Russian Federation.[16] On the same day, president Putin made an address to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin, where he said that 'the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, in preventing the events that were unfolding and are still underway in Kiev, Donetsk, Kharkov and other Ukrainian cities'.[17] Thus, Russia presented itself as the defender of Russian citizens and the Russian-speaking minority in Crimea.[18]

Few weeks later Russia explicitly admitted engagement in the conflict – on 17 April 2014, during the annual special Direct Line with Vladimir Putin, broadcast by the Russian TV and radio stations, Russian president said that: *Of course, the Russian servicemen did back the Crimean self-defence forces. They acted in a civil but a decisive and professional manner, as I've already said*.[19] However, this line of argumentation changed in January 2015, when Russia denied that there was proof that it sent its troops and weapons to Eastern Ukraine.[20] Then, in December 2015 President Putin stated again that *We never said there were not people there who carried out certain tasks including in the military sphere*.[21] Thus, in the end one may conclude that Russia confirmed unspecified support for the militants operating in Ukraine but denied sending its regular armed forces. Such assurances stay at odds with the fact that, soon after the outbreak of the violence in the Crimean Peninsula and in Eastern Ukraine, the militias fighting against the government in Kiev were identified as Russian soldiers (or at least Russian backed separatists) given that their guns, uniforms, vehicles and accents were similar to those identified with Russia.[22]

15 'Crimea Referendum: Voters «Back Russia Union»' (BBC News 16 March 2014) <https://www.bbc.com/news/worldeurope-26606097> accessed 20 Feb 2020.

16 'Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed' (Kremlin.ru 18 March 2014) <http://en.kremlin.ru/events/president/news/20604> accessed 20 Feb 2020.

17 Address by President of the Russian Federation.

18 UNSC, Provisional Records, 69th year, 7125th meeting (3 March 2014) S/PV.7125, 5.

19 'Direct Line with Vladimir Putin' (Kremlin 17 April 2014) <http://en.kremlin.ru/events/president/news/20796> accessed 20 Feb 2020.

20 'Russia Says No Proof It Sent Troops To Ukraine' (Newsweek 21 Jan 2015) <https://www.newsweek.com/russia-says-no-proofit-sent-troops-ukraine-300987> accessed 20 Feb 2020.

21 S Walker, 'Putin Admits Russian Military Presence in Ukraine for First Time' (The Guardian 17 Dec 2015) <https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine> accessed 20 Feb 2020.

22 V Shevchenko, '«Little Green Men» or «Russian Invaders»?' (BBC News 11 March 2014) <https://www.bbc.com/news/worldeurope-26532154> accessed 20 Feb 2020; N Buckley, R Olearchyk, A Jack, K Hille, 'Ukraine's 'Little Green Men' Carefully Mask Their Identity' (Financial Times 16 April 2014) <https://www.ft.com/content/05e1d8ca-c57a-11e3-a7d4-00144feabdc0> accessed 20 Feb 2020.

Summing up, Russia tried to blur the character and scale of its involvement in Ukraine. It presented some legal arguments which could be deemed as justification of the Russian intervention in Ukraine, as they referred to such concepts as intervention by invitation and intervention to rescue nationals abroad. On the other hand, however, Russia denied both direct military involvement in Ukraine, as well as indirect engagement, and admitted only some unprecise backing of Crimean 'self-defence' forces. Thus, Russia portrayed the crisis in Ukraine as an internal affair of that State, prompted by the policy of the Kiev government, that Russia neither induced, controlled or fuelled. Even though many international actors immediately attributed responsibility to Russia for the events in Ukraine,[23] the Russian position as to its involvement in Ukraine and the opaque legal situation that followed may be undoubtedly determined as exploiting the grey zone of international law.

3. Legal classification of Russian conduct in Ukraine

It was already mentioned in the previous section that Russia attempted to dismiss accusations of its involvement in Crimean events and the conflict in Eastern Ukraine. To put it differently, Russia denied the use of force against Ukraine.

Article 2 (4) of the UN Charter, which establishes the prohibition of the use of force, states as follows:

> *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*[24]

To start with, one has to observe that President Putin claimed that no case of the use of force was at stake at all, since, as he put it in his address to State Duma deputies, *I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties*.[25] Thus, according to president Putin, to determine that the use of force took place, a certain gravity of violence and damage, measured by the number of casualties, are needed; to put it differently, what counts are the tangible effects of the alleged use of force. Since this test was not fulfilled in case of the events in Crimea, there was no breach of the prohibition of the use of force. Even though the events which took place in the Crimean Peninsula in 2014 indeed differed from other armed interventions carried out by States after 1945, both with regard to their course and employed means, the Russian involvement may still be labelled as the use of force against Ukraine. Firstly,

23 For example, UE and US immediately condemned Russia for aggression against Ukraine: 'U.S. Condemns Russian Intervention in Ukraine' (Radio Free Europe 1 March 2014) <https://www.rferl.org/a/ukraine-west-concern-russian-troops/25281903.html> accessed 20 Feb 2020; European Parliament resolution of 13 March 2014 on the invasion of Ukraine by Russia [2014/2627(RSP)], preamble (A, C), para 1, 4.

24 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS 16, 1.

25 Address by President of the Russian Federation.

> *gravity does not need to be measured solely by the intensity of fighting and the number of victims. The intentions of the aggressor and the consequences that the improper use of its forces deployed in the territory of another State could have* [...] *are also important factors to consider*.[26]

In this case Russia's aim was to take control over Crimea, with the result of the annexation of the. Peninsula; thus, the serious gravity of intentions and consequences is undoubted. Secondly, one has to bear in mind how Russia justified its interest in Crimea – using arguments which were reminiscent of such concepts as intervention by invitation and intervention to rescue nationals abroad, which are used by States to justify the use of force.[27] On these grounds, a majority of scholars determined that Russia in fact used force against Ukraine.[28]

After determining that the Russian involvement in Ukraine is a case of the use of force, two aspects of the prohibition need to be reviewed. Firstly, Russia denied sending its troops to Ukraine, neither to Crimea nor to Donbass; to put it in the language of *jus ad bellum*, Russia denied the direct use of force against Ukraine. Secondly, Russia admitted that it provided unspecified, but allegedly minor, support to militias operating against the Kiev government. Thus, Russia denied also the indirect use of force against Ukraine, which, despite not being mentioned explicitly, is also covered by the prohibition of the use of force.[29] In order to establish that Russia used indirect force against Ukraine, one has to prove that Russia exercised control over the militias, using the criteria such as the

26 V Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) ZaoRV 75, 33–34

27 A Tancredi, 'The Russian Annexation of the Crimea: Questions Relating to the Use of Force' (2014), Questions of International Law: Zoom Out 1, 7.

28 See e.g. C Henderson, *The Use of Force and International Law* (CUP 2018) 34, 220, 375; C Gray, *International Law and the Use of Force* (OUP 2018) 32; V Bílková 30–37; JA Green, 'The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited' (2014) JUFIL 1(1), 5. As some scholars mention that Russia used force against Ukraine, while others contend that Russia committed aggression against that State, one has to observe that the question of the responsibility of Russia does not concern only the violation of the prohibition of the use of force but also the prohibition of aggression, as one of the most grave forms of the use of force (see UNGA, Resolution 3314 (XXIX) of 14 December 1974. Definition of Aggression A/RES/3314).

29 The Declaration on Principles of International Law, which is considered to reflect customary international law and be the most authoritative commentary to the UN Charter, states that *No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State* (UNGA, Resolution 2625 Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations of 24 October 1970 A/RES/2625 - hereinafter: Declaration on Principles of International Law). See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, para 209 (hereinafter: Nicaragua judgement). This view is also supported by majority of scholars, see e.g. C Henderson 60–62; O Dörr, 'Use of Force, Prohibition of' (Max Planck Encyclopedia of Public International Law Sept 2015) <http://opil.ouplaw.com> accessed 20 Feb 2020; A Randelzhofer, O Dörr, 'Article 2(4)' in B Simma, D-E Khan, G Nolte, A Paulus (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 211–213.

'effective control test'[30] or the 'overall control test'.[31] Given that Russia made efforts to conceal its links with the militias acting in Ukraine, attribution on the grounds of the effective control test may turn out to be impossible,[32] while employing the 'overall control test' also may raise some doubts.[33] Yet despite this, while the international community is rather confident about the responsibility of Russia for sending its own troops to Ukraine, as well as responsibility for the actions of militias, the question is whether international judicial organs, like the International Court of Justice[34] or the International Criminal Court[35] will be able to determine the international legal responsibility of Russia on the grounds of the available information.

Finally, the consequence of the use of force by one State against another is the state of armed conflict. As Russia denies the use of force against Ukraine, it also has never recognized the existence of an international armed conflict between Russia and Ukraine.[36] During an international armed conflict, a State is obliged to apply the rules of international

30 In the Nicaragua case, the ICJ came to the conclusion that even 'the general control by the respondent State over a force with a high degree of dependency on it' is not sufficient to attribute the conduct of *contras* to the USA since *such acts could well be committed by members of the contras without the control of the United States*. To attribute responsibility for the *contras*' activities to the USA, the USA would have had to exercise effective control over contras (Nicaragua judgement, para 115).

31 A different test was adopted by the International Criminal Tribunal for the former Yugoslavia, which in the case *Prosecutor v Dusko Tadić* decided that the overall control of a State over an armed group is sufficient to attribute the responsibility to a State, i.e. regardless of whether a State 'imposed, requested or directed' each of the group's activities (Prosecutor v. Dusko Tadić, Judgement in the Appeals Chamber, IT-94-1-A, 15 July 1999, para 122).

32 S Hassler, N Quénivet, 'Conferral of Nationality of the Kin State – Mission Creep?' in S Sayapin, E Tsybulenko (eds), *The Use of Force Against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (Springer 2018) 102.

33 A Tancredi 26.

34 See the case submitted by Ukraine against Russia before the ICJ 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*)' (ICJ 2017-2019) <https://www.icj-cij.org/en/case/166> accessed 20 Feb 2020.

35 See the proceedings before the International Criminal Court concerning alleged crimes committed in the context of the 'Maidan' protests since 21 November and other events in Ukraine since 20 February 2014, 'Preliminary examination' (ICC 2014-2019) <https://www.icc-cpi.int/Ukraine> accessed 20 Feb 2020.

36 See e.g. the statement made by Kremlin spokesman Dmitry Peskov who said that *there is no war between Ukraine and Russia. There is a civil war in Ukraine* 'Peskov otvetil na frazu Poroshenko o «kholodnom mire» s Rossiyey. Podrobneye na RBK' [Песков ответил на фразу Порошенко о «холодном мире» с Россией Подробнее на РБК - Peskov responded to Poroshenko's phrase about the "cold world" with Russia. More on RBC] (RBC 30 Jan 2019) <https://www.rbc.ru/rbcfreenews/5c518ac29a7947e38183a3d9?from=newsfeed> accessed 20 Feb 2020.
Most commentators agree that currently, in parallel to an international armed conflict, a non-international armed conflict exists between rebels and the government of Ukraine (see e.g. 'International armed conflict in Ukraine' (RULAC Geneva Academy 2017) <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine> accessed 20 Feb 2020.

humanitarian law, which provide special protection to certain groups, including civilians and prisoners of war. By refusing to recognise the existence of an international armed conflict with Ukraine, Russia also denies the protection to these groups.

Summing up, Russia is exploiting different aspects of *jus in bello* and *jus ad bellum* to avoid responsibility for the use of force against Ukraine and to refuse protection to the Ukrainian population during an ongoing international armed conflict. Thus, it may serve as another example of the use by Russia of grey zones in international law with regard to the conflict in Ukraine.

4. Right to self-determination

Another legal concept that that is exploited by Russia is the right to self-determination. The latter may be defined in general as 'the right of all peoples freely to determine their political, economic and social status'.[37] Even though the right to self-determination was mostly promulgated during the period of decolonization to support people in their struggle for independence,[38] it is also broadly recognized today, outside the context of colonialism. International law grants the right to self-determination to 'peoples' which may refer to the whole nation or to 'only a portion of the population of an existing state'[39] who enjoy at least some of the following features: *(a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life*.[40]

One can distinguish between the internal self-determination, so 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state';[41] and external self-determination, described in the Declaration on Principles of International Law as *the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people*. The realisation of the external aspect of the right to self-determination cannot amount to threats to 'an existing state's territorial integrity or the stability of relations between sovereign states'.[42] However, some authors refer here to another passage from the Declaration on Principles of International Law, which states that territorial integrity or political unity of States are protected provided that States conduct themselves *in compliance with the principle of equal rights and self-determination of peoples* [...] *and thus possessed of a government representing the whole people belonging to*

37 M Weller, Escaping the Self-Determination Trap (Martinus Nijhoff Publishers 2008) 23. See also UNGA, Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 A/RES/1514, para 2.

38 K Ryan, 'Rights, Intervention, and Self-Determination' (1991) Denv J Int'l L & Pol'y 20(1), 62–63.

39 Reference re Secession of Quebec [1998] 2 SCR (217), para 123–124 (hereinafter: Reference re Secession of Quebec).

40 UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations (Paris 22 Feb 1990) SHS-89/CONF.602/7, para 22(1).

41 Reference re Secession of Quebec, para 126.

42 Ibid para 127.

the territory without distinction as to race, creed or color'. This provision allegedly means that 'the protection of territorial integrity is not absolute' and it may be 'suspended' when a State does not comply with the principle of self-determination of peoples.[43] In such case, 'peoples' may violate the territorial integrity of a State[44] – they may secede from the existing State. Nevertheless, one needs to highlight that the mutual relations between the right to self-determination, secession and protection of territorial integrity are not precisely defined, and one may find conflicting arguments both in the practice of States[45] and in the doctrine of law.[46]

This vagueness was exploited by Russia. It was previously mentioned that Russia justified its interest in Crimean affairs using the fact that there was a substantial Russian speaking minority in the Peninsula, which was allegedly being persecuted by the Ukrainian authorities. Russia also relied on the results of the referendum held in Crimea in which the residents of the Peninsula supported accession to the Russian Federation. Thus, according to Russia, the right to self-determination is at stake here. President Putin said in his address to the Duma, that 'as it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination'.[47] The speaker of the Federation Council, Valentina Matviyenko, also referred to self-determination saying that 'the right of people to self-determination has not been abolished so far. [...] why should the people of Crimea be deprived of their right to legal self-determination?'.[48] Likewise, the Russian representative in the UN SC mentioned the right to self-determination during the debate within the Council.[49] Apart from the right to self-determination, president Putin also referred to the ICJ Advisory Opinion in the Kosovo case, when the Court decided that 'international law contains no prohibition of declarations of independence';[50] and stressed that most of

43 TD Grant, 'Armed Force in Aid of Secession' (2014) MLLWR 53(1), 85.

44 P Roethke, 'The Right to Secede Under International Law: The Case of Somaliland' (2011) Journal of International Service 20(2) 40.

45 See e.g. the statements made by Russia during the proceedings before the ICJ in the Kosovo case, when Russia claimed that self-determination justifies unilateral secession only *in truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question*. Written Statement by the Russian Federation of 16 April 2009, para 88, <https://www.icj-cij.org/files/case-related/141/15628.pdf> accessed 20 Feb 2020.

46 See e.g. A Kapustin, 'Crimea's self-determination in the light of contemporary international law' (2015) ZaoRV 75,117 which supports the right to remedial secession of Crimean residents.

47 Address by President of the Russian Federation; see also Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol of 11 March 2014, para 1, <https://www.rada.crimea.ua/news/11_03_2014_1> accessed 20 Feb 2020.

48 JC Finley, 'Russia supports Crimean parliament's request to join Federation' (UPI 7 March 2014) <https://www.upi.com/Top_News/World-News/2014/03/07/Russia-supports-Crimean-parliaments-request-to-join-Federation/8051394203191/>accessed 20 Feb 2020.

49 UNSC, Provisional Records, 69th year, 7144th meeting (19 March 2014) S/PV.7144, 8.

50 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403, para 79, 84.

the Western States agreed with this ruling.[51] Since, according to Russian authorities, the situation in Crimea was similar to that of Kosovo, the international community should also recognise the declaration of independence and the annexation of Crimea as legal.

Several points of the Russian position regarding the right of self-determination of Crimean residents raise considerable doubts: whether the Russian-speaking minority was truly being persecuted by Ukrainian authorities; the problem of whether the population of Crimea 'met the formal criteria of being a self-determination unit';[52] whether unilateral secession is allowed under contemporary international law, outside the context of decolonization; and what is the implication of the ICJ Advisory Opinion in the Kosovo case for the Crimea situation.[53] Given that varied (if not conflicting) legal argumentation may be presented with regard to these issues, one may conclude that the interpretation of the right to self-determination and its implementation are another examples of Russia exploiting the grey zones in international law.

5. Passportisation

Immediately following the annexation of Crimea, pro-Russian protests started also in three eastern Ukrainian cities – Kharkov, Luhansk and Donetsk.[54] The protests were reportedly supported by Russia, which provided uniforms and weapons for the separatist forces;[55] as was mentioned before, Russia never admitted the scale of support given to the protesters in Eastern Ukraine. On 11 May 2014 the separatists organised referenda on self-rule, in which a majority of voters supported the independence of these regions from Ukraine.[56] As a result, on the next day the leaders of the separatists declared the creation of Donetsk People's Republic and Luhansk People's Republic.[57]

Both 'republics' received recognition only from each other and from another disputed entity, South Ossetia. Russia did not recognise the 'republics', but following the self-rule

51 Address by President of the Russian Federation.

52 CJ Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' (2015) ILS 91, 242; E Leonaitė, D Žalimas, 'The Annexation of Crimea and Attempts to Justify it in the Context of International Law' (2016) Lith Annu Strateg Rev 14, 23–24.

53 See SF van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law', (2015) NILR 62, 348–349, 358–359.

54 R Balmforth, N Zinets, 'Protests in Eastern Ukraine Aimed at Bringing in Russian Troops, Warns PM' (Reuters 7 April 2014) <https://www.reuters.com/article/us-ukraine-crisis-storm/protests-in-eastern-ukraine-aimed-at-bringing-in-russian-troops-warnspm-idUSBREA350B420140407> accessed 20 Feb 2020.

55 'Armed Pro-Russian Protesters Seize City in Eastern Ukraine' (The Guardian 13 April 2014) <https://www.theguardian.com/world/2014/apr/12/pro-russian-protesters-wind-up-tension-in-eastern-ukraine> accessed 20 Feb 2020.

56 'Ukraine separatists declare independence' (Al Jazeera 12 May 2014) <https://www.aljazeera.com/news/europe/2014/05/ukraineseparatists-declare-independence-201451219375613219.html> accessed 20 Feb 2020.

57 N Feeney, 'Pro-Russia Insurgents Declare Independence in Eastern Ukraine' (Time 12 May 2014) <https://time.com/96102/ukraine-donetsk-independence-russia/> accessed 20 Feb 2020.

referenda, the Russian minister of foreign affairs, Sergei Lavrov, said that his State will 'respect the will' of the people of Ukraine.[58] Moreover, although both 'republics' also immediately requested that Moscow consider annexing the regions,[59] officially president Putin asked the separatists to delay holding a referendum, while after the proclamation of independence he insisted that Russia did not want to annex the 'republics'.[60]

Nevertheless, Russia started to support the new 'republics' – since 2014, Russia has continued to send convoys with humanitarian aid to Donbass, which raises considerable concerns that Russia may be using the label of 'humanitarian convoys' to provide military support to the 'republics'.[61] Even more attention was attracted by president Putin's decision in February 2017 to sign the Executive Order On Recognition in the Russian Federation of Documents and Vehicle Registration Plates Issued to Ukrainian Citizens and Stateless Persons Permanently Residing in Certain Districts of Ukraine's Donetsk and Lugansk Regions,[62] which in fact allows people living in those two self-proclaimed republics to travel, work and study in Russia. Kiev authorities called it 'another proof of Russian occupation as well as Russian violation of international law'.[63]

The biggest objection though was raised by the Executive Order identifying groups of persons entitled to a fast-track procedure when applying for Russian citizenship on humanitarian grounds, signed by president Putin on 24 April 2019.[64] Based on the Order, Donbass residents may obtain Russian passports (or, to put it differently, Russian nationality) within the fast-track procedure without taking residency in Russia. The Order was condemned not only by Ukraine, but also by the European Union and the USA as another attack against Ukrainian sovereignty.[65] On the other hand, Moscow claimed that

58 'Lavrov: Russia «respects results of referendum»' (BBC News 12 May 2014) <https://www.bbc.com/news/av/world-europe-27370038/lavrov-russia-respects-results-of-referendum>accessed 20 Feb 2020.

59 A Marquardt, MS James, 'Ukrainian Separatists Ask to Join Russia' (ABC News 12 May 2014) <https://abcnews.go.com/International/ukrainian-separatists-join-russia/story?id=23679656> accessed 20 Feb 2020.

60 SS Nelson, 'Many in Eastern Ukraine Want To Join Russia' (NPR 24 June 2017) <https://www.npr.org/2017/06/24/534207470/many-in-eastern-ukraine-want-to-join-russia> accessed 20 Feb 2020..

61 A Luhn, 'Russia to Send Humanitarian Convoy into Ukraine in Spite of Warnings' (The Guardian 11 August 2014) <https://www.theguardian.com/world/2014/aug/11/russia-humanitarian-convoy-ukraine> accessed 20 Feb 2020.

62 'Executive Order on Recognising Documents Issued to Ukrainian Citizens and Stateless Persons Living in Certain Districts of Ukraine's Donetsk and Lugansk Regions' (Kremlin 18 Feb 2017) <http://en.kremlin.ru/events/president/news/53895> accessed 20 Feb 2020.

63 'Putin Orders Russia to Recognize Documents Issued in Rebel-Held East Ukraine' (Reuters 18 Feb 2017) <https://www.reuters.com/article/us-ukraine-crisis-russia-documents/putin-orders-russia-to-recognize-documents-issued-in-rebel-held-east-ukraineidUSKBN15X0KR> accessed 20 Feb 2020.

64 'Executive Order Identifying Groups of Persons Entitled to a Fast-Track Procedure when Applying for Russian Citizenship on Humanitarian Grounds' (Kremlin 24 April 2019) <http://en.kremlin.ru/acts/news/60358> accessed 20 Feb 2020.

65 N MacFarquhar, 'Outrage Grows as Russia Grants Passports in Ukraine's Breakaway Regions' [The New York Times 25 April 2019] <https://www.nytimes.com/2019/04/25/world/europe/russia-citizenship-ukraine.html> accessed 20 Feb 2020.

the decision to create such procedures was made *with a view to protecting human and citizens rights and freedoms, and guided by the universally recognised principles and norms of international law*. During the UN SC meeting, the representative of Russia claimed that the Order concerned the 4 million citizens 'outlawed' by Ukraine, 'whose existence has been obstinately ignored by the Western parts of the international community'.[66] Responding to the international critique, he said that the Order does not violate international law since it does not require anyone to renounce their Ukrainian citizenship in order to obtain a Russian one,[67] so it does not violate any provision of the so-called Minsk agreements.[68]

The measures employed by Russia under the 2019 Order are called 'passportisation' which refers to 'large-scale conferral of nationality by one state to citizens of another state that reside outside the borders of the conferring state'.[69] Passportisation is not *per se* illegal,[70] so a case-by-case assessment is always necessary. To this end, one needs to take into account several factors: every State may freely determine their rules for granting citizenship, while international law imposes only a few limits on this entitlement, including that there must be a genuine connection between a national and their State of nationality;[71] there is a prohibition of forced naturalisation under international law; extraterritorial naturalisation may constitute, under some circumstances, interference into the internal affairs of a State and thus violate the principle of non-intervention, especially if a State does not allow for dual citizenship.[72] When it comes to the latter, passportisation may affect the interest of an existing State of nationality in a broader sense: since population is one of the elements of statehood, losing citizens may ultimately lead to the failure of statehood. Moreover, passportisation undermines the personal jurisdiction of a State, which is one of the emanations of a State's sovereignty.[73] One also has to bear in mind

66 UNGA, Provisional Records, 74th year, 8516th meeting (25 April 2019) S/PV.8516, 15.

67 Article 4 of the Ukrainian Constitution states that *there is single citizenship in Ukraine* (see Constitution of Ukrainian adopted at the 5th session of the Verkhovna Rada of Ukraine on 28 June 1996 <https://rm.coe.int/constitutionof-ukraine/168071f58b> accessed 20 Feb 2020). Thus, Ukrainians who acquire Russian citizenship will not be allowed to retain their Ukrainian citizenship at the same time.

68 UNGA, Provisional Records, 74th year, 8516th meeting (25 April 2019) S/PV.8516, 15; 'Minsk Agreements' refers to Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin, altogether with the Memorandum on the implementation of the provisions of the Protocol, Letter dated 24 February 2015 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council. Anex I S/2015/135 <https://undocs.org/S/2015/135> accessed 20 Feb 2020.

69 M Cuvelier, *Passportization in International Law: Theory and Practice of Large Scale Extraterritorial Confferals of Nationality* (MA thesis, Universiteit Gent 2017/2018) 7 <https://lib.ugent.be/fulltxt/RUG01/002/479/381/RUG01-002479381_2018_0001_AC.pdf> accessed 20 Feb 2020.

70 A Peters, 'Passportisation: Risks for International Law and Stability – Part I' (EJIL: Talk! 9 May 2019) <https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-one/> accessed 20 Feb 2020.

71 Nottebohm Case (second phase), Judgement of April 6th, 1955, ICJ Reports 1955, p. 4, p. 23.

72 M Cuvelier 63–69.

73 A Peters 'Passportisation: Risks for International Law and Stability – Part I'.

that extraterritorial naturalisation on a mass scale may 'produce' a national minority of a foreign State, which will subsequently invoke the protection of this minority as a reason for interference into the internal affairs of a State where this minority resides, including armed intervention to rescue nationals abroad.

Summing up, the passportisation carried out by Russia in Ukraine is another example of Russia exploiting the 'grey zones' of international law – while passportisation is not in principle illegal, and Russia invoked humanitarian reasons for the 2019 Order, it may turn out to be just a smokescreen for further interference by Russia into the internal affairs of Ukraine. From this perspective, the passportisation carried out by Russia in Donbass may be labelled as a violation of international law.[74]

Conclusions

This paper has discussed four types of activities undertaken by Russia with regard to the conflict in Ukraine from the perspective of public international law: involvement in the conflict; the legal classification of Russian actions; the right to self-determination, as it is invoked by Russia; and the passportisation carried out in Donbass. Although Russia attempted to conceal the real character and scope of actions undertaken in Ukraine, as well as defined certain international legal norms in a very discretionary way, careful analysis of data and multilayer examination of legal rules allows for the labelling of all these actions as illegal. Thus, despite Russia's attempt to blur the legal assessment of its actions, international law provides tools to assess Russia's conduct, what constitutes a proof of the resilience of international law, which has to also be applicable in situations involving new threats and challenges.

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Contemporary Central & East European Law

The 2020 Foreign Investment Law of China: Confucianism and New Challenges for Social Development

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Abstract

On January 1, 2020 the new Foreign Investment Law of the People's Republic of China (中华人民共和国外商投资法) entered into force to promote investments in China. The aim of the law is to foster cross border investments. This law was passed on March 15, 2019 by the National People's Congress. The Chinese FDI legal framework is composed of a set of laws and regulations that are dynamically shaping the economic reality. What are the possible tensions between the new law and the complex system of values in China? Is the new law an agent of implementing *de facto* social development? In summary, the results show that there is a complex relationship between FDI and social development in China. The new Chinese law might be an inspirational source of non-European legal tradition for Central Europeans.

Keywords

China, FDI, business, social development

1. Introduction

On January 1, 2020 the new Foreign Investment Law (FDI) of the People's Republic of China (中华人民共和国外商投资法)[1] entered into force to promote investments in China. The objective was to foster cross border investments and foreign direct investments. The Foreign Investment Law was passed on March 15, 2019 by the National People's Congress. The political context for the new law was a US-China trade war. The Chinese FDI legal framework is thus composed of a set of laws and regulations that are intended

1 *Zhong hua renming gong he guo wai shang touzi fa.*

to dynamically shape the economic reality. From 1.01.2020 there will be no differences in treatment between Chinese nationals and foreigners with respect to foreign investments.

In the 18th Century Adam Smith wrote about China: *China has been long one of the richest, that is, one of the most fertile, best cultivated, most industrious, and most populous countries in the world.* [...] *The poverty of the lower ranks of people in China far surpasses that of the most beggarly nations in Europe.*[2] Since that time China has changed profoundly. After the 1980s, new market economy rules meant less control for enterprise and more freedom, but China is based on Confucianism, which protect the interests of the State and its responsibility. The conception of government, the relationship between ruler and ruled, the methods of ruling, and of the obligations of individuals toward the political community go hand in hand with the Confucianism idea of social engagement.[3] In China there are two concepts of law: *li* (礼) and *fa* (法).[4] The first refers to 'moral rule' and the idea of individual and social obligations, and the latter is translated as 'law' in the sense of written law such as *lex, loi, Gesetz, prawo*. Two questions appear problematic regarding the new legal framework. Firstly, market economy rules mean less control for enterprise and more freedom, but China is based on Confucianism, which protect the interests of the State and its responsibility toward society. Moreover, social development was established as an objective to reach within the new law. Is the new law an agent of implementing *de facto* social development?

In order to deliver an answer, the paper will analyze the broad context of FDI's development in China (2) with the provisions of new law (3). Secondly, Confucianism will be studied (4) in terms of social development (5), ending with main findings (6).

2. Foreign direct investments in China

The Organization for Economic Co-operation and Development (OECD) provided a definition of FDI, which *is a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy*.[5] More precisely, FDI is considered *as a means of acquiring technologies, skills and access to international markets, and of entering dynamic trade and production systems internal to multinational enterprises (MNEs)*.[6]

Figure 1 shows a comparison between the People's Republic of China and Hong Kong. One can observe a constant drop of inwards FDI as a percentage of GDP from

2 A Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (The Modern Library 1994) 82.

3 L El Amine, *Classical Confucian Political Thought A New Interpretation* (Princeton University Press 2015).

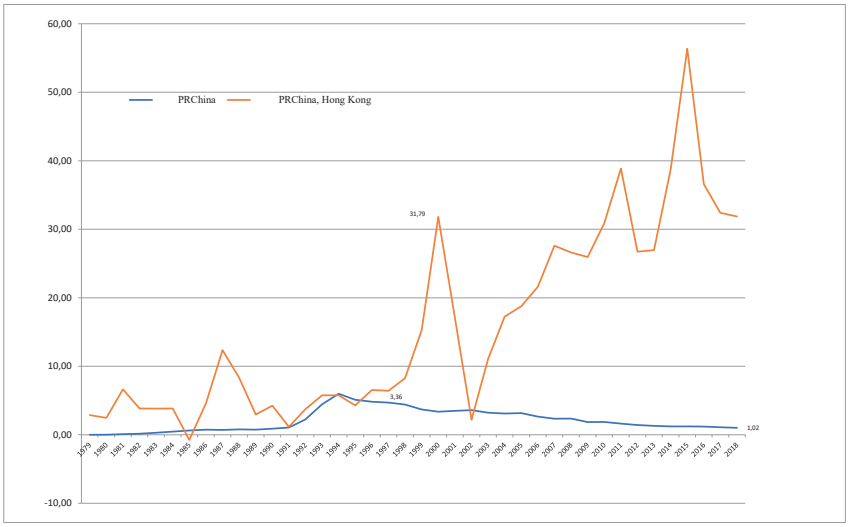
4 L Moccia, 'The Idea of «Law» in China: An Overview' in L Golota, J Hu, K Van der Borght, S Wang (eds), *Perspectives on Chinese Business and Law* (Intersentia 2018) 59-94.

5 'Foreign direct investments (FDI)' <https://doi.org/10.1787/9a523b18-en>.

6 S Lall, R Narula, 'Foreign Direct Investment and Its Role in Economic Development: Do We Need a New Agenda?' (2004) EJDR 16(3), 448.

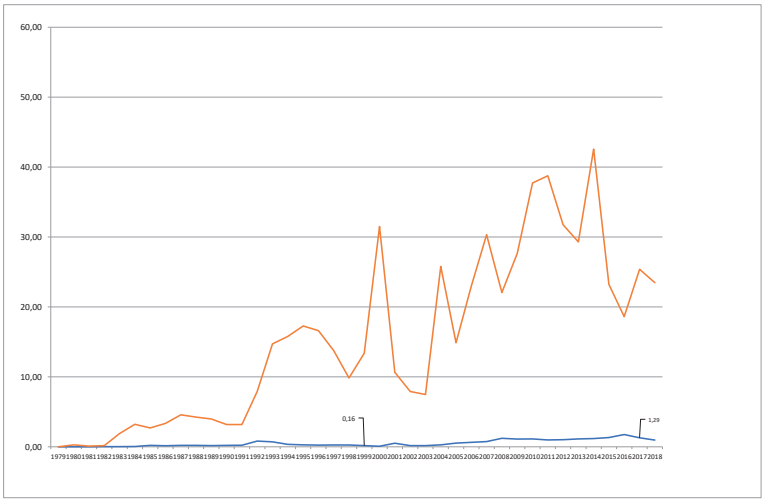
3.36% in 1999 to 1.02% in 2018 China, in the meantime it shows a growing percentage of outwards FDI, from 0.16% to 1.29%, respectively (Figure 2). Wang and Gao divided 40 years of outwards FDI into three stages: 'restricted' (1979-1999), 'relaxed' (2000-2016), and 'regulated' (from 2017)[7]. Moreover, FDI is differentiated between administrative units of the country. Does the new law make a difference for boosting FDI inflows? This question will be analyzed in the next section.

Figure 1. FDI inwards as a percentage of Gross Domestic Product (GDP), 1979-2018



Source: Author's extrapolation from UNCTAD Statistics (2019) <http://unctadstat.unctad.org/EN>.

Figure 2. FDI outwards as a percentage of Gross Domestic Product (GDP), 1979-2018



Source: Author's extrapolation from UNCTAD Statistics (2019) <http://unctadstat.unctad.org/EN>.

7 B Wang, K Gao, 'Forty Years Development of China's Outward Foreign Direct Investments: Retrospect and the Challenges Ahead' (2019) China & World Economy 27(3), 1-24.

3. The new investment law

The new law on Foreign Direct Investments[8] is the result of the long process of establishing rules and practices during last forty years (1979-2019) in terms of doing business and investments by foreigners. This period experienced different paths of development of FDI transfers.[9]

The Chinese laws had adopted until 2019 a separate registration system for Chinese FDI enterprises and domestic companies.[10] In other words, the establishment of domestic companies applied the Company Law of the PRC, in the meantime China had threedifferent laws for the establishment of wholly foreign owned enterprises, Joint Venture law and Contractual Joint Ventures respectively. Since 2020, a new era of FDI has emerged.

As far as general provisions are concerned, according to Art. 2 foreign investments are all those including investment activities within China directly or indirectly conducted by foreign natural persons, enterprises, and other organizations:

(1) A foreign investor forms a foreign-funded enterprise within China alone or jointly with any other investor,
(2) A foreign investor acquires any shares, equities, portion of property, or other similar interest in an enterprise within China,
(3) A foreign investor invests in any new construction project within China alone or jointly with any other investor,
(4) Investment in any other manner as specified by a law or administrative regulation or the State Council.

The main objective includes a *high-level investment liberalization and facilitation policy, establishes and improves foreign investment promotion mechanisms, and creates a stable, transparent, predictable and fair market environment* (Art. 3). According to Art. 4:

8 Order No. 26 of the President of the People's Republic of China, Xi Jinping, Foreign Investment Law of the People's Republic of China, adopted at the Second Session of the 13th National People's Congress on March 15, 2019.

9 From 1978 – 2000, China set up its complex legal framework for FDI, starting 2001 China in amended legal provision in broad scope of issues (S Wang, 'Chinese Foreign Direct Investment Law' in L Golota, J Hu, K Van der Borght, S Wang (eds), *Perspectives on Chinese Business and Law* (Intersentia 2018), 215-244, <http://doi.org/10.1017/9781780687643>]..

10 These laws are:
1) Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, 1979 (2016 Amendment);
2) Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, 1986 (2016 Amendment);
3) Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, 1988 (2017 Amendment). Detailed Rules for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures ('2017 Second Revision PKULAW Version' <http://www.lawinfochina.com/display.aspx?id=b216ad17914f6f4dbdfb&lib=law> accessed 1 Dec 2019).

The State shall implement a foreign investment management system addressing pre-entry national treatment to include a foreign investment negative list.

Pre-entry national treatment is defined as treatment given to foreign investors at the stage of entry in which the investment standards are not lower than that of domestic investors and their investments; the negative list refers to state regulations for foreign investment in specific areas to include special management measures for investment implementation approval. The negative list will be issued by the State Council. Moreover, in any international treaty or agreement concluded which will be more favorable in respect of access for foreign investors, the relevant provisions of the treaty or agreement may apply.

According to Art. 6, national security and the public interest should be preserved and foreign investors and foreign-funded enterprises conducting investing activities within China shall abide by the laws and regulations of China, and neither compromise China's national security nor cause damage to the public interest.

Chapter II starts with Art. 9, which introduced the principle of equality between national and foreign enterprises: the state's various policies shall equally apply to foreign-funded enterprises. Comments and suggestions from foreigners should be considered 'in a proper manner' (Art. 10). More cooperation is needed which might be multilateral or bilateral between China and countries, regions or international organizations (Art. 12). In order to boost investments, the State can establish special economic areas to promote foreign investment (Art. 13) or guide foreign investors to invest in specific industries, fields and areas, taking into account national economic and social development (Art. 14). According to Art. 17, foreign enterprises may conduct financing through public offering of shares, corporate bonds and other securities or 'by other means'.

Chapter III established the core issue of a completely new provision on protection of Intellectual Property (IP) rights, which was one of the main issues at stake for foreign investors - protection of their company's know how (Art. 22). The State shall 'encourage technology cooperation on the basis of free will and business rules'. In addition, according to Art. 20 there will be no expropriation (*State is not to expropriate any investment made by foreign investors*).

Chapter IV established clear rules on how the business must be operated. It is not allowed to invest in specific fields named in the 'negative list' (Art. 28). In any other activities, the treatment between domestic investment and foreign investment should be equal. In some industries obtaining an investment license is required (Art. 30). According to Art. 31, the business forms, structures, and rules of activities of foreign funded enterprises shall be governed by the Company Law of the People's Republic of China, the Partnership Enterprise Law of the People's Republic of China, and other laws. A foreigner must comply with anti-monopoly assessments of the business operations in accordance with the provisions of the Anti-Monopoly Law of China (Art. 33). In addition, foreign investors must submit investment information to the commercial authorities

through the enterprise registration system and the enterprise credit information publicity system (Art. 34).

According to Art. 14 of the new law:

> *the State encourages and guides foreign investors to invest in specific industries, fields, and regions in accordance with the needs of national economic and social development. Foreign investors and foreign-invested enterprises may enjoy preferential treatment in accordance with laws, administrative regulations, or provisions of the State Council*.

In conclusion, the freedom of FDI was established within the new legal regulation framework. In addition, the unification of legal frameworks and equalization before State's law came into effects. The new law changed the Intellectual Property rights. However, the new regulation included open clauses that should be still defined from the legal practice, for example 'a proper manner' (Art. 10), 'free will', 'business rules', 'principle of equity' (Art. 22), 'efficiency and transparency' (Art. 19).

There are three barriers in FDI for foreign investors: national security, public order and finally monopoly activities. On one hand, antimonopoly legislation must be the rule, but on the other hand, no harm to any State's activities may occur, which stems from the Chinese system of value what will be analyzed in the following part.

4. Confucianism and law

The combination of Confucianism and Taoism lies at the root of legal understanding in China. The system of social hierarchy based on Confucius (Kǒngfūzǐ, 孔夫子) refers to the legal system: *li* 礼 (禮) that means rites and moral obligations, and the strictly legal approach referring to a written law *fa* (法). *Li* has different meaning.[11] Is Confucianism still present in modern China?

During the New Cultural Movement (新文化运动), 1915-1919, Confucianism was suppressed in the name of democracy and science. According to Zhu Cheng,[12] in modern China, Confucianism is revived, but only for the *elite:* government, socialists, and scholars. Confucianism is needed for the following reasons: 1) to resolve problems, 2) nationalistic attitudes, 3) to implement moral order. However, modern Chinese people, especially the younger population, do not follow Confucian ideas, as long as economic prosperity is considered.

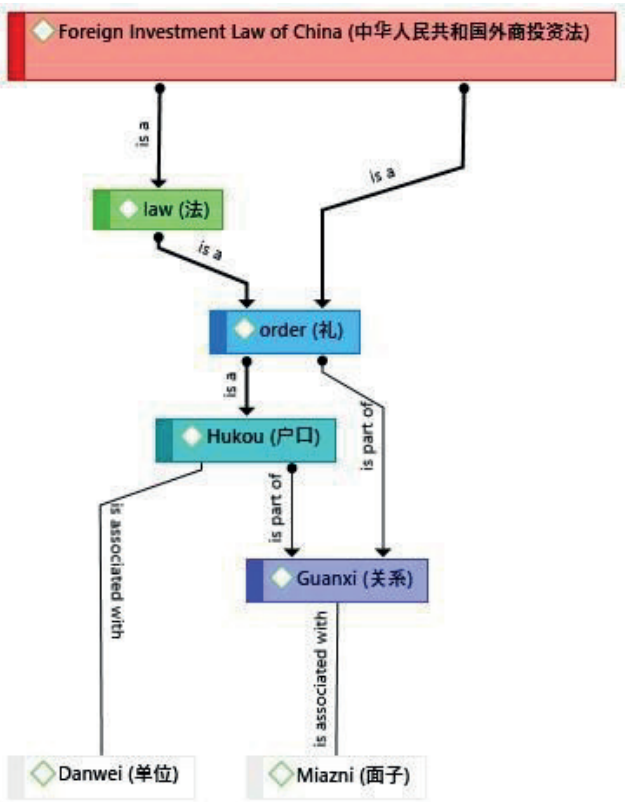
What is the relation between Confucianism and the new law on FDI? Do *li* and *fa* have an impact on Foreign Direct Investments? Figure 3 shows that written law in China is immersed in the moral order of *li*, which has its origins directly in *hukou* and *guanxi.*

11 Order, moral obligation, morality, etc.

12 Personal interview with Zhu Cheng (朱承), Shanghai Academy, 15 October 2019, Shanghai.

Introduced by Mao Zedong in the time of planification economy and society, *hukou* (户口) refers to a household registration system that divided the population into two categories: agricultural registrants in rural areas and non-agricultural (urban) in metropolitan areas, set up under the Regulations on Hukou Registration in 1958 by the National People's Congress (NPC). The objective was to regulate internal movement of the Chinese. It created a legal domicile for every person and bound each person to that dwelling. The information included details on births, deaths, marriages, divorces, and the movement of all members in the family. *Hukou* was *de iure* abolished in 2003 as a consequence of the Sun Zhigang Case.[13] This case showed the impacts of a changing society on the old institutions of stratification such as *hukou*.

Figure 3. Model of the normative paradigm of law



Source: Author's analysis.

13 Sun Zhigang Case (孙志刚事件) in 2003. On March 20, 2003, 27-year-old Sun Zhigang died in the medical clinic of a detention center (拘留所) in Guangzhou. He had been detained after being unable to show his three identification documents: a temporary living permit (暂住証), his identity card, and his residence permit (*hukou*) which was with his family in Hubei. Three jurist scholars: Dr. Xu Zhiyong, Dr. Yu Jiang and Dr. Teng Biao prepared an official reply on the basis of violation of Constitutional principle, as the only legislative body is the NPC.

However, *hukou* is important nowadays in the developed main cities such as Beijing, Shanghai, and Guangdong, where education, social security and health services are still provided through formal registration. However, in the rural areas it is less important, as most of the younger generation choose to migrate to the cities. Table 1 shows the relationship between urban and rural *hukou*.

Table 1. Theoretical model to explain *hukou* and *guanxi* in modern China

Company members	*Hukou*		*Guanxi*	
	rural	**urban**	**rural**	**urban**
Chinese	weak	strong	strong	weak
Foreigner	weak	weak	weak	strong

Source: own elaboration.

The question of whether *hukou* has an impact on FDI should be addressed. On the urban level there is a weak influence of *hukou*. Nevertheless, at the rural level, a person who is registered in the locality would have social relations that will allow a foreigner to make investments easily and with a possible positive impact in the region.

On the contrary, nowadays most Chinese from rural areas migrate to the urban cities and they keep their status from their homelands, but the emotional connection with their households and hometown is extremely weak. For them, living in urban cities might be difficult as an urban *hukou* has more privileges than a migrant from other provinces, but this is the only option to improve their life conditions. Wang observes that 'people are treated differently in accordance with where their legal residency is, and the change and relocation of any citizen's legal residency must be approved by the government'.[14]

Hukou focuses on where people come from, and *danwei* (单位), also introduced by Mao, refers to the place of employment and political affiliation. Previously all urban workers were organized as part of a *danwei*: a factory, a store, a school, or a government office. Xie et al. observed that 'in pre-reform China, *danwei* were largely responsible for generating inequality in benefits, but not in earnings. During the economic reform, the central role of *danwei* in determining benefits has been displaced either by the private market (in the case of housing) or by social welfare (in the case of medical benefit and pension)'[15]. It was still important independent from region or sector. *Danwei* was *the first step and principal channel for implementing party policy in the Chinese socialist infrastructure*.[16]

Moreover, in Chinese society *guanxi* (关系) plays an important role for political, economic and business activities, but has different impacts on the rural and urban levels,

14 F-L Wang, *Organizing Through Division and Exclusion: China's Hukou System* (Stanford University Press 2005) XII-XIII.

15 Y Xie, L Quing, W Xiaogang, '«Danwei» and Social Inequality in Contemporary Urban China' (2010) Res Sociol Work 1(19), 295, <http://www.doi.org/10.1108/S0277-2833(2009)0000019013>.

16 E Y-H Tsang, *Understanding Chinese Society: changes and transformations* (World Scientific 2016) 8.

as shown in Table 1. It means relationships and informal networking, which are critical parts of doing business in China, it is of especially great importance on the urban level in first tier cities such as Beijing, Shanghai, Guandong, and Shenzen.

Guanxi is source of stratification, and more and more its impact is reduced in modern society.[17] Tsang refers it to 'dyadic, particular, and sentimental tie that has the potential to facilitate exchange of favors between parties connected by the tie'.[18] It originates from a Confucian thought meaning 'mutual responsibility', and non-family based interpersonal networks. It is still important on the rural level.

Social face, *mianzhi* (面子) means to 'give face', to take your own responsibility. The social contract of the state is built on the idea of harmonious society *héxié shèhuì* (和谐社会), which stems from the Confucius's the Great Harmony (an ideal or perfect society), *dàtóng* (大同) and prosperous society, *xiǎokāng shèhuì* (小康社会). These are the bedrocks of the official state policy *guócè* (国策) in the post-transformative era.

In conclusion, for rural Chinese, *hukou* is less important and *guanxi* is more important. The market economy drives the forces of migration and consumption. That's why for urban Chinese, hukou is very important, but guanxi less important. People in an urban megalopolis would like to be ruled by law, not by informal relations such as moral order, *li* or *guanxi.* For a foreigner, on the rural level *hukou* and *guanxi* are both weak. But on the urban level, *guanxi* for foreigners is of the utmost importance.

5. Conclusion

From January 1, 2020 there is no difference between Chinese and foreigners in treatment with respect to foreign investments. According to Art. 42, Foreign Owned Enterprises Law, Joint Ventures Law, and Chinese-Foreign Cooperative Enterprises Law will expire, however, foreigners can continue with any activities established before January 1, 2020, until five years after the implementation of the new Law. The concept of the law must take into account the social context in order to challenge the gaps between the developments of the West and the East in China. Social stratification in contemporary urban China, which stems from *hukou* and *danwei,* should be challenged by the new law, however these institutions of social stratification still play a significant role in modern China.

Up to now, FDI has brought inequalities, and moreover, has not solved the problems of social exclusion and inequality.[19] Finally, analysis of the new Chinese FDI law is particularly

17 The example of the diminishing role of guanxi is 'ant tribes' (蚁族 *yǐ zú*) who live in the outskirts of first-tier and second-tier cities, in poor conditions. *Guanxi,* non-family based interpersonal networks are not sufficient in the rural areas and small urban cities, so university graduates from poor regions migrate to big cities and become 'ant tribes'. The crisis of masculinity frequently occurs with *wen* (being intellectual) and *wu* (being physically masculine) as suggests Tsang (Ibid). To feel like an outsider, 外地人 (*wàidìrén*), outlander non-local person, from out of town. Face (脸*lia3n*) refers to loss their status. According to Confucius, the main virtue guiding the behavior of the leader is ren 仁 (benevolence).

18 E Y-H *Tsang, Understanding Chinese Society: changes and transformations (World Scientific 2016)* 8.

19 Global City 2017 Report' on FDI.

important for Poland and other Central and East European countries, that have to diversify not only their own business relationships, but also consider a global perspective.

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Contemporary Central & East European Law

Representation in the Polish legal system

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PREFACE

The following article is aimed at presenting definitions and typologies concerning the issues of representation in the Polish legal system. Synonymous or interchangeable usage of legal terminology concerning representation in economic activity may lead to considerable disruption to proper functioning of civil law entities, and especially commercial law entities.

In order to conduct business in the form of partnership enterprises, the majority of the entities of commercial law are formed and consequently registered in the National Court Register.[1] Other formations of entities of commercial law that are formed by natural persons or legal persons, including so called legal persons without corporation status, are associations, foundations and healthcare enterprises.[2] Operating any of these activities requires heightened activity in domains such as, e.g., commercial activity, marketing, production, contractual activity, administration, and many others, the full list of which cannot be presented here, for obvious reasons. This increased need for activities in numerous spheres, especially in the case of large entities results in the need for them to have one or more representatives,[3] and frequently also apparent attorneys,[4] who are appointed from sallersman/woman and other persons active in the business

1 Ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze Sądowym [Act of 20 August 1997 on the National Court Register] [1997] JoL 121, 769.

2 Searching for an entity on the basis of data obtained from the database: Ministerstwo Sprawiedliwości, Krajowy Rejstr Sądowy [the National Court Register], <https://ems.ms.gov.pl/krs/wyszukiwanie> accessed 31 Jan 2019; COIG, Spis polskich firm [List of Polish companies], <http://www.coig.com.pl/spis-polskich-firm_katalog_polskich_firm.php> accessed 31 Jan 2019.

3 J Fabian, *Pełnomocnitwo* [Power of attorney] (PWN 1963) 680.

4 T Dziurzyński, Z Fenichel, M Honzatko, *Kodeks handlowy. Komentarz,* vol. 1, [Commentary on the Commercial Code] (Ksiegarnia Powszechna 1936) 138.

premises (Art. 97).[5] The activity in question and its development are coherent with the relevant regime prevailing in the State, which thus influences the commercial market. The regulation of representation is associated with the development of capitalism, or strictly speaking, with the period of capitalist formation. This thesis is confirmed by the analysis of codification in some European countries. It does not seem accidental that there is a lack of regulation of representation as a separate legal phenomenon in early-capitalist codes, such as the Napoleonic Code,[6] or the Austrian Code,[7] whereas representation serving a role that is closest to the contemporary role of power of attorney is present in later codes, such as the German Civil Code.[8] In the history of the Polish legal regulations concerning power of attorney, the distinction between power of attorney and a contract order, in a similar manner as in the German regulations, has existed since the Code of Obligations.[9]

1. INTRODUCTION TO ATTORNEY

However, the functioning of an attorney must be distinguished from the functioning of the bodies of the legal person.[10] According to the Polish judicature,[11] legal persons act through their bodies, which comprise natural persons. This attitude, which is consistent with the theory of bodies, is contrary to the theory of representation[12] (Vertretertheorie) that was previously binding. The previously approved theory of representation was based on the assumption that, because of the legal person's inability to act independently, it had statutory agents (as it was in the case of natural persons), that is, its bodies. The accepted viewpoint entails legal consequences as a result of which, among others, liability for declaration of intent, defects of declarations of intent and the legal consequences are directly related to possible liability for the delinquency of legal persons in respect of their own acts.[13]

5 In case of doubt, a person active in the business premises intended for public use is deemed to be authorized to carry out legal transactions, which usually tend to be carried out with persons using the services of this company.

6 Code Napoléon, Code civil des Français – French civil code, enacted in 1804.

7 Allgemeines Bürgerliches Gesetzbuch – common civil code, enacted in 1811.

8 BGB (Bürgerliches Gesetzbuch) – general German civil code enacted in 1896, effective from 1 January 1900.

9 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań [Ordinance of the President of the Republic of Poland of 27 October 1933 – Code of obligations] [1933] JoL 82, 598.

10 A Klein, 'Charakter prawny organów osoby prawnej' [Legal nature of the organs of a legal person] in J Błeszyński, J Rajski (eds) *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego* [Publications about civil law. Book in honor of Witold Czachórski] (PWN 1985) 124

11 Judgment of PSC III CZP 8/90 [1990] (1990) OSN 10-11, item 124.

12 W Muller-Freienfels, *Die Vertretung beim Rechtsgeselschaft* [Representation in the legal society] (Mohr 1955) 13.

13 M Pazdan, 'Dobra i zła wiara osoby prawnej' [Good and bad faith of a legal person] in A Szpunar et al. (eds.) *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-*

As a result of such an assumption, declarations of intent of the bodies of a legal person apply to the legal person and are considered statements made on its own behalf. This view is different from the previously applied theory of representation, according to which declarations of the attorney are regarded as his/her statements that are only statements made on behalf of the legal person (the principal).[14] In favour of accepting the viewpoint of the theory of bodies are the code[15] regulations. Due to the current regulations, the rules governing the functioning of the bodies of legal persons without corporation status have not been individually regulated, and the legislator refers to the rules applicable to the bodies of legal persons. The type of regulations concerning entitlements of the bodies of legal persons that are contained in the Code of Commercial Companies is different in relation to/comparison with the competences of attorneys (including attorneys of legal persons), whose entitlements (*in principle*) come from the power of attorney granted by the principal.[16]

2. TO HOLD A TITLE AT SOURCE ATTORNEY

Diverting attention somewhat away from the question of the bodies of legal persons and the theory of representation, we should focus on the issue of the authorisation by law of the representatives of legal persons and on the construction of representation. This issue is extremely common among legal persons or legal persons without corporation status who have a partner not being a natural person. What may help proper understanding of legal nuances and distinctions is an analysis of the construction of representation in the Polish law and, therefore, in Polish economic relations.

According to the construction of representation regulated by the Civil Code[17], a representative is a person who takes legal action on behalf of another person, that is on behalf of the representee. Due to the way the representative acts within his/her authorization, activities undertaken by them will result in legal consequences not for them but for the representee. The above described regulation significantly affects the possibility of accepting or submitting declarations of intent by representatives on behalf of the represented partnership enterprises. Because of these individual features related to accepting and making statements of intent, there are two types of representation. The first one is constituted by passive representation wherein the authorised person has competence to accept third parties' declarations of intent on behalf of the representee; whereas the second one is an

Petrakowskiej [Studies on private law. Book in honor of Professor Biruta Lewaszkiewicz-Petrakowska] (WUŁ 1997) 195.

14 M Pazdan in Z Radwański (ed), *Prawo cywilne – część ogólna* [Civil law - general part 2] (C.H. Beck 2008) 467.

15 Ustawa z dnia 15 września 2000 r. – Kodeks spółek handlowych [Act of 15 September 2000 - Commercial Companies Code] [2000] JoL 94, 1037.

16 R Longchamps de Barier, *Studia nad istotą osoby prawniczej* [Studies on the essence of a legal person] (Drukarnia Jakubowskiego i Sp. 1911) 206.

17 Ustawa z 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 Civil Code] [1964] JoL 16, 93.

active representation consisting in being empowered to make declarations of intent on behalf of the representee. Representation in Polish law may also be categorised by the source of authorisation. According to this criterion, representation is divided into two types, i.e., statutory guardianship and the power of attorney.[18] The first group of statutory guardians comprises the following types of authority: parental authority over a minor, authority of a guardian or legal guardian, of a trustee of a common thing established by the court, or any of the partners of a civil partnership.[19] At this point it is worth focusing attention on the evolution concerning private companies in relation to the functions that are performed by the partners competent to represent them. During the time when the Commercial Code[20] was in force, and in the early years of binding force of the Commercial Companies Code, partnerships of private companies were treated as statutory attorneys.[21] This standpoint changed following the amendment of the Civil Code, Art. 33 [1] § 2.[22] As a consequence of such regulation, in the case of representation of commercial partnerships, the theory of the bodies of a legal person, and not of representation,[23] should be applied. What is important is that in the current legal situation, the liquidator of the registered partnership is not considered to be a statutory representative, although they were considered as such in the days of the Commercial Code. The second group of representation, which is in effect not because of the binding regulations but because it has been authorised due to the declaration of intent of the represented, includes the power of attorney and procuration, being a peculiar variation of the power of attorney.

The difference between the two sources of authorization by law entails different frames and bases for the authorization. Depending on whether it is a statutory representation or a form of the power of attorney, the very authorization will be regulated either by law or by the intention of the represented. Due to the needs that are particularly common among subjects managing enterprises, what is especially important is the granted power of attorney and procuration - that is, representation granting authorisation that is dependent on the will of the principal.

3. POWER OF ATTORNEY

While dealing with the issue of the power of attorney, it should be emphasized that it is a unilateral legal transaction. As a result of this legal act, which is a declaration of intent

18 A Wolter, *Prawo Cywilne. Zarys części ogólnej* [Civil law. Outline of the general part] (PWN 1986) 342.

19 M Pazdan in Z Radwański (ed) 2008, 460.

20 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 czerwca 1934 r. – Kodeks handlowy [Ordinance of the President of the Republic of Poland of 27 June 1934 – Commercial Code] [1934] JoL 57, 502.

21 B Gawlik in Z Radwański (ed) 2008, 736; S Sołtysiński, *Kodeks handlowy. Komentarz* [Commercial Code. Commentary] vol. 1 (C.H. Beck 1997) 602; K Nędza in A Kappes (ed), *Prawo spółek* (Zakamycze 1997) 308.

22 Art. 33[1] § 1 CC. In the case of the organizational units that are not legal persons, who are granted legal capacity by law, relevant provisions regarding legal persons are applied respectively.

23 M Pazdan in Z Radwański (ed) 2008, 461.

of the principal, the third party becomes entitled to act effectively on behalf of the represented.[24] Because of its legal nature, in order to effectively authorize someone there is no requirement to make a declaration of intent to third parties, or even to the attorney in question.[25] In the mentioned case of the absence of a declaration of intent as for the power of attorney granted to the attorney, it is particularly relevant to apparent authorities.[26] Apparent attorneys, who are people active in the business premises of the entrepreneur, carrying out the function of representative of the entrepreneur, actually are not authorized in the strict sense on the basis of the granted authorization, but, in the vast majority of cases, due to their being subject to concluded contracts of employment or managerial contracts, and others, such as, e.g., civil law contracts.

Because of the biding legal conditions, although the represented has not granted power of attorney to the representative and instead signed a different agreement, de facto the relation of representation is established under the law, although none of the parties may be aware of its existence.[27] Quite different, however, in terms of the characteristics of performed activities, is the situation of the attorney (excluding apparent authority). In order to make his/her declarations of intent result in legal effects directly for the represented, there are several conditions that must be fulfilled. It may be assumed that there are cardinal conditions for power of attorney, under which the declaration submitted by the representative will have legal effects in relation to the principal. The canon of the aforementioned features being part of the actions of the attorney comprises; having authority and acting within its limitations, having the ability to represent, acting on behalf of the represented and performing legal actions that are within the scope of the type of activities for performing which the attorney may be authorized.[28]

In the field of economic activity, what entrepreneurs are especially interested in is representation based on their intent, that is, the power of attorney. The scope of the authorities granted to the attorney depends on the principal's will. In the declaration of intent, the principal decides both about investing somebody with the power of attorney and its scope. An important component of the power of attorney consists of the impossibility to establish authority exercising unlimited power, that is, so called *omnipotency*. This limitation results from the necessity to protect the interests of the represented.

Because of the necessity to protect the principal, the scope of the power of attorney must be defined.[29] According to objective criteria, representation may be divided into three types, which are the following: a limited power of attorney, a special power of attorney, and a particular power of attorney.

24 Judgment PSC of IV CR 368/76 [1976] (1977) OSNC 9, item 167.
25 R Longchamps 1887.
26 Judgment of the Court of Appeal in Katowice I ACr 323/92 [1992] (1993) OSA 7, item 47.
27 Judgment of PSC I CKN 323/99 [2001] (2002) OSNC 7-8, item 94.
28 M Pazdan in Z Radwański (ed) 2008, 469.
29 Ibid 475.

The individual types of power of attorney differ in terms of the areas of the activities they refer to.

A limited power of attorney consists of granting the attorney the power to carry out activities concerning ordinary management. The activities of ordinary management usually comprise activities related to current management of the company resources lying within the competence of the represented.[30] There is no specific list of activities constituting ordinary management, merely that acts that go beyond the scope of ordinary management have been precisely defined, and this may be a base to make *a contrario* assumptions about whether a particular activity is within the scope of ordinary management. What the scope of ordinary management does not include is the arbitration covenant, therefore *per analogium* it must be assumed that issuing a plaint note[31] is beyond the scope of ordinary management. Likewise, activities consisting in the sale of property/assets or establishing the limited property rights[32] do not belong to the scope. This type of viewpoint, limiting the scope of activities to ordinary management, certainly serves to protect the principal's interests against the risk of damage that might be caused by the attorney. Otherwise, there would be a real threat to the principals due to the fact that a limited power of attorney is very popular, and therefore it is granted most frequently. The reasons for this popularity does not result from the entitlements granted to the limited power of attorney by legislature, but from the widespread availability of this solution and a lack of awareness of the possibility of granting another type of representation among those people interested in it. For these reasons, it is natural that it would be pointless to grant broad entitlements to a limited power of attorney, such as authorization for property charges by establishing the limited property right or sale of the property. It has been assumed, however, that in the case of representation granted by the board of the association engaged in business activity, a limited power of attorney constitutes authorisation sufficient for entering into a civil partnership agreement[33] and there is no need to grant additional power of attorney for this purpose. The viewpoint concerning entering into an agreement of civil partnership has been justified by the necessity for establishing civil partnerships as typical contracts occurring in business.

Another type of power of attorney is a special power of attorney. The special power of attorney, just as the name suggests, comprises authorization to perform special actions specified in the content of the power of attorney. Competent authorisation to carry out activities resulting from the power of attorney should specify the type of the action covered by the power of attorney and its subject. In the absence of unambiguous definition of the type of the action that is to be covered by the power of attorney, the rules that are applied

30 W Robaczyński in M Pyziak-Szafnicka (ed), *Kodeks cywilny. Komentarz, Część ogólna* [Civil Code. Commentary General part] (Wolters Kluwer Polska 2009) 970.

31 Resolution of PSC III CZP 8/02 [2002] (2002) OSNC 2002 11, item 133.

32 Judgment of PSC II CKN 866/97 [1998] (1999) OSNC 3, item 66.

33 Judgment of PSC II CKN 362/97 [1997] (1998) OSNC 2, item 33.

for the interpretation of declarations of intent[34] should be followed. The special power of attorney is not accompanied by any catalogue of the purpose of the activities for which the attorney can be authorized. Special power of attorney may be granted for the purpose of doing activities that are within the scope of ordinary management, as well as activities falling outside the scope of ordinary management[35]. However, an interpretation aimed at justifying a position accepting the possibility of granting specific power of attorney for all legally permitted purposes would be incorrect. The special power of attorney, in Poland also referred to as a generic power of attorney, is subject to a restriction that boils down to excluding all actions that require special power of attorney from the scope of the purposes of granting it. Special power of attorney constitutes authorization of an attorney to take specifically defined, definite legal actions. The scope of the special power of attorney may comprise a single or a fixed number of legal actions. In the absence of an indication of the number of legal actions for the purpose of which the special power of attorney has been granted, its character changes and it becomes a particular power of attorney[36]. Special power of attorney also includes actions related to signing a contract. Importantly, concluding a contract considered as a legal action for the purpose of which the scope of authorization is wider, should be distinguished from signing of a contract treated as a technical operation[37]. The solution adopted in practice based on the special power of attorney is investing the power of attorney to a member of the management board of the partnership enterprise. The justification for this type of power of attorney lies in the record of the partnership agreement, which authorizes two or more members of the management board to make declarations of intent on behalf of the partnership enterprise. This record may result in curbing activity in the sphere of the company's current business, and overcoming this problem may consist of authorizing a board member to perform particular actions[38]. Despite the apparent overlapping of the entitlements resulting from granting a special power of attorney to a member of the body authorized for representation, this provision is often used in practice, thus simplifying the procedure for decision-making in the field of minor or current affairs of the company.

A particular power of attorney is informally particularized in two cases. The first one is the power of attorney endorsement regulated in art. 18 of the Law on promissory notes.[39] The usage of the power of attorney endorsement entails entitlements for the endorsee. As a result of this legal procedure, the endorsee will be given the power to exercise all rights granted by the promissory note, including its endorsement, however only along

34 Judgment of PSC II CKN 866/97.

35 S Rudnicki in S Dmowski, S Rudnicki, *Komentarz do kodeksu cywilnego. Księga 1. Cześć ogólna* [Commentary on the Civil Code. 1st Book. General part] (LexisNexis 2007) 409

36 W Robaczyński in M Pyziak-Szafnicka (ed) 972.

37 Judgment of PSC I CSK 406/06 [2007] LEX 274237.

38 Judgment of PSC III CZP 68/06 [2006] (2007) ONSC 6, item 82.

39 Ustawa z dnia 28 kwietnia 1936 r. - Prawo wekslowe [Act of 28 April 1936 – Bills of Exchange Law] [1936] JoL 37, 282.

with the consequences of the power of attorney.[40] The second of the aforementioned cases of particularised particular power of attorney is a general power of attorney (in Polish - procuration). However, because of the scope of the entitlements of an attorney and the characteristics of this power of attorney, it is not possible to give a complete description of the regulations concerning the particular power of attorney, and thus it becomes necessary to carry out a separate analysis of this type of power of attorney.

4. GENERAL POWER OF ATTORNEY

Procuration (general power of attorney) in the legal regulations in Poland emerged soon after independence was gained, that is in 1919. The legislator decided to unify the rules in the territory of the Republic of Poland, starting from the sphere of the economy. Procuration was regulated together with the introduction of the commercial register, which was crucial for creating the opportunity for trade and industry to flourish in the recreated country. Along with the Decree of 7 February 1919 on the commercial register[41] coming into force, the institution of procuration was regulated for the first time in Polish law. Another normative act regulating the issue of procuration was the Commercial Code. The articles referring directly to the issue of procuration also remained in force after the introduction of the Code of Commercial Companies, and until the amendment where the Civil Code and some other laws of 14 February 2003[42] were introduced. Bringing the amendment into force resulted in the abolition of the provisions of the Commercial Code, which regulated procuration. Another consequence of this amendment was the introduction of Chapter III into Book I of the Civil Code, which was entitled *Procuration*. In the doctrine, it is questionable whether procuration constitutes a subtype of power of attorney or not, and thus, as a consequence of such assumptions, whether there is an occurrence of the superiority of the power of attorney over procuration. Apart from the aforementioned digressions on the superiority and relationship between procuration and the power of attorney, which existed at the time of the Commercial Code, it should be assumed that procuration is in many respects similar to the power of attorney. Procuration lies in the empowerment of an authorized agent (*prokurent* in Polish) to act on behalf of the principal, whereas the scope of procuration *ex lege*[43] encompasses the empowerment of an authorized agent to act in all legal relationships concerning managing an enterprise

40 A Szpunar, *Komentarz do prawa wekslowego i prawa czekowego* [Commentary on the bill of exchange law and check law] (Wydawnictwo Prawnicze 1994) 72.

41 Dekret z 7 lutego 1919 r. o rejestrze handlowym [Decree of 7 February 1919 on the commercial register] [1919] JoL 14, 164.

42 Ustawa z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw [Act of 14 February 2003 on the amendment to the Act – the Civil Code and some other acts] [2003] JoL 49, 408.

43 According to Art. 109 § 1 CC, procuration is the power of attorney granted by the entrepreneur subject to mandatory entry in the register of companies, which includes authorization to perform judicial and extrajudicial documents, which are related to the business.

regardless of the provision or the will of the principal. One of the features distinguishing procuration from the power of attorney is the person who has the legitimacy to grant it. According to the regulations in force, procuration may be granted by a registered entrepreneur.[44] This regulation has nowadays been extended in comparison with this type of authorization in the past. Before the question of procuration was regulated in the Civil Code, the doctrine had conveyed the view that the entitlement to grant procuration belongs exclusively to commercial partnership companies,[45] whereas currently, because of the wording of Art. 109 [7] § 4 of the Civil Code,[46] it should be assumed that procuration may be granted by an entrepreneur who is a natural person, being a person who is registered in the Central Register and Information on Economic Activity.[47] Another difference between procuration and the power of attorney lies in its extent. Procuration ensures the entitlement to carry out activities related to managing an enterprise, and this difference is determined by the law, not by the will of the principal, as in the case of power of attorney granted through the intent of the principal. The last of the major differences between procuration and power of attorney is a lack of possibility of limiting procuration in relation to third parties.[48] With regard to the substance of the regulations relating to procuration, it may be noted how it is divided into individual and joint procuration. Independent procuration consists of an individual entitlement according to which each of the authorized agents is competent to act independently. Joint procuration, however, grants the empowerment to a few people to act as one authorized agent.[49] The distinction between joint procuration and joint representation should be recognized, and the formulations cannot be used interchangeably since they relate to different legal forms.

Joint representation is a type of representation consisting of an authorized agent acting together with, e.g. one of the guardians of the body of a partnership company. However, it is not a type of joint procuration, since the entitlements that are exercised by both persons do not result from procuration. It may be assumed that the joint representation is especially favourable to the partners who, because of various reasons, avoid performing

44 Entrepreneurs are registered: in the case of legal persons and legal persons without corporation status in the National Court Register, in the case of natural persons - in the Central Register and Information on Economic Activity.

45 S Machalski, 'Stanowisko prokurenta według k.p.c. z uwzględnieniem prawa upadłościowego' [Commercial proxy's position under the Code of Civil Procedure including bankruptcy law] (1936) PPH 2, 70; A Rakower, 'Objaśnienie prawa wekslowego' [Explanation of the bill of exchange law] (1939) MPHiW 4, 47.

46 Art. 109 [7] § 4 CC. The death of the entrepreneur or the loss of his/her legal capacity shall not terminate the prokuration.

47 Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej [Act of 2 July 2004 on freedom of economic activity] [2004] JoL 173, 1807, Art. 14.

48 Art. 109 [1] § 2 CC. Procuration cannot be limited when it affects third parties, unless a specific provision provides otherwise - restriction applies to Art. 109 [5]. Procuration can be reduced to the scope of issues listed in the register of the division of the enterprise.

49 Resolution of PSC III CZP 34/14 [2015] (2015) OSNC 7-8, item 80.

management functions in a partnership company. To provide a more detailed description of this method of managing the company, I will present in a schematic way the whole process from the founding of the company to its functioning. Starting from the moment of founding the company, in which the partner wants to avoid serving as a member of the management board, the whole process, simplified to some extent, is as follows: during the registration of the partnership enterprise, the partner appoints the management board and establishes himself/herself as the authorized manager, and makes the provision, according to which the representation of the company is given to the authorized manager, who acts jointly with a member of the board. Consequently, such a model of regulation does not result in limiting the powers of the authorized manager, but it contributes to limiting the entitlements of the board, which is obliged to act in certain situations together with the authorized manager. When the partnership agreement is properly defined, the authorized manager constitutes a kind of security buffer in relation to declarations of intent made by the management board of a company with limited liability.

The choice of the character of procuration depends entirely on the will of the principal, which arises out of his/her declaration of intent disclosed in the register.[50] While dealing with the issue relating to procuration, it should be mentioned who, in relation to legal persons and so called legal persons without corporation status, has statutory entitlements to decide about establishing procuration. With respect to private companies, which are usually referred to as legal persons without corporation status, appointing of an authorised agent requires the approval of all partners entitled to manage the affairs of the company.[51] In the case of associations of capital, the appointment of an authorised agent requires the consent of all board members.[52] Entrepreneurs do not have complete freedom when choosing a person to be appointed as an authorised agent by them, since it must be a natural person with full legal capacity.[53] The foregoing limitation with respect to the requirement relating to the type of people appropriate to be authorised is also consistent with the provisions that prevent the transfer of procuration onto another person.[54] The introduction by the legislator of the interdiction of appointing a legal person an authorised agent was undoubtedly meant to safeguard the interests of the principal. There is no doubt that the interests of the principal might be threatened in cases where an authorized agent is a legal person. The risk would be even greater because of the changeability of persons responsible for the management of legal persons. Along with this, trust in the competence of the current management board would not be transferred

50 U Promińska in M Pyziak-Szafnicka (ed) 1003.

51 Art. 41 §1 of the Commercial Companies Code (CCC) applied appropriately to other private companies..

52 Art. 208 § 6 of the CCC in relation to a limited liability company, and Art. 371§4 CCC in relation to a joint stock company.

53 Art. 109 § 2 CC. An authorized agent may be appointed from a natural person with full legal capacity.

54 Art. 109 § 6 CC. The general power of attorney cannot be transferred. An authorized agent may appoint a attorney to perform a particular action or some kind of action.

onto consecutive new board members. For these reasons, it should be assumed that the restriction on the transferability of procuration is unquestionably justified, and that the restriction related to the legal form of an authorized agent is indispensable.

6. ATTORNEY IN COMPLEX STRUCTURE COMPANIES

With reference to entities with a complex structure, such as commercial companies where other companies are partners, both the power of attorney and procuration are inextricably linked with the entity sitting on the board. In practice, the situation when the parent company that is a partner of another partnership company has an authorised agent, and this very agent is also appointed an authorized agent for a subsidiary company, is a phenomenon that frequently occurs. This kind of action in relation to representation is not allowed by the applicable legal regulations,[55] and in view of the purpose,[56] it does not seem to be appropriate. What could be a feasible solution concerning the issue of procuration in all companies with a partner (or partners) who is a commercial company is dual authorisation. If an authorised agent were to perform their functions for both the parent company as well as for the subsidiary company, they should be registered as the authorized agent in both of the represented companies in the National Court Register. In the case of attorneys, the same guidelines should be applied by analogy, naturally with the exclusion of registration in the appropriate register.[57]

A considerable question from the hitherto presented deliberations relating to clusters of partnership companies is the appropriate procedure on the side of the representing bodies.[58] In the case of attorneys or authorised agents, in a situation when they would be entitled to represent both partnership companies, there would be often a real risk of not precisely indicating the entity represented. As a consequence of this ambiguity, the contractor of the subsidiary company would not be able to know which of the companies is entering into the contract.[59] To prevent such a contingency, while signing the contract, together with the signature, the attorney or authorized agent should clearly indicate on whose behalf the declaration of intent is being submitted.[60] This view seems to be consistent with the line of case-law, stipulating that the person signing the declaration of intent, next to their signature should disclose the legal relationship on the basis of which they operate, i.e., on behalf of whom the declaration of intent is being made.[61] The discussed

55 Art. 109 [8] § 1 CC. Granting procuration and its termination should be reported by an entrepreneur to the register of entreprises.

56 Individual companies may engage in activities of different type, and therefore the necessary competences of the authorized agents (*prokurents*) may radically differ from each other.

57 Power of Attorney is not liable to be entered in the appropriate register.

58 It applies to both attorneys and authorised agents (in the Polish law - prokurents).

59 Z Radwański in Z Radwański (ed), 2008, 296.

60 Judgment of the Court of Appeal in Poznań I ACa 235/08 [2008] LEX 466417.

61 Judgment of the Court of Appeal in Warsaw VI ACa 143/03 [2004] LEX <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/vi-aca-143-03-wyrok-sadu-apelacyjnego-w-warszawie-520250452> accessed 31 Jan 2019.

annotation, which precisely points to the person of the principal, is particularly important for the person who is the attorney or authorised agent. It is of such importance to representation because it is based on the liability aspect, since in the absence of the indication of on whose behalf the declaration of intent is made, it is assumed that the person making it acts on their own behalf,[62] just as is the case when acting without authorization.[63] The situation when the action is carried out without authorization often occurs in the cases of signing promissory notes by attorneys who do not have relevant competence for that.[64]

CONCLUSION

In conclusion, the activity of attorneys and authorised agents must be inextricably linked to indicating the person of the principal, which may be taken as a rule. To put it more precisely, while acting as an attorney, one should be obliged to reveal the person of the principal on every occasion, both during the negotiations, and in particular, when making the final declaration of intent. Finally, it is worth noting that the representation granted by entrepreneurs plays an important role in the economy, and making use of it or executing *lege artis* constitutes one of the pillars of safe and fair economic relations.

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Contemporary Central & East European Law

Polish Employment Law in the Face of Digitization and New Technologies

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Abstract

The digital revolution, also called the fourth industrial revolution, constitutes another era of change, caused by the development of computerisation and modern technologies. It is characterised by rapid technological progress, widespread digitisation and an impact on all areas of life, including the provision of work. The changes affecting this area are so significant that there are proposals to remodel the definition of the employment relationship in the Labour Code. New forms of employment, which do not fit the conventional definition of an employment relationship, are emerging and gaining importance. An example could be employment via digital platforms. At the same time, there are also employment forms that do fit that definition, but deviate from the conventional understanding of the terms and conditions for performing work, which have undergone modification due to the use of new technologies. Teleworking, or working outside the employer's premises, are examples of that. Employers get further opportunities to organise and control work, which often raises concerns due to the employee's right to privacy, the protection of personal rights and personal data.

Keywords

employment relationship, digitisation, new technologies, employment via the digital platform, right to disconnect, teleworking

Introduction

The sources of Polish labour law are: the Labour Code, its accompanying acts and executive acts, as well as the so-called particular sources of labour law that only exist and function in labour law: collective labour agreements, collective agreements, work regulations, remuneration, the company social protection fund and others, as well as the statute specifying the rights and obligations of the parties to the employment relationship (Art. 9 § 1 Labour Code[1]). The specificity of these sources lies in the fact that they can make the situation of the employee more favourable than the applicable labour law provisions (i.e. bills and implementing acts) and can introduce provisions regulating the order in the work process in a given workplace.

The Polish Labour Code dates from the 1970s. Its numerous amendments, and other acts in the field of labour law, starting from the 1990s, were aimed at adapting the regulations to changes in the economic system, the new image of the Polish employer, which ceased to be state-owned, and then to EU law. Unfortunately, existing regulations require further changes to face the challenges of globalisation and the development of new technologies that change the way work is performed. At the same time, these factors significantly affect the development and content of specific sources of labour law. Employers try to combine general regulations with the obligations and rights of employees whose work is based on new technologies in their work regulations. The limits for introducing new internal regulations are, firstly, the prohibition on shaping internal regulations regarding employee rights and obligations less favourably than is the case in acts and executive acts, and, secondly, the principle of equal treatment of employees.

The progress of digitisation means that it will be necessary for the legislator to intervene to adapt universally applicable labour law to the changing conditions of work performance. Currently, the applicable legal provisions often prove to be completely useless when it comes to regulating new phenomena in employment.

1. Worker and Employee, Work Relationship or Employment Relationship

1.1. Work Relationship

A work relationship is a particular type of relationship between an employer and an employed person. The basis of this relationship is the subordination of the person performing the work to the employing entity, i.e. the employer. The provision of Art. 22 § 1 of the Labour Code stipulates that by entering into an employment relationship, the employee undertakes to perform work of a specific type for the employer and under his leadership, at the place and time designated by the employer, and the employer agrees to

1 Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 16 maja 2019 r. w sprawie ogłoszenia jednolitego tekstu ustawy – Kodeks pracy [Proclamation of the Marshal of the Polish Sejm on 16 May 2019 on the announcement of the uniform text of the Act – the Labor Code] [2019] JoL 1040.

employ the employee for remuneration. The absence of any element of this definition means that the work is not performed under a work relationship, and the provisions of labour law do not apply to it. As a result, a whole new group of contractors appears, namely people performing work, but not within an employment relationship, and thus deprived of employee rights.

The development of techniques and technology, and ongoing digitisation, provoke the question concerning the current definition of subordination or the possible necessity to redefine this notion. The definition of an employment relationship implies subordination at the place, and time designated by the employer, while at present, concerning many employee orders, determining the location and time ceases to be relevant, or becomes challenging to decide on and capture. Work can be performed at any place and time. The changing model of subordination and the increasingly common rendering of work without subordination also require research on the correctness of the definition of an employment relationship based on subordination, and the consideration of the desirability of replacing this with a definition based on the criterion of economic dependence of the employee on the employer.

1.2. Employer and Employee definitions

Currently, the question concerning the employer's model in Polish labour law is still to be answered. Under Art. 3 the Labour Code, an employer is defined as an organisational unit, even if it does not have legal personality, as well as a natural person if they employ employees. At the same time, some of the employees perform work, often in conditions of full compliance, obtaining orders after registration on a digital platform. The role of the work platform is to enable or facilitate access to competent contractors with the potential and willingness to execute specific contracts in return for remuneration or payment for individuals and entities seeking such contractors for specific services related to the provision of work.[2] Work is allocated via a digital platform or application and managed algorithmically. The computer program continuously monitors work performance and continually evaluates performance. The employee interacts with the system, instead of with people; also, decision about the employee's position are made by a computer system based on an algorithm. The owner of the digital platform does not perform activities traditionally considered to belong to an employer; they only derive profits from a platform that algorithmically manages provision of work.

In Poland, there are platforms operating under crowdwork principles and that offer work on demand via apps. Crowdwork is work through online platforms that allow individuals or enterprises to access other users via the Internet to remotely solve specific problems, e.g. providing legal services, programming, graphics work, and voice transcription. Examples of the use of crowdwork in Poland are the Legal Up (Tu Prawnik),

2 A Świątkowski, 'Elektroniczne platformy zatrudnienia' [Electronic Employment Platforms] (2019) MPP 7, 18.

Oferia, and Freelancer platforms. The second category, work on demand as part of digital applications, is considered to be work in which tasks traditionally require the physical presence of the service provider in a specific place, i.e. transport, cleaning or delivery. These tasks are performed through entities such as Uber, Taxify, Pozamiatane, Pomocedomowe, UberEats, and Deliveroo.[3]

Taking up a job through a digital platform is in most cases similar to concluding an adhesive contract, the autonomy of the will of the employee is limited only to choosing whether he joins the platform or not, which is contrary to Art. 11 the Labour Code, according to which a consistent declaration of will of the employer and employee should include not only the establishment of an employment relationship but also the determination of working conditions and pay.

Taking the Uber application as an example, among the EU Member States there are some where its business activity has been banned (e.g. Italy), partly restricted (e.g. France), partially regulated (e.g. Great Britain), or remains completely unregulated (e.g. Poland). Interestingly, Uber's main markets, where the most significant number of application users are registered, are Great Britain, France and Poland, respectively.[4]

Work based on digital systems is also provided as virtual collective work in many countries, including Poland. It is defined as a form of work based on the distribution of tasks within an indefinite set of potential operators, who are then connected via an internet platform with the client requesting the execution of the tasks. The main feature of virtual collective work is the far-reaching fragmentation of services rendered. Orders typically include simple, tedious tasks that require meticulousness, such as browsing and tagging photos, collecting data, completing surveys, transcribing, etc., and, importantly, are divided into smaller parts, so-called gigs or micro-tasks. Such an operation enables effective separation of the primary tasks, usually large, among a broad group of virtual collective employees to accelerate the time of completing the job and, above all, to reduce the final cost.

2. Atypical Forms of Employment

Digitisation, globalisation and new technologies result in the emergence of so-called atypical forms of employment.[5] Definitions of atypical employment are usually constructed by

3 M Kozak, 'Zatrudnienie w gig economy na podstawie Ubera' [Employment in the Gig Economy Based on Uber] (2019) MPP 6, 19.

4 B Bednarowicz, 'Uberyzacja zatrudnienia – praca w gospodarce współdziałania w świetle prawa UE' [Uberisation of Employment – Work in the Collaborative Economy in Light of EU Law] (2018) MPP 2, 12–18.

5 R Blanpain, 'The World of Work and Industrial Relations in Developed Market Economies of the XXIst Century: The Age of Creative Portfolio Worker' in R Blanpain (ed), *Non-Standard Work and Industrial Relations* (Kluwer Law International 1999) 4; conf. AK Ghose, 'Trade Liberalization, Employment and Global Inequality' (2000) Int'l Lab Rev 139(3), 281; R Blanpain, 'The World of Work in the XXI Century: From Globalization to Flexicurity' in F Hendrickx (ed), *Flexicurity and the Lisbon Agenda: A Cross-Disciplinary Reflection* (Intersentia 2008) 3-4; I Boruta, 'Transformacja

comparison with the employment model referred to as traditional, typical or classical. This typical model describes employment for an indefinite period, based on an employment contract, in which the employee has an employment relationship only with his employer, providing full-time work at the employer's premises and enjoying protection against dismissal. The requirements for such employment must be combined, the absence of any of them gives rise to an atypical employment relationship.[6]

Atypical forms of employment can basically be divided into two groups: those under an employment relationship, and those outside an employment relationship, i.e. provided under civil law contracts or by persons running their own business, i.e. self-employed. Forms of employment using advanced technology are found in both groups.[7]

2.1. Atypical Forms of Employment under an Employment Relationship

In Poland, due to the development of technology, the most popular are atypical forms of employment consisting of providing work outside the employer's premises using electronic devices.[8] However, the provisions on telework contained in the Labour Code impose several restrictions and obligations on the parties to the teleworking contract, which in practice prevent the provision of work in this form. As a result, the employer and employee shape their mutual rights and obligations in such a way that they do not apply the code regulations on teleworking, and the employee is not called a teleworker, but a mobile employee. Therefore, the unsuccessful regulation of telework included in the Labour Code results in the fact that the rights and obligations related to the performance of work using electronic devices are determined only by internal labour law provisions, such as labour regulations or the employment contract.

prawa pracy i przyszłość prawa pracy w Europie (synteza raportu Supiot)' [Transformation of Labour Law and the Future of Labor Law in Europe (Synthesis of the Supiot Report)] (2003) PiZP 9, 2 et seq; J Wratny, 'Elastyczne formy zatrudnienia w perspektywie polskiego prawa pracy' [Flexible Forms of Employment in the Perspective of Polish Labour Law] in C Sadowska-Snarska (ed), *Elastyczne formy pracy. Szanse i zagrożenia* [Flexible Forms of Employment. Opportunities and Risks] (Wydawnictwo WSE 2008) 32.

6 Among others A Chobot, *Nowe formy zatrudnienia. Kierunki rozwoju i nowelizacji* [New Forms of Employment. Directions of Development and Amending of Regulations] (Wydawnictwa Prawnicze PWN 1997) 139–167; J Wratny, 'Nietypowe formy zatrudnienia w perspektywie polskiego prawa pracy' [Atypical Forms of Employment in the Perspective od Polish Labour Law] in K Frieske (ed), *Deregulacja polskiego rynku pracy* [Deregulation of the Polish Labour Market] (Instytut Pracy i Spraw Socjalnych 2003) 117.

7 A Świątkowski (2019) 18-24.

8 M Gersdorf, 'Zatrudnianie pracowników w formie telepracy' [Teleworking Employment] (2008) PiZS 5, 9–14; A Świątkowski, 'Telepraca – specyfika zatrudnienia na odległość' [Teleworking – Specificity of Distance Employment] (2006) MPP 7; M Goroszkiewicz, 'Etapy wdrażania telepracy' [Stages of Implementing Teleworking] (2008) MPP 1; E Suknarowska-Drzewiecka, 'Warunki świadczenia pracy w systemie telepracy' [Conditions of Supplying Services in Teleworking] (2019) MPP 3, 26–29.

Performing work is not then teleworking, but is referred to as homeworking or working outside the office. The employer determines the place of work in accordance with the definition of employment relationship in the Labour Code. Alternatively, the workplace may remain up to the employee. Very often in the case of homeworking, the employer no longer determines nor controls the working hours, either, while in the case of a conventional employment relationship, work is provided at the place and time determined by the employer. At the same time, it should be noted that technological development and digitization made available a large number of ways for employee subordination. The supervisor can track every move of the employee through an electronic monitoring system and very often, this control is also extended to rest time or vacation time, not necessarily in the form of immediate orders to perform certain jobs, but in the form of requests to provide information related to the work process. Constant contact between the employee and the employer on the one hand prevents the employee from fully exercising their right to rest, but also often leads to digital addiction. Therefore, there is a demand for digital disconnection as an employee's right or even the employee's obligation. The constant tension caused by the need to respond to e-mails can build up stress, often leading to burnout or cognitive impairment. There are countries that have already adopted such regulations (e.g. France), countries which are actively discussing the need for such regulations (e.g. Canada), and countries where much is happening in this area in terms of collective bargaining (e.g. Germany).[9] In Poland, this problem is just starting to be addressed.

Another important problem related to homeworking can be mobbing, understood in this context as digital harassment. The employee becomes a victim of mobbing solely on the basis of digital or telephone contact, without any personal contact with the mobber. Homeworking can also be accompanied by other negative phenomena, such as the fading boundary between professional and private life, a sense of social isolation or difficulties in implementation of the employee's right to privacy when working at home.

Working away from the office also raises doubts as to safety and hygienic conditions of work for employees working in the teleworking or homeworking system. The employer's compliance with the health and safety at work standards involves observation of the employee's behaviour at work, which in the case of working at home, entails finding a balance between the employee's right to privacy on the one hand and on the other, observation and control in order to ensure safe and hygienic working conditions.

It is also worth addressing the issue of the need to define a model for the so-called diligent teleworker / homeworker. The employee is obliged to perform his work with diligence and proper care. The former is judged taking into account the personal relationship of the employee to his duties, while the latter is essentially objective. In the employment relationship, proper care is understood as performance of work in a manner consistent with all legal (e.g. health and safety regulations, traffic regulations on public roads, sanitary

9 B Surdykowska, 'Prawo «do odłączenia» – coraz większe wyzwanie we współczesnym świecie pracy' [The Right to «Disconnect» – a Growing Challenge in the Modern World of Labour] (2019) MPP 12, 6–7.

and fire safety regulations, etc.), technical (e.g. work methodology, proper use of tools), technological (e.g. operational instructions), organisational regulations (e.g. supervisor's instructions, cooperation in the work process), which the employee should follow when performing given work. Inherently, due diligence cannot therefore be a uniform model for all employees, but differs for different professions. Each profession has its typical pattern of proper employee behaviour, which a diligent employee should respect. Performing work with proper care, as a certain objective condition, depends not only on the employee, but also on the employer and on the extent to which he enabled the proper performance of the work (organized the work process – Art. 94^2 of the Labour Code[10]). The employer evaluates the work of a given employee relative to the diligent employee model and makes key decisions on that basis, such as whether to conclude another employment contract, increase his salary or, conversely terminate the employment contract.

Usually, people who are interested in homeworking are highly qualified individuals, who value independence in terms of organising their work, or who are trying to balance their professional and family duties. This form of work also creates employment opportunities for people with disabilities, or those living in economically weak regions with a high unemployment rate.

Another developing way of doing work is to provide it in a mobile way to sales representatives or service technicians.[11] They perform work outside the premises of the employer, and the requirements of the Labour Code regarding working time are in many situations impossible to meet for employers. The issue of such employees' business travel is also disputed – accounting for the employee's business travel raises concerns.[12]

2.2. Atypical Forms of Employment outside the Employment Relationship

Based on Polish regulations, employment does not have to be work-related, and work can also be provided under provisions of civil law contracts, in the absence of the subordination characteristic of the employment relationship. A particular form of civil law employment is entrusting work to a person who, in relation to the employing entity, appears not as a natural person, but as an entity conducting economic activity under the Act on the Freedom of Economic Activity (self-employment). Works entrusted based on civil law contracts are of various types, from simple services such as cleaning to highly specialised tasks. Very often the nature of civil law employment is attributed to work provided through digital platforms and as part of virtual collective work, although employees are also employed

10 Judgment of PSC I PKN 627/00 [2001] (2003) OSNAPiUS 17, 413.

11 A Jefimow-Czerwonka, 'Zadaniowy czas pracy pracowników mobilnych' [Task Time of Mobile Employees] (2018) MPP 2, 20–27; P Prusinowski, 'Dodatkowe aspekty związane z zatrudnianiem pracowników mobilnych' [Additional Aspects Related to the Employment of Mobile Employees] (2011) MPP 10, 509–513.

12 Ł Prasołek, 'Podróże służbowe pracowników mobilnych' [Mobile Employees' Business Travel] (2010) MPP 7, 335–342.

in this way. The status of those employed through a digital platform often also depends on the platform model. Persons employed through platforms where the organizers direct people to work for entities reporting the need for work are often considered employees. However, in a situation where the contractor chooses the entity for which they will provide work, the contractors are persons outside an employment relationship. At the same time, there is the concept of a new hybrid form of employment, which requires not only an appropriate regulation and but also the act of granting certain employee rights to employees who work via platforms and applications similar to Uber drivers, i.e. the right to rest, paid leave, protection against termination in special situations etc.[13]

Civil law contracts are used in Poland to commission work that can be done anywhere, the results of which can be sent using electronic means of communication. This form of employment is similar to teleworking or homeworking performed under an employment relationship. The main difference, however, is that in the case of civil law contracts there is no subordination of the contractor. Due to the fact that, in contrast to the conventional employment relationship, in the case of digital work there is no determination of the place and time of work by the supervisor, it is necessary to identify the elements of subordination for teleworking and homeworking. However, the lack of subordination in this regard is not intended as a complete lack of any supervision or interference by the ordering party. The relationship between the ordering party and the contractor undoubtedly includes some kind of management that should be understood in accordance with the science of organisation and management. Problems that accompany these civil law contracts are, just as in the case of teleworking and homeworking under an employment relationship, the right to disconnect, maintain the right to privacy and ensure safe and hygienic working conditions. Employers and entrepreneurs who are not employers (i.e. those who do not employ people on the basis of employment contracts) are required to provide safe and hygienic working conditions for persons performing work on a basis other than an employment relationship (Art. 304 of the Labour Code).

3. Safe and Hygienic Working Conditions

3.1. The Problem of Being Available to the Employer

One of the essential elements of hygienic working conditions is the employee's right to rest, implemented based on the provisions of the Labour Code regarding working time and vacation leave. Technological development and digitisation results in offering services and work to competing enterprises at the recipient's request, while the regulations on working time do not provide for on-call work. Work on demand raises doubts because it assumes the full availability of the employee, which conflicts with the right to daily and weekly rest. Daily and weekly rest is guaranteed by Directive 2003/88 of the European

13 M Kozak 18–23.

Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[14].

The opportunity to work outside the workplace resulting from digitisation is associated with a new model for defining, accounting for, and controlling working time. The current regulations of the Labour Code are insufficient. The correction of these regulations through the provisions of company labour law is impossible due to the prohibition of regulating employees' rights and obligations in a less favourable way than the provisions of laws and implementing acts do.

New technologies allow contact with employees from almost anywhere on earth. An employee on vacation or absent from work for justified reasons (e.g. due to illness or due to a day off), from a technical point of view, can always be in contact with the employer. The question then arises or the definition of rest and leave in connection with the employee's duty to care for the good of the workplace, and about the possibility of defining the limit of the permissible contact between the employer and the employee at a time when the employer is not available. Currently, it should be analysed whether it is advisable to introduce an employee's right to digital disconnection from work, understood as turning off a business phone, or even a ban on using a business phone, a ban on answering e-mail, or text messages sent to a private phone number.

3.2. The Identification of New Factors Harmful to Health

As a result of the development of techniques and technology, new ways of protection against harmful working conditions appear, new adverse factors are diagnosed, and some threats become outdated.

One of the most significant threats is the loss of the opportunity to exercise the right to rest by disconnecting from communication with the employer. This increasing lack of rest results in the appearance of stress at work, and in turn, long-term stress at work is associated with the emergence of diseases. The provision of digital work from an employee's home is often associated with a violation of work-life balance, which translates into an increase in the level of depression.

Another problem of people providing work in the teleworking system, or through digital platforms or the like, is the feeling of isolation resulting from building interpersonal relationships in the work environment solely using electronic means, and sometimes even operating without interpersonal relationships, in the case of algorithmic work management. Often this way of providing work favours the emergence of addiction to electronics.

Other observed negative phenomena associated with digital work are musculoskeletal disorders, worsening spinal disorders, and carpal tunnel syndrome.

14 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2013] OJ L 299, 9–19.

4. The Control of Quantity and Quality of Work

Undoubtedly, the development of techniques and technology provides employers with great opportunities to control the quantity and quality of work. The control may include both the content of the employee's electronic devices, the content of e-mail correspondence or the employee's behaviour in rooms where video monitoring is installed. Electronic work time readers can accurately record the time during which the employee remains at the employer's disposal in the monitored place. The expansion of technical control options is accompanied by doubts about the legal control options, related to the employee's right to privacy, respect for personal rights, the right to protect his personal data, and the right to the confidentiality of correspondence.

5. Employee Data Protection

5.1. Employee Monitoring

One of the latest amendments to the Labour Code was the introduction of provisions regarding the possibility of employers using video monitoring and e-mail monitoring. The amendment was the result of a complete remodelling of the structure of the law on the protection of personal data, resulting from the introduction by the EU legislator Regulation of the European Parliament and of the Council 2016/679 of 27 April 2016 on the protection of individuals concerning the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC1.[15] The GDPR Regulation has led to the introduction of uniform rules for the processing and protection of personal data throughout the EU. At the same time, the European legislator left Member States some freedom to clarify the rules for the processing of personal data concerning specific situations. The possibility for the employer to introduce video monitoring in the workplace and to monitor e-mail has been made conditional on meeting particular conditions specified in the Act. The solutions presented raise many doubts, and the premises for introducing monitoring provided for in the Labour Code do not fully meet the needs of either employees or employers.[16] Outside of the regulation in the Code, there is

15 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) [2016] OJ L 119, 1–88.

16 M Gorbunow, 'Interes państwa a wykonywanie obowiązków pracodawcy związanych z wprowadzeniem monitoringu na gruncie Kodeksu pracy' [State Interest and Performing Duties by the Employer in Regard to Implementation of Video Surveillance Based on Labor Code] (2020) MPP 2, 6–10; M Gorbunow, 'Monitoring w świetle nowelizacji Kodeksu pracy z 10.5.2018 r.' [Video Surveillance in the Light of Amendment of Labor Code of 10.05.2018] (2019) MPP 10, 7–11; K Kowalska, 'Monitoring wizyjny w zakładzie pracy w kontekście ogólnego rozporządzenia o ochronie danych (RODO)' [Workplace Video Monitoring in the Context of the GDPR] (2019) MP 6, 316–324; O Dąbrowska, 'Kryteria dopuszczalności stosowania monitoringu w miejscu pracy oraz związane z tym obowiązki pracodawcy w świetle reformy ochrony danych osobowych' [Acceptance Criteria for

monitoring in the broad sense, including the use of video equipment, telephone cameras, sound cameras, other means of communication and the use of methods to determine location and identity.

5.2. Social Media as a Source of Knowledge about an Employee

Viewing candidate profiles in the recruitment process and employee profiles constitute the processing of personal data within the scope of the GDPR. Because of the very fact of applying the recruitment process, it cannot be presumed that the candidate has agreed to viewing, and thus processing, of their personal data published on the Internet on private social networking sites (as opposed to on portals informing about education, employment, internships, internships and the skills of the candidate or employee). Employers cannot think that they are entitled to view the profiles of candidates on social media because these profiles are publicly available. A legal basis, such as a legitimate interest, is necessary for such processing.[17]

Information obtained as a result of reviewing the profiles of candidates or employees may be used by the employer to discriminate against the employee, or as cause not to hire the candidate due to discriminatory factors, e.g. due to political views. However, the ability to check whether your employer respects the principles of personal data protection posted on publicly available portals is effectively nonexistent.

6. Digitisation and Application of New Technologies as Factors for the Professional Development of Employees

Despite the adverse effects of digitisation, its undoubted advantages cannot be questioned, which is the possibility of providing work to people for whom access to traditional employment is difficult. These are people for whom the obstacle to taking up work is commuting to the workplace, or even leaving their apartment, or providing work at designated times.

the Use of Monitoring in the Workplace and Related Obligations of the Employer in the Light of the Reform of Personal Data Protection] (2019) PME 1, 12–19; M Kuba, 'Monitoring poczty elektronicznej pracownika – refleksje na tle nowych regulacji prawnych' [Employee Email Monitoring – Reflections on the New Regulations] (2019) PiZS 11, 29–35; G Orłowski, 'Nielegalny legalny monitoring' [Illegal Legal Monitoring] (2018) MPP 7, 7; K Syska, 'Obowiązki pracodawcy związane z monitoringiem pracowników na gruncie RODO i znowelizowanego Kodeksu pracy' [Obligations of the Employer Related to Employee Monitoring under the GDPR and the Amended Labour Code] (2018) MP 22, 25–32; M Frąckowiak, T Świeboda, 'Ochrona danych osobowych pracownika w perspektywie RODO i przepisów dotyczących monitoringu wizyjnego stosowanego przez pracodawcę' [Protection of Personal Data in the Context of GDPR and Regulations in Regard to Video Surveillance Used by Employer] (2018) MPP 7, 8–15.

17 P Nowak, 'Sprawdzanie kandydatów do pracy pod kątem zawartości ich profili na portalach społecznościowych – analiza w świetle RODO i Kodeksu pracy' [Verification of Candidates for Work Regarding Content in Their Profiles in Social Media – Analysis in the Light of GDPR and the Labour Code] (2018) MPP 8, 15–19.

Performing work at home, in the hours chosen by the employee, is an employment opportunity for disabled people, people caring for small children or disabled family members, and people from regions affected by unemployment. It is worth noting that the directive of the European Parliament and of the Council on the balance between the professional and private lives of parents and guardians grants employees returning from parental leave the right to request their employer to work remotely.[18]

Conclusions

The digital revolution, also called the fourth industrial revolution, is another era of change, caused by the development of computerisation and modern technologies. It is characterised by rapid technological progress, widespread digitisation and an impact on all areas of life, including the provision of work. The changes in this area are so significant that there are proposals to remodel the definition of the employment relationship in the Labour Code. Both teleworking and homeworking fit the current definition of an employment relationship, but the way in which they are performed differs significantly from the conventional employment relationship.

Digitisation, technology development and globalisation affect every aspect of the provision of work, from the conclusion of the contract, through its performance, up to the rights and obligations of employees.

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18 A Ślęzak-Gąsiorowska, 'Dyrektywa w sprawie równowagi między życiem zawodowym a prywatnym rodziców i opiekunów – perspektywa polska' [Directive regarding work-life balance of parents and caretakers – Polish perspective], (2019) MPP 7, 13–17.

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Criminalisation of Beggars: the Causes and Consequences of the Phenomenon

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Abstract

All authorities desire to control various aspects of their subjects' lives. Those in power claim to do it in the name of protecting the peace and safety of all citizens. For one of groups perceived to be the most dangerous is the one whose members evade formal or informal social control – they do not work, do not have a family or are estranged from them, they have no permanent home. Therefore, to make sure that no one is out of the reach of governmental control, criminal law is utilised against them and whole ways of life, and the everyday behaviours of vagrants and homeless people began to be criminalised. And this process is still ongoing. The law thus punishes a person for their personal identity, and not for specific improper or harmful behaviour undertaken by them. In this paper I would like to analyse the problem of criminalisation of beggars throughout Polish history, and present how it impacted (and still impacts) upon the lives of the poorest and the most excluded parts of Polish society.

Keywords

beggary, criminalisation, poverty, criminology of the poor, exclusion, homelessness

Introduction

The feature in common across all authorities is the desire to control various aspects of their subjects' lives. Those in power claim to do it in the name of preserving the peace and safety of all citizens. The most dangerous group of citizens is (or is perceived to be) those whose members evade control – they do not work, do not have a family or are estranged from them, they have no permanent home. In other words, they have no 'anchor' providing stability within society. In this way, they remain outside formal and informal social control – at least not the type of control that is maintained by the better, more wholesome

sections of society.[1] None of this is, however, about the real or imagined threat posed by the members of this outcast group; if anything, it's the imagined threat of not having control over them and the lack of knowledge (at least on the part of the authorities) about how they will behave, making control of such behaviours even more difficult.

This leads to the formation of a group which starts to be perceived as different from the rest of the society and thus dangerous. In this way society begins the process of othering of the poor, the underclass, those seen as internally homogeneous, yet disconnected from the majority. In addition, members of this group are depicted as suffering from moral deficits that make them evil to the core. This process, in turn, is called 'a conservative demonisation'.[2] That's why this group is seen as potentially dangerous and, in the eyes of the government, should be carefully monitored.

Controlling and punishing the poor: a short historical overview

Just like many other European countries, from the end of the Middle Ages, Poland began the process of introducing legislation in order to regulate and limit the movement of free people, also known as drifters[3] or rogues. They were characterised by '*a vagrant lifestyle very much at odds with standards, norms and hierarchies of values which were commonly adopted and accepted by the circles of n o b l e*[4] *people. They were individuals without real estate assets, a place called home or a job to speak of*'.[5]

To get by and survive, the members of the group often resorted to begging. Generally speaking, begging and taking alms was for centuries not considered to be a negative phenomenon. Quite the contrary – giving to the poor was (and still is) a principle of faith and a sign of charity. They key aspect of it, though, is who is responsible for collecting donations for the poor. In the Middle Ages it was customary for the Catholic Church to take on the role of an intermediary between rich benefactors and their poor beneficiaries (special mendicant orders were established for this purpose), and the money collected as alms constituted a significant proportion of many cloisters and churches' income. Hence, charity was institutionalised – first through the Church and its institutions, and later through other charitable organisations. This institutionalisation led to increased control over the poor, who were quickly divided into two groups – those who were entitled to receive support, and those who weren't. Authorities of many cities (especially in

1 A Kossowska, *Funkcjonowanie kontroli społecznej. Analiza kryminologiczna* [Practical Aspects of Social Control. Criminological Analysis] (Agencja Scholar 1992) 35–39.

2 J Young, *The Vertigo of Late Modernit* (Sage 2007) 5–6.

3 S Grodziski, *Ludzie luźni. Studium z historii państwa i prawa polskiego* [The Vagabonds. The Study of the History of the Polish State and Law] (UJ 1961).

4 Emphasis added WK.

5 M Kamler, *Złoczyńcy. Przestępczość w Koronie w drugiej połowie XVI i pierwszej połowie XVII wieku (w świetle ksiąg sądowych i miejskich)* [The Villains. Criminality in the Polish Crown in the Second Half of the 16th and the First Half of the 17th Century (in the Light of Archives from Courts and Magistrates)] (Neriton 2010) 30.

Germany) began to license begging, issuing special permission to beg, and keeping registers of individuals entitled to collect money this way. In other cities (e.g. in Strasburg or Lviv) brotherhood of beggars – a form of self-organisation and self-control[6] – were established.

The other side of the coin when defining which poor people deserve to be helped, is the emergence of an idea that anyone capable of working should do so, rather than indulge in a life of leisure at someone else's cost. The poor should not partake in any forms of enjoyment (e.g. in taverns) – instead, they were supposed to only work or pray. Those who refused to comply with the obligation to work were banished from the city, and if they failed to honour that too, they would be flogged or thrown into prison.[7] Persistent begging in Henry VIII's England was punished with mutilation and anyone caught begging for the third time was sentenced to death.[8]

Homeless and jobless individuals are then perceived as dangerous for the sole reason of behaving differently than the rest of the society expects them to. As a dangerous group, they should be punished. The available punishments included forced labour on public works, or being sent to the galleys.[9] A good illustration of this process is the conservative demonisation described above – branding people as evil and criminal simply because they are poor and have a non-standard lifestyle.

Similar legislation was introduced in Poland, where it was particularly important to exercise control over the peasants who worked the land (*chłopi pańszczyźniani*) and their attempts to escape from the noblemen who profited from their unpaid work. As of the 16th century, legislation obliged burghers and other noblemen to report such runaways, under penalty of law. Runaway peasants were used to do unpaid public work in cities, while healthy beggars were shackled and forced to do clean-up work (such as removing manure or mud). In the Enlightenment, more and more emphasis was placed on differentiating between laziness or idleness, and destitution. Beggars were sent to workhouses, with only few of them being granted licences and permission to beg (valid only in specific places and on specific days).[10] Much in the same vein, the Penal Code of Congress Kingdom of Poland from 1818, in article 499 provided for punishment of people begging in public places only if they were healthy and capable of work but simply 'resort to begging out of habit or idleness only'.[11] Similar regulations featured in subsequent legislation in force in

6 B Geremek, *Litość i szubienica. Dzieje nędzy i miłosierdzia* [Mercy and Gallows. The History of Misery and Compassion] (Czytelnik 1989) 47–64.

7 B Geremek, *Ludzie marginesu w średniowiecznym Paryżu: XIV–XV wiek* [People from the Social Margin in the Medieval Paris in the 14th–15th Centuries] (Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk 2003) 34–44; T. Nail, *The Figure of the Migrant* (Stanford University Press 2015) 66–78.

8 K Marx, *Capital: A Critique of Political Economy. Volume One* (Penguin Books 1976, 1st 1867) 896-897 - It's an example of a predecessor of the American 'three strikes and you're out' practice. See: J Pratt, *Penal Populism* (Routledge 2007).

9 B Geremek (2003).

10 S Grodziski.

11 *Kodex karzący dla Królestwa Polskiego: z dodaniem praw kryminalnych później uchwalonych, reiestru*

the territory of Poland in the 19th century, whereby begging was punishable by custody or flogging.

In 1927 a Presidential Decree on combatting begging and vagrancy entered into force, whose Art. 25 introduced a punishment of up to 5 years' imprisonment for people who begged despite having enough means to survive. In the penal code of 1932, the wording had been changed and from then on 'bold and deceitful' begging was prosecuted (Art. 32 § 2).[12] One form of combatting begging as a phenomenon was placing beggars in workhouses (on both a voluntary and obligatory basis) and poorhouses. Such initiatives were forms of control and quite often forced isolation.

The Second Republic of Poland struggled with a shortage of workhouses. In 1927, when the previously mentioned law came into force, there were only two, and new ones had hardly emerged before the Great Depression began at the turn of the 1920s and 1930s. In Warsaw and neighbouring areas, such houses first appeared only in 1933 and were called 'poor prisons' (*dziadowskie więzienia*). With their strict regime and mandatory detention of inmates, they had a lot in common with actual prisons. Anti–begging initiatives launched in Warsaw in the years 1933-1939 covered 5,817 persons who'd been sentenced by court to a stay in workhouses if they were capable of working (around 22% of cases) and poorhouses and hospitals if they were ill (around 30% of defendants). One-in-three of these people appeared in court multiple times (the record holders made 7 appearances). Generally it must be observed that anti-begging activities did not significantly contribute to reducing the scale of begging in Warsaw. What did change, however, was the character of it. As a result of police activity, beggars steered clear of city centre, and instead of begging on the streets they went from house to house, or formed circus troupes and singing ensembles to collect money.[13]

Punishability of begging in contemporary Polish law

Art. 58 of the 1971 Petty Offences Code[14], still in force today, combines the traditions of 19th century codes with the communist idea of forcing people to work.[15] Penalties are

porządkowego i alfabetycznego, przypisków wskazuiących artykuły związek z sobą maiące [Criminal Code of the Polish Crown], (Natanson 1830, 1st 1818) 111.

12 D Janicka, 'O zwalczaniu żebractwa i włóczęgostwa w II Rzeczypospolitej (1918–1939). Studium historycznoprawne' [On the Fight Against Beggary and Vagrancy within the Second Republic of Poland (1918–1939): A Legal and Historical Study] (2019) Archiwum Kryminologii 41, 1, 465–495 <http://www.doi.org/10.7420/AK2019K>.

13 M Rodak, *Z dziejów stołecznych zmagań z żebractwem 1933–1939. Dom etapowy przy ul. Przebieg* [The History of the Struggles with Beggary 1933–1939 in the Polish Capital City. The Transitionary House on Przebieg Street] (2010) Studia Mazowieckie 5(1/2), 47–61.

14 Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 4 kwietnia 2019 r. w sprawie ogłoszenia jednolitego tekstu ustawy - Kodeks wykroczeń [Announcement of the Speaker of the Sejm of the Republic of Poland of 4 April 2019 regarding the publication of a uniform text of the Act - Petty offences code] (2019) JoL 821 with further amendments.

15 In the 1980s in communist Poland there was legislation introducing the obligation of work. Interestingly,

applied to any person who begs despite having resources to get by or who is fit to work (Art. 58 § 1 of the Petty Offence Code). Begging is not limited to collecting money only, it is also accepting non-monetary donations, e.g. clothes or food. Begging is defined as a systematic activity based on appealing to people for support, rendering it, as it were, a source of income. It is also important to prove that the offender has means to support themselves (e.g. they receive a pension or other forms of social assistance, they have other income or live in a care facility which provides for their upkeep) or is capable of working.[16] The latter case raises an issue of the relationship between ability and willingness to work, and the impossibility of finding it, e.g. due to high unemployment. It is believed that lack of job opportunities is independent of efforts put into finding work and should not be used as a reason to punish a beggar.[17] It would seem that such circumstances are shared not only by people unable to find work because of high unemployment but also individuals who are victims of rampant discrimination on the labour market (affecting, for instance, Roma community) or those who cannot take up employment because they have no right to do so legally (such as is the case of undocumented migrants).

Anyone who begs in an insistent or fraudulent manner (Art. 58 § 2 of the Petty Offence Code) risks an even higher punishment. In this case the penalties are applied even if the person in question has no means of livelihood or is unable to work.[18] Wojciech Jankowski explains the rationale behind these grounds:

> *Insistence is when the offender forces themselves on another person and won't stop asking for donations, making it impossible for them to walk by freely. The offender may also exhibit aggressive behaviour, persistence or even harass the donor, as well as act dismissively or threateningly towards a person who refuses to donate, even to the point of insulting them. The other characteristic trait, which is the fraudulent behaviour, aims to mislead the person that the offender*

this only concerned men aged 18–45. Penalties were applied to any person who, being able to work, did not take up any employment within a period of 3 months and failed to register as a job seeker in a relevant office. Registered job seekers were delegated to work – it could be a selected enterprise, public work or an obligation to study. Avoiding registration or failure to do the assigned work could be penalised with up to 2 years' imprisonment. See Z Ostrihanska, I Rzeplińska, *Pasożytnictwo społeczne – stereotypy i fakty* [Social Parasitism – Stereotypes and Facts] (UW 1988) 72–77. Persons who were subject to this legislation were named by the authorities as 'social parasites', a term that perfectly exemplifies the goal of the legislation – control over a group of people who wanted to escape formal social control, back then executed by a totalitarian regime. See W Klaus, 'The Relationship Between Poverty, Social Exclusion and Criminality' in K Buczkowski, B Czarnecka-Dzialuk, W Klaus, A Kossowska, I Rzeplińska, A Kossowska, I Rzeplińska, *Criminality and Criminal Justice in Contemporary Poland: Sociopolitical Perspectives* (Ashgate 2015) 54.

16 W Jankowski, T Grzegorczyk (eds), *Kodeks wykroczeń. Komentarz* [Code of Petty Offences. A Commentary] (Wolters Kluwer 2013).

17 M Mozgawa (ed), *Kodeks wykroczeń. Komentarz* [Code of Petty Offences. A Commentary] (Wolters Kluwer 2009).

18 Ibid.

wants to receive money from. It may take the forms of acting to get sympathy, pretending to have an incurable condition or to have a family member who does, feigning disability, difficult family circumstances, pretending to be ill or disabled, etc.[19]

The regulations seem to be in line with similar ones that were introduced in Austrian cities. Although they don't categorically ban begging, they expect the persons earning money by begging to conduct themselves appropriately. To illustrate these rules Eberhard Raithelhuber uses the term 'still and silent beggar'. First of all, the person asking for support needs to be of age. Second, they need to sit still in dedicated places (some parts of the city are out of bounds and it's forbidden to beg there) in a manner that does not compromise pedestrian or vehicle traffic. Finally, a person who is begging must not actively encourage people to support them, which means no asking, no chatting, no eye contact even. They are to sit quietly, with eyes downcast.[20] In other words, they should quietly and demurely wait for the handout that a rich person might graciously allow them to have, but under no circumstances should a passer-by feel put out or guilty for not supporting a person in need.

When it comes to Polish regulations, the catalogue of punishments drawn up with regard to begging is extensive. Starting from a reprimand, a fine (there seems to be little consideration for how a person who begs, i.e. is penniless, is supposed to pay the fine), through to restriction of liberty or even detention (anywhere between 5 and 30 days).

The purpose of criminalisation of beggary – geography of exclusion

The aim of a provision banning begging is clear – it is to get rid of a 'problem' – not to solve it, but to rid of it, so that unwelcome and poor individuals do not spoil the impeccable aesthetic of city centres. There's no room for poverty in places like that, i.e. no room for the poor. Julia Wardhaugh coined the term 'geographies of exclusion' to appropriately name the phenomenon.[21] Here, criminal law is used as a tool of exclusion, to convey the fact of non-belonging to society.

As is clear from the above overview, the phenomenon of criminalising the poor is nothing new. However, there are new, law-based instruments, implemented in order to achieve the goal of dividing the urban space – with the view of making some of it accessible only to a selected group – the higher echelons of society. The lower, excluded classes, without access to these spaces, have been dubbed 'margizens' by Mark Schuilenburg.[22]

19 W Jankowski, T Grzegorczyk (translation by the author).

20 E Raithelhuber, 'The Stilled-Other of the Citizen: «Roma Beggars» and Regimes of (Im)mobility in an Austrian City', in T Magazzini, S Piemontese (eds), *Constructing Roma Migrants: European Narratives and Local Governance* (Springer 2019) 141, 146–147.

21 J Wardhaugh, *Sub City: Young People, Homelessness and Crime* (Ashgate 2000) 102.

22 M Schuilenburg, 'Citizenship Revisited: Denizens and Margizens' (2008) Peace Review: A Journal of

The term perfectly illustrates their place in society – on the margins, or preferably outside of them. Margizens and their problems are to be 'avisual' for the authorities and society.[23]

With the growth of neoliberalism, attitudes have shifted – it's no longer public authorities that are or should be responsible for supporting vulnerable communities. The order of the day is every man for himself – each person is exclusively responsible for their own fortunes as well as misfortunes. Following this logic, if you continue living in misery it must mean that you've made such a choice, prefer it that way or can't be bothered to do anything about it, otherwise you'd change your circumstances. Krzysztof,[24] who has been experiencing homelessness for the last 7 months, has this to say about the 'choice' of being homeless:

> *It's not* [...] *a lifestyle choice, no. If it was a lifestyle choice, then nobody would want to work, don't know,* [they'd] *drop everything, throw some old rags on, or what not, some tatters and just walk the streets, begging, drinking, having fun, enjoying life. In reality* [...] *every day of my life and others' lives* [on the street] *is simply a fight for survival.* (Krzysztof)

People who are worse-off and socially excluded are perceived and depicted by neoliberal authorities and middle-class voters (as well as lower class, working and aspirational, who have bought into the rhetoric aimed against themselves) as an undeserving underclass, who just can't be bothered to work.[25] The alleged unwillingness to work is an tired trope that keeps reocurring regardless of place or mind-set – whether it's medieval Catholicism, communist Poland or a neoliberal globalised contemporary world. It is based on simple binaries – 'us' and 'them', where 'they' are refused membership of society and are undeserving of support. This occurrence is known as 'welfare nationalism'.[26]

Criminal provisions directed against begging have one more very important advantage. They can be applied how and when it's convenient. It's impossible to universally implement them, owing to tricky logistics, costs and uncertain results, as illustrated by

Social Justice 20(3), 358–365, <http://www.doi.org/10.1080/10402650802330238>; M Schuilenburg, *The Securitization of Society: Crime, Risk, and Social Order* (New York University Press 2015).

23 H van Baar, P Vermeersch, 'The Limits of Operational Representations: Ways of Seeing Roma Beyond the Recognition-Redistribution Paradigm (2017) Intersections: East European Journal of Society and Politics 3(4), 120–139, <http://www.doiorg/10.17356/ieejsp.v3i4.412>.

24 The quote was obtained during research conducted by the Author. The qualitative research involved 21 interviews with experts working with individuals experiencing homelessness and 37 interviews with homeless persons, of which 13 interviews were conducted with 15 Romanian Roma from Wrocław (including two dyads). All the names of the interviewees have been changed. The research was conducted within the research grant entitled 'Victimisation of the homeless in Poland' financed by the National Science Centre, Poland (application no. 2017/01/X/HS5/02035).

25 D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001) 53–58.

26 V Barker, 'Nordic vagabonds: The Roma and the logic of benevolent violence in the Swedish welfare state' (2017) EJC 14(1), 120–139 <http://www.doi.org/10.1177/1477370816640141>.

the example of the fight against begging in the 1930s.[27] However, if the need arises, they can come in handy – the discretionary power can be helpful. It can also be used in a very selective way, e.g. against the Romanian Roma, who make their living begging on the streets. The absurdity of police interventions and a clear demonstration that they solve no problems whatsoever (if anything, they create even more issues) are perfectly illustrated in Lamita's (a Roma woman lived in the city of Wrocław) story:

> *The police give us a 500 PLN fine and tell us we can't beg. We tell them we know we can't, but what can we do? We have no work, how are we supposed to live then? They don't care. And if they see that you have 10, 20 PLN, they will turn your pockets inside out, search everywhere. If they see money, they take it.* [...] [On top of that they give you the ticket] *for 500 PLN. Not 50, or 100, no – it's 500 PLN straightaway*. (Lamita)

The law is used to intimidate and drive beggars away from public places. Sometimes it's done in a very curt manner, like in the incidents recounted by Mundra, which are nothing less than harassment.

> *Often, we would be taken to the police station or searched on the street, and they would take the money, all of it.* [...] [At the station] *they would keep us from morning till evening.* (Mundra)

The example of Polish cities suggests that begging is mainly undertaken by Roma people from Romania or other countries, with Polish Roma unlikely to engage in the activity. Poles affected by homelessness beg rarely (although exceptions happen), more often resorting to other strategies, e.g. in cities they 'help' to find a parking spot or offer to 'keep an eye' on a parked car. Collecting money on public transport may happen, though seldom. If there is a group collecting money at train stations or on the streets in city centres, their members will often be youngsters, not necessarily affected by poverty. Often, they inform openly that they need the money 'for beer' or other pleasures and have become an element of urban folklore, engaging in the activity more for fun, than anything else. Also, they are not targeted by the police or municipal wardens, who do not chase them away.

Conclusions

In order to initiate the process of criminalising the homeless, they first need to be depicted as dangerous deviants who disrupt social order. Creating deviants[28] helps authorities to maintain order, because *the deviant does not threaten the order, rather the deviant* [...] *helps to shore up order. Othering, then, is a key process which maintains order*.[29]

27 M Rodak.

28 HS Becker, *Outsider: Studies in the Sociology of Deviance* (The Free Press 1966).

29 J Young 6.

The group that suffers the most in the process are the poor. As Julia Wardhaugh points out, they are both invisible and highly visible. Visible when they need to be removed, shouldering the blame for violating public order. And invisible when they are in need or require support to lift themselves out of abject poverty, a continuous predicament that they aren't able to end without assistance.[30] Criminal law is of no use here and cannot solve any of social problems – an observation made by Juliusz Makarewicz in one of his esteemed classics is as true as ever.[31]

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30 J Wardhaugh 91–93.

31 J Makarewicz, *Zbrodnia i kara* [The Crime and the Punishment] (H Altenberg Księgarnia Wydawnicza 1922) 148–149.

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Nazi Crimes in Poland: A Never-Ending Search for Justice

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Abstract

This article deals with the model for prosecuting Nazi crimes committed in Poland in the light of the model presently used in international criminal law. It tries to answer the question: should the investigation of crimes of international law be handed over to transnational tribunals? Should they be hybrid tribunals involving a national factor, or completely supra-national tribunals like the International Criminal Court? Is it legitimate to transfer jurisdiction over these matters to national courts? The case of unpunished Nazi crimes in Poland may give a partial answer to this question. Certainly, various attempts made after World War II, including procedures brought before Polish courts, have contributed to understanding the function of international criminal law, and finding the answer to the question of the best model for prosecuting crimes of international law. At present, we also have the experience of international criminal tribunals, in particular the ICC, which is an efficient machine for prosecuting crimes of international law. Interesting conclusions can be drawn from its functioning that could improve the work of Institute of National Remembrance (IPN) prosecutors, and shed new light on the considerations regarding the prosecution of Nazi crimes in Poland after World War II.

Keywords

prosecution of war crimes, international criminal law, Nuremberg trials, Polish Supreme National Tribunal, Institute of National Remembrance, post-conflict justice

In the 21st Century the issue of prosecuting Nazi crimes[1] committed in Poland is still pending. It would seem that too many years have passed to continue the search for justice. However, since justice has not been delivered in due time – and what 'due time'is will be looked at in more detail later on – it seems that over 70 years later there is still an expectation that justice will be delivered, and bring the sense of justice having been done. Is it now too late? Nowadays, when we talk about 'justice' our mind's eye is directed towards a courtroom. We share a feeling that this is the right place to look for justice. As such, criminal law and criminal trials assume the key role in delivering justice after crimes of international law have been committed – crimes such as genocide, crimes against humanity, war crimes and the crime of aggression (so called 'strict form of legalism'); obviously, this is the justice in systematic 'legal constraints'. However, this is just one of the views presented in literature: there are still other opinions, according to which courts should focus on administering justice, understood as determining the guilt or innocence of an individual and not delivering justice, a historical picture of past events, or a sense of revenge (so called liberal legalism).[2] In the Anglo-Saxon literature the inability of adversarial trials to search for the true account of events has also been underlined. Also during the Interantional Criminal Tribunal for the former Yugoslavia (ICTY) trials it was observed that usually 'history largely gives legitimacy to the Prosecutor and condemns the accused".[3] Thus, other forms of transitional justice instruments should (according to this conception) be applied, such as e.g. 'truth and reconciliation commissions'. Generally, however, state authorities took over the functions of revenge and compensation that had traditionally belonged to the victim of a crime. In the case of crimes committed in Poland and against Polish citizens, however, they seem to have failed – on many levels and because of numerous reasons. P. Grzebyk wrote that in the post-war period, the lack of criminal-law response from law enforcement authorities of any of the states was an example of the selectivity of post-war international justice; moreover, the lack of response proved how political interests outweighed the needs of justice. It is also worth remembering that prosecution of war criminals became an obligation under international law: the Declaration of January 13, 1942 announced that the United Nations undertook to identify war criminals and ensure that they were tried and judgments were executed; also the Moscow Declaration of October 30, 1943 announced on behalf of 32 United Nations that war criminals ought to be aware of the

1 On distinguishing between 'Nazi' crimes and 'German' crimes see: K Małcużyński, *Norymberga, Niemcy 1946* [Nuremberg. Germany 1946] (Wiedza 1946) 66 who quoted Prosecutor Jackson saying that not the whole nation was responsible for the crimes; also A Klafkowski, *Ściganie zbrodniarzy wojennych w Niemieckiej Republice Federalnej w świetle prawa międzynarodowego* [Prosecution of War Criminals in the German Democratic Republic in the Light of the International Law] (Wydawnictwo Poznańskie 1968) 10, 180 and J Lubecka, 'Punishing German War Criminals in Poland' in J Niechwiadowicz (ed), *German Camps, Polish Victims* (Support Poland Limited 2012) 12–18.

2 RA Wilson, *Writing History in International Criminal Trials* (CUP 2011) 3.

3 Ibid 5.

fact that they would be brought to the place where they had committed their crimes and judged there by the nations that had fallen victim to their violence.[4]

In this article, the efforts to deliver justice for the crimes of international law committed by the Nazis on the territory of Poland will be explained, as they took place in many different legal forums, as well as the reasons why they have so far failed to deliver complete results – 'complete' in this case meaning bringing to justice even a significant fraction of the perpetrators. The article will also deal with the question of if there are any legal obstacles to prosecution of Nazi crimes by the Polish authorities. It will show that there are both legal grounds to do it, and that it is being done in practice. It will also analyse the model of delivering justice after World War II in the perspective of the presently known solutions. Finally, the reasons which stand behind the continuous investigation of crimes committed over 70 years ago will be explained.

The model adopted for prosecuting Nazi crimes after World War II assumed a shared forum: actions towards bringing the perpetrators of Nazi crimes to justice were undertaken in all the available legal forums. Crimes of international interest were prosecuted by an international tribunal (the first one in history): the Military International Tribunal in Nuremberg conducted trials of the Nazi leaders. The most serious crimes of Polish national interest were chosen to be tried in the special tribunal forum – the Supreme National Tribunal – the rest of the Nazi crimes were left to be tried before common courts – both German courts, including those established by the Allies, and also Polish courts. Establishing an international criminal tribunal, whose jurisdiction had priority and which became a procedural forum for the crimes whose prosecution was in the interest of the four victorious states, was characteristic of the model of delivering justice after a great international conflict. The Tribunal, necessarily, had only a limited jurisdiction: only those Nazi crimes that were in the interest of the whole European area were to be prosecuted. The crimes, it was decided, had to be directed against the whole of Europe and not only against one nation. Therefore, only a select few of the crimes committed on the territory of Poland and against Polish citizens were prosecuted by the Military International Tribunal in Nuremberg. Thus, the 'internally' committed crimes were to be prosecuted by national courts. The main prosecutor in Nuremberg, Robert Jackson, even wanted the trial to be only focused on the crime against peace.[5] For political reasons, and for the sake of cooperation on the part of the Soviet Union in the 'international criminal tribunal project', many cases were abandoned (e.g. the Warsaw Uprising, the Katyn crimes).[6]

4 A Klafkowski 129.

5 P Grzebyk, *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials* (Max Planck Institute 2019b) 7, 11.

6 P Grzebyk (2019b) 13 and P Grzebyk, 'Unintended or Deliberate – the Omission of the Wola Massacre in the Nuremberg and Post-Nuremberg Trials' in E Habowski (ed), *Wola 1944. Nierozliczona zbrodnia a pojęcie ludobójstwa = Wola 1944: an Unpunished Crime and the Notion of Genocide* (Instytut Solidarności i Męstwa im. Witolda Pileckiego 2019) 311.

On a national level, trials were held both in Poland and Germany. Different models were used in two German states: the courts established by the Allies in the occupational zones in Western Germany investigated Nazi crimes. Also Western German authorities brought some of the perpetrators before the courts throughout the 60s and 70s.[7] However, the trials held in Western Germany were rightfully described as an 'evasion of justice'.[8] The real scale of this evasion may be seen in the fact that, for razing the entire city of Warsaw to the ground, only four soldiers were found guilty, and they were convicted to deprivation of liberty for periods ranging from 6 months to 9 years.[9] In Eastern Germany, the model of prosecution of Nazi crimes also raised reservations: the occupying Soviet authorities set up military courts in which hearings were held without public oversight.[10] These courts were subject only to the Soviet military administration and simultaneously applied both German and Soviet law.[11] However, while the previously mentioned courts tried 80,000 people, these tried only 744. Finally, during the so-called Waldheim trials, 3324 people were tried – in speedy, 20-minutes long trials and according to the collective responsibility principle.[12]

The crimes committed within the territory of Poland were also (simultaneously and in parallel) prosecuted by the Polish national authorities. At the national level of prosecution, Special Criminal Courts were instituted just after the Red Army entered Polish territory – these courts were also responsible for prosecuting war criminals in a special accelerated procedure.[13] In 1945 the Main Commission for the Investigation of Hitlerite Crimes began

7 Although the numbers of the war criminals vary: according to Western Germany archives 80,000 perpetrators were found guilty, according to Eastern Germany archives it was only 5,234 – see: A Klafkowski 136.

8 See P Marti, *Sprawa Reinefartha. Kat Powstania Warszawskiego czy szacowny obywatel* [The Reinefarth Case. A Hangman of the Warsaw Uprising or a Respectable Citizen] (Świat Książki 2016) 171–174; H Radziejowska, 'The Memory of Wola Massacre of 1944: New Sources and Areas of Research' in E Habowski (ed) 390; K Friedla, 'Mit obrachunku z przeszłością. Ściganie zbrodni nazistowskich i wojennych w radzieckiej strefie okupacyjnej Niemiec i Niemieckiej Republice Demokratycznej' [Accounting Myth with the Past. Prosecution of Nazi and War Crimes in the Soviet Occupation Zone of Germany and the German Democratic Republic] (2016) Zagłada Żydów. Studia i materiały 12, 493–494 describing the research conducted by Henry Leide, who proved how instrumentalised the criminal trials conducted by the Allies were, and how they were used for political purposes, as well as analysing the background and recruitment of former Nazis who cooperated with the Stasi. According to the research, from the very beginning, the prosecution of Nazi crimes in the German Democratic Republic was the responsibility of the Stasi and special services. They were also involved in prosecution of National Socialist crimes.

9 H Radziejowska 390.

10 A Klafkowski 71 who at that time regretted the GDR's rejection of the Nuremberg law.

11 K Friedla 494 From 1945 to 1947 according to official Soviet reports, 65,138 persons who were accused of belonging to Nazi organizations were interned, from which the Soviet military courts had sentenced in total 17,175 persons – and until 1950: even 80,000.

12 In total: 12,000 war criminals were found guilty, see A Klafkowski 135; K Friedla 498.

13 J Lubecka, 'Rozliczenie zbrodni niemieckich w Polsce, ze szczególnym uwzględnieniem Małopolski. Stan badań, perspektywy badawcze' [Settlement of German Crimes in Poland, with Particular Emphasis on

prosecuting Nazi crimes committed in the territory of Poland (obviously including crimes committed against persons of Jewish nationality).[14] Regarding the effect of the works of the Commission *inter alia,* 7 trials were conducted before the Supreme National Tribunal (SNT) and 49 accused stood trial.[15] Regardless of the fact that the Main Commission functioned as a justice body of the Peoples' Republic of Poland many of its activities corresponded to the universal needs and interests of Polish society and the nation.[16] It is not possible to say that no action was taken by the Tribunal. Thousands of witnesses were interviewed, mainly during hearings before the Supreme National Tribunal, and delegations of Polish prosecutors were twice sent to Germany. One cannot ignore the SNT's capital contribution to documenting crimes.[17] However, prosecution before the SNT cannot be assessed as fully effective – not only because prosecutors did not have any liberty in selecting cases and perpetrators, but also because many suspects could not be physically brought before the Tribunal because of lack of consent for their extradition. Nonetheless, many suspects were extradited[18] – as e.g. on the 25th of May 1945 Rudolf

Lesser Poland. Research Status, Research Perspectives] (2012b) Zeszyty Historyczne WiN-u 21(35), 77.

14 The Main Commission for the Investigation of German Crimes in Poland was established on the basis of Dekret z dnia 10 listopada 1945 r. o Głównej Komisji i Okręgowych Komisjach Badania Zbrodni Niemieckich w Polsce [Decree, dated 10 November 1945, on the Main Commission for the Investigation of German Crimes in Poland] [1945] JoL 51, 293 and thereafter functioned on the basis of the Ustawa z dnia 6 kwietnia 1984 r. o Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce - Instytucie Pamięci Narodowej [Act of 6 April 1984 on the Main Commission for the Investigation of Crimes against the Polish Nation – Institute of National Remembrance] [1984] JoL 21, 98 and now it is ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [2019] JoL 1882, t.j. On the crimes committed against persons of Jewish nationality see J Hackmann, 'Defending the «Good Name» of the Polish Nation: Politics of History as a Battlefield in Poland, 2015–2018' (2018) Journal of Genocide Research 20(4), 594 – although the author does not the share opinions expressed in the text.

15 See: T Cyprian, J Sawicki, *Siedem wyroków Najwyższego Trybunału Narodowego* [Seven Judgments of the Supreme National Tribunal] (IZ 1962); J Lubecka, 'Der Prozess Gegen Rudolf Höß. Verlauf und Juristische Aspekte' in E Heitzer, G Morsch, R Traba, K Woniak (ed), *Im Schatten von Nürnberg. Transnationale Ahndung von NS-Verbrechen* (Metropol Verlag 2019) 158.

16 See: Ł Jasiński, 'Sprawiedliwość i Polityka. Działalność Głównej Komisji Badania Zbrodni Niemieckich / Hitlerowskich w Polsce 1945–1989' [Justice and politics. Activities of the Main Commission for the Investigation of German / Nazi Crimes in Poland 1945–1989] (2018) Dzieje Najnowsze 50(1), 317.

17 J Sawicki, *Przed polskim prokuratorem. Dokumenty i komentarze* [Before the Polish Prosecutor. Documents and Comments] (Iskry 1958) 89–90; A Klafkowski 211.

18 The numbers are given e.g. by W Bułhak, 'In Search of Political Justice: From the Main Commission for the Investigation of German Crimes in Poland to the Institute of National Remembrance' in M Brechtken, W Bułhak, J Zarusky (eds), *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930s to the 1950s* (Wallstein 2019) 183: *Of the 4,000 or so applications for extradition received in the American Zone of Occupation, about thirty per cent concerned Poland. This was the largest group of extradited persons in terms of their number and percentage. Somewhat fewer than four hundred people were extradited from the British Zone. Relatively small groups, counted in no more than double figures, were brought over from the French and Soviet Zones.*

Höß was extradited to stand trial before the SNT.[19] The Tribunal conducted trials of perpetrators that were held prisoner in Poland.[20] In practice, these were the crimes that were practically and politically 'correct' to be prosecuted. All the cases chosen to be tried had to be confirmed by the communist party. In the post-war period, most trials of 'less spectacular perpetrators' were also held before common courts: e.g. the trial of Jurgen Stroop, responsible for the destruction of the Warsaw Ghetto, took place before common courts; it was the Provincial Court in Warsaw that sentenced the former governor of East Prussia, Erich Koch, to death.[21] The proceedings before the SNT were suspended when no more extraditions could be performed – and this is given as the reason why the Tribunal ceased operations.[22] Later, as J. Lubecka observes, after the signing in December 1970 of an agreement normalizing relations with the Federal Republic of Germany, all the pending cases were neglected and discontinued – there was no special authority to deal with them, nor was there any political will to prosecute Nazi crimes. In addition, after signing this agreement, the Polish side agreed that Nazi crimes should be prosecuted primarily by the German Center for the Investigation of National Socialist Crimes in Ludwigsburg (Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung *Nationalsozialistischer Verbrechen*).[23]

Since 1998, prosecution of all crimes committed during the Second World War has been again taken over by the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN – the re-named Main Commission).[24] Art. 45 of the IPN act stipulates that investigations in the cases of Nazi crimes, communist crimes, other crimes against peace, humanity or war crimes, perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 and 31 July 1990, are commenced and conducted by the prosecutor of a departmental commission. The investigations and later trials (before common courts) are conducted on the basis of the Code of Criminal Procedure (CCP)

19 J Lubecka (2019) 165.

20 T Cyprian, J Sawicki (1962).

21 In the period from 1944 to 1960 – 4,500 German war criminals were found guilty. See: L Kubicki, *Zbrodnie wojenne w świetle prawa polskiego* [War Crimes under Polish Law] (PWN 1963) 179–184; J Lubecka, 'Strafgerichtsprozesse deutscher Kriegsverbrecher in Kleinpolen 1945 bis 1950 mit besonderer Berücksichtigung der Tätigkeit des Obersten Nationalen Gerichtshofs' in S Rosenbaum, A Dziurok, P Madajczyk (eds), *Die deutsche Minderheit in Polen und die kommunistischen Behörden 1945–1989* (Ferdinand Schöningh Verlag 2017) 40 et. subseq.

22 T Cyprian, J Sawicki, *Oskarżamy. Przemówienie wstępne Wacława Barcikowskiego* [We Accuse. The Opening Statement by Wacław Barcikowski] (Przełom 1949) 266.

23 The contemporary authors expressed a negative assessment of the headquarters in Ludwigsburg's activities - only in 1965 did it extend the examination of archives outside the territory of the Western Germany and agreed to use the Polish legal assistance. See: A Klafkowski 220; J Lubecka (2012b) 71.

24 Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz niektórych innych ustaw [Act of 29 April 2016 amending the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation and some other acts] [2016] JoL 749 consolidated text.

of 1997. Annually, the IPN prosecutors conduct around 300 investigations in the cases of Nazi crimes.[25] As A. Rzepliński explains, the IPN prosecutors established 'a monopoly' to prosecute Nazi crimes, communist crimes, and other crimes against peace, humanity, or war crimes committed in the Polish territories during a 50 year period – from the invasion of Poland by the Third Reich on 1st September 1939 to the transition from the Communist political system to a democracy under the Constitutional Act of 31st December 1989.[26] The same author cites numbers relating to the caseload dealt with by the IPN:

> *Polish authors calculate that the prosecution of Nazi crimes in Poland involved by the end of the summer of 1980 between 80,000 and 100,000 people, and by the end of December 1977 at least 17,919 persons were convicted under the decree of 31 December 1944.* [...] *At the end of February 2004, IPN prosecutors had conducted 1295 investigations, including 335 (25.9%) in Nazi crime cases, 878 (67.8%) in Communist crime cases, and 82 (6.3%) in cases concerning other crimes: war crimes and crimes against humanity*.[27]

Thus, even during the current time, trials can be held before common courts – and therefore it cannot be said that the search for justice has been completed, as investigations are still pending. Similarly, just after the war, as well as presently, the substantive law on the basis of which the charges are formulated are the provisions of decree of 31 August 1994 on the punishments for Nazi criminals guilty of murders and tortures inflicted upon civilians and prisoners and for traitors to the Polish Nation.[28] On this point, from the perspective of substantive criminal law, one can debate on the retroactive application of the substantive law of the decree – which is, as a rule, forbidden.[29] On the other hand, the procedural provisions in play are always based on the up-to-date code of criminal

25 J Lubecka (2012b) 72.

26 A Rzepliński, 'Prosecution of Nazi Crimes in Poland in 1939–2004' [speach at The First International Expert Meeting on War Crimes,Genocide, and Crimes against Humanity, organized by International Criminal Police Organization – Interpol General Secretariat) (2004) 3, <https://web.archive.org/web/20160303222313/http://www.gotoslawek.org/linki/FirstInternationalExpertMeetingOnWarCrimes.pdf> accessed 6 Dec 2019.

27 Ibid; E Kobierska-Motas, *Ekstradycja przestępców wojennych do Polski z czterech stref okupacyjnych Niemiec. 1946–1950* vol 1-2 [Extradition of War Criminals to Poland from four German Occupation Zones. 1946–1950 Vol. 1–2] (IPN-GKBZpNP 1992) 19.

28 Obwieszczenie Ministra Sprawiedliwości z dnia 11 grudnia 1946 r. w sprawie ogłoszenia jednolitego tekstu dekretu z dnia 31 sierpnia 1944 r. o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego [Announcement of the Minister of Justice of December 11, 1946 regarding the publication of a uniform text of the decree of August 31, 1944 on the sentence of fascist Nazi criminals guilty of murder and ill-treatment of civilians and prisoners of war and of the traitors of the Polish Nation] [1946] JoL 69, 377.

29 T Cyprian, J Sawicki, *Nieznana Norymberga. Dwanaście procesów norymberskich* [Unknown Nuremberg. Twelve Nuremberg Trials] (Książka i Wiedza 1965) 24.

provisions, according to the principle of catching the trial 'in flight' by the provisions of the new procedural law.

There is no doubt that the crimes in question can still be investigated at the present time: no procedural premises stand in the way. Since the crimes were committed on the territory of the Republic of Poland, pursuant to Art. 5 of the Criminal Code (CC) the Polish penal act is applicable and the nationality of the perpetrator is of no consequence. Secondly, Nazi crimes, which under international law constitute crimes against peace, humanity or war crimes, do not become statute-barred – which is obvious both in international and Polish law. Even final decisions issued in Germany releasing defendants from criminal responsibility cannot bar prosecution, although in the European Union the international *ne bis in idem* principle applies: a legally binding ruling that terminates proceedings in any Member State of the European Union must be considered as valid as if it had been issued on the territory of the Republic of Poland. However, this principle applies only under several specific conditions that are not met in all cases. The main principle, established by the Court of Justice of the European Union in the case of Kossowski, is that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person,

> *cannot be characterized as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place*.[30]

It is clear from many decisions of the German authorities that the body of evidence gathered in the cases showed many proceedings were discontinued even though the suspicion that the suspect had committed the act with which he was charged 'could not be excluded'[31] – which leads to the conclusion that such a decision does not constitute the *res iudicata* situation.

Only one procedural premise stands in the way of investigating crimes committed during World War II: in principle, criminal proceedings may be conducted exclusively against living persons. However, Art. 45(4) of the IPN act provides that the circumstance referred to in article 17 § 1(5) CCP – the death of the accused – cannot constitute an obstacle to the conduct of proceedings by a prosecutor of the IPN. The objective of an investigation into Nazi crimes is not only to punish the offender (and, in light of the data of commission of the crimes falling within the competence of the Institute, numerous offenders are actually deceased), but also to clarify the circumstances of the case, and in particular to determine the victims. Once this goal is accomplished, proceedings are on

30 See Judgment of CJUE C486/14 [2016] EU:C:2016:483 point 54..

31 Reasons for decision of discontinuation of proceedings in the case against H. Reinefahrt", case no. V/31/ 411 E – 165/58, Federal Archives in Ludwigsburg.

the basis of Art. 17 CCP, (because the suspect is dead). In most of the cases (if not all) presently being prosecuted by the IPN, too many years have passed to make it possible for the perpetrator to face a real trial[32] – which is obvious in criminal procedure, but hard to understand for the victims. However, at the present time, the mechanism established by the IPN is the only, and the final, possibility to investigate these never-before investigated crimes. It is important to underline that a *sui generis* assignment of guilt occurs in a decision on discontinuance of criminal proceedings - which allows for pointing to the perpetrators and acknowledging the victims. In this situation, it is not a legally binding determination of guilt, and there exists no doubt as to the fact that, in legal categories, a person against whom preparatory criminal proceedings were instigated and thereafter discontinued continues to be innocent in the eyes of the law.

By the way of example, the case of the Warsaw Uprising is currently being investigated – three investigations conducted so far have been merged into this investigation: the case of murders of patients in hospitals in the Old Town, massive killings of the civilian population of Polish, Jewish and Russian nationality, and presently its scope covers all the crimes committed during the Uprising: against children, patients, women and men, as well as prisoners of war. It is an investigation 'in a case' (*in rem*) and not against a certain person (*in personam*), as no charges have ever been presented to anybody. The IPN also investigated such cases as: the Gestapo-inspired mass murder in Jedwabne on 10 July 1941, the kidnapping of Polish children for 'Germanization' at the *Lebensborn* establishment, the deportation of some 20,000 inhabitants of the Żywiec Area to the General Government province in 1940, the mass killings of Polish citizens of Jewish nationality during the liquidation of the so-called Lublin Ghetto, the killing by the Germans of 25 professors of Polish schools of higher education, members of their families and persons living in the same household, in Lwów in July 1941, the homicide of about 350 people by German soldiers on 8 August 1944 in the ruins of the Grand Theatre in Warsaw.[33] In these closed cases it often established that they were discontinued because of a *res iudicata* premise: in the justification one of such decisions to discontinue it was explained that

> *undoubtedly the person responsible for the crimes in question was General Governor Hans Frank as the perpetrator inspiring the actions of others and tolerating the criminal behavior of the Gestapo officers subordinate to him.* [...] *He was tried and sentenced to death in the Nuremberg trial*.[34]

However, in the above cited decision the prosecutor in charge of the case did not provide

32 See M Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsley 2002) 41–42.

33 A Rzepliński 7 et subseq.

34 The IPN decision on discontinuation of proceedings in the case of alleged crimes of Hans Frank, of 29 May 2006, case no. S 42/05/Zn.

a legal basis for recognizing that the IMT verdict in Nuremberg establishes *res iudicata* for the Polish judiciary. Such basis should be Art. 114 § 1(2) CC, which provides that although, as a rule, a decision issued abroad does not constitute an obstacle to the initiation or conduct of criminal proceedings for the same offense before a Polish court, this rule does not apply to the decisions of international criminal tribunals acting on the basis of international law binding on the Republic of Poland. As a result, if the perpetrator of the crime is judged by an international tribunal, in the territory of the Republic of Poland this judgment has the status of *res iudicata* and it is impossible to proceed again with the same case against the same person [art. 17 § 1(7) CCP]. In other cases, investigations conducted by the IPN prosecutors ended with discontinuation because of the death of the perpetrator, although additional considerations regarding the form and nature of criminal responsibility of the perpetrators were presented:

> *The accused's liability concerned various forms of committing crimes. They were tried both for committing crimes and for directing the activities of other persons for whom they were responsible pursuant to Art. 6 of the Nuremberg IMT Statute. It resulted from the fact that these people, by committing war crimes, acted in the implementation of a joint plan, i.e. a conspiracy to commit these crimes. In the course of the proceedings, it was also established that all the accused were involved in the development and implementation of this plan and in the plot as leaders, instigators of instigators and helpers*.[35]

Why, despite so many efforts to prosecute World War II criminals, is there still a sense of impunity of them in the Polish society?[36] Why was prosecution of war criminals so ineffective in the immediate post-war period? Does prosecution by the IPN meet its intended goals? Should it continue? And here, the question of purposefulness comes into play.

The answer to the first two questions requires explaining both practical and political reasons. Firstly, the model of prosecuting Nazi crimes in Poland was marked by a practical inability to investigate these crimes. Not only in Poland was it marked by the reality of the Cold War – a lack of cooperation between the two zones, and even open hostility where Nazi trials were used as a proxy for conducting a fight. In Poland, among practical reasons the lack of state apparatus was visible. After the War, state authorities, courts, and prosecutors' offices, had to be re-established. As in many cities there was not a single building left untouched by the war, there was no space for their activities – e.g. at that time the Supreme Court was moved to Łódź. Many lawyers lost their lives, as they were among those most prosecuted by the Nazi occupation forces (there is information that almost 50% lost their lives)[37]. In many cases, advocates did not want to act as counsel for

35 The IPN decision on discontinuation of proceedings in the case of alleged crimes committed in Ghetto in Styj, of 9 April 2013, case no. S 37/11/Zn.

36 Of course justice cannot be treated as a tool of politics and 'a history as a battlefield' – see Hackmann 587.

37 J Lubecka (2017) 42.

German defendants – the cruel memory of the crimes committed against their relatives, friends and nation was still too fresh.

Even more influential were the political reasons. As Poland became an occupation zone of the Soviet Union, decisions as to the areas of interest of judicial authorities had to be 'confirmed' by the communist party. Therefore, e.g., an investigation into the crimes committed during the Warsaw Uprising – the capital city of Poland was totally destroyed, to the last building – was initiated only in 1972 and concerned only crimes committed in several hospitals. For political reasons also, Nazi suspects were not extradited from Germany, as the Allies were not willing to cooperate with Poland – which had ended up in the Soviet zone.[38] The Allies were not willing to pass on information about their methods of investigation. Also the suspects often claimed that they were in possession of some key information regarding sensitive issues. Moreover, cooperation with the Soviets could have led to serious issues in the political fields of the Western states.[39] There were also rumors that some of the accused had entered into an agreement with special services in exchange for refusing to surrender them to Poland.[40] In the eyes of contemporary authors, the authorities of Western Germany did not take any legal actions that could facilitate the prosecution of German war criminals in Poland (or in the Eastern Germany). Because of many reasons no *in absentia* trials were held: although before the Supreme National Tribunal they were possible this possibility had been never used. On the other hand, Eastern Germany cooperated with the Polish authorities frequently – special services regularly exchanged data and information about Nazi criminals – in order to obtain data of 'compromising content' regarding West German citizens.[41]

The second question about purposefulness cannot be answered strictly in the affirmative: in general, it is no longer reasonable and necessary to conduct investigations into Nazi crimes in present times. The time for prosecution of Nazi crimes has passed. The search for justice was important for many reasons. It should have been a part of the so called trans-conflict justice (or transitional justice[42]). According to this theory, the societies who experienced the trauma of international or civil war must see justice

38 Poland identified over 12,000 criminals it requested to be extradited; till 1950s eventually about 2,000 German criminals were extradited to Poland, that is only 15%, see A Klafkowski 266–267 and later: MA Drumbl, 'The Supreme National Tribunal of Poland and the history of international criminal law' in M Bergsmo, C Wui Ling, Y. Ping (eds), *Historical Origins of International Criminal Law* Vol. 2 (Torkel Opsahl Academic EPublisher 2014) 600.

39 As P. Marti wrote, the Allies supposed that they had significant experience in fighting against the Soviets, and thus could be useful for the UK and the US if a conflict broke out between the two blocs: see P Marti 94.

40 L Kubicki 54.

41 K Friedla 502-503.

42 See P Gulińska-Jurgiel, 'Post-War Reckonings: Political Justice and Transitional Justice in the Theory and Practice of the Main Commission for Investigation of German Crimes in Poland in 1945' in M Brechtken, W Bułhak, J Zarusky (eds), *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930s to the 1950s* (Wallstein 2019) 196.

done to the perpetrators of these crimes in order to be able to function as a normal society again. The trials in cases of crimes of international law allow us to learn about the true course of events that played a role in establishing historical events, and fulfil the 'right to the truth'. They give objective knowledge to all the victims and allow them to face the criminals who stand in the court's stalls. Such trials give an opportunity to 'point a finger' at the guilty: they show who is to blame, and for exactly what actions.[43] In consequence of establishing an objective truth, a national collective memory can be built.[44] Criminal trials become a tool of building and accepting the memory of events. There is even a human right which is considered to be the right to the truth. The role of criminal trials interplays with the role of historians, giving them the possibility to listen to the victims and witnesses. Criminal trials held after the incriminating events help historians to gain access to witnesses, documents and materials – as gathering of such elements is done under state authority, they become a tool of 'writing history'.[45]

Seen from this perspective, it is clear that investigations conducted by the IPN in present times cannot play the multiplicity of roles traditionally held by criminal trials in cases of crimes of international law during the post-war period. Moreover, they can be concluded only in one manner: by discontinuing the investigation because of the death of the suspect. There are only two remaining reasons why they may be important in the present times, although these do not play as important a role as the earlier described factors. Firstly, the changing political situation changed the possibilities and willingness to cooperate. The judicial authorities are finally able to establish the objective facts of many crimes. The archives in Germany are finally open, and many influential historians wish to help the Polish authorities in researching the facts. The decisions given by the IPN will end in many cases what P. Grzebyk calls 'the deafening silence over the victims and perpetrators'.[46] As it turns out, we do not yet know everything about the facts of many crimes. Moreover, Nazi crimes can be investigated alongside and jointly with communist crimes – which was not possible in the times just after the War. Questions can be posed about why in many cases the prisoners of the Nazi concentration camps were sent directly to gulags; or why war prisoners of the Maczek Army were not allowed back into Poland – they had to wait many years and were finally held prisoner and investigated in Poland. Secondly, as was explained earlier, in the decision on discontinuation of criminal proceedings, some sort of assignment of guilt takes place. Thus, society and relatives can no longer claim that this person was 'uninvolved' in the perpetration of crimes and that it is defamation to blame them.[47] What is also important, is that the relatives of victims

43 Similarly J Lubecka (2012b) 69-70.

44 See BF Havel, 'Public law and the construction of collective memory' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsley 2002) 383, 389; J Wawrzyniak, *Veterans, Victims, and Memory: The Politics of the Second World War in Communist Poland* (Peter Lang Edition 2015) 21.

45 RA Wilson 1.

46 P Grzebyk (2019b) 2.

47 As happened when, during events marking the 70th anniversary of the outbreak of the Warsaw Uprising

can finally learn the identity of these criminals. However, all these reasons – although important – lose relevance and become less and less important as the number of victims of these crimes still alive diminishes.

It is worth mentioning that criminal investigations into Nazi crimes are not only being held in Poland: in 2015 in Germany four new Oświęcim trials were launched before the courts in Detmold, Hanau and Neubrandenburg (here the case is postponed by the 'indisposition' of the 95-year old perpetrator) and Kiel. Three men and one woman were to stand before the German courts, accused of complicity in crimes committed in the Nazi extermination camp Auschwitz. To date, only one trial in Detmold has ended. A former guard of the extermination camp in Auschwitz, Reinhold Hanning was accused of complicity in the murder of 170,000 people, convicted and sentenced to five years imprisonment.[48] In 2011 a trial against Iwan (John) Demianiuk was concluded, and in 2015 – against Oskar Gröning. After the high-profile Demianiuk trial, in which he was sentenced to 5 years in prison, many German commentators expressed the opinion that there would be more such trials in the future. These few examples of late trials of people involved in Nazi crimes clearly illustrate the still 'uncomfortable legacy' of many unpunished Nazi crimes that can be observed in Germany. Prosecuting Nazi crimes in Germany had an additional characteristic: both German states had chosen and developed different strategies in the process of settling accounts with their Nazi past, and above all, they had constantly competed with each other in this field in the fight for image and acceptance in the international arena. It is claimed that after the unification 25 years needed to pass in order to conduct fair and thorough trials of Nazi criminals.[49] It seems that both societies – German and Polish – perceive the issue of Nazi crimes as 'unfinished business'. Also, both societies realize their own goals of building collective memory and dealing with the 'ghosts of the past'.

The final part of the analysis is looking for a general model of dealing with crimes in the post-war period nowadays and evaluating the role of national and international justice. The analysis of the model of prosecuting Nazi crimes after World War II in Poland may be related to the model of prosecuting all such crimes of international law: genocide, crimes against humanity and war crimes. The model used in Poland after World War II may become a part of the discussion on the current model for prosecuting crimes of international law: should they be handed over to supranational tribunals? Should they be hybrid tribunals involving a national factor or completely supra-national tribunals like the ICC? Is it justified to transfer jurisdiction over these matters to national courts? The case of unresolved Nazi crimes in Poland may give a partial answer to this question. On the other hand, the present experience of the international criminal justice may be helpful for the prosecution of such crimes in Poland. At present, we also have the experience of

protests were organized by the family of Heinz Reinefarth claiming that he had never been convicted of any crimes, see H Radziejowska 390.

48 See K Friedla 489.

49 Ibid 490-491.

international criminal tribunals,[50] in particular the International Criminal Court, which is an efficient tool for prosecuting crimes of international law. Interesting conclusions can be drawn from its functioning that could improve the work of IPN prosecutors and shed new light on the considerations regarding the prosecution of Nazi crimes in Poland after World War II.

In relation to the above mentioned questions, several conclusions can be presented. International criminal courts nowadays seem to be a necessary solution. Although it would seem that national courts are better placed to investigate crimes committed in their territory, both the practical reasons as well as political ones in cases of dealing with certain crimes speak in favour of the international justice system. From a practical point of view after a conflict the state apparatus is frequently non-existent, and there are practical reasons why the state itself cannot conduct trials on such a scale as would seem necessary. Moreover, the new judicial systems established after a war may not be fully functional; it may be influenced by other states (in the case of Poland it was a case of a new occupation). Political reasons may stand in the way of extradition of perpetrators: other states may refuse to extradite nationals or residents – whereas an international tribunal has special powers at their disposal to force cooperation (as provided by the ICC Statute[51]). From a theoretical point of view it has been proved that international criminal trials have produced historical narratives that have been much farther reaching than national courts. International courts obtain documentary archives from all the interested governments and

50 M.A. Drumbl writes: *Eerie parallels arise between prosecutions conducted under the Polish decrees and those conducted over 50 years later in Rwanda under the gacaca legislation, which was also simultaneously used to prosecute both genocide-related offences and persons pretextually alleged to have collaborated in or denied genocide* [...] *The work of the Tribunal also contributes to the typological study of perpetrators of mass atrocity*, see MA Drumbl 600-601.

51 In accordance with Art. 87(7) Rome Statute of ICC, where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. In response, the Security Council may take measures within its powers [this is also referred to in the Agreement concluded between the International Criminal Court and the UN in Art. 17 (3)]. On the other hand, the Assembly of States Parties to the Statute may apply general means of pressure applied by states in international relations, e.g. to decide on the application of common economic or political sanctions. Sanctions for non-cooperation in the practice of the International Criminal Court were used after the arrest warrant against the former president of Sudan Al-Bashir was issued. The International Criminal Court 'complained' to the Assembly of States Parties to the Rome Statute of the Union of six states in which the former president was staying that refused to execute the arrest warrant; they were Malawi in 2011, Chad in 2013, Democratic Republic of Congo in 2014, Djibouti, and Uganda in 2016 (in each case the non-cooperation was also notified to the UN Security Council, which presented the situation in Sudan for consideration Court). In several other cases, after finding a lack of cooperation consisting in refusing to arrest Al-Bashir, the International Criminal Court found this fact, but taking into account the unique circumstances of the case, he did not decide to present it to the Assembly of States Parties to the Rome Statute of the Academy of Fine Arts and the UN Security Council (this concerned South Africa in 2017 and Jordan in 2019).

sides of a conflict. At the same time, criminal trials are often criticised as 'overly complex, excessively technical, and obsessed with minor procedural details",[52] which makes them 'boring' for observers and commentators. Also, it came to be called a 'central mistake' to confuse the need to bring one man to trial with the need to produce a clear narrative of war crimes and atrocities for the history books and to prove certain versions of history (in the case of Slobodan Milosević tried before the ICTY).[53] Moreover, international criminal courts are influenced by political reasons more than they would be ready to admit. As was mentioned above, the Nuremberg trials were not free from the political influence of the Soviet Union (for the sake of the functioning of the first instance of an effective mechanism of international criminal justice) and the ICC in many cases cannot avoid such accusations (as in the case of discontinuation of an investigation into the situation in Afghanistan in the first instance). As soon as political interference becomes visible, a mechanism of delivering justice may lose credibility. In order for criminal procedure to be trustworthy it must stay clear of any political influence and remain grounded in the domain of law. On the other hand, sometimes it is political influence that makes it possible for international criminal justice to exist.

Even if an international court exists, and has jurisdiction over some cases – the most grave and important – the national courts should play (as far as they are practically able to do so) an important complementary role. Usually, international courts are not designed to fulfil important tasks of transnational justice such as conflict-resolution, reconciliation and deterrence. Such functions of justice should be fulfilled by a national justice system. Thus, each forum of justice plays different roles and these roles are intertwined. As an international criminal court deals with the most heinous crimes of international interest, national courts hold trials of minor war criminals, more rooted in the local circumstances: this connection of the roles played by the two forums of justice can be seen as dealing with 'monumental history' by international justice and by national courts dealing with 'microhistories'; obviously, the national courts also should perceive the 'micro-stories' of individuals through the prism of the monumental history, and gather materials that could contribute to historical research.[54] L. Kubicki observed that proceedings against individual persons can never give a proper and full picture of war crimes committed during World War II, and consideration only of the facts of an individual case does not allow for proper assessment. Also in national forum there is a need to undertake extensive source research, aimed at potentially gathering the full evidence regarding the circumstances of the crime – as only in the light of this general information does it become possible to properly analyze the crimes committed in Poland.[55] There are also other connections between these two mechanisms of delivering justice. Characteristic of the relation between international trials and national trials – both after World War II and nowadays – is the influence of

52 RA Wilson 11.
53 Ibid 1.
54 Ibid 112.
55 L Kubicki 45.

the concepts used in the international forum on national law and jurisprudence. In the Nuremberg trials, legal concepts of criminal enterprise and command responsibility were used – and later the Polish Supreme National Tribunal and common courts utilised the same legal notions.[56]

R. Lemkin complained that although some elements of justice have been done in Nuremberg, the Allies did not want to establish a rule of international law that would prevent and punish future crimes of this type – they 'refused to envisage future Hitlers'.[57] Finally, since the International Criminal Court operates, this failure has been repaired. The elements of the most heinous crimes of international law have been described in the Rome Statute, playing a preventive role, as well as defining and developing international criminal law in this area. Nowadays, the influence of international criminal courts on the concepts functioning in national law cannot be neglected: such notions of criminal law and procedural criminal law as the irrelevance of state immunity of perpetrators or the understanding of the notion of command responsibility have become part of national law. Thus it is clear that the principles of prosecution of crimes of international law have been evolving and are still evolving both on national and international level as these two are linked and in constant communication.

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Contemporary Central & East European Law

How Crime has Changed in a Universally Mobile Society, Based on the Example of Poland: a Research Concept

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Abstract

We live in a time of constant change. For modern societies, the period of the last 30 years is also a time of changes connected with the reconstruction of the surrounding reality. For Poland, it is also a period of changes in the political and economic systems. Such profound changes must also be followed by changes in the structure of crime. Technological changes and the mobility of societies are changing not only the methods but also the ways in which crimes are committed. New types of crime are emerging, while 'old crimes' are changing or disappearing. The aim of this article is to outline the above issues within the context of a planned research project on the analysis of changes in crime, using the example of Poland.

Keywords

transformation, change, society, crime, mobile, system

A society constituted around various interpersonal relations, realized in both the «real» and the virtual spheres, is a hybrid composed of human individuals (entering into these relations) and material things (objects, and devices supporting relations). It is a dynamic and unlimited system. The development of new technologies meets the expectations and needs of society. The convergence of modern media and mobile communications fosters the permanent inclusion

> *of people in the global web and influences the way people see themselves as part of one community*.[1]

The turn from the 20th to the 21st century is recognised as the beginning of the information era and a mobile society, which is determined by modern information and communication technologies exerting a fundamental impact on all aspects of social life.[2]

The relationship between social dynamics, in the broad sense of the term, and crime is one of the most interesting research problems for criminology. In this context, 'crime' is most often understood as a phenomenon occurring in the social reality related to the existence of norms accepted by the general public, which are violated as a result of the perpetrators' actions. As Irena Rzeplińska points out,

> *crime is a set of behaviours accompanying human societies «from time immemorial», constantly present and always controlled by a specific criminal law reaction. A crime is one of many social behaviours, but specific, because it is forbidden by the criminal law at the time it is committed*.[3]

These behaviours are against the law, disclosed in official registers and included in statistics, which unfortunately eliminates a dark figure of crimes from the area of consideration.

The term 'social change' covers various social processes at the micro and macro levels.[4] Speaking of social change in connection with crime, we usually mean wars, revolutions, political changes, political and economic changes, industrialisation processes, demographic changes, migrations, the formation of new lifestyles, the level of fear of crime and the effectiveness of crime control.[5] These changes also include the ongoing processes of digitisation and technological miniaturisation, accompanied by an increase in virtual mobility.[6] These phenomena occur at local and global levels with varying degrees of intensity.

1 AZ Wassilew, 'Technologie «podłączenia» w społeczeństwie mobilnym' [«Connectivity» Technologies in a Mobile Society] (2011) Zeszyty Naukowe Uniwersytetu Śląskiego. Studia Informatica 28(656) 467; more on this subject: J Urry, *Socjologia mobilności* [Sociology Beyond Societies: Mobilities for the Twenty-First Century] (PWN 2009).

2 I Hejduk, 'Rozwój technologii cyfrowych a wykluczenie społeczne osób 65 plus' [Development of Digital Technologies and Social exclusion of people aged 65+] (2016) Zeszyty Naukowe Uczelni Vistula' 46(1) 64.

3 I Rzeplińska, 'Przestępczość i jej kontrola – co wynika z dwudziestolecia RP?' [Crime and its Control – What is the Result of Twenty Years of Poland?] in P Kozłowski, H Domański (eds), *Po 20 latach. Polska transformacja z perspektywy ekonomicznej, socjologicznej i prawniczej* [After 20 Years. Polish Transformation from an Economic, Sociological and Legal Perspective] (Key Text, INE PAN 2010) 195.

4 A Kossowska, 'Social Change and Criminality: Mutual Relationships, Determinants and Implications' in K Buczkowski et al (eds), *Criminality and Criminal Justice in Contemporary Poland. Sociopolitical Perspectives* (Ashgate 2015) 37

5 Ibid 73-74.

6 J Urry 49.

One of the most important reasons for the lack of consensus on the definition of crimes, and the choice of methods of their control by individual states, are the social changes, which are not homogeneous for everyone. It is clear, therefore, that they cannot fail to have an impact on the dynamics and structure of crime as well. In Poland, the development of an information society based on mobile technologies took place in parallel with the transformation process. It should be stressed that this was a so-called broad systemic transformation, i.e. the radical social and political changes that took place in the countries of central and eastern Europe after 1989. It was then that the political and economic systems were changed, social and political consciousness changed, and a different system of values was adopted, including a different legal culture. At the same time, it should be noted that the change that took place at that time was – for the course of social processes – extremely sudden: the change in the economic and political systems required rapid social changes. As Wolfgang Rau notes, for central European countries the period of transition following the fall of the Berlin Wall was associated with three types of change:

- political change, consisting of the transition from an authoritarian system to a democratic state, connected with limiting the role of the state in society;
- economic change that transformed ownership structures from state ownership to private ownership;
- social change, leading to the liquidation of the socialist 'welfare state', in which the government provided work and social security, and moving towards releasing the economic initiative of citizens, which was associated with problems resulting from these changes (primarily unemployment, including youth unemployment).[7]

One of the effects of rapid and sudden social change is a significant increase in crime, which also affected Poland after the collapse of the communist system in 1989. The reason for this was the weakening of the mechanisms for social control, general social disorganisation and anomie, which, according to Durkheim, results from the fact that the breakdown in old forms of social solidarity is not accompanied by the rapid formation of new ones, resulting in a moral vacuum, and the members of society are deprived of signposts and control, which, among other things, is conducive to breaking the law.[8] Piotr Sztompka uses the concept of the 'social trauma of change' in this context.[9]

In the last 30 years in Poland, the pace of the changes and their scope caused, on the one hand, the necessity of penalising new acts, due to the emergence of new areas in which society functions and the necessity of their control, and on the other hand, they forced

7 See W Rau, 'Countries in Transition: Effects of Political, Social and Economic Change on Crime and Criminal Justice' (1999) Eur J Crime Cr L Cr J 7(4) 356.

8 K Krajewski, 'Zmiana społeczna, kontrola społeczna, anomia, przestępczość' [Social Change, Social Control, Anomie, Crime] in K Buczkowski, W Klaus, P Wiktorska, D Woźniakowska-Fajst (eds), *Zmiana i kontrola. Społeczeństwo wobec przestępczości* [Change and Control: Society Against Crime] (Wydawnictwo Naukowe Scholar 2017) 11; also E Durkheim, *Suicide: A Study in Sociology* (Taylor and Francis 2005).

9 A Kossowska 46.

a withdrawal from penalising certain behaviours,[10] and finally, significantly influenced the characteristics and size of certain types of crimes, as well as the necessity adopting an appropriate criminal policy towards them, understood as a scientific discipline covering the issues of a reasonable and purposeful fight against crime.[11]

Without questioning the importance of various methodological tools that enable us to estimate the dark number of crimes that bring us closer to knowing the real level of crime, it is worth focusing on analysing official statistics, and trying to compare them with specific areas of the transformation in Poland. An analysis of the recorded figures on the dynamics of crime in Poland over the past 30 years will help us to understand that talking in general about the increase in crime in the early 1990s is too simplistic, because it is not observable in all categories of criminal acts. The stabilisation of crime and the return of a downward trend are also not relevant for every category of crime. Our research concept is to track official statistics of the Polish Ministry of Justice in terms of the 'susceptibility' of selected crimes to the 'popularity' of their occurrence due to specific social changes.

Even a cursory review of judicial statistics allows us to determine trends in crime in recent years. Some of them are the result of the aforementioned social transformation, some are the result of demographic changes, and some are the result of the state's criminal policy which, after a period of relative liberalisation in the regulations (in the 1990s and the early 2000s, is returning to repressive tendencies (since the middle of the first decade of the 21st century).

The changes in legislation were, in a way, a reaction to an increase or decrease in recorded crime. It is worth noting, however, that the period of growth in the number of detected crimes recorded in the first years of the 21st century became a breeding ground for trends strengthening the punitive nature of criminal law and demanding a hardening of the criminal policy pursued by the state. Paradoxically, however, the changes aimed at hardening the rules mostly appeared when the level of crime in the country began to decline, especially within the group of criminal offences.

However, the downward trend in assault and robbery, robbery related offences, property crime, and crimes against life and health, has been accompanied by an increase in economic crime. In the year 2012 alone, there was nearly 10% increase in criminal incidents in this group. It seems that the increase in the number of cases falling into the rather capacious category of economic crimes may indicate the predominant trends in crime for the coming years. The development of the capital market and changes in international trade result in a significant number of crimes against the fiscal interests of the state (tax evasion, in particular indirect taxes such as VAT or excise duty).

It should be remembered that we are living in a period of widespread social mobility. This facilitates not only the free movement of individuals, but also the perpetrators

10 See G Rejman, *Prawo karne. Część szczególna. Przestępstwa gospodarcze* [Criminal Law. Special Part. Economic Crimes] (UW 1980).

11 B Wróblewski, Wstęp do polityki kryminalnej [Introduction to Criminal Policy], (Księgarnia Stowarzyszenia Nauczycielstwa Polskiego 1922) 3.

of crimes, which may allow for, but is not restricted to, the more efficient functioning of complex structures of organised crime. Increased mobility contributes to increased migration, and the emergence of new challenges related to social multiculturalism. A noticeable new phenomenon, hitherto not recorded on such a large scale in Europe or Poland so far, is crime committed by foreigners, among whom there are also political or economic migrants. Statistics on crime committed by foreigners in Poland have been maintained since 1984.[12] It is worth mentioning that the structure of crime committed by foreigners differs from the general structure of crime registered in our country. In particular, it is characterised by a low level of crimes against persons and a high percentage of crimes against the reliability of documents, which results from the fact that foreigners crossing the Polish border use forged documents. Another feature characteristic for foreigners is the crime of smuggling, registered both at border crossings and at the so-called green border. A separate crime committed by foreigners in the 1990s was crossing the state border contrary to the provisions of the criminal code a dramatic increase that occurred in 1992 was related to a large migration wave of Romanian citizens. According to surveys, foreigners in Poland most frequently commit crimes against the credibility of documents, followed by crimes against public order, security in communications, economic trade and property.[13]

New technologies that allow people to move away from personal contacts are also conducive to changes in the picture of crime. The widespread access to content on the internet, the ease with which information can be exchanged and retrieved, as well as the resulting technological changes (such as the widespread use of smartphones), mean that we need to look again at the image of crime and identify areas that may be criminogenic factors. As Yvonne Jewkes notes, *the internet is a world of entertainment, spectacle, narcissism and all sorts of performances and, in terms of enjoyment, a perfect place to commit spectacular crimes*.[14]

Therefore, an important trend to follow will be those categories of crimes which have become possible thanks to the existence of this medium: hacking computers and computer networks, dissemination of viruses, violations of privacy through the publication of photographs or content offensive to people, thefts and violations of intellectual property, and finally economic crime of a new type – related, by way of example only, to the theft of funds from bank accounts, credit cards or payment cards. The internet facilitates cross-border criminal activities through facilitating the transfer of funds between countries and allowing contact between members of criminal groups.

12 I Rzeplińska, 'Zapobieganie przestępczości cudzoziemców w Polsce' [Preventing the Perpetration of Criminal Offences by Foreign Nationals Residing in Poland] (2016) Archiwum Kryminologii 38, 7 <https://doi.org/10.7420/AK2016A>.

13 More broadly M Rychlik, P Wiktorska, 'Polityka karna wobec cudzoziemców przebywających w Polsce' [Penal Policy Towards Freigners Staying in Poland] (2016) Archiwum Kryminologii 38, 61–91 <https://doi.org/10.7420/AK2016D>.

14 Y Jewkes, Media i przestępczość [Media and Crime] (WUJ 2010) 31.

As a result of the development of the new medium, crimes that have been known to criminal law for a long time are also undergoing a transformation, but the internet has also caused a significant modification of their modus operandi. This applies in particular to the dissemination of pornographic content (including child pornography), insults, defamation, threats, as well as various forms of internet harassment, known as cyberstalking or cyberbullying. The internet is also a place where it is possible to commit hate crimes or terrorist activities.[15]

Changes in the image of crime in a period of change and political transformation often result from the dynamics of market processes. The accompanying legislative chaos connected with the period of social disorganisation made it easier for transformations in the structure of crime to take place. For some, it provided an opportunity to liberate their creativity and entrepreneurship, making them beneficiaries of the changes, for others, it was the end of their current lifestyle and certainty as to their function in the social fabric.[16] Against this background, new forms of crime appeared, which had so far not been observed to such a large extent. One of the side-effects of the bankruptcy of enterprises and growing unemployment was the occurrence of economic crime connected with extortion of social security funds.[17] This crime occurs everywhere where state budget funds are redistributed to support society, and the perpetrators of this crime may be both entrepreneurs and natural persons claiming undue benefits from the social security system or disability benefits. It is also impossible not to mention the previously unheard of forms of theft in large shopping centres. On the one hand, they may be the result of poverty in some regions of the country which, as a result of the transformation, have lost the most (e.g. the decline of mining or heavy industry), and on the other hand, they may be the result of the ease of access to, and availability of, goods which may be stolen.

The feeling of social inequality as a result of the transformations and changes in the structure of society may also affect the social consent for carrying out such crimes as: insurance crime, extortion of loans, subsidies and other forms of financing, economic corruption (especially in the area of public procurement), tax fraud.[18] These are all types of crime that have become characteristic of the last thirty years and are closely linked to the ongoing social changes.

15 More broadly K Buczkowski, 'The Status of Criminality in Poland since 1918' in K Buczkowski et al (eds) *Criminality and Criminal Justice in Contemporary Poland. Sociopolitical Perspectives* (Ashgate 2015).

16 See J Błachut, A Gaberle, K Krajewski, *Kryminologia* [Criminology] (Arche 2001) 245 et subseq.

17 More broadly Z Kukuła, 'Prawo karne wobec przestępczości socjalnej' [Criminal Law in View of Social Crime] (2010) Studia Prawnoustrojowe 11; Z Kukuła, 'Zagrożenie przestępczością socjalną w obszarze ubezpieczeń społecznych' [The Threat of Social Crime in the Area of Social Insurance] (2016) Ubezpieczenia Społeczne. Teoria i Praktyka 2(129).

18 See K Buczkowski, 'Wpływ zmian społecznych na kształt i dynamikę przestępczości gospodarczej – zarys problematyki' [The influence of social changes on the shape and dynamics of economic crime – outline of the problem] in K Buczkowski, W Klaus, P Wiktorska, D Woźniakowska-Fajst (eds), *Zmiana i kontrola. Społeczeństwo wobec przestępczości* [Change and Control: Society Against Crime] (Wydawnictwo Naukowe Scholar 2017).

Over the last 30 years, there has also been a steady increase in drug crime. In 2015, the police recorded 46,000 drug crimes, and 51,000 in 2016. Polish courts most often convict offenders of crime for possession of drugs (both in quantities for personal use and larger). This was followed by sales and marketing. Drugs are also an excellent source of income, mainly for criminal groups. They earn significant amounts of money, which is later used for other criminal activities, e.g. white collar crime.[19] In our country, as in the rest of the world, drug addiction has become the basis of the drug business. Illegal drug trafficking is a large and extremely profitable enterprise, not only domestically but also globally. The gangs and mafias that are active in this sector are earning unimaginable profits from drug sales.[20] In relation to drug crime, there is a prevailing thesis that regular drug use, under conditions of difficult and illegal access, forces those using drugs to engage in criminal activities, motivated by the need to obtain funds to purchase drugs. However, whether drug use leads to crime or alternatively, whether a criminal lifestyle encourages drug use remains a matter of debate.[21] The increase in drug-related crime and the problem of drug addiction is also a consequence of the development of mobile technologies and the changing model of society. Drug trafficking at street corners or in nightclubs has almost totally disappeared, and young users are increasingly using social media to contact dealers. Snapchat, Instagram and Facebook are not only a market where existing users can find and buy what they want, but also an advertising board for dealers who offer marijuana, cocaine and other illegal drugs for sale.

Another problem resulting from increasing social mobility is the increase in offences against safety in traffic security. These offences are characterised by the fact that they are committed in connection with land, water or air traffic. In view of the huge number of vehicles involved in land traffic, the most common crime of this sort is a car accident, the consequence of which is disruption to human health for more than seven days, whether to a passenger, driver, pedestrian or cyclist. The number of car accidents increased dramatically in the first years of the transformation, which was an obvious consequence of the increase in the number of vehicles on Polish roads, including used vehicles imported from abroad. On-going infrastructure improvements and media campaigns are slowly reversing this trend.[22] A separate type of crime is driving while intoxicated, which does not have to be connected with causing an accident in order for it to be a punishable act. A spectacular increase in the number of acts of this kind was observed in connection with

19 A Łukaszewicz, 'Handel narkotykami – wzrost liczby przestęptsw narkotykowych' [Drug Trafficking – Increase in Drug-Related Crime] (Rzeczpospolita 6 Jul 2017) <https://www.rp.pl/Prawo-karne/307059929-Handel-narkotykami---Wzrost-liczby-przestepstwnarkotykowych.html> accessed 8 Dec 2019

20 K Laskowska, *Nielegalny handel narkotykami w Polsce* [Illegal Drug Trafficking in Poland] (Temida2 1999) 9

21 G Marshall (ed), *Słownik socjologii i nauk społecznych* [The Concise Oxford Dictionary of Sociology] (PWN 2005) 204

22 'Wypadki drogowe – raporty roczne' [Traffic Accidents – Annual Reports] (Policja) <http://statystyka.policja.pl/st/ruch-drogowy/76562,Wypadki-drogowe-raporty-roczne.html> accessed 8 Dec 2019.

the amendment of the penal regulations penalising driving under the influence of alcohol in a vehicle other than a motor vehicle.[23]

It is also interesting to draw attention to the changes that have taken place over the last 30 years in the process of controlling the phenomenon of domestic violence and gradually moving away from responding to it under criminal law, including in particular article 207 of the Penal Code, which criminalises the crime of physical and mental abuse of family members or close partners. A fundamental metamorphosis has taken place in the means of controlling domestic violence, which is a social phenomenon that is very difficult for all participants: from consent and acceptance of violent behaviours towards weaker and dependent people as an organisational norm, or even determining the meaning of social life in its many dimensions, through criminal penalization, to the currently visible tendency to control violence on the basis of civil law.[24]

We have only highlighted selected aspects of the relationship between crime and the social changes that have occurred in Poland over the past 30 years. According to Giddens, social change is not a new phenomenon, but is instead a phenomenon that takes place in all societies at different stages of development. Now, however, it is proceeding at a completely different pace, which is the source of specific contemporary problems that cause a state of confusion in a rapidly changing reality, especially since this changeability takes place on many levels simultaneously.[25] In analysing some aspects of the functioning of developed societies, Jock Young said: *Crime has ceased to be something rare, unnatural, marginal or alien, it has become the daily bread of our daily lives*.[26]

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23 Ustawa z dnia 14 kwietnia 2000 r. o zmianie ustawy – Kodeks karny [The act of 14th April, 2000, amending the Penal Code Act] [2000] JoL 48, 548.

24 More broadly P Wiktorska, 'Zmiany w kontrolowaniu przemocy wobec najbliższych' [Changes in the Monitoring of Violence Against Family Members] in K Buczkowski, W Klaus, P Wiktorska, D Woźniakowska-Fajst (eds) Zmiana i kontrola. Społeczeństwo wobec przestępczości [Change and Control: Society Against Crime] (Wydawnictwo Naukowe Scholar 2017) 220.

25 A Giddens, *Socjologia* [Sociology] (PWN 2004) 739.

26 A Kossowska 82.

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