



VILNIUS UNIVERSITY
FACULTY OF LAW

International conference of PhD students
and young researchers

**THE INTERACTION OF NATIONAL LEGAL SYSTEMS:
CONVERGENCE OR DIVERGENCE?**

CONFERENCE PAPERS

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25–26 April

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Foreword by the Organisers

Nowadays, there are no doubts that social relations are more and more actively overstepping previously existed boundaries. Globalisation, development of regional markets, intensive migration, rapid technological breakthroughs and many other factors inherent to post-modern societies influence relations between states. In this context the research in interaction of national legal systems is especially important. How the disappearance of previously existed social boundaries determines the convergence of national legal systems in private and public law? Or contrarily, are we able to identify opposite impact of divergence in particular fields of law? These and other questions important to the contemporary legal science are the subject-matter of the Conference papers of PhD students and young researchers.

The scope of the Conference is most impressive: from the paradigms of new science to the usage of the proportionality principle in national courts, from the comparative analysis of penal effect measures to the regulation of non-marital cohabitation of heterosexual couples, from the fiduciary duties of company directors in the UK, Delaware and Germany to the convergence of Polish and Austrian administrative procedure. Therefore, the PhD students and young scholars from Austria, Belgium, Estonia, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Russia, Ukraine and the United Kingdom came to discuss with each other, other students and legal scholars on various issues of law. The difference in the research fields is an undoubtable advantage of the Conference as all participating researchers consolidate their scientific inquiries under the same unifying grounds: the topic of interaction of national legal systems, the willingness to cooperate and the aim to raise critical questions and boldly quest for the answers.

The Conference and this set of the papers aim to promote the discussion between young scholars from different universities. PhD students and young researchers are able to meet each other, discuss and spread legal ideas to a wide audience. The Conference strives to allow authors to be heard, criticised and improve their research projects. Therefore, the readers of the Conference papers are encouraged to consider papers as interactive and contact authors with insights and questions.



Information about the Conference

Venue: Vilnius University Faculty of Law, Vilnius, Lithuania

Date: 25-26 April, 2013

Selection of the participants: abstracts of the prospective papers of all candidates evaluated by the Scientific Committee of the Conference

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Jelena Larionova, PhD student, Department of Private Law, Vilnius University

Vitalij Levičev, PhD student, Department of Public Law, Vilnius University

Donatas Murauskas, PhD student, Department of Public Law, Vilnius University

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HISTORICAL MEANING OF CONVERGENCE OF POLISH AND AUSTRIAN ADMINISTRATIVE PROCEDURE

Marcin Banasik*

Jagiellonian University in Kraków, Poland

Łukasz Sobolewski**

Jagiellonian University in Kraków, Poland

I. INTRODUCTION

Convergence is one of the terms, which defines most accurately tendencies in ongoing changes in social systems. At the field of legal culture we may observe both convergence of whole legal systems (e.g. Continental legal system and *common law*) and approach and similarity of single branches of law or individual institutions¹. In authors opinion convergence may arise not only from the cooperation of governments and following regulations. The other, not less important factor, is convergence through reception of historical solutions, successful in other countries with similar culture and social principles.

Legal systems recognise many ways and examples of mutual unification. As a rule it results from an international interaction between countries, which search practical solutions to improve interaction, growth of trade exchange, simplification of procedures and optimization of decisions of their citizens. Authors point that the significant aspect of convergence manifests in situations, when new countries or those experiencing fundamental transformation may derive profits from adopting legal institutions from other states. However, it has to be noticed, that such changes need to be done with respect to existing differences in level of economical development and culture².

* PhD student at the Department of Administrative Procedure at the Faculty of Law and Administration at Jagiellonian University.

** Student of the Vth year of Law at the Faculty of Law and Administration at Jagiellonian University

1 A. Doczekalska, 'Multilingualism of law and convergence of legal cultures in Europe and Canada', <http://www.prawo.univ.gda.pl/teoria/uploads/zjazd/Doczekalska.pdf>, p. 1. Author cites thesis of supporters of convergence, who assume that convergence of two legal cultures is possible (e.g.: G.R. De Groot, 'European Education in the 21st Century' [1992], [in:] B. de Witte and C. Forder (editor) 'The Common Law of Europe and the Future of Legal Education/ Le droit de l'Europe et l'avenir de l'enseignement juridique', Deventer: Kluwer Law & Taxation, p. 54 – cited [in:] ibidem). The author also mentions of antagonists of possibility of convergence (e.g. P. Legrand, 'European Legal Systems are not converging' [1996], [in:] International and Comparative Law Quarterly, vol. 45, p. 52–81; J. Smits, 'The Contribution of Mixed Legal Systems to European Private Law' [2001], Intersentia Uitgevers Antwerpen – Groningen, p. 103 – cited [in:] ibidem). The second group of cited authors in opinion of A. Doczekalska claim, that „convergence has a superficial character, and culture structures, which are foundation of the law, do not undergo convergence”.

2 There is no room for making 'copies' of legal solutions instead of conscious and deliberated process of convergence.

Polish legislator decided to follow legal solutions of other countries during the period between the two World Wars in the process of reconstruction of the State. In 1928 Polish president issued Regulation on General Administrative Proceedings³, which, much alike staying currently in force Administrative procedure code⁴, was imitating Austrian administrative procedure code, dated 1925, first administrative procedure code in history⁵. Moreover, the Act on Supreme Administrative Tribunal⁶, passed in 1922, based Polish administrative jurisdiction on French model modified in Austria, which, since 1875 had its Austrian Administrative Tribunal⁷. Described regulations had become the foundation of modern Polish and Austrian administrative procedure and administrative jurisdiction.

II. HISTORICAL BACKGROUND

In order to understand the grounds of reception of Austrian legal solutions after Great War, we have to investigate the causes back in the XVIII century. At that time unprecedented partition of Polish – Lithuanian Commonwealth took place. Austria, Russia and Prussia were the aggressors. Consecutive partitions, dated 1772, 1793 and 1795 have led to disappearance of the Commonwealth from political map for 123 years. Part of the Polish territory was under Austrian's emperor rule, being a part of Austrian Empire. In that period whole legal system and administrative institutions were acquired from Austria. Hence, on part of the territory previously belonging to Polish – Lithuanian Commonwealth, Austrian public administration bodies were in force and administrative jurisdiction was exercised by Austrian Administrative Tribunal. Poland regained independence in 1918. As L. Ehrlich emphasizes, it was not an act of creation of a new country, but a recovery of a position of being a subject in the light of international law, which Poland had for centuries⁸. Such situation brought a necessity of rebuilding and creating new state structures, its institutions, public administration and legal system. That problem concerned also, understandably, reconstruction of administrative procedure and system of control of legality of public administration activity.

First attempt of codification of administrative procedure was made in 1923, when Parliament passed Act on legal remedies against decisions of administrative authorities⁹. Adopted regulation was following Austrian normative solutions included in Act on appeal right¹⁰, dated 1896. Mentioned Act from 1923, although it was a *novum* on ground of administrative procedure, introduced

3 Regulation of the President of Poland on General Administrative Proceedings, OJ RP no 36, pos. 341 with amendments, dated 22 of March 1928, hereafter: G.A.P.

4 Administrative Procedure Code, OJ RP 2000, no 98, pos. 1071 with amendments, hereafter: A.P.C.

5 Z. Janowicz, 'Development of general administrative procedure' [1970], Law, Economy and Sociology Movement, booklet 3, p. 121 and following.

6 Act on Supreme Administrative Tribunal, OJ RP no 67, pos. 600, dated 3 of August 1922, hereafter: August Act.

7 M. Żukowski, 'History of Administration in Poland during XX century' (Warsaw 2011) p. 230–231.

8 L. Ehrlich, '*Ius Gentium*' (Cracow 1932), p. 300.

9 Act on legal remedies against decisions of administrative authorities, OJ RP no 91, pos. 712, dated 1 of August 1923.

10 R. Kędziora, 'General administrative procedure' (Warsaw 2012) p. 4; J. Ronowicz, 'Principles of administrative procedure in Poland during The period between the two World Wars and in the years 1944–1960' [2009], PWSZ IPiA Lubuskie Studies, Volume V, s. 143.



only one instance appeal system¹¹, which was in accordance with March Constitution, adopted in 1921. Full Polish codification of administrative procedure was adopted not before 22 of March 1928, when, beside March Regulation of the President of II Polish Republic, two other Regulations came into force: Regulation on compulsory proceedings in administration¹² and Regulation on penal administrative proceedings¹³. March Regulation was formally in force up to 1961, when presently applicable A.P.C. replaced it.

III. PRINCIPLES OF ADMINISTRATIVE PROCEDURE

During the reconstruction of the Polish state, T. Hilarowicz, on the basis of original Polish regulations and hitherto Austrian legal solutions, formulated four “main principles of procedure due to legal remedies” : principle of proceedings instituted *ex officio*, principle of competency of the authorities, principle of administrative instances and principle of free appraisal of evidence¹⁴. Those principles, with some amendments, are in force up to now and some among them are legal norms, directly stipulated in A.P.C.¹⁵.

Principle of proceedings instituted *ex officio* constituted a duty to obey legal order by public administration bodies (administrative authority) and to conduct proceedings at their own initiative for the purpose to maintain order. That principle also covered supervisory powers to abrogate *ex officio* decisions of the lower instance in each case when the right to appeal was not available¹⁶. Similarity of that principle with principle of law and order introduced by art. 6 and 7 of A.P.C. may be observed. As J. Ronowicz claims: “a duty to observe legal order might refer both to acting on the basis of provisions and to stand on guard of law and order during the proceedings”¹⁷. Procedure of reversing decisions *ex officio* was an innovative measure. It may be better compared to modern extraordinary procedures of verification of decision provided in A.P.C.¹⁸, rather than identifying it with ordinary appeal procedure¹⁹. In the pre – war regulations the possibility of verification of decisions *ex officio* was positioned in art. 96 of G.A.P., which was allowing to renew proceedings *ex officio*. Currently, extraordinary procedure of verification of decisions is regulated in chapter 12 and 13 of A.P.C. and in § 68 and following of AVG²⁰.

¹¹ *Ibidem*.

¹² Regulation of the President of Poland on compulsory proceedings in administration, OJ RP no 36, pos. 342 with amendments, dated 22 of March 1928.

¹³ Regulation of the President of Poland on penal administrative proceedings, OJ RP no 38, pos. 365 with amendments, dated 22 of March 1928.

¹⁴ T. Hilarowicz, ‘Legal remedies in Polish *administrative – political* procedure’ (Cracow 1923), p. 3–5.

¹⁵ H. Knysiak-Molczyk [in:] T. Woś (chief editor), ‘Administrative procedure’, (Warsaw 2013), p. 110.

¹⁶ *Idem*, s. 6–8.

¹⁷ J. Ronowicz, ‘Principles ...’, p. 143.

¹⁸ B. Adamiak, J. Borkowski, ‘Administrative procedure and administrative jurisdiction’ (Warsaw 2007), p. 299.

¹⁹ J. Ronowicz, ‘Principles ...’, p. 144.

²⁰ Administrative Procedure Code from 1991 r., Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG, Official Gazette (Bundesgesetzblatt) 51/1991 with amendments, hereafter: AVG.

Principle of competency of the authorities determined a rule to deal with the case by that authority, which had territorial and *ratione materiae* competence. According to art. 20 of A.P.C. *ratione materiae* competence means that particular, specified bodies are authorised and obliged to settle precisely identified administrative cases²¹. Territorial competence is defined as a legal capacity of the administrative body to settle a case which meets its *ratione materiae* competence and belongs to territory of activity of that body²². Though those principles are not literally principles of administrative procedure, they undoubtedly form part of the principle of acting of authorities on the basis of law, because art. 19 of A.P.C. constitutes for the administrative bodies the duty to observe their competences *ex officio*. Similar regulation can be found in Austrian administrative procedure²³. It is worth to notice that already art. 2 of G.A.P. envisaged that authorities has to observe their territorial and *ratione materiae* competence²⁴.

Principle of instances assumes administrative proceedings in two instances, which means that each administrative case, identical subjectively and objectively, can be considered and decided by two authorities (of first and second instance)²⁵. Initially, in the period between the two World Wars, Poland adopted Austrian three – instance model of proceedings, which was exchanged not until passing the March Constitution in 1921, which limited the possibility to appeal to one instance only. We have to remember that in that period the principle of administrative instances meant mostly the right to appeal, not directly specified number of instances²⁶. That understanding of this principle was connected with the fact that Polish regulation was based on Austrian regulations, especially Act dated 12 of May, 1896, from which the right to appeal resulted. Pursuant to the provisions of art. 82 of G.A.P., the right to appeal was limited only to one, directly higher instance. In present A.P.C. the principle of two – instances results directly from art. 15 of A.P.C. and has also constitutional grounds in art. 78 of Constitution of Republic of Poland. Instances in Austrian administrative procedure has its source in § 63 and the following of the AVG.

Principle of free appraisal of evidence was adopted from Austrian procedure. It means the freedom of public administration bodies to gather and appraise the evidence during the proceedings. This principle is a part of principle of objective truth, which results from art. 7 of A.P.C., according to which public administration body has a legal duty to gather and examine the evidence in a way which would allow to ascertain facts of the case in accordance with reality²⁷. Similarly in Austria, § 37 of AVG determines that the purpose of proceeding by the authorities is to establish the objective truth with respect to party's right to defend. Moreover, § 46 of AVG allows as an evidence everything that could be useful to determine the facts of the case or may be purposeful in the specific case. Similar proceedings are provided in art. 75 of A.P.C., which permits everything, what can contri-

21 H. Knysiak-Molczyk [in:] T. Woś (chief editor), 'Administrative ...', p. 141.

22 *Ibidem*.

23 § 1-6 AVG.

24 Art. 3-6 of G.A.P. determined competences and resolution of possible disputes arising.

25 *Ibidem*.

26 J. Ronowicz, 'Principles ...', p. 145.

27 H. Knysiak-Molczyk [in:] T. Woś (chief editor), 'Administrative ...', p. 113.



bute to clarify the case. Previously, art. 49 of G.A.P. personified that principle by determining that everything can serve as an evidence as long as it is not against the law (e.g. forced testimony).

As a result of entry into force of G.A.P., which was based on Austrian Act from 1925, several other principles were introduced to Polish administrative procedure: **principle of hearing of parties, principle of fast proceedings, principle of openness, principle of oral hearing during the explanatory proceedings.** Mentioned principles had on purpose to ensure more transparency during the proceedings and to enable the parties to defend their rights. For example, art. 44 of G.A.P. decided that public administration body shall apply reasons of purposefulness, speed, simplicity and economy during the explanatory proceedings. What is more, there was a possibility to conduct (art. 45 of G.A.P.) an oral hearing if reasons of acceleration and simplicity supported it. On the basis of art. 47 of G.A.P. officer had a duty to make accessible facts of the case to the parties and to enable them to make their own statements. Those principles, initially resulting from Austrian Act from 1925, were incorporated to A.P.C. In gently modified form they now follow from art. 10 of A.P.C. (possibility for a party to express on the evidence and on demands), art. 12 of A.P.C. (detailed and fast proceedings), regulations of chapter 5 of A.P.C. (possibility of oral hearing) and whole chapter 2 of A.P.C. (general principles).

Modern Austrian solutions originate from the above mentioned principles. § 43 of AVG constitutes an obligation to enable a party to express on evidence and statements of the second party, § 17 of AVG ensures for the parties the possibility to access to documents, § 39 of AVG declares, that public administration body shall conduct proceedings with respect to reasons of purposefulness, speed, simplicity and economy. As we can see, Polish and Austrian administrative procedure have a lot of similarities, based on regulations originating from XIX and XX century.

IV. ADMINISTRATIVE JURISDICTION

Austrian source of Polish administrative procedure implied the necessity to adopt from Austria administrative jurisdiction to Polish legal system. On 22 of October 1922 with due ceremony started its functioning Supreme Administrative Tribunal²⁸. It was appointed by August Act, and has been based on regulations concerning Austrian Administrative Tribunal²⁹. According to art. 2 of Act from 1875 AAT adjudicated in each case, when the party felt offended by unlawful decision of public administration bodies³⁰. August Act, in its art. 3 determined that SAT was constituted in order to adjudicate on legality of instructions and decisions of authorities, both governmental and local. Both, SAT and AAT could control administrative decisions not until using all possible administrative instances (§ 6 of Austrian Act and art. 1 of August Act). Moreover, Polish and Austrian tribunals were the 'courts of law', which means they adjudicated about the legality of public authorities decisions.

²⁸ Hereafter: SAT.

²⁹ Hereafter: AAT.

³⁰ A. Dziadzio, D. Malec, 'Official Journal of The State 1876, no 36. History of law. Proceedings and jurisdiction in the light of sources' (Cracow 2000).

Proceedings before SAT were regulated in a similar way as in AAT. Similarities concerned the situation of the parties and initiation of the proceedings – only at the request of the parties (§ 5 of Austrian Act and art. 9 of August Act). Cassation right was granted to both tribunals, each of them had also one instance only. Finally, Austrian and Polish administrative tribunals ruled on the basis of facts of the case established before authority of the last instance during administrative proceedings.

Supreme Administrative Court³¹, created in 1980, originates from SAT, and, thus, from AAT. After constituting, in 2002, two – instance system of administrative jurisdiction³², Poland even overtakes Austria, where one – instance system is up to a task³³. Nevertheless, both systems are still very much alike, as Polish administrative courts and Austrian *Verwaltungsgerichtshof* make eliminative, not reformative, judgments as a rule³⁴. It is worth to notice that jurisprudence has a big influence on public administration's decisions. In that scope SAC refers and enforces the meaning of SAT's achievements³⁵. That would be obviously impossible without deriving from Austrian patterns.

V. BENEFITS DERIVING FROM SIMILARITIES

Thanks to characteristic convergence of Polish and Austrian regulation, both countries can effectively cooperate, especially nowadays, when dozens of administrative regulations concern public economic law. Harmonization of internal markets realized through implementation of principles of free movement of goods, persons, services and capital³⁶, as well as freedom of establishment³⁷ results in strong need of international cooperation, which may be easier, when the procedures are similar. Authors find as most significant stated below examples:

1. Simplification of procedures and improvement of economic relations

Convergence of procedural systems of countries which belong to European Union creates suitable field for realization of principles of free movement of goods and capital and favours freedom of establishment. Entrepreneurs operating in one country can easier relocate or create branches of company in another country, when proceedings concerning obtaining licences or permissions are similar in both states. Differences in substantive law are compensated by the same or similar

31 Hereafter: SAC.

32 Act on system of administrative courts, OJ RP no 153, pos. 1269, dated 25 of July 2002.

33 Ł. Piebiak, 'System of jurisdiction in Republic of Austria', *Iustitia* 3(9)/2012, accessible at www.kwartalnikiustitia.pl, Access date: 23.03.2013 r. In Austria since 20 years there is an ongoing discussion concerning introduction of two – instance administrative jurisdiction. Current regulation resembles Polish administrative jurisdiction system before 2004.

34 Some exceptions are introduced by art. 188 of Act on proceedings before administrative courts, OJ no 153, pos. 1270, dated 30 of August 2002. On grounds of Austrian law there is a situation, when a party can lodge a complaint on inactivity of administration body for a period longer than 6 months. If the authority remains inactive, than administrative court can issue a decision instead of the authority.

35 D. Malec [in:] J. Malec, D. Malec, 'History of administration and administrative thought' (Cracow 2003), p. 240–251.

36 Art. 26 of the Treaty on the Functioning of the European Union, OJ EU 2008 C 115.

37 Art. 49 and 56 of the Treaty on the Functioning of the European Union, OJ EU 2008 C 115.



provisions of administrative procedure and administrative jurisdiction systems being much alike. As a result, the public administration authorities of foreign countries are more predictable in each case when they have to obey a similar proceedings. Convergence creates conditions that ensure security for the entrepreneurs, as they can easily predict the scope of their rights during administrative proceedings in foreign country and define their position in the light of specific case. Such security and predictability, resulting from similarity in domestic and foreign administrative procedures makes business entities more likely to invest capital or develop economic activity on such markets. What is more, similarity of administrative proceedings shortens period of time needed to obtain licence or permission in foreign country. Last but not least, homogenous system of administrative jurisdiction might have significant meaning for the entrepreneurs³⁸.

2. Use of practice of applying certain institutions of law in foreign countries

Acquiring model solutions from administrative procedure allows in '*hard cases*' to derive from achievements of practice and jurisprudence from the country with long history of acquired institution of law. Observation of functioning of legal solutions may have a key importance in the legislature process in the scope of avoidance of improper regulations. The most significant conclusions may derive from analysing jurisprudence. However, using of foreign country's judicial decisions have to be done cautiously and shall be exploited at the field of legislation, not during application of the provisions of law.

3. Use of achievements of another country during the proceedings before Court of Justice of the European Communities and before European Court of Human Rights³⁹

Convergence of legal systems may be used during the proceedings before CJEC⁴⁰ and ECHR. During the trial, representatives of states may refer to similar solutions and provisions of law in another country. By doing so, the countries may prove that existing regulations do not infringe *acquis communautaire* or human rights. In order to defend its rights the subject may demonstrate that possible restrictions are injustice, because the meaning of the examined institution of law should be understood in the same way as in another country, which did not violated provisions of Community or Convention Law. This may take place when legal systems have common tradition and formed on the basis of similar solutions. The spirit of law and the purpose of regulations are very useful in scope of mentioned situations⁴¹.

38 In case of tax proceedings, matters concerning real estates or administrative proceedings in infrastructure sectors, it may have a significant meaning because of the size of invested capital. Predictability of the Law is priceless for entrepreneurs.

39 CJEC and ECHR respectively.

40 Especially before the Court of the first instance.

41 That common spirit is functioning in Polish and Austrian administrative procedure and administrative jurisdiction.

VI. RESUME

To sum up the foregoing considerations it should be emphasized that both, Polish and Austrian administrative procedures have a common tradition and are based on similar legal acts, originating from the same grounds. Moreover, administrative jurisdiction shows significant similarities in both countries. That local convergence resulted from the history events. Such example of convergence, dating back to XIX century, should be useful not only for purposes of academic discussion, but also for entrepreneurs and public administration bodies. As indicated above, procedural similarities may result in benefits manifesting in growth of trade turnover or upgrade of institutions of law.

Adopting of Austrian procedure and administrative jurisdiction in late twenties of XX century was a very innovative step, which allowed to rebuild Polish state in a modern way. Nowadays, convergence may also be used to introduce quality change in legal systems.

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THE IMPACT OF EU LAW ON HARMONISATION OF NATIONAL CRIMINAL LAW

Teresa Bedulska*

Vilnius University, Lithuania

Abstract. The main aim of this paper is to address the issues of EU criminal law and of its impact on national law of EU Member States. The spheres of EU criminal law are briefly mentioned. Much attention is paid to methods of harmonisation, used by the Union, positive and negative harmonisation are mentioned and the use of each is described. The change of national law is shown while analysing the norms regulating the trafficking in humans. In the abovementioned context the existing EU regulation on the subject is discussed, pre-EU regulations of national law are compared with the new ones implementing the requirements of supranational law. While analysing EU and Lithuanian legal acts on human trafficking, doubtful regulations are presented for discussion and solutions are proposed.

Keywords. Criminal law, European Union, harmonisation, trafficking in humans

INTRODUCTION

Modern states are no more isolated. The nowadays reality forces them to act together and to join international organizations. International organization passes its own law and it affects the law of its member states. Criminal law for a long time remained out of the scope of international law, because it was considered to be the cornerstone of state sovereignty. Nowadays, also the criminal law is widely internationalised. Lithuanian criminal law is mostly affected by norms, enacted by European Union. The impact of Union law is best described by K. Lenaerts: „we simply do not have such an extent of sovereignty, on which we can rely in our relationship with EU“.¹

This paper consists of two main parts. In the first part the EU general competence in the sphere of criminal law will be briefly addressed. In the second part, the impact on Lithuanian Criminal law will be shown through analyse of change of a definition of trafficking in humans.

EU CRIMINAL LAW

For a long period of time EU did not possess any competence in the field of criminal law. Still, from its beginning the concept of total integrity (in the sphere of justice also) emerged. Nowadays, norms of criminal law form a huge deal of EU enacted law.

* 5th year law student at Law Faculty of Vilnius University, Saulėtekio al. 9, I rūmai, LT-10222 Vilnius; Email: nn_barbara@yahoo.com.

¹ K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism.' [1990] No.38. American Journal of Comparative Law. p. 50.

The EU criminal law-making process takes two ways². First of all, legal acts in the sphere of criminal substantive law are enacted. This is so called vertical harmonisation of the criminal law which means that European Parliament and Council acting together adopt a directive, describing minimum requirements for criminal offences definitions and penalties as it concerns serious international crimes or crimes that one state cannot combat on its own. Predefined areas are: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.³ Next, EU passes laws in the field of criminal procedure, and this is described as horizontal harmonisation. What a difference between those two is? When vertical harmonisation occurs, such an act requires member states to comply with its obligations and to replace their national norms with the EU norms. It does a huge deal of unification in the field of criminal law but at the same time the implementation of such law can have a negative impact on national law, because the imported law can disbalance i.e. existing system of penalties. Also it is feared that EU legislative work in this field will cause overcriminalisation. In the case of horizontal harmonisation, different principles apply. This field is built on mutual recognition and mutual trust in other member state's legal system⁴ and its regulations are mainly to ensure the effective cooperation without significant ingerence in the national laws of criminal procedure and there exist natural safeguards, i. e. protection of human rights. In other words, the possibility of transnational criminal justice has therefore led to so ever-stronger need for the transnational protection of those subject to criminal justice systems.⁵ It follows that vertical harmonisation is much more problematic. It is why author of this work choosed to examine more closely the impact of EU acts of the criminal substantive law, in particular, the regulations concerning trafficking in humans.

EU legal acts can be divided into two main groups – criminal law and criminal procedure. But in order to reflect differences in regulation inside these, other clasification is proposed:

1. criminal law
2. criminal law norms as it concerns the responsibility for violation of Union financial interests.
3. criminal procedure
4. human rights enforcement in criminal proceedings.

When the Lisbon Treaty was adopted, criminal law matters became an integral part of EU law, with no more differences in the sources of law. For now uniform legal acts could be issued in any sphere belonging to EU competence: regulations, directives, decisions. Regulations under Article 288 TFEU are directly applicable: they are to be treated by national legal systems as valid national legislation but taking precedence over conflicting domestic provisions. They are independent of the national legal order, which may not generally transpose the regulation into the

2 P. Asp, 'Mutual recognition and the development of criminal law cooperation within the EU'// Harmonisation of criminal law in Europe. (Intersentia: Intersentia Publishers 2005) p. 23

3 The Treaty on Functioning of European Union. Consolidated version 2012. OJ C 326, 26.10.2012, art. 83

4 *Gözütok and Brügge*, joint cases C-187/01 and C-385/01, [2003] ECJ

5 S. Miettinen, 'Criminal Law and Policy in the European Union' (New York: Routledge Taylor and Francis group 2013)

national legal system. Thus, if an EU regulation described particular acts and required Member States to impose penalties for those acts, a Member State may be required to refrain from reinterpreting the constituent offences even where it must take legislative action to penalise those offences. Historically, even in areas where the Member States would criminalise analogous breaches of domestic law, the Union has shied away from attempting to establish EU criminal rules in the form of regulations. Instead, it has typically sought to emphasise the administrative or civil nature of Union penalties whilst leaving Member States free to impose further criminal law consequences.⁶ It is mostly because of the very nature of criminal law, as the general principle is that this field of law is codified, and all offences are described in one national act.

Because of its non direct application and special status given to some Member States by Treaties, EU criminal law has not had a uniform geographic application throughout the Member States; even prior to Lisbon various provisions enabled some Member States to opt in or opt out of areas or individual pieces of legislation.⁷ I. e. the UK and Ireland are by default excluded from criminal law measures passed after 1 December 2009⁸, but may opt in under the procedures specified in the protocol. Denmark is excluded from both pre-Lisbon third pillar measures and all post-Lisbon measures. The EU conventions on criminal law matters often included the possibility of opt outs.

EU LAW IMPACT ON THE LITHUANIAN LAW

By signing the Treaty of Accession to EU⁹, Lithuania undertook the obligation that from the date of accession it will be prepared to fully implement the requirements of *acquis communautaire* in the sphere of cooperation in justice and home affairs and to introduce the whole *acquis communautaire* into its legal system. The possibility for EU legislation to become part of the Lithuanian legal system as well as its supremacy and direct application principles were established by the supreme legal act – the Constitution of the Republic of Lithuania.¹⁰ EU criminal law affected also Penal Code¹¹ and the Code of Criminal Procedure¹² – from their structure to the new legal constructions.

6 Id. p. 85

7 S. Miettinen, 'Criminal Law and Policy in the European Union' (New York: Routledge Taylor and Francis group 2013) p. 60

8 Art 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

9 Belgijos Karalystės, Danijos Karalystės, Vokietijos Federacinės Respublikos, Graikijos Respublikos, Ispanijos Karalystės, Prancūzijos Respublikos, Airijos, Italijos Respublikos, Liuksemburgo Didžiosios Hercogystės, Nyderlandų Karalystės, Austrijos Respublikos, Portugalijos Respublikos, Suomijos Respublikos, Švedijos Karalystės, Jungtinės Didžiosios Britanijos ir Šiaurės Airijos Karalystės (Europos Sąjungos Valstybių Nanių) ir Čekijos Respublikos, Estijos Respublikos, Kipro Respublikos, Latvijos Respublikos, Lietuvos Respublikos, Vengrijos Respublikos, Maltos Respublikos, Lenkijos Respublikos, Slovėnijos Respublikos, Slovakijos Respublikos Sutartis dėl Čekijos Respublikos, Estijos Respublikos, Kipro Respublikos, Latvijos Respublikos, Lietuvos Respublikos, Vengrijos Respublikos, Maltos Respublikos, Lenkijos Respublikos, Slovenijos Respublikos ir Slovakijos Respublikos stojimo į Europos Sąjungą. <http://www3.lrs.lt/pls/inter3/oldsearch.preps2?Condition1=216705&Condition2=>

10 Lietuvos Respublikos Konstitucija (Lietuvos Respublikos piliečių priimta 1992 m. spalio 25 d. referendumu) // Vals-tybės Žinios, 1992 m. Nr. 31–953

11 Lietuvos Respublikos Baudžiamasis kodeksas. Valstybės žinios, 2000. Nr 89-2741 (su vėlesniais pakeitimais ir papildymais)

12 Lietuvos Respublikos Baudžiamojo proceso kodeksas. Valstybės Žinios, 2002. Nr. 37-1341, (su vėlesniais pakeitimais ir papildymais)

The agreement to proceed in a particular way does not always yield that result in practice. In this context the judgement of Lithuanian Supreme Court could be mentioned. While analysing the newly changed norm of the Lithuanian Penal Code, which added some attributes to definition of trafficking of humans, Supreme Court stated, that this new 30/06/2005 version adopted in order to implement EU law requirements, narrows the criminal responsibility¹³. This clearly did not match the aims of framework decision 2002/629/TVR on trafficking of human beings. The above mentioned decision was focused on widening the definition of this crime and aggravating penal responsibility.

EUROPEAN UNION LEGISLATION ON TRAFFICKING IN HUMAN BEINGS

The EU begun to enact laws on criminalisation of human trafficking from the very moment it had been given the competence to address criminal law issues. This crime was subject to the Joint Action,¹⁴ later replaced by Framework decision¹⁵, and next by the directive.¹⁶

First, the rules of Framework decision will be analysed. It criminalised such a criminal activity: the recruitment, transportation, transfer, harbouring, subsequent reception, exchange or transfer of control over a person while using one of following methods: coercion, force or threat, including abduction, deceit, fraud, an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or payments or benefits are given or received to achieve the consent of a person having control over another person. All the acts must be committed for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

The directive widened the definition of human trafficking. Besides prostitution and other sexual exploitation, slavery, forced labour or services, exploitation purposes now include begging, the exploitation of criminal activities, or the removal of organs. Because of limited size of this work, only the exploitation for criminal activity as raising most questions, will be analysed.

The exploitation for criminal activity for the purposes of this directive should be understood as forcing into theft, stores robbery, distributing drugs or any other similar profitable activity, which is punishable under Member States law. Some authors note, that the directive limits the definition only to criminal offences, and not includes administrative ones.¹⁷ It should be noticed that directive

13 Lietuvos Aukščiausiojo Teismo 2006 m. kovo 28 d nutartis baudžiamojoje byloje 2K-332/2006

14 97/1154/JHA: Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children. [1997] OJ L63/2,

15 Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings. [2002] OJ L203/11,

16 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. [2011] OJ 110/11,

17 A. Urbelionytė, 'Europos Sąjungos teisinio prekybos žmonėmis reglamentavimo pokyčiai priėmus direktyvą 2011/36/ES'. [2012] Jurisprudencija. No.4(3) p. 1143-1155.

does not establish the exhaustive list of persons exploitation spheres, and Member States are free to include administrative offences too.

The wording of directive causes some doubts also with regard to connecting criminal activity only with profitable crimes. Such a description unreasonably narrows the perpetrator's responsibility. Although humans are trafficked mostly because of perpetrator's wish to earn money, and the new „owner“ of a person forces the victim to repay the money spent, still nobody can negate the possibility, that a person can be acquired in order to make him, for example, kill somebody.

The new directive required Member States to give victims immunity from prosecution for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being trafficked. The preamble of the directive included the example list of such offences – such as the use of false documents, or offences under legislation on prostitution or immigration. It could be considered as a welcomed achievement, but in practice it is also important to assure the victims are not punished for any offences, they were forced to commit. Also, for the greater protection of victim's rights, immunity for the offences the victim preforms in order to get free from perpetrator should be granted.

PRE-EU REGULATION IN LITHUANIAN PENAL CODE

Trafficking in persons was introduced to the Lithuanian penal system for the first time in the 1998 with the amendment of 1961 Penal Code. It was a result of international obligations, in particular Convention of the rights of a child and and UN convention on prohibiting discrimination. In 1995 m. Lithuania has ratified the Convention on the Rights of the Child¹⁸ and the United Nations Convention on the Elimination of All Forms of Discrimination against Women¹⁹. These international acts required the Member States to take appropriate measures to combat trafficking in women and children, child kidnapping and the use of women for prostitution.

The art. 131³ of an old Penal code described trafficking of persons as selling or otherwise conveying and purchasing a person. The norm could be relied on when the perpetrator committed such acts with an intent to sexually abuse the victim, use him for prostitution, or to receive financial or any other pecuniary benefits. The transporting of person for prostitution purposes also was considered as trafficking of humans. It is worth mentioning that some scholars took the view, that such a transporting affects not a person's freedom, but is contrary to the morality and should not be considered as a part of trafficking in humans.²⁰

In 2003 the new Penal Code came into force. Its art. 147 introduced new version of trafficking in persons. A person was liable for this crime if any of these acts was committed – selling, purchasing, otherwise conveying and acquiring a person. The description of criminal intent has broadened – it

18 Vaiko teisių konvencija. [1989] Valstybės žinios, 1995-07-21, Nr. 60-1501

19 Jungtinių Tautų Konvencija dėl visų formų diskriminacijos panaikinimo moterims. [1979] Valstybės žinios, 1996-03-08, Nr. 21

20 Tarptautinė migracijos organizacija. 'Prekybos žmonėmis nusikaltimų tyrimo bei teismo nagrinėjimo problemos Lietuvoje'. Vilnius, 2006. p. 38

was sufficient to prove that any kind of pecuniary or personal benefits was received. No measures to influence victim's free will were included. Transporting for the purposes of prostitution was criminalised in other section of Penal Code. Lithuanian legal doctrine expressed a view, that the norm lacked certainty, contrary to EU law, but in the other hand, definition of criminal intent was more useful for practical purposes²¹ and did not require to introduce into Lithuanian law unusual construction of not only seeking, but also knowing, that the victim would be abused.²²

POST-EU REGULATION IN LITHUANIAN PENAL CODE

Currently 4 norms of Lithuanian penal code explicitly deal with offences related to trafficking in human beings. Article 147 contains the general rule. Besides, the trafficking of children is criminalised in art. 157. The special characteristics of victim are taken into account while applying this rule. Furthermore, two norms penalise the consequences of such a criminal act. Art. 147¹ deals with use for forced labour, and newly inserted article 147² criminalises the use of forced labor or personal services. With regard to limited size of this work only art. 147 would be analysed.

The wording of art. 147 of Lithuanian penal code has several times changed. The most significant modification was made in 2005, when Lithuanian legislator implemented the EU framework decision 2002/629/JHA on trafficking of human beings. Short and practical definition was replaced by detailed regulation, copied from abovementioned framework decision. It offered more alternatives with regard to how the crime could be committed. In addition to selling, purchasing, conveying, or otherwise acquiring a person, both holding in captivity and such in their nature preparatory stages of this crime as recruiting and transporting were included. Also the way of how the crime was committed, was introduced into this norm for the first time in the history of Lithuanian criminal law. Newly changed art. 147 listed using physical violence or threats or by otherwise depriving of a possibility of resistance or by taking advantage of the victim's dependence or vulnerability or by resorting to deceit or by paying or granting other material benefit to a person who actually has the victim under his control, Besides, the definition of an aim pursued changed to the one previously unknown to the Lithuanian law. The offender could be punished only if he/she sought or was aware, that the victim would be used for prostitution or gaining profit from this person's prostitution or using him for pornography purposes or forced labour. It should be mentioned that the definition of the aim is more narrow than the one included in the framework decision.

In order to comply with the requirements of EU law the responsibility of legal person was introduced.

Generally, it can be said, that following the EU, Lithuania introduced into its law the three-branched definition of this particular crime. Trafficking of human beings could only be incriminated when the offender's act consisted at least of one attribute from each group.

21 A. Abramavičius, D. Mickevičius, G. Švedas, 'Europos Sąjungos teisės aktų įgyvendinimas Lietuvos baudžiamojoje teisėje' (Vilnius: Teisinės informacijos centras 2005). P. 138

22 Aiškinamasis raštas dėl Lietuvos Respublikos Baudžiamojo kodekso 147, 147¹, 157 ir 303 straipsnių pakeitimo, kodekso papildymo 147² straipsniu ir kodekso priedo papildymo įstatymo projekto.

After 2005, new legal acts concerning trafficking of humans were enacted on international and supranational level. In order to reflect them, changes were made in penal code.

As it was already mentioned, the EU directive 2011/36/EU contained broader list of criminal intents that the previous framework decision. Some of them – such as trafficking of humans with an intent to acquire the victim's organ, tissue or cells, were already applied in Lithuanian penal law and constituted an aggravating circumstance. Still, the aim of using the victim for begging or forcing the victim into criminal activity had to be introduced to Penal Code through 30/06/2012 amendment.

Aggravating circumstances, which now expressly included the perpetrator's status as a public official and serious harm or danger to the victims, were introduced to §2 of art. 147. Newly inserted §3 offered victims immunities from related offences. It should be mentioned that Lithuanian legislator did not accept the possibility of *expressis verbis* offering victims immunity also from administrative offences.

The last amendments resulted in the provision, that victim's consent to the subsequent use, does not disable the perpetrator's guilt, if any of abovementioned measures to control victim's free will was used. It is of particular importance because in many situations victim agrees to be sold, especially when prostitution is concerned.²³ When victim's consent does not eliminate perpetrator's responsibility, it is disputable, if art 308²⁴ of Lithuanian Penal Code is anymore required. Such criminal activity as transporting for prostitution purposes, involvement in prostitution are almost impossible without gaining control over the victim. These acts do not differ from the trafficking in human, but the sanctions do differ – and it is clear that art. 308 is a perfect way to escape more severe penalties. Author of this paper thinks that the art. 308 should be abolished, or at least penalty for involvement in prostitution should be increased.

It should be mentioned in this context, that EU law, as it concerns trafficking in humans, had a similar impact on other Member States law. I.e. Polish criminal law for a long time resisted its influence. Many authors agree, that pre-EU definition was unclear.²⁵ The Commission criticised such attitude²⁶, and finally in 2010 the definition of the crime was introduced.²⁷ From the first look it is clear, that the definition was copied from the EU law, and contains the same features, as introduced into Lithuanian law. It is worth noticing, that Lithuanian jurisprudence²⁸ and Polish

23 O. Fedosiuk, 'Prekyba žmonėmis kaip nusikaltimas žmogaus laisvei' // Jurisprudencija. 2003.T. 45 (37). P. 86–98

24 **Article 308. Involvement in Prostitution**

1. A person who involves a person in prostitution

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years.

2. A person who involves in prostitution a person dependent on him financially, subordinate in office or otherwise or involves a person in prostitution by using physical or mental coercion or by deceit or who, in any manner, involves in prostitution a minor shall be punished by imprisonment for a term of two up to seven years.

3. A legal entity shall also be held liable for the acts provided for in this Article.

25 Z. Ćwiąkański, [in] A. Zoll (red.), 'Kodeks karny. Komentarz, t. II' (Warszawa: Wolters Kluwer Polska 2008) p. 1155.

26 Report from the Commission, the Council and the European Parliament. Based on Article 10 of the Council Framework Decision of 19 July 2002 on combating against trafficking in human beings. Brussels, 02.05.2006 COM (2006) 187 final.

27 Ustawa z dnia 20 maja 2010 r. o zmianie ustawy – Kodeks karny, ustawy o Policji, ustawy – Przepisy wprowadzające Kodeks karny oraz ustawy – Kodeks postępowania karnego. Dz.U. 2010 nr 98 poz. 626 2010.09.08

28 Lietuvos Aukščiausiojo Teismo 2006 m. kovo 28 d nutartis baudžiamojoje byloje 2K–332/2006

legal doctrine²⁹ turned the same way – both of them decided, that new norm, based on EU law, narrowed the application of criminal responsibility. It should be also borne in mind, that Polish legislator abolished the norm criminalising involvement in prostitution because it was considered as trafficking in humans duplicate.³⁰

CONCLUSIONS

1. Serious changes were made both in constitutional and criminal law while implementing EU law. Still, sometimes the courts explain the EU based law contrary to its meaning and aims pursued.
2. The Directive 2011/36/EU describes the involvement in criminal activity only as involvement in misdemeanors and not very serious felonies, which should give profit to the perpetrator. It should be possible to incriminate the attribute when involvement in any criminal activity is concerned.
3. The requirement to give the victims the immunity from prosecution for the crimes directly connected with the human trafficking should be amended including the statement that victim should not be punished for any forced criminal activity.
4. Immunity for the offences the victim performs in order to get free from perpetrator should be granted.
5. The art. 308 should be abolished as duplicating the trafficking in human beings norm. If it is not removed from the Penal Code, at least penalty for involvement in prostitution should be increased in order to prevent avoiding penalties for gaining control over another person's will.

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29 A. Grzelak, M. Królikowski, A. Sakowicz, 'Europejskie prawo karne. Zarys prawa' (Warszawa: C.H.BECK 2012) p. 295

30 A. Sakowicz, Przestępstwo handlu ludźmi z perspektywy regulacji międzynarodowych, [2006] Prokuratura i Prawo. No. 3, p. 56–57.

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Travaux préparatoires:

Aiškinamasis raštas dėl Lietuvos Respublikos Baudžiamojo kodekso 147, 147¹, 157 ir 303 straipsnių pakeitimo, kodekso papildymo 147² straipsniu ir kodekso priedo papildymo įstatymo projekto.

THE HISTORICAL DEVELOPMENT OF REGULATION OF NON-MARITAL COHABITATION OF HETEROSEXUAL COUPLES AND ITS EFFECT ON THE CREATION OF MODERN FAMILY LAW IN EUROPE

Olga Beinaroviča*

University of Latvia, Latvia

Abstract. The institute of non-marital cohabitation appeared in “old Europe” as a solution to a spreading trend of *de-facto* unions. The official prohibition of divorce until the 20th century caused a common situation when persons, being officially married and having failed to be divorced, started cohabiting with persons other than their spouses. As no legal rules existed, cohabitation implied a series of complicated matters, particularly when a couple separated (e.g. division of assets). As late as in the 1960s, informal cohabitation was still not considered to be a legal subject. In the 1970s, law experienced some amendments, initially in Slovenia and Croatia, and later in Nordic countries.

Although today the most widespread type of private union between men and women is still marriage, new types of unions, such as non-marital cohabitation, exist. While marriage is legally recognised at both national and international levels, the institute of non-marital cohabitation often is excluded from the legislation of many countries. However, some researchers admit that evolution of legal policy on non-marital cohabitation is entering a new phase in West-European jurisdictions.

With increasing human mobility in Europe the number of cohabitating heterosexual couples is also rising significantly. Despite couples with cross-border dimension becoming more common, the differences between national legal systems still exist. This often results in unexpected and unwelcome consequences for cohabitants with regards to their legal status, especially when it comes to management of their property or separation.

The purpose of the research is two-fold:

- to give a short comparison of the models of cohabitation regulation in Europe that appeared in 20th century, and
- to examine how historical regularity of development of the law-making of non-marital cohabitation could be applied to the shaping of modern concept of family law in Europe.

Keywords: non-marital cohabitation, *de facto* unions, family life

INTRODUCTION

Traditional understanding of a family composed of a husband, a wife and children is still considered to be common in Europe. At the same time, other concepts of a family are commonly recognised. One of the so called new forms of family life is non-marital cohabitation (further – cohabitation). The institute is to be understood as a union between a man and a woman when

* M.jur., PhD, Department of European and International law, Faculty of Law, University of Latvia, Raiņa bulvāris 19, LV-1586, Riga, Latvia; E-mail: olga.beinarovica@gmail.com

persons live together on a permanent basis without having registered an official marriage. Within decades cohabitation of heterosexual couples has developed as a strong alternative to civil and religious marriage.

The number of cohabitating couples, as well as the number of children born in such unions, has been steadily increasing. This is confirmed by evidence from both statistical data and research¹. For instance, in 2007 in Germany there were around 2.4 million outside-marriage unions, 32 per cent of cohabitants had common children.² In 2000 in Sweden there were around 1.2 million cohabitants³. In 1991 in Portugal more than 194 000 people lived together without marriage (for comparison, 4.8 million were married⁴). In the United Kingdom 11 per cent of households in England and Wales are headed by a cohabitating couple.⁵ It is assumed that 2000–2001 figure will rise to 30 per cent of non-married woman-cohabitants under 50 by 2012.⁶ Some authors report different but very close figures: in the United Kingdom cohabitation is a choice of 8 per cent of couples, about 40 per cent of children are born during cohabitation and 80 per cent of them have both parents' names in birth certificate.⁷ In April 2007 census revealed that 2 million couples lived together, and the number of cohabitating couples to married ones is expected to grow from one in six to one in four by 2031.⁸ All around Europe the number of children who are born during cohabitation varies from 5 to 60 per cent,⁹ which additionally stresses the topicality of the phenomenon. Also in Latvia in 1990 more than 80 per cent of all children were born in families where parents were officially married.¹⁰ However, in 10 years non-marital cohabitation became much more common and by 2000 the number of children born to unmarried mothers rose from 20 to 30 per cent,¹¹ having kept increasing up til now. In 2012 the number of children born outside marriage was about 44 per cent, while 42 per cent of couples remained unmarried.¹²

The development of legislation must be able to respond to the challenges of social reality and requirements of modern life and society. Family law is one of such areas because it directly

1 F. Burton, "Family law" (London: Cavendish Publishing limited 2003) 36. M.D.A Freeman, C.M. Lyon, "Cohabitation without marriage: an essay in law and social policy" (Hants: Gower Publishing Co 1983) 1. S. Cretney, "Family law in the 20th century: A history" (New York: Oxford University Press 2005).

2 N. Dethloff, „Familienrecht, 29. Auflage“ (München: C.H.Beck 2009) 253.

3 A. Saldeen, "Cohabitation outside marriage or partnership" In: The international survey of family law (Bristol: Jordan Publishing limited 2005) 503.

4 S.O. Pais, "De facto relationships and the same-sex relationships in Portugal" In: The international survey of family law (Bristol: Jordan Publishing limited 2002) 338.

5 S. Harris-Short, J. Miles, "Family law: text, cases and materials, 2nd edition" (New York: Oxford University Press 2011) 2.

6 H. Wood, D. Lush, D. Bishop, "Cohabitation law, practice and precedents, 3rd edition" (Bristol: Jordan Publishing limited 2005) 6.

7 M. Welstead, S. Edwards, "Family law" (Oxford: University Press 2006) 23.

8 P. de Cruz, "Family law, sex and society" (London and New York: Rofledge 2010) 240.

9 V. Jarkina, A. Unbedahte, "Daži aspekti par partnerattiecībām Latvijā un ārvalstīs" [2009] Jurista vārdi 47(590) 40.

10 Latvijā teju puse bērnu dzimst neregistrētās attiecībās. Available: <http://www.delfi.lv/archive/print.php?id=42798504> [last accessed via Internet 7.03.2013].

11 J. Vēbers, "Latvijas Republikas Civillikuma komentāri. Ģimenes tiesības" (Rīga: Mans īpašums 2000)

12 Valsts neplāno aizsargāt neregistrētu kopdzīvi. Available: http://www.tvnet.lv/zinas/latvija/433976-valsts_neplano_aizsargat_neregistretu_kopdzivi/print [last accessed via Internet 6.02.2013].

affects mutual relations of persons and provides a certain balance in society. Apart from personal opinions of single individuals about marriage and cohabitation, a fact of wide spread of the latter is obvious, and it's undoubtful that many other forms, such as life-long unions, exist. An argument that it is individual responsibility for entering a union not recognised by a state does not stand the criticism, especially when children are born in such a union.

A number of couples of citizens of one nation, and especially of partners holding different citizenship of the European Union (further – EU), who choose unions other than marriage has been rising for years. At the same time the future of harmonisation of an approach to the concept of family and its correlation with *de facto* families stays unclear. It still has not drawn the necessary legislators' attention. Nevertheless, the provisions of legislation provided for cohabitants in European jurisdictions stay unclear.¹³ They do not hold the same rights granted to married couples¹⁴, being in especially vulnerable position with respect to property entitlement when the couple separates or if one of the partners dies.¹⁵ Also if it comes to cross-border situations, persons can not rely on continuity of their family relations when changing a country of residence.¹⁶

The content of the "family life" definition was extended by the European Court of Human Rights (further – EctHR) already in 1979 in *Marckx v Belgium*¹⁷ stating that *de facto* unions forms family life in a way it is done by an official marriage.¹⁸ In addition, Council of Europe, Court of the EU and EctHR play a significant role in developing the institute, having supported it by equality and non-discrimination principles.¹⁹ Still, some scholars argue that legal differences between marriage and non-marital cohabitation should be maintained as they tend to accommodate different family lifestyle choices and the latter should not be assimilated to marriage.²⁰ If debating about the international level of harmonization, such opponents as McGlynn are concerned that harmonization in the area of international family law tends towards the lowest common denominator.²¹

13 J.M. Scherpe, "The legal status of cohabitants – requirements for legal recognition" 283–294. In: "Common core and better law in European family law" Ed. by K. Boele-Woelki (Antwerp-Oxford: Intersentia 2005) 283.

14 R. Probert, "Cretney's family law. 6th edition" (London: Sweet&Maxwell 2006) 12. F. Burton, "Family law" (London: Cavendish Publishing limited 2003) 36. A. Barlow, "Living together: A guide to the law" (London: Fourmat Publishing 1992) 233.

15 K. Standley, "Family law. 5th edition" (Hampshire: Palgrave Macmillan 2006) 50.

16 N. Dethloff, "Arguments for the unification and harmonisation of family law in Europe" 37–44. In: "Perspectives for the unification and harmonisation of family law in Europe" Ed. by K. Boele-Woelki (Oxford-Antwerp-New York: Intersentia 2003).

17 C. O'Mahony, "Irreconcilable differences? Article 8 ECHR and Irish law on non-traditional families" [2012] International Journal of Law, Policy and the Family 26(1).

18 *Marckx v. Belgium*, Application no. 6833/74 [1979], available: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534> [last accessed via Internet 6.03.2013]

19 C. McGlynn, "Challenging the European harmonisation of family law: perspectives on "the family" In: „Perspectives for the unification and harmonisation of family law in Europe" ed. by K. Boele-Woelki (Oxford-Antwerp-New York: Intersentia 2003) 219 – 238.

20 S.O. Pais, "De facto relationships and the same-sex relationships in Portugal" In: The international survey of family law (Bristol: Jordan Publishing limited 2002) 339.

21 C. McGlynn, "Families and the European Union. Law, politics and pluralism" (Cambridge: University Press 2006) 199.

Nevertheless, even if the international law is not incorporated into national legal systems, it should be relevant for understanding domestic family law, and where the statutory wording is ambiguous or uncertain, national courts should assume that national legislator would not have intended to legislate contrary to the EU member states' international obligations.²² Within the entry into force of the Treaty of the functioning of the EU the EU has continued the developing of its own fundamental rights system. It has been argued that there is a concern of misuse of correct understanding of human rights and therefore EctHR should act as a safeguard.²³

1. ORIGINS OF THE DEVELOPMENT OF THE INSTITUTE

As the public opinion of the traditional family concept has significantly changed, cohabitation can be accepted as a new legal phenomenon of 21st century. But the institute of cohabitation has a long history, likewise the institute of marriage.²⁴ Glendon pointed out that cohabitation was not legally recognised even in the 1960's.²⁵ Still Bradley stressed that the principle declared by Napoleon „*les concubins se passent de la loi, la loi se désintéresse d'eux*”²⁶ was echoed in 1960's English law.²⁷ Lord Devlin mentioned that a man and a woman who lived together without registering a marriage were not punished in according to law, while were protected by law. They were beyond the law and their union was not binding to any obligations.²⁸

Among academia there is an opinion that origins of the cohabitation are to be found in ancient Rome, equalizing the institute with concubinate, which refers to a legal outside-marriage union which differs from both marriage and legal prostitution.²⁹ Another similar concept is reflected in French law,³⁰ where the term “*concubinage*” to define outside-marriage cohabitation has been used.³¹ However, cohabitation and concubinate should not be seen as mutually replaceable, because concubines have never obtained a legal status, nor have their children.³²

The origins of cohabitation in its modern form may be found in “old Europe”, especially France, where divorce was not legally allowed until 1884.³³ It fostered cohabitation of persons without

22 S. Harris-Short, J. Miles, “Family law: text, cases and materials” (Oxford: University Press 2007) 8.

23 D. Chalmers, G. Davies, G. Monti, “EU law cases and materials” (Cambridge: University Press 2010) 259.

24 A.R. Dublier, “Wifely behavior: a legal history of acting married” [2000] Columbia Law Review 100 963.

25 M.A. Glendon, “The transformation of family law. State law and family in the United States and Western Europe” (Chicago: University Press 1996) 252.

26 Concubines ignore the law, but law is indifferent towards them – author's translation.

27 D. Bradley, “Regulation of unmarried cohabitation in West-European jurisdictions – determinants of legal policy” [2001] International Journal of Law, Policy and the Family 15 22.

28 P. Devlin, “The enforcement of morals” (Oxford: University Press 1965) 77.

29 L.D. Wardle, L.C. Nolan, “Fundamental principles of family law. 2nd edition” 206. Available: <http://books.google.lv/books?id=WjgL3ha8OSQC&printsec=frontcover&hl=lv#v=onepage&q=concubinage&f=false> [last accessed via Internet 6.03.2013].

30 C.G. Bowman, “Unmarried couples, law and public policy” (Oxford: University Press 2010) 207.

31 B.Dickson, “Introduction to French law” (London: Pitman Publishing 1994) 217.

32 L.D. Wardle, L.C. Nolan, “Fundamental principles of family law. 2nd edition” 191. Available: <http://books.google.lv/book?id=WjgL3ha8OSQC&printsec=frontcover&hl=lv#v=onepage&q=concubinage&f=false> [last accessed via Internet 6.03.2013].

33 B.Dickson, “Introduction to French law” (London: Pitman Publishing 1994) 217.

registering marriage, as they could not qualify to conclude official marriage. The Civil Code of France of 1804 contained several provisions for setting paternity of children. Even if it did not affect the circumstances of cohabitation directly in a situation if a husband brought his concubine to a family home, a wife was authorized to request a divorce.³⁴ Despite legislation having not comprised direct provisions on cohabitation, the institute continued to exist. Glendon emphasized that by separation of such unions a problem of sharing common property and assets, which a woman could additionally use for her rights protection³⁵, became outstanding. Since 19th century courts assisted in dealing with property disputes between cohabitants by treating them similarly to spouses. Still, a practical difficulty arose to identify a contribution made by each cohabitants which often results in sharing property in equal parts.³⁶

2. CHANGES IN LEGISLATION DURING THE 20TH CENTURY

In the second half of the 20th century the main priority in family relations was given to fulfilment of emotional needs. This determined the development of the process of „*démariage*“³⁷, when a family concept abstracted from the necessity to conclude an official marriage. Persons, mostly women, became financially independent and felt free to build unions beyond marriage. Therefore, in the last 40 years the development of such personal relationships determined the involvement of lawyers, legislators and court when dealing with legal aspects of cohabitation and property disputes of cohabitants upon breaking unions. However, despite liberal public attitude towards cohabitation, legislators in several countries in Europe maintained a repressive approach towards persons who chose cohabitation instead of marriage.³⁸

34 Article 230 of the Code of Napoleon. Available: http://www.napoleon-series.org/research/government/code/book1/c_title06.html#chapter1 [last accessed via Internet 6.03.2013].

35 In France plaintiffs in property, acquired together during cohabitation, division cases mostly were women – author’s comment.

36 M.A. Glendon, “The transformation of family law. State law and family in the United States and Western Europe” (Chicago: University Press 1996) 256.

37 A. Barlow, “Regulation of cohabitation, changing family policies and social attitudes: a discussion of Britain within Europe” [2004] *Law & Policy* 26(1) 57.

38 Criminal penalty theoretically could be imposed in Italy till 1968, in a part of Germany – till 1970, in Norway – till 1972. In: D. Bradley, “Regulation of unmarried cohabitation in West-European jurisdictions – determinants of legal policy” [2001] *International Journal of Law, Policy and the Family* 15 22.

The Article 95 of the Police Code of Bavaria of 1891 (Polizeistrafgesetzbuch – german) stated that persons who lived together without registration of marriage could be punished by a fine, 8 days long custody and forced divorce. In: J.Eekelaar, N.K. Sanford, “Marriage and cohabitation in contemporary societies: areas of legal, social and ethical change : an international and interdisciplinary study. Available: <http://books.google.lv/books?id=bVqPAAAAAAAJ&q=bavarian+police+code+forcible+separation&dq=bavarian+police+code+forcible+separation&source=bl&ots=4D6-c2MMNU&sig=AMEJO7BjS832oZSf8wBP9fbjyTs&hl=lv&sa=X&ei=czs6UI6XIsGm4gSmxIDwDg&ved=0CDMQ6wEwAA> [last accessed via Internet 6.03.2013] 288.

The paragraph 379 of the *Penal Code of 1902* of Norway stated that living together in a sexual union without registration of marriage is an offence. In: M.Kautto, J.Fritzell, B.Hvinden et al. “Nordic welfare states in the European context” Available: http://books.google.lv/books?id=utE4NTnMtXYC&pg=PA100&lpg=PA100&dq=norwegian+code+of+1902+cohabitation&source=bl&ots=jlond62UYA&sig=MWDlpIfebKqGQfVwxBy2bR_Nmdf4&hl=lv&sa=X&ei=Jjo6UK-

In the 1970's progressive discussion on necessity to foresee the legal regulation of cohabitation³⁹ was initiated in ex-Yugoslavia. There (as well as in Hungary) non-marital cohabitants were to some degree legally protected already since Second World War. As a reference event the Federal Constitution of Yugoslavia of 1974 could be mentioned having delegated family law jurisdiction issues to autonomies.⁴⁰ Afterwards legislators established relevant laws in a series of countries: in 1976 in Slovenia, 1978 – Croatia, 1979 – Bosnia and Hercegovina, 1980 – Serbia and 1984 – Kosovo⁴¹.

Later the debate on legal regulation of cohabitation was held in Northern countries with an initiative of Swedish scholar Trost. He noted that the spread of cohabitation became particularly obvious in Sweden and Denmark from 1973 till 1978⁴², which additionally is being supported by his research data⁴³. It was the main subject of Northern countries lawyers' conference held in Reikjavik in 1975.⁴⁴ In 1980 the Family law Commission of Norway published a special report on unmarried partners, whereas in 1981 the Family law Commission of Denmark produced a report exclusively on non-marital cohabitation. In 1981 the Family law experts group of Sweden finalised its work on a report about proposals for changes in regulation of cohabitation.⁴⁵ However, some researchers underlined⁴⁶ that the Swedish legislator followed a theory of neutrality, having stressed a

fC4TY4QTE3oFw&ved=0CDAQ6AEwAA#v=onepage&q=norwegian%20code%20of%201902%20cohabitation&f=false [last accessed via Internet 6.03.2013] 100.

39 K. Boele-Woelki, "Perspectives for the unification and harmonization of family law in Europe". Available: http://books.google.lv/books?id=fzDYiBbXGVYC&pg=PA446&lpg=PA446&dq=Marital+and+other+family+relations+law+of+slovenia&source=bl&ots=BA-Yich4nM&sig=5GrgSjwZoy4nXzdBzo2ANVsSPZM&hl=lv&sa=X&ei=_kY6UNvVMK6Q4gTLuIDgDA&ved=0CCwQ6AEwAA#v=onepage&q=slovenia&f=false [last accessed via Internet 6.03.2013] 446.

40 M. Antokolskaia, "Harmonisation of family law in Europe: a historical perspective" (Antwerpen-Oxford: Interessantia 2006) 383.

41 A. Devers, "Private international law aspects of non-marital unions: some french reflections on the applicable law" [2003] Yearbook of Private International Law 5 192.

The Article 12 of the *Marital and other family relations law of Slovenia of 1976* stated that "the same legal norms are applicable to a union of a man and a woman even if they are not married but live together for a durable period of time as if they were married if there are obstacles to conclude an official marriage. See: P. Šarčević, "Private international law aspects of legally-regulated forms of non-marital cohabitation and registered partnerships" 38. In: Yearbook of Private International Law [1999] 1 ed. by P.Šarčević and P.Volken. Available: http://books.google.lv/books?id=BgJlQWD665AC&pg=PA38&lpg=PA38&dq=Marital+and+other+family+relations+law+of+slovenia&source=bl&ots=PbInUjEoAU&sig=ZQr7g52b6iCnxd_hUN6bHnHrDo8&hl=lv&sa=X&ei=_kY6UNvVMK6Q4gTLuIDgDA&ved=0CDEQ6AEwAQ#v=onepage&q=Marital%20and%20other%20family%20relations%20law%20of%20slovenia&f=false [last accessed via Internet 6.03.2013].

Whereas the Article 7 of the *The Law on Marriage and Family Relations of Croatia of 1978* stated that "a man and a woman who live together outside marriage have an obligation to ensure mutual support, property and other rights in accordance with the law". See: P. Šarčević, "Cohabitation without marriage: the Yugoslavian experience" [1981] *The American Journal of Comparative Law* 29(2) 321.

42 J. Trost, "A renewed social institution: non-marital cohabitation" [1978] *Acta Sociologica* 21(4) 303.

43 *Ibid*, 309–310.

44 A. Agell, "The Swedish legislation on marriage and cohabitation: a journey without a destination" [1981] *The American Journal of Comparative Law* 29(2) 285.

45 S. Danielsen, "Unmarried partners: Scandinavian law in the making" [1983] *Oxford Journal of Legal Studies* 3(1) 59.

46 D. Bradley, "Regulation of unmarried cohabitation in West-European jurisdictions – determinants of legal policy" [2001] *International Journal of Law, Policy and the Family* 15 23. A. Agell, "The Swedish legislation on marriage and cohabitation: a journey without a destination" [1981] *The American Journal of Comparative Law* 29(2) 285. M.A. Glendon, "The transformation of family law. State law and family in the United States and Western Europe" (Chicago: University Press, 1996) 274.

central role of official marriage in the family law, although it did not exclude the necessity to solve practical issues for heterosexual cohabitating couples. As it was acknowledged, such unions were characterised by fulfilment of family functions. A remark should also be made that legislators did not aim to create a new legal institute either at the national or international level, but rather to react to social changes in community for better protection of parties involved.

In England Domestic Violence and Matrimonial Proceedings Act of 1976 could be considered as the first attempt to extend the scope of law and promote the protection of cohabitants' rights.⁴⁷ Fatal Accidents Act of 1982 was amended in a way to grant a cohabitant the right to receive a compensation for maintenance provided by other cohabitant if he/she was a victim of a negligent homicide.⁴⁸ Qualifying criteria to be able to apply for compensation was set as follows: a survived cohabitant must have lived with a deceased in a common household as a husband and wife for at least 2 years before one of partners' death. However, already in 1995 Family Homes and Domestic Violence Bill became null and void for being criticised of reducing the difference between a marriage and other forms of unions.⁴⁹

3. MODERN DEVELOPMENT AT THE INTERNATIONAL ARENA

Despite the growing role of the institute of cohabitation not only in national, but also European and international family law, the international legal society has not actively turned itself to solving of problematic issues linked to the institute. As Cretney stressed the law still did not provide an adequate legal regime for couples who lived without registering official marriage. In 2002 Lord Lester notified that such couples faced extreme difficulties when legally recognizing the family life of such couples because they did not enjoy complete property rights, were not treated properly from the side of state institutions, especially in case of one of partner's severe illness or death.⁵⁰

There have been several conferences organized by the Council of Europe to be mentioned. In July 1981 in Italy the 11th colloquium on EU law took place, where problematic issues of regulation of cohabitation were discussed. In March 1999 in the Netherlands during the 5th European conference on family law a discussion on legally regulated forms of cohabitation was held.⁵¹

However, without trying to resolve problems of international private law in this area⁵², the Hague Conference of Private International law more than 20 years has followed the development

47 For example, Part 2 of the Article 2 of the Act stated that: "in the reference's 1 part includes a union of a man and a woman who live together in a common household as a husband and wife". Available: Domestic Violence and Matrimonial Proceedings Act 1976. Pieejams: http://www.bailii.org/uk/legis/num_act/1976/ukpga_19760050_en.pdf [last accessed via Internet 6.03.2013].

48 Fatal Accidents Act 1982. Available: http://www.bailii.org/uk/legis/num_act/1976/ukpga_19760030_en.pdf [last accessed via Internet 6.03.2013].

49 S. Cretney, "Family law in the 20th century: a history" (New York: University Press 2005) 523.

50 Ibid, 524.

51 A. Devers, "Private international law aspects of non-marital unions: some french reflections on the applicable law" [2003] Yearbook of Private International Law 5 196.

52 K. Boele-Woelki, "Private international law aspects of registered partnerships and other forms of non-marital cohabitation in Europe" [2000] Louisiana Law Review 60(4) 1053.

of the institute of non-marital cohabitation. A special report on the issue was prepared⁵³ having indicated some rising problems regarding non-marital cohabitation with international nature. Šarčević has positively evaluated such actions,⁵⁴ having mentioned that the most challenging task was to agree on a common definition so that it accepted even those states in national legal system of which the regulation of cohabitation did not exist.

In September 2001 a group of international scholars settled a Commission on European Family Law⁵⁵. As a representative of its Organisational Committee, Boele-Woelki announced that one of the Commissions's activities direction would cover the research of new forms of cohabitation, including all formal and informal forms of it. The main goal of this research direction is to create a model at the European level at least regarding cohabitation.⁵⁶

Despite such inactive involvement of international organizations addressing the problems regarding regulation of cohabitation there is still a strong academic confidence about the necessity of drawing-up a EU Council regulation or recommendation of International law institute concerning this topic.⁵⁷ Thus, it may be concluded that the regulation of non-marital cohabitation remains a topical debatable matter in the doctrine of European and international family law.

4. PERSPECTIVES OF FUTURE AMENDMENTS TO MODERN FAMILY LAW IN EUROPE

Material law norms on the recognition of the unmarried cohabitation vary significantly across the European countries. At the EU level, the European Commission has no power to make pressure in this area. But what could and should be done to equalize the rights of cohabitating partners with the status of spouses is to follow the case-law of the ECtHR and the Court of the EU at the national level and to establish common minimal standards at the EU level. There are clear indications that the reform must be brought into European family law harmonizing the common approach to the legal perception of persons who choose other than traditional family model form. Some jurisdictions have been more willing and prompter than others in reforming law relating to cohabitation of couples outside marriage.⁵⁸

A proposal for harmonised private international law rules relating to cohabitation divided experts at a General Affairs meeting of the Hague Conference of Private International Law in 2000.

53 Note on developments on internal and private international law concerning cohabitation outside marriage, including registered partnerships. Hague Conference on Private International law, Council of the General Affairs and Policy of the Conference, 2008. Available: http://www.hcch.net/index_en.php?act=events.details&year=2008&varevent=261&zoeek=cohabitation [last accessed via Internet 6.03.2013].

54 N.A. Baarsma, "The Europeanisation of International Family law". Available: http://books.google.lv/books?id=JHneB1-54xn8C&pg=PA54&lpg=PA54&dq=international+conferences+on+non-marital+unions&source=bl&ots=fXJwBID-nw&sig=PXp9iLVmAtQCd__8t7BJ23r-Y&hl=lv#v=onepage&q=non-marital%20cohabitation&f=false [last accessed via Internet 6.03.2013].

55 Commission of European Family law. Available: <http://ceflonline.net/history/> [last accessed via Internet 6.03.2013].

56 K. Boele-Woelki, "The Principles of European family law: its aims and prospects" [2005] *Utrecht Law Review* 1(2) 163.

57 A. Devers, "Private international law aspects of non-marital unions: some french reflections on the applicable law" [2003] *Yearbook of Private International Law* 5 197.

58 P. de Cruz, "Family law, sex and society" (London and New York: Rofledge 2010) 282.



The proposals to start work on this item with a view to develop a set of harmonised choice of law rules were vehemently resisted by a number of delegations, notably on the ground that cultural and legal values in EU are too diverse to reach agreement on private international law rules.⁵⁹ Notwithstanding later one of the strategic directions of the activities of Hague Conference of Private International Law was defined as developing a topic on private international law aspects of cohabitation outside marriage and registered partnership.⁶⁰

The Commission on European Family Law is viewed as a first step to harmonize family law at the EU level by some researchers.⁶¹ One of its work fields work concerns the new forms of cohabitation, including all types of formal and informal cohabitation, outside marriage.⁶²

Nevertheless, trying to protect the only possible concept of traditional family as marriage countries are cautious to invent any harmonization at the EU level. The EU is not competent to adopt provisions concerning material family law. Taking into account that cohabitation also is not a legal institute in many member states any proposals on harmonization could lead to the same reaction. Therefore the author suggests working out a common approach to defining the institute and developing the main criteria for recognizing the legal institute.

CONCLUSION

After theoretical and empirical analysis it can be concluded that:

1. Cohabitation as a new form of unions between men and women is becoming very popular, especially when human mobility in the EU has escalated due to no internal borders. Still, cohabitation as a legal institute is not recognised at either national level by many most EU member states or the supranational level. Therefore, cohabitants are not granted similar level of protection of their rights.
2. The development of legislation should respond to the challenges of social reality and requirements of modern life. This is particularly critical for family as it directly affects mutual relations of persons and provides certain balance in society. At the same time, the future of harmonisation of the approach to the concept of family and its correlation with the *de facto* families stays unclear.
3. Cohabitation was not legally recognised up until the 1960's. Its origins in its modern form may be found in "old Europe", especially France, where divorce was not legally allowed until 1884. It fostered cohabitation of persons without registering marriage, as they could not qualify to conclude official marriage.
4. Among academia there is an opinion that origins of cohabitation are to be found in ancient Rome, equalizing the institute with concubinate, which refers to a legal outside-marriage union still

59 A. Fiorini, "Rome III – choice of law in divorce: is the europeization of family law going too far?" [2008] *International Journal of Law, Policy and the Family* 22(2) 193.

60 Strategic plan update, drawn up by the Permanent Bureau of the Hague Conference of Private International law. Preliminary Document No 2 of February 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference. Available: http://www.hcch.net/upload/wop/genaff_pdo2e2008.pdf [last accessed via Internet 6.03.2013].

61 N. Dethloff, "Familienrecht, 29. Auflage" (München: C.H.Beck 2009) 18.

62 K. Boele-Woelki "The Principles of European family law: its aims and prospects" [2005] *Utrecht Law Review* 1(2) 163.

being different from both marriage and legal prostitution. However, cohabitation and concubinate should not be seen as mutually replaceable, because concubines have never obtained a legal status, nor have their children.

5. A progressive discussion on the necessity to foresee the legal regulation of cohabitation was initiated in ex-Yugoslavia and Hungary, later spreading to Northern countries. Protection of rights of cohabitants varied from defining a new legal institute to solving practical issues of such unions. Currently, cohabitation remains a topic of interest for international organisations.

6. The European Commission has no power to make pressure to harmonise material law norms in the area of family law. But what could and should be done to equalize the rights of partners with the status of spouses is to follow the case-law of the ECtHR and the ECJ at the national level and to establish common minimal standards at the EU level. Working out a common approach to define the institute and develop the main criteria for recognizing the legal institute is suggested.

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INTERACTION OF DOMESTIC LAW OF UNITED STATES OF AMERICA WITH DOMESTIC LAWS OF OTHER COUNTRIES DEALING WITH REPARATION FOR NAZI CRIMES

Nika Bruskina*

Vilnius University, Lithuania

Abstract. The United States of America (hereinafter – the USA/US) is considered to be an active participant and negotiator in the questions related to the reparation for the crimes committed during the National Socialist (hereinafter – Nazi) regime. At the end of the 20th century – the beginning of the 21st century, the case-law or the risk of it in the courts of the USA was one of the factors urging the Swiss banks to make payments for the dormant bank accounts opened by or on behalf of Holocaust victims, etc.; urging certain insurance companies to pay on insurance policies issued prior to and during the Nazi era; urging the Federal Republic of Germany (hereinafter – Germany) and the Republic of Austria (hereinafter – Austria) and their companies to take measures in order to compensate for forced labour during the Nazi regime, etc. However, it should be mentioned that not only the litigation in the American courts was essential. Economic and political pressure, support of the victims in the USA, the risk of negative reputation gave impetus as well. The settlements had influence on both the domestic law of defendant countries and the USA. Furthermore, the USA has been urging other countries to enact legislation on restitution or compensation for the private/communal property seized during the totalitarian regimes.

Keywords: Nazi, Holocaust, USA, compensation, reparation

INTRODUCTION

The process of restitution or compensation for the crimes committed during the Nazi regime is not always effective and timely. To make matters worse, some categories of victims or some violations are out of the scope of the national regulation. The USA is considered to be an active participant and negotiator in the questions related to the reparation for Nazi crimes up to our days. The object of this paper is the settlements reached regarding the Holocaust era lawsuits in American courts at the end of the 1990s – beginning of the 2000s and the acts of the USA urging other countries to take measures on restitution/compensation for the private/communal property seized during the Nazi/Communist Regimes. It is aimed to establish the interaction between the

* In 2009, Nika Bruskina graduated from Law faculty, Vilnius university (Lithuania) and got her Master's degree. The specialization of Nika Bruskina is the international law and European Union law. Her main research interest is the international protection of human rights. From 2009, she has been PhD student at Department of Public Law, Law faculty, Vilnius university. During her PhD studies Nika has been running the workshops on international public law and supervising the term papers of the students. In her doctoral thesis Nika is analyzing the problems and effectiveness of the compensation for the crimes committed during Nazi and Communist regimes in the context of international law and domestic law. She has already presented the results of her research in several international conferences. Nika is the author of certain scientific articles related to her doctoral thesis.

legal system of the USA and other countries' in this particular context as well as the factors influencing this relationship.

I HOLOCAUST-ERA CLAIMS IN AMERICAN COURTS AT THE END OF 1990S – BEGINNING OF 2000S

A. Overview of Litigation

Claims Against Swiss Banks as Start

In 1996–1997, some class action lawsuits were filed in the USA District Court for the Eastern District of New York against certain Swiss banks. Besides those lawsuits, huge economic and commercial pressure was put on Swiss financial institutions¹. Thus, negotiations concerning settlement were launched. In August 1998, the parties reached an agreement to settle the lawsuits for U.S. \$1.25 billion. The distribution of the funds for this settlement proceeded under the supervision of the Court (Judge Edward R. Korman). The Swiss bank settlement involved not only dormant accounts, but also insurance claims and claims for looted assets, slave and forced labour, refugee class².

Claims Against Other Banks

In 1998, there were lawsuits against German, Austrian banks. In March 1999, Bank Austria and its subsidiary, Creditanstalt, settled the lawsuits against them for \$40 million (the settlement was approved by Judge Kram in January 2000)³. Certain actions were against French banks as well. French banks and the government of France preferred diplomatic, not judicial method. In 18 January 2001, the agreement was concluded between the USA and France on the payments of compensation to Holocaust survivors and their heirs who had claims against French banks for deposits made during the Holocaust era⁴. The agreement also provides compensation to individuals who were subjected to additional anti-Semitic persecution. On 21 February 2006, the governments of France and the USA exchanged letters providing a special \$15,000 payment to Holocaust survivors and a final \$1,000 payment to thousands of heirs resulting from seized French bank accounts of Jewish victims of the Holocaust. This completed the agreement originally signed in January of 2001⁵.

1 L. Collins, 'Reflections on Holocaust Claims in International Law' [2008] 41(3) Israel Law Review 408.

2 U.S. Department of State, Swiss Bank Settlement <<http://www.state.gov/p/eur/rt/hlcst/c11378.htm>>, visited on 26 January 2013; M. J. Bazylar, 'The Holocaust Restitution Movement in Comparative Perspective' [2002] 20 Berkeley Journal of International Law 15–16.

3 M. J. Bazylar, 'The Holocaust Restitution Movement in Comparative Perspective' [2002] 20 Berkeley Journal of International Law 18.

4 Agreement between the Government of France and the Government of the United States of America concerning payments for certain losses suffered during World War II (with annexes and joint statement). Washington, 18 January 2001, UNTS Vol. 2156, p. 281 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202156/v2156.pdf>>, visited on 17 March 2013.

5 U.S. Department of State, French Bank Agreement <<http://www.state.gov/p/eur/rt/hlcst/c13540.htm>>, visited on 25 March 2013.



Insurance Claims

The claims against insurance companies began with class action lawsuits in the USA in 1997. Keeping in mind that insurance companies in the USA are regulated at the state level, and receive their licences to operate from the state, the companies were threatened that the licences to do business in the state would be revoked for failure to honour the claims for compensation. With support from the National Association of Insurance Commissioners and the U.S. Department of State, the International Commission for Holocaust Era Insurance Claims (hereinafter – ICHEIC) was established in August 1998⁶. ICHEIC's mission is to resolve unpaid insurance policies filed by the beneficiaries of Holocaust-era policies and their heirs.

Slave and Forced Labour Claims

The USA courts were flooded with the claims against German companies having used forced labour. In the course of those lawsuits, the United States Government played a great role in the negotiations that resulted in the establishment of the German Foundation “Remembrance, Responsibility, and the Future” (hereinafter – German Foundation)⁷.

Austrian government's actions to compensate former slave labourers can be explained by the precedent of Germany and German companies which had used forced labour⁸. Under the Agreement of 24 October 2000, the Reconciliation Fund was created⁹. The General Settlement Fund for Victims of National Socialism (hereinafter – General Settlement Fund) was established under the Agreement of 23 January 2001¹⁰.

B. Why did Nazi Victims Choose American Courts and Why Only in 1990s?

Analyzing the Holocaust-era claims of the 1990s one can ask why the victims of Nazi persecution chose the USA courts to litigate, but not, for instance, the court of a country where the violation

6 U.S. Department of State, Insurance <<http://www.state.gov/p/eur/rt/hlcst/c11381.htm>>, visited on 31 March 2013.

7 See Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation „Remembrance, Responsibility and the Future“, 17 July 2000, Berlin, UNTS Vol. 2130 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202130/v2130.pdf>>, visited on 15 May 2012.

The German Foundation made payments for the slave and forced labor, other personal injury (including medical expenditures) and certain property loss or damage caused by German companies during the Nazi era, including claims against German banks and insurance companies.

8 M. J. Bazylar, ‘The Holocaust Restitution Movement in Comparative Perspective’ [2002] 20 Berkeley Journal of International Law 25.

9 Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund „Reconciliation, Peace and Cooperation“ (Reconciliation Fund), 24 October 2000, Vienna, UNTS Vol. 2162, p. 3 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202162/v2162.pdf>>, visited on 16 March 2013. That Fund provided payments to certain slave laborers and forced labourers in Austria during the Nazi era.

10 Agreement between the Austrian Federal Government and the Government of the United States of America concerning the settlement of issues of compensation and restitution for victims of national socialism, 23 January 2001, Vienna, UNTS Vol. 2170, p. 279 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202170/v2170.pdf>>. visited on 27 March 2013. Payments from the General Settlement Fund cover a variety of property losses, including the non-payment of insurance policies.

had taken place or where the victims resided. M. Bazylar summarised as follows: American courts are famous for recognizing jurisdiction over defendants whereas courts of other countries would find jurisdiction to be lacking¹¹; American-style discovery, unknown in Europe, allows the plaintiff's lawyers to better develop the case through requests for production of documents, requests for admission, and depositions of adverse parties and witnesses during the pre-trial process; the usual guarantee of jury trials in civil cases and the fact that juries are granting awards in the millions (or even billions) of dollars made the filing of a Holocaust-era lawsuit in the United States more likely to succeed financially; furthermore, the existence of the concept of a "class action," where representative plaintiffs can file suit not only on their own behalf, but also on behalf of all others similarly situated, creates a more efficient system of filing suits and raises the prospect of large awards against wrongdoers; American attorneys are greater risk-takers than their European colleagues¹². However, the court system of the USA should not be overvalued. One should recall that there are no judgments of the American court related to the Holocaust-era claims of the 1990s, since during the litigation the settlements were adopted or some of those lawsuits were dismissed on jurisdictional grounds.

Usually scholars are analyzing why it took so much time to decide on the compensation to the Nazi victims (the campaign in American courts began only in the 1990s). It is stated that one of the main reasons is the Cold War and the Communist regime since the governments of Russia and its satellites refused to permit research into Holocaust questions or the payment of compensation to Holocaust victims and their heirs¹³. Consequently, the end of the Communist regime in Eastern Europe made it possible to extend Holocaust programs to the victims of those countries. Others state that claims in those years were the last chance for many Holocaust survivors¹⁴.

C. Why Were Reached Such Settlements?

One can raise a question why the countries and their companies agreed to pay for the injuries.

First, the role of media drawing the public attention to the problems of reparation to Holocaust victims should not be forgotten¹⁵.

11 Changes occurred in the case-law of the American courts. Beginning from the famous case *Filartiga v. Pena-Irala* the courts were to allow a human rights case to proceed even if the contested acts did not occur in the United States and the plaintiff is not American. M. J. Bazylar, 'The Holocaust Restitution Movement in Comparative Perspective' [2002] 20 *Berkeley Journal of International Law* 13–14.

12 M. Bazylar, 'From "Lamentation and Liturgy to Litigation": the Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits in American Courts' [2011]. 95 *Marquette Law Review* 250–252. Some of these arguments are also enumerated by M.R. Marrus. M.R. Marrus, 'Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s' (University of Wisconsin Press 2009) 84.

13 U.S. Department of State, Holocaust Issues, <<http://www.state.gov/p/eur/rt/hlcst/>>, visited on 26 January 2013. Also see M.R. Marrus, 'Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s' (University of Wisconsin Press 2009) 75–77. For instance, new documents, opened archives from the Soviet Union countries (i.e. evidence) were revealed, the end of the Soviet bloc prompted new demands to reckon with past wrongs.

14 M.R. Marrus, 'Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s' (University of Wisconsin Press 2009) 79.

15 M.R. Marrus, 'Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s' (University of Wisconsin Press 2009) 11–12, 27. For instance, in 1995, Israeli historian and journalist Itamar Levin, deputy editor of an Israeli busi-

Second, the settlement was useful for some reasons: reaching a settlement, the defendants were protected from rather big litigation costs; the settlement was a more rational use of money (spending it on Holocaust victims but not on litigating lawyers); not litigating the corporations evaded perverse reputation in the market of the USA¹⁶. One of the reasons to come to terms was the precedent of Swiss bank settlement¹⁷. At that time in certain states of the USA, the boycott was declared to the subsidiaries of the Swiss banks, i.e. the risk to other corporations and banks was real¹⁸. Despite the fact that it is stated that the litigation in the American court had a great impact on the settlements and that both parties of the negotiations agreed that without such litigation the sum of the payment would have been smaller¹⁹, one can find a statement that the dismissal of five claims in the course of the negotiations influenced the sum of the payment for the forced labour in the German companies; otherwise the sum could have been bigger²⁰.

Third, the claimants were supported at the high governmental and business levels. President Clinton appointed Stuart Eizenstat as a special representative to participate in the negotiations. World Jewish Congress and Jewish Material Claims Against Germany also pressed German companies to pay compensation as those companies were not held responsible for their participation in the use of the forced labour²¹. A lot of foreign countries were involved in the process, not only the USA. For example, Israel, East European countries, where the forced labour had been used, (Belarus, Czech republic, Poland, Russia, Ukraine) urged Germany to pay compensation.

Fourth, political and diplomatic reasons were important. Such settlements are supposed to be a way for the United States to keep friendly relations with its close trading partner, in the interest of foreign policy²². For example, not settling the problem could put diplomatic relations with German East neighbouring countries at risk²³.

ness newspaper *Globes*, wrote articles on how the Swiss banks had mistreated heirs of deceased Holocaust victims. Later the international press spread those facts throughout the world. In 1995–1997, the Western media was full of information on stolen Jewish property. Within about a year after Levin's report, lawyers filed three class action lawsuits in a federal court in Brooklyn against the three Swiss banks – Credit Suisse, the Union Bank of Switzerland and the Swiss Bank Corporation.

16 The reputation was extremely important for the companies as they were acting in the USA market.

17 M.R. Marrus, 'Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s' (University of Wisconsin Press 2009) 18; M. J. Bazyley, 'The Holocaust Restitution Movement in Comparative Perspective' [2002] 20 *Berkeley Journal of International Law* 17.

18 L.Collins, 'Reflections on Holocaust Claims in International Law' [2008] 41(3) *Israel Law Review* 408. Especially, it was relevant for the companies exporting their goods and having their subsidiaries in the USA.

19 J. Authers, 'Making Good Again: German Compensation for Forced and Slave Labourers'. In 'The Handbook of Reparations' (New York: Oxford University Press Inc 2006) 440.

20 M. J. Bazyley, 'Holocaust Justice: The Battle for Restitution in America's Courts' (New York: New York University Press 2003) 77.

21 J. Authers, 'Making Good Again: German Compensation for Forced and Slave Labourers'. In 'The Handbook of Reparations' (New York: Oxford University Press Inc 2006) 429.

22 J. Bell, 'Maybe not the Best Solution, But a Solution: the German Foundation Agreement' [2004] 6:107 *Cardozo journal of Conflict Resolution* 110–111.

23 B. Neuborne, 'Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement' [2003] 58:615 *NYU Annual Survey of American Law* 619.

D. Implementing Settlements and Role of USA

The settlements had influence on the domestic law of countries, since implementing their obligations states adopted the relevant new laws²⁴ or made amendments to the laws on social benefits for the Nazi victims²⁵.

One can notice in the settlements under discussion that the USA undertook to control the process. For instance, the Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation (hereinafter – C.I.V.S.) had an obligation to issue and transmit to the US Government a confidential report, setting forth on a case-by-case basis the results of each case, the bases for decisions if denied, and the amounts awarded²⁶. The USA participated in the appointment of members of the committees, arbitration panel under the agreements²⁷. Furthermore, under the Reconciliation Fund agreement, for instance, Austria agreed to “continue to pursue discussions with interested parties concerning potential gaps and

24 For instance, the Law on the Creation of a Foundation “Remembrance, Responsibility and Future” [2 August 2000], entered into force [August 12, 2000] Federal Law Gazette I 1263, last amended by the Law of 1 September 2008, which came into force [9 September 2008] Federal Law Gazette I 1797 <<http://www.stiftung-evz.de/eng/the-foundation/law.html>>, visited on 28 March 2013; Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law), as well as on an Amendment to the General Social Security Law and the Victims Assistance Act (NR: GP XXI AB 476 p. 55.BR: AB 6301 p. 672, latest version as at: June 2010). Original version: Federal Law Gazette I no. 12/2001, <http://en.nationalfonds.org/docs/EFG_DT_EN.pdf>, visited on 6 August 2012, Bundesgesetz über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmaßnahmen (Entschädigungsfondsgesetz) StF: BGBl. I Nr. 12/2001 (NR: GP XXI AB 476 S. 55. BR: AB 6301 S. 672.) <<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001181>>, visited on 30 March 2013; Federal Law – Concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime (Reconciliation Fund Law) <http://www.reconciliationfund.at/db/admin/de/index_main.php?cbereich=5&cthema=374&carticle=733&fromlist=1>, visited on 6 August 2012.

25 Agreement between the Austrian Federal Government and the Government of the United States of America concerning the settlement of issues of compensation and restitution for victims of national socialism, 23 January 2001, Vienna, UNTS Vol. 2170, p. 279 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202170/v2170.pdf>>. visited on 27 March 2013. See Paragraph 4 b of Annex A.

26 Agreement between the Government of France and the Government of the United States of America concerning payments for certain losses suffered during World War II (with annexes and joint statement). Washington, 18 January 2001, UNTS Vol. 2156, p. 281 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202156/v2156.pdf>>, visited on 17 March 2013. See Annex B, Paragraph J.

27 The Fund making payments to the victims under that agreement was to supervised by a Board of five members, two of whom to be appointed by the USA. Agreement between the Government of France and the Government of the United States of America concerning payments for certain losses suffered during World War II (with annexes and joint statement). Washington, 18 January 2001, UNTS Vol. 2156, p. 281 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202156/v2156.pdf>>, visited on 17 March 2013. See Annex B, paragraph F.2. The USA was to appoint one of the members of the committee for property matters. Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation „Remembrance, Responsibility and the Future“, 17 July 2000, Berlin, UNTS Vol. 2130 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202130/v2130.pdf>>, visited on 15 May 2012. See Paragraph 11 of Annex A of the Agreement. The USA was to appoint one member of the Claims Committee for all property aryianization claims and the USA, with prior consultation with the Conference on Jewish Material Claims, the Austrian Jewish Community, and attorneys for the victims, and Austria was to appoint one member of the Arbitration Panel for In Rem Restitution of Publicly-Owned Property, the Government of the USA and Austria were to consult regarding the recommendations of the Arbitration Panel under that agreement. Agreement between the Austrian Federal Government and the Government of the United States of America concerning the settlement of issues of compensation and restitution for victims of national socialism, 23 January 2001, Vienna, UNTS Vol. 2170, p. 279 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202170/v2170.pdf>>. visited on 27 March 2013. See Paragraphs 3 d, s and Paragraph 2a of Annex A.



deficiencies in the restitution and compensation legislation enacted by Austria after World War II to address aryanization issues during the National Socialist era or World War II on the territory of present-day Austria” and it is stated that the USA will facilitate this process²⁸.

The Office of the Special Envoy for Holocaust Issues should be mentioned. It “develops and implements U.S. policy with respect to the return of Holocaust-era assets to their rightful owners, compensation for wrongs committed during the Holocaust, and Holocaust remembrance”²⁹. The Office has been involved in the negotiations related to the Holocaust-era claims and in implementing various relevant agreements.

E. Impact of Settlements on Litigation in USA

The settlements analyzed above gave impetus to the future litigation in the USA as well. Before reaching a settlement desire to make “legal peace”, not to have the same claims in the American courts was extremely important for the states and their companies. One can find such provisions concerning the legal peace / legal closure in the settlements made in the course of the lawsuits in the US courts in the 1990s. For example, in return for \$1.25 billion, plaintiffs agreed to waive all lawsuits against the Swiss banks being sued; the settlement released not only the defendant banks but also “the government of Switzerland, the Swiss National Bank, all other Swiss banks, and all other members of Swiss industry, except for the three Swiss insurers who are defendants in the federal class action insurance litigation”³⁰. Paragraph 1 of Article 2 of the German Foundation agreement provides that “[t]he United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest”³¹. The similar provisions regarding the elimination of the claims from the litigation in the USA courts are entrenched in the French banks’ Agreement³², the Reconciliation Fund and General Settlement Fund Agreements³³.

28 Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund „Reconciliation, Peace and Cooperation“ (Reconciliation Fund), 24 October 2000, Vienna, UNTS Vol. 2162, p. 3 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202162/v2162.pdf>>, visited on 16 March 2013. See Part 4 of Article 1 of the Agreement.

29 U.S. Department of State, Holocaust Issues, <<http://www.state.gov/p/eur/rt/hlctst/>>, visited on 26 January 2013.

30 M. J. Bazylar, ‘The Holocaust Restitution Movement in Comparative Perspective’ [2002] 20 Berkeley Journal of International Law 16.

31 Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation „Remembrance, Responsibility and the Future“, 17 July 2000, Berlin, UNTS Vol. 2130 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202130/v2130.pdf>>, visited on 15 May 2012. Also, see the preamble, Paragraph 1 of Article 1 of the Agreement, Annex B, Joint Statement.

32 Agreement between the Government of France and the Government of the United States of America concerning payments for certain losses suffered during World War II (with annexes and joint statement). Washington, 18 January 2001, UNTS Vol. 2156, p. 281 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202156/v2156.pdf>>, visited on 17 March 2013. See the preamble, Paragraph 1 of Article 1, Article 2 of the agreement, Annex C.

33 Agreement between the Austrian Federal Government and the Government of the United States of America concern-

The US' interests in reaching this legal peace include the interest to bring some measure of justice to the victims of the Nazi era or World War II in their lifetimes; the interest in the furtherance of the close cooperation with the friendly country and trading partner, Austria, and important European Ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of victims come; and the interest in achieving legal peace for all claims that have been or may be asserted against Austria and/or Austrian companies involving or related to the claims covered by the Reconciliation Fund / German companies arising from their involvement in the Nazi era and World War II³⁴.

It should be noted that the money was to have been transferred only on condition the last claim was dismissed in the American court³⁵. Thus, after the last class action in the USA was dismissed, and the Austrian Federal Government announced on 13 December 2005 that legal peace had been obtained, the General Settlement Fund began making first advance payments³⁶.

The case-law of the USA courts prove that such lawsuits are dismissed in the interests of the USA. For example, the plaintiff, Simon Frumkin, was enslaved and forced to work during the war for Philipp Holtzmann, AG. The court dismissed Mr Frumkin's claims, "not because he was underserving of relief, but because the magnitude of World War II had placed claims such as his beyond the province of the court, and into the political realm"³⁷. Another example: the State of California

ing the Austrian Fund „Reconciliation, Peace and Cooperation“ (Reconciliation Fund), 24 October 2000, Vienna, UNTS Vol. 2162, p. 3 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202162/v2162.pdf>>, visited on 16 March 2013. See the preamble, Article 1 and 2, Annex B. Agreement between the Austrian Federal Government and the Government of the United States of America concerning the settlement of issues of compensation and restitution for victims of national socialism, 23 January 2001, Vienna, UNTS Vol. 2170, p. 279 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202170/v2170.pdf>>, visited on 27 March 2013. See the Note Verbale of the Federal Ministry for Foreign Affairs of the Republic of Austria, Paragraph 10 of Annex A and the affirmative reply of the Embassy of the USA.

34 Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund „Reconciliation, Peace and Cooperation“ (Reconciliation Fund), 24 October 2000, Vienna, UNTS Vol. 2162, p. 3 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202162/v2162.pdf>>, visited on 16 March 2013. See Annex B; Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation „Remembrance, Responsibility and the Future“, 17 July 2000, Berlin, UNTS Vol. 2130 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202130/v2130.pdf>>, visited on 15 May 2012. See Annex B.

35 For instance, according to the Joint Statement of 18 January 2001 (Paragraph 3(c)), the \$ 22.5 million contribution of the banks shall be due and payable to the Fund once all cases pending as of 18 January 2001, against banks arising out of World War II have been dismissed with prejudice. Agreement between the Government of France and the Government of the United States of America concerning payments for certain losses suffered during World War II (with annexes and joint statement). Washington, 18 January 2001, UNTS Vol. 2156, p. 281 <<http://treaties.un.org/doc/Publication/UNTS/Volume%202156/v2156.pdf>>, visited on 17 March 2013. Also, the General Settlement Fund "will be capped at 210 million US-Dollar plus interest, at the Euribor rate, accruing to it beginning 30 days after all claims, pending as of June 30, 2001, against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II are dismissed with prejudice". Annex A, Paragraph 2 of the General Settlement Agreement. Under Paragraph 4, Part d of the Joint Statement, DM 5 billion contribution of German companies shall be due and payable to the Foundation and payments from the Foundation shall begin once all lawsuits against German companies arising out of Nazi era and World War II pending in the USA courts are dismissed with prejudice by the courts.

36 National Fund of the Republic of Austria, General Settlement Fund <<http://en.nationalfonds.org/sites/dynam-icbbc3.html?id=news20060526140625005&ln=>>, visited on 27 March 2013.

37 L.Collins, 'Reflections on Holocaust Claims in International Law' [2008] 41(3) Israel Law Review 433-434.



enacted section 354.6 of the California Code of Civil Procedure. Under that section the claims could not be dismissed for failure to comply with the applicable statute of limitation if they were submitted on or before 31 December 2010. In *Deutsch v. Turner Corp.*, former WWII slave laborer, Josef Tibor Duetsch brought suit against the German company. The court held “reluctantly” that section 354.6 was invalid under the USA Constitution and that in its absence the remaining claims were time-barred³⁸. In *American insurance association v. Garamendi* the Supreme court decided that the domestic law in favour of the claims of the Holocaust victims “compromised the President’s very capacity to speak for the Nation with one voice in dealing with other governments to resolve claims arising out of World War II”³⁹.

II. RESOLUTIONS WITHIN US CONGRESS

There are certain resolutions within the USA Congress praising the efforts by countries in Central and Eastern Europe that have enacted legislation for the restitution of, or compensation for, private and communal religious property improperly confiscated during the Nazi and Communist eras and urging each of those countries to ensure that the legislation is effectively and justly implemented; furthermore, urging the countries in Central and Eastern Europe which have not already enacted such laws to return such confiscated properties to their rightful owners or, where restitution is not possible, pay equitable compensation for them⁴⁰. Examples of more recent similar resolutions can be presented as well (the Governments of Poland, Romania, Latvia, Slovenia and the Government of Croatia are called to take measure regarding the restitution/compensation for the seized property)⁴¹.

In addition, the USA is monitoring the situation. For instance, the officials of the USA expressed their support to Lithuania whilst adopting the Law on Good Will Compensation for the Immovable Property of Jewish Religious Communities⁴²; the enacted acts on restitution and compensation for

38 L. Collins, ‘Reflections on Holocaust Claims in International Law’ [2008] 41(3) Israel Law Review 431–432.

39 L. Collins, ‘Reflections on Holocaust Claims in International Law’ [2008] 41(3) Israel Law Review 430.

40 The House of Representatives Concurrent Resolution No. 371: Strongly supporting an immediate and just restitution of, or compensation for, property illegally confiscated during the last century by Nazi and Communist regimes; 11 June 2008; 110th Congress; 2d Session <http://thomas.loc.gov/home/gpoxmlc110/hc371_1h.xml>, visited on 5 October 2011; The Senate of the United States Resolution. No. 603 Expressing the sense of the Senate on the restitution of or compensation for property seized during the Nazi and Communist eras; 26 June 2008; 110th Congress; 2d Session <<http://www.gpo.gov/fdsys/pkg/BILLS-110sres603is/pdf/BILLS-110sres603is.pdf>>, visited on 31 March 2013. For instance, the Government of Poland was called to provide for the restitution of or compensation for wrongly confiscated private property, the Government of Lithuania was called to immediately enact legislation on restitution or, where restitution is not possible, compensation for communal and religious property, seized and confiscated by the Nazis during World War II or subsequently seized by the Communist government after World War II.

41 The Senate of the United States Resolution No. 516 Expressing the sense of the Senate on the restitution of or compensation for property seized during the Nazi and Communist eras. (Reported in Senate – RS), June 29, 2012, 112th Congress, 2d Session, 19 September 2012 Placed on Senate Legislative Calendar under General Orders <<http://www.gpo.gov/fdsys/pkg/BILLS-112sres516rs/pdf/BILLS-112sres516rs.pdf>>, visited on 31 March 2013; The House of Representatives Resolution No 766 Expressing the sense of the House of Representatives on the restitution of or compensation for property seized during the Nazi and Communist eras, 8 February 2012, 112th Congress, 2d Session <<http://www.gpo.gov/fdsys/pkg/BILLS-112hres766ih/pdf/BILLS-112hres766ih.pdf>>, visited on 31 March 2013.

42 Republic of Lithuania. Law on Good Will Compensation for the immovable Property of Jewish Religious Com-

private and Jewish communal property by the governments of Serbia and Lithuania are emphasized and set as potential model for other governments to follow⁴³.

CONCLUSION

Due to the peculiarities of the domestic law of the USA and the favourable situation in post-Communist Europe, the American courts became specific forum/"shelter" to the Holocaust victims at the end of the 1990s. Litigation in the US courts, media, political, diplomatic, commercial reasons urged defendant states and their companies to reach settlements and make certain payments to the Holocaust victims. The settlements reflect the role and influence of the USA in this sphere, however, the settlement gave impetus to the pending or future litigation in the US courts as well. The USA is active in encouraging other states to retribute or compensate for the property seized during the Nazi regime, according to the resolutions within the USA Congress.

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43 The Senate of the United States Resolution No. 516 Expressing the sense of the Senate on the restitution of or compensation for property seized during the Nazi and Communist eras. (Reported in Senate – RS), June 29, 2012, 112th Congress, 2d Session, 19 September 2012 Placed on Senate Legislative Calendar under General Orders <<http://www.gpo.gov/fdsys/pkg/BILLS-112sres516rs/pdf/BILLS-112sres516rs.pdf>>, visited on 31 March 2013.



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HUMAN RIGHTS UNIVERSALISM AND PARTICULARISM IN THE JURISPRUDENCE OF LITHUANIAN COURTS

Karolina Bubnytė*

Vilnius University, Lithuania

Abstract. The paper deals with how the phenomena of imminent tension between universalist and particularistic standards reflects in the jurisprudence of Lithuanian courts of last resort, acting within a pluralistic legal context meaning that human rights come into national legal system from various interrelated legal layers, and that the most influential legal instrument in this regard is the European Convention on Human Rights.

The paper deals with two questions – in Part I it reveals the impact of universal standards of HR protection (both positive and negative) on the jurisprudence of Lithuanian courts, while in Part II it discusses possible manifestations of certain particularistic trends in this regard.

Referring to numerous examples of the case law of national, supranational and international judicial bodies it is argued –that due to highly pro-universalistic attitude of the Lithuanian courts of last resort their harmonious coexistence is a prevalent state of affairs leading to continuous convergence of universal, regional and national HR standards, though, this notwithstanding, still some space rest for particularistic human rights standards remains.

It is also argued that during an endless process of human rights particularisation and universalization Lithuanian courts participate on equal footing in transnational community of courts by coupling together in universal and particularistic standards for HR protection, not only adjusting and supplementing national legal system in this regard but also participating in creation and further development of the universal HR standards.

Key words: human rights, particularism, universalism, national courts

INTRODUCTION

Although each analysis of universal v. particular within the field of human rights law might go deep into the philosophical question of cultural relativism – it is not intend to do that this paper. The paper deals with how this phenomena of imminent tension between universalist and particularistic standards reflects in the jurisprudence of Lithuanian courts of last resort, inevitably, taking into consideration an entire global and European pluralistic legal context meaning that at the national level interact human rights from various interrelated legal layers. Mostly the universal human rights (hereinafter – also referred to as HR) standards penetrate into the jurisprudence of Lithuanian courts through the European Convention on Human Rights (hereinafter referred

* PhD student. The Role of Courts in the Implementation of the European Convention on Human Rights in Lithuania. *Scientific supervisor:* Prof (HP) Egdirijus Kūris. *Specific field of the author's interest:* Implementation of the European Convention on Human Rights at national level, specifying on the relationship between national courts and the European Court of Human Rights in the context of European pluralistic legal order.

to as the ECHR or the Convention)¹. This is not surprising: firstly, the Convention was one of the sources of inspiration during the drafting process of the Constitution², secondly, highly convention-friendly attitude of the Constitutional Court (hereinafter – also referred to as the CC) could be mentioned, which literally paved the way to the ratification of the ECHR when deciding a case of its constitutionality³, and afterwards, by declaring the jurisprudence of the European Court of Human Rights (hereinafter – also referred to as the ECtHR) a source of interpretation of national constitutional law⁴ used the conventional law as an inspirational source for the interpretation of the national constitution. Ordinary courts encouraged by the CC developed in their jurisprudence the principles of direct application of the Convention and its supremacy over the national law, and unconditionally bound themselves with the *erga omnes* effect of the case-law of the ECHR⁵. As to other HR treaties, being also constituent part of Lithuanian legal system⁶, they perform relatively low influence⁷ due to their substantial and institutional differences. Especially taking into consideration the “constitutionalist” ambitions of the ECtHR to become a constitutional instrument for all Europe⁸, one could easily conclude that universal, regional and national HR standards undergo **continuous convergence**, and in fact they do, fostered by on-going vertical (supranational-national) and horizontal (supranational and national) cooperation of courts⁹. On the other hand, one

1 It is stated in the preamble that the Convention aims at securing “the collective enforcement of certain of the rights stated in the Universal Declaration”.

2 Kūris, E. Ekstranacionaliniai veiksniai Lietuvos Respublikos Konstituciniam Teismui aiškinant Konstituciją [Extranational factors in the course of interpretation of the Constitution provided by the Constitutional court]. *Teisė*. 2004, 50, p. 78–93.

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5 In this regard, **convergence** between the domestic impact of the EU law and ECHR is clearly remarkable in assigning to the ECHR legal qualities of direct application and supremacy, and holding both of them as special sources of supranational law (Baltic States could be declared the champions in this regard), see, in more detail, Martinico, G. and Policino, O. *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Perspective*. Groningen: 2010, p. 249.

6 E.g. the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), the Charter of Fundamental Rights of the European Union.

7 For comparison: through 2001 the Lithuanian Supreme Court referred to Convention and (or) jurisprudence of the ECtHR in around 40 cases, and the Lithuanian Supreme Administrative Court – in 3 cases, while in 2011 the Lithuanian Supreme Court – in around 60 and the Lithuanian Supreme Administrative Court in around 80 cases, and in 2012 respectively – around 90 and 150 cases; www.infolex.lt. Trends in CC is somewhat different – the more national official constitutional doctrine is growing and expanding less references are being made to the Convention (for comparison – the CC to date referred to the Convention and/or ECtHR case-law in more than 40 final acts, while almost 30 thereof were adopted from 1993 through 2004.

8 The Judgment of the ECtHR [GC] of 18 December 1996 in the case *Loizidou v. Turkey*, Application no. 15318/89.

9 Waters, M. Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties, *Columbia Law Review*, 107 (2007), 628–705.



could not state so easily that the convergence is a *fait accompli* for one simple reason: upon their “domestication” universal HR standards start their relatively new, if not to say true life, inevitably acquiring certain **particularistic** national features¹⁰. It is remarkable, how all national judges still acting within framework of their competence as it is defined in the national legal order, manage to play major part in the application and effective implementation of the universal HR standards of international law, acting within these multiple layers of legal regulation¹¹, coupling them together with the national HR standards. This is also true for the Lithuanian courts.

The paper deals with two questions – Part I reveals selected aspects of the impact of universal standards of HR protection (both positive and negative) on the jurisprudence of Lithuanian courts, while Part II discusses possible manifestations of certain particularistic trends in this regard.

I. THE IMPACT OF THE UNIVERSAL HR STANDARDS OF THE JURISPRUDENCE OF LITHUANIAN COURTS

1. The impact of universal standards in the field of human rights is mostly perceived as highly positive phenomena, as their harmonious coexistence is a prevalent state observed in the jurisprudence of Lithuanian courts of last resort:

- national and universal HR standards through an endless **process of harmonization** are constantly **improved and (or) supplemented** or even leading for the development of higher national standards. To mention just few examples where national HR doctrine was developed taking into consideration universal standards by both – Constitutional and ordinary courts: the most prominent example in this regard is the abolition of the death penalty as being contrary with the Constitution by the CC in 1998¹². As regards Lithuanian Supreme Court and the Supreme Administrative Court – creation of domestic remedy for excessive length of judicial proceedings¹³, development of jurisprudence on the State’s responsibility for the errors committed by the national institution in the property restitution process¹⁴, extending

¹⁰ The notion particularistic standards does not refer to errors committed by domestic courts in this regard or ignorance of universal standards, which in fact could be distinguished as the main reason for the majority of violations found in cases against Lithuania of ECtHR, it refers to consciously made reference to some country specific legal standards due to its particular historical and political situation, cultural diversity etc. Ignorance and not conscious disrespect i.

¹¹ So called „*role splitting theory*“, developed by Georges Scelle, see, in more detail, Dupuy, P.-M. Unity in the application of international law at the global level and the responsibility of judges at the national level: Reviewing Georges Scelle’s „*Role splitting*“ theory. In Boisson de Chazournes, L.; Kohen, M. *International Law and the Quest for its Implementation/Le Droit international et la quête de sa mise en oeuvre Liber Amicorum Vera Gowlland-Debbas*. Leiden: 2010, p. 417–429.

¹² The Constitutional Court Ruling of 9 December 1998, *Official Gazette*. 1998, No.109-3004.

¹³ The Judgment of the Lithuanian Supreme Court of 6 February 2007 in civil case No. 3K-7-7/2007; the Judgment of the Lithuanian Supreme Court of 4 February 2009 in civil case No. 3K-3-5/2009; the Judgment of the Lithuanian Supreme Court of 12 February 2010 in civil case No. 3K-3-75/2010; the Judgment of the Lithuanian Supreme Court of 2 December 2011 in civil case No. 3K-7-375/2011; the Judgment of the Lithuanian Supreme Administrative Court of 23 June 2010 in administrative case No. A⁸⁵⁸ – 940/2010. To date ECtHR has found violations in 69 cases against Lithuania, in 25 among them – violations of Article 6-1 were found due to prolonged judicial proceedings and 14 – due to some other aspects of Article 6 of the Convention.

¹⁴ The Judgment of the Lithuanian Supreme Court of 16 December 2011 in civil case No. 3K-3-518/2011, the Judgment of the Lithuanian Supreme Court of 26 January 2012 in civil case No. 3K-3-4/2012, 1, the Judgment of the Lithuanian Supreme

the concept of positive obligations of the State, in securing the effective enjoyment of the freedom of assembly for sexual minorities¹⁵, strengthening legal protection afforded in the context of the judicial proceedings for incapacitation upholding the view that the full-incapacitation is to be considered as a legal instrument of *ultima ratio*¹⁶ could be mentioned, though there are many more examples. Universal HR standards are capable supplementing national human rights and freedoms at the highest – constitutional level, formally being just a source of interpretation of national constitutional law, substantively. The CC in developing the constitutional concept of „*inborn nature of human rights*“ (enshrined in Article 18 of the Constitution) positioned them as being above law, and highlighted that national standards should be developed taking due account to *the principles and norms of international law*¹⁷. Constant development in this area was highlighted by stating that „no legal act may establish an exhaustive list of inborn rights and freedoms“¹⁸ and that „the rights of the person must be defended against unlawful actions of other persons as well as against those of state institutions or officials not formally, but efficiently and in reality“¹⁹ (connotations with „*practical and effective rights*“²⁰ *doctrine formulated by the ECHR are inevitable*), prompting all national courts to consider themselves as prime defenders of HR. It should be noted that the CC also „borrowed“ certain methodological instruments, which became used widely in constructing national HR provisions: e. g. the test of proportionality was developed in referring to the

Administrative Court of 14 June 2012 in administrative case No. A⁸⁸-1610/2012. The jurisprudence of national courts was inspired by that ECtHR requiring not to put an excessive burden on private individuals in restricting their rights to property within the meaning of Art. 1 of Protocol No. 1.

15 The Judgment of the Lithuanian Supreme Administrative Court of 7 May 2010 in administrative case No. AS⁸²² – 339/2010 heavily relies on the Judgment of the ECtHR of 3 May 2007 in the case of *Baczkowski and Others v. Poland*, Application no. 1543/06.

16 The Judgment of the Lithuanian Supreme Court of 11 September 2007 in civil case No. 3K-3-328/2007 and the Judgment of the Lithuanian Supreme Court of 11 July 2008 in civil case No. 3K-3-370/2008 refer to the Judgment of the ECtHR of 27 March 2008 in the case of *Shtukaturov v. Russia*, Application no. 44009/05 and the UN Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006.

17 In its ruling of 9 December 1998 the Constitutional Court construed human life and dignity as constituting that minimum, that starting point from which all the other rights are developed and supplemented, and which constitute the values which are unquestionably recognised by the international community, on the other. The CC highlighted that „*the State of Lithuania, recognising the principles and norms of international norms, may not apply virtually different standards to the people of this country. Holding that it is a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its natural part*“, see the Constitutional Court Ruling of 9 December 1998, *Official Gazette*. 1998, No.109-3004

18 It is stated in the conclusion of the CC of 24 January 1995 that „<...> neither the Constitution nor the Convention contain a complete and final list of human rights and freedoms“, see the Constitutional Court Conclusion of 24 January 1995, *Official Gazette*. 1995, No. 9-199.

19 See the Constitutional Court Rulings of 1 October 1997, *Official Gazette*. 1997, No.91-2289, of 8 May 2000, *Official Gazette*. 2000, No.39-1105, of 12 July 2001, *Official Gazette*. 2001, No.62-2276 and No. 86, of 17 August 2004 *Official Gazette*. 2004, No.129-4634 and of 7 February 2005 *Official Gazette*. 2005, No.19-623.

20 Meaning that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (starting from the Judgment of the ECtHR of 9 October 1979 in the case of *Airey v. Ireland*, Application no. 6289/73).



case-law of ECHR²¹, the concept of positive obligations²² etc., not to mention the influence exerted by external HR standards on revealing concrete aspects of the content and scope of the constitutional rights²³;

- universal HR standards might serve for **filling legal gaps**, and the most prominent example in this regard is the case of *L. v. Lithuania* heard by the ECtHR²⁴, in which a violation of Article 8 of the Convention due to an existing legal gap in Lithuanian legislation as regards the right to gender reassignment has been found²⁵. Despite the fact that legal gap is still pending, the Lithuanian courts prompted by the ECHR, had formed a case law²⁶ considering legislative omission described above as a sufficient ground for a civil liability of the State filling a legal gap *ad hoc* (by deciding concrete cases), which has a twofold consequences: 1) that of compensating the inactivity of national parliament delaying to execute the judgment of the ECtHR and 2) that of safeguarding the implementation of the rights of the transsexuals.
- supranational judicial control constantly forces the national legal system to **re-adjust national HR standards**, unsurprisingly, the ECtHR could be named as the most effective “external accelerator” in this regard – though the Court was established for protecting individual rights and not hearing the cases for the conventionality of the national legislation *in abstracto*, the mechanism of individual complaint was a key factor of success of the Conventional system, gradually allowed in proclaiming the Convention “a constitutional instrument of European public order”²⁷, indeed, capable to convince the states to modify both its legislation or its application²⁸. E. g. the case-law of national courts usually is being brought in line with the conventional requirements without any undue delay, all the more that all procedural Lithuanian laws provide for the opportunity of the reopening of national proceedings following the finding of the violation of the Convention²⁹;

21 See the Rulings of the Constitutional Court of 18 April 1996, *Official Gazette*. 1996, No.36-915, 19 December 1996, *Official Gazette*. 1996, No.126-2962, 13 February 1997, *Official Gazette*. 1997, No.15-314, 6 May 1997, *Official Gazette*. 1997, No.40-977, 7 January 2000, *Official Gazette*. 2000, No. 3–78.

22 The Ruling of the Constitutional Court 7 January 2000, *Official Gazette*. 2000, No.3–78.

23 The Lithuanian Constitution does not contain explicit provisions as regards the right to a fair trial – only the right to apply to court is *expressis verbis* enshrined therein, see, in more detail, Sinkevičius, V. Teisės į teisingą teisinį procesą samprata Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [Concept of the right to a fair legal process in the jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Konstitucinė jurisprudencija. Lietuvos Respublikos Konstitucinio Teismo biuletenis*. 2006, Vol. 2, p. 250–286.

24 The Judgment of the ECtHR of 11 September 2007 in the case of *L. v. Lithuania*, Application no. 27527/03.

25 The first paragraph of Article 2.27 of the Civil Code (which only came into force on 1 July 2003) provides that an unmarried adult has the right to gender reassignment surgery (*pakeisti lytį*), if this is medically possible. A request by the person concerned must be made in writing. The second paragraph of this provision states that the conditions and procedure for gender reassignment surgery are established by law. The ECtHR has stated that non-adoption of a special law leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Until now such a law is not enacted.

26 The Judgment of the Lithuanian Supreme Administrative Court of 29 November 2010 in administrative case No. A⁸⁵.-1452/2010.

27 The Judgment of the ECtHR [GC] of 18 December 1996 in the case *Loizidou v. Turkey*, Application no. 15318/89.

28 See also Part I (2) below.

29 Art. 366 of the Code of Civil Procedure, Art. 456 of the Code of Criminal Procedure and Art. 153 of the Law on Administrative Proceedings.

- they serve as means for **strengthening legitimacy of national courts** – the creativity of supra-national courts might be used as a valid legal argument justifying creativity of national courts, furthermore, as public confidence in Lithuanian courts is remarkably low, in supporting their judgments with some influential external legal source (at the same time being a constituent part of Lithuanian law) as, for example, the ECHR, the national courts may use the authority of the ECtHR (remarkably popular in the eyes of public opinion) to strengthen theirs;

2. The impact of universal HR standards on Lithuanian courts should not be overestimated, and it is not always harmonious – clashes between universal and particular legal standards for HR protection might arise and indeed they do, revealing the “dark side” thereof:

- the impact of universal standards of HR protection **should not be regarded as all-embracing, uniform standards around a single model** (be it European or global), disregarding the particularities of historic, political, cultural, moral and legal context of a given country³⁰. One might ask: on what mandate they may dictate for us whether time has come for all Europe to allow gay couples to marry, to adopt children, whether European States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, to lift prohibitions of abortion, to take of crucifixes from the walls, the scarfs from heads, etc.? Without penetrating into discussions about legitimacy of the judgments of the supranational judicial bodies in general, one may presume that the judgment of any external judicial body showing not enough deference towards national standards³¹ simply would not be accepted in certain society and subsequently would face real difficulties in the process of its implementation³²; here a social dimension of law or, in other words, an internal point of view of national legal system to the universal legal rules³³ comes into play as a certain limiting factor. This has happened with two judgments related with disproportional restriction in regard to Article 8 of the Convention imposed on ex-KGB agents as regards their employment in private sector (cases of *Sidabras, Džiautas* and *Rainys, Gasparavičius*³⁴), and with another one – discussed above case of *L. v. Lithuania*³⁵, concerning a violation of Article 8 of the Convention due to an existing legal gap as regards the right to gender reassignment.

30 The manifestations of particularism are discussed in more detail in Part II below.

31 For this purpose the ECtHR has developed a world-wide admired legal instrument called “margin of appreciation” (see the Judgment of the ECtHR [Plenary] of 7 December 1976 in the case *Handyside v. the United Kingdom*, Application no. 5493/72), but not so many admiration could be observed towards its application, see, in more detail, Letsas, G. A Theory of Interpretation of the European Convention on Human Rights. Oxford: 2009, p. 80–98.

32 The Judgment [GC] of the ECtHR of 6 October 2005 in the case of the case of *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, the Judgment of 23 November 2010 in the case of *Greens and M.T. v. the United Kingdom*, Applications nos. 60041/08 and 60054/08, the Judgment of the ECtHR [GC] of 22 December 2009 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06.

33 Hart, H.L.A. *Teisės samprata [The Concept of Law]*. Translated by Kūris. E. Vilnius: Pradai, 1997, p. 14.

34 The Judgment of the ECtHR of 27 July 2004 in the case of *Sidabras and Džiautas v. Lithuania*, Applications nos. 55480/00 and 59330/00 and the Judgment of the ECtHR of 7 April 2005 in the case of *Rainys and Gasparavičius v. Lithuania*, Applications nos. 70665/01 and 74345/01. Finally, they were executed in 2009 as the restriction was automatically lifted upon the expiry of its term; however, non-execution of these judgments resulted in a new case communicated to the Lithuanian Government: *Sidabras, Džiautas and Rainys v. Lithuania* (Applications Nos. 50421/08 and 56212/08).

35 See *supra* note 25.

- the impact of universal HR standards is not unlimited **from normative point of view to the law either – the limits are imposed by the Constitution itself**. Lithuania in this regard could be attributed to states sharing strong “*souverainist*” character³⁶ upholding unconditional claim of constitutional supremacy in respect of all international law; thus, no impact that would contradict national Constitution is allowed in principle; in this regard one can observe quite curious tendency of **convergence** between different national legal systems: monistic countries (like Lithuania) in striving to protect their national legal systems from unlimited influence of supranational law *de facto* takes a more dualistic stance; while purely dualistic states in response to powerful globalized movement of HR produced a sort of “*creeping monism*”³⁷. Indeed, upon finding a violation of Article 3 of Protocol No. 1 to the Convention in regard of the applicant’s³⁸ permanent and irreversible disqualification from standing for parliamentary elections in the case of *Paksas v. Lithuania* heard before the Grand Chamber of the ECtHR³⁹ an open clash arose between the Convention and the Constitution of Lithuania, as the restriction for the persons removed from office following impeachment proceedings for committing a gross violation of the Constitution and breaching the constitutional oath from taking any office (including that of MP) the beginning of holding of which, according to the Constitution, is linked with taking the oath set forth in the Constitution is enshrined at a constitutional level⁴⁰. The CC in this case for the first time took somewhat more dualist position towards the ECHR: heavily relying on the principle of supremacy of Constitution, it highlighted the separation between conventional and national legal systems, holding that “even though the jurisprudence of the ECtHR, as a source for construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution” (the jurisdiction of the ECtHR extends to all matters concerning the interpretation and application of the Convention). On the other hand, noting that Lithuania must follow the *universally* recognised principles and norms of international law inter alia under Paragraph 1 of Article 135 of the Constitution, it was concluded that *Lithuania is obliged to eliminate the said inconsistency of the provisions set forth in Article 3 of the Protocol No. 1 of the Convention and Article 59 § 2 and Article 74 of the Constitution* and that the adoption of the corresponding amendment(s) to the Constitution is the only way to remove this incompatibility. The subject of the case at issue reveals also an interesting example of overlapping international legal layers in the field of HR:

36 Martinico, G. and Policino, O. *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Perspective*. Groningen: 2010, p. 25.

37 When even unratified treaties are being incorporated into national law through the case law of domestic courts, see Waters, M. *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, *Columbia Law Review*, 107 (2007), 628–705.

38 Ex-president of the Republic of Lithuania, removed from office by the Seimas on 6 April 2004 in accordance with the impeachment proceedings for gross violations of the Constitution and breach of the constitutional oath.

39 The Judgment of the ECtHR [GC] of 6 January 2011 in the case of *Paksas v. Lithuania*, Application no. 34932/04.

40 Comprehensive official constitutional doctrine including also the constitutional sanction, which partly became a subject matter before the ECtHR, was developed by the CC in its Ruling of 25 May 2004, *Official Gazette*. 2004, No.85-3094.

the narrower scope of protection afforded by the Convention (scope of application of Art. 3 of Prot. 1 is limited to parliamentary elections) could be supplemented with that afforded under Articles 25 (a), 25 (b) and 25 (c) of the International Covenant on Civil and Political Rights (hereinafter – ICCPR), covering in general all aspects of the said above constitutional restriction. Quite unsurprisingly, currently the case of *Paksas of Lithuania* is pending before the UN Human Rights Committee⁴¹.

- paradoxically enough, **the impact of universal standards of HR protection may result in divergence of the national law standards**: e.g. in Lithuania the CC is not empowered to examine a conventionality of laws, thus ordinary courts may decide cases in setting aside national laws (following the principles of direct application and supremacy, applicable in regard to Conventional law), thus overcoming the CC and posing a real threat for **decentralisation** of the constitutional control, if one takes into account an overlapping nature of constitutional and conventional rights. On the other hand, exactly for the same reason, usually they put a problem of alleged unconventionality of national law before the CC. Still, thinking about possible inconsistency in jurisprudences of Lithuanian courts of last resort and taking into consideration the fact that there is no subsequent national legal mechanism to remove them⁴², one could imagine some improvement of the domestic legal system, e.g. introducing certain model constitutional complaint.

II. DESPITE THE FACT THAT THE IMPACT OF UNIVERSALIZATION IN HR STANDARDS IS PERCEIVED FROM LITHUANIAN PERSPECTIVE AS HIGHLY POSITIVE PHENOMENON (LIKE IN OVERWHELMING MAJORITY OF POST-SOVIET STATES), ONE CANNOT CONCLUDE THAT NO SPACE REST FOR SOME PARTICULARISTIC STANDARDS FOR THE FOLLOWING REASONS

1) harmonization of national and universal standards of HR in result of which national standards are improved and (or) supplemented **should not be regarded as some mechanic process**; quite to the contrary – national courts participating in this process face a complicated task indeed: **to find a proper balance between universal and national standards** while integrating them, to adapt external standards properly in mitigating somewhat expansive penetration of universal/supranational legal standards; this attitude of Lithuanian courts is developing on case by case basis, though so far almost unconditional obedience prevails;

2) there always remains **space for development of some higher national HR standards**: first of all, international documents call for them themselves through so-called “maximization clauses”⁴³

⁴¹ Case of *Rolandas Paksas v. Lithuania*, communication No. 2155/2012.

⁴² So far the questions of application of law had been regarded as not falling within the jurisdiction of the Constitutional Court.; e.g. decision of the CC of 11 May 2012. *Official Gazette*. 2012, No.56-2786

⁴³ Van De Hayning, C. No place like home: Discretionary space for domestic protection of fundamental rights. In Popelier, P.; Van De Hayning, C.; Van Nuffel, P. *Human rights protection in the European legal order: The interaction between the European and the national courts*. Cambridge: Intersentia, 2011, p. 65–96.



put in explicit words both in ECHR and EU Charter⁴⁴. E. g. for some rights the CC had afforded a higher protection (e. g., right to court is construed as an absolute right⁴⁵, requirement that HR may be limited only by law meaning the legal act with precise legal qualities adopted by the national parliament – the Seimas⁴⁶, while in international law institutions this notion is construed not so strictly) and overall trend in the constitutional jurisprudence of constant move towards higher standards of HR protection is also apparent;

3) legal systems of each country **stem from their particular historic, political, cultural, moral and legal system peculiarities**; Lithuania, which had survived a Soviet annexation and occupation from 1940 to 1990 and upon the restoration of its independence (on 11 March 1990), has had to undergo a certain transitional period towards a democratic state under the rule of law, putting in place so-called transitional legal regulation indeed posing some HR problems in regard of: the above mentioned KGB cases⁴⁷ arose in the context of lustration laws, property restitution and privatisation processes – so far gave violations before the ECtHR exclusively in relation to the prolongation of judicial proceedings in this respect, other complaints of the applicants related to substantive aspects of national legal regulation were found by the ECtHR as managing to achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights: namely, the protection of the rights of the tenants, who had privatised the nationalised property⁴⁸, statutory requirement of Lithuanian citizenship for the persons entitled to claim the restitution of nationalised property⁴⁹, the above mentioned case of *Paksas v. Lithuania* deserve to be called particularistic indeed, as related to impeachment proceedings, to be regarded as a self-defence mechanism of still immature democracy⁵⁰; national legislation on official spelling of names could be referred to as cultural-specific question, was

44 See Article 53 of the ECHR and Article 53 of the Charter.

45 The Ruling of the Constitutional Court of 17 August 2004. *Official Gazette*. 2004, No.129-4634, the Ruling of the Constitutional Court of 29 December 2004. *Official Gazette*. 2005, No.1-7, the Ruling of the Constitutional Court of 13 May 2010. *Official Gazette*. 2010, No.56-2766.

46 The Ruling of the Constitutional Court of 26 October 1995. *Official Gazette*. 1995, No.89-2007, the Ruling of the Constitutional Court of 13 February 1997. *Official Gazette*. 1997, No.15-314

47 See *supra* note 34.

48 The Decision of the ECtHR of 5 December 2002 in the case of *the Synod College of the Evangelical Reformed Church of Lithuania v. Lithuania*, Application no. 44548/98.

49 The decision of the ECtHR of 30 June 2009 in the case of *Shub v. Lithuania*, Application no. 17064/06, it should be noted in this regard that the UN HR Committee in a huge number of cases against Czech Republic had found that the Czech citizenship as a prerequisite for the restitution of property is unreasonable and therefore deemed to be discriminatory under Article 26 of the Covenant (e.g. *Gratzinger and Gratzingerova v. the Czech Republic*, views of 12 February 2012, communication no. 1463/2006, while earlier the GC of the ECtHR had reached exactly opposite position in Grand Chamber decision of 10 July 2002 in the case of *Gratzinger and Gratzingerova v. the Czech Republic*, Application no. 39794/98. Though numerous complaints related to alleged violations of right of ownership in the course of the process of restitution are still pending before the ECtHR.

50 The Government stressed that Lithuania had been a democracy only between 1918 and 1940 and after 1990; accordingly, it did not have a long-standing democratic tradition, society had not completely rid itself of the “remnants of the totalitarian occupying regime” – including corruption and a lack of public trust in State institutions – and there were numerous examples of inappropriate and unethical conduct in politics. Lithuania’s political, historical, cultural and constitutional situation therefore justified the measure in question, even though it might appear excessive in a well-established democracy.

heard at both – universal and regional levels, namely, the cases of *Cytacka* before the ECtHR⁵¹, *Vardyn* – before the ECJ⁵², and *Kleckovski* – the UN HRC⁵³; a certain trend could be distinguished in this regard – that an external control moves towards a greater deference among courts and thus, international court will need strong arguments in order to depart from the conclusions reached by national highest courts, more and more often profiting of opportunity to refer the case back to national courts (e.g. *Vardyn* case);

4) as universal standards start their real life in particular contexts when national courts are implementing them, one may come to quite a paradoxical statement: the more particularistic context is taken into account, the more legitimate common denominator will be reached – the ECtHR in deciding whether to confer the state a margin of appreciation on particular particularistic approach to HR protection, uses the test of “*common European consensus*” (more consensus – less margin⁵⁴), which is grounded on careful analysis of particular aspects of national legal systems; while national courts when judging on HR cases are more and more inclined to the analysis of the jurisprudence of each other. The CC of Lithuania in constructing human rights refers also to jurisprudence of other national courts in this regard, e. g. hearing the case on constitutionality of State Family Policy Concept⁵⁵ the CC referred not only to broad jurisprudence of ECHR on Article 8 of the Convention but as well to the concept of family as it has been analysed in the practice of numerous constitu-

51 The Decision of the ECtHR of Application 10 July 2012 in the case of *Cytacka and Others v. Lithuania*, Application no. 53788/08. The applicants complained under Articles 8 and 10 in conjunction with Article 14 of the Convention that their right to respect for private and family life and their right to freedom of expression were breached by the inability to have the Polish spelling in the school's official name: application was rejected for failin to exhaust domestic remedies.

52 Judgment of the Court (Second Chamber) of 12 May 2011 in the case C-391/09 *Malgožata Runevič-Vardyn and Lukas Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, wherein a national court referring for a preliminary ruling raised questions regarding the compatibility of national legal regulation on spelling of names with the respective EU legislation implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The ECJ referred the case back to national courts in stating that: „not precluding the competent authorities of a Member State from refusing, in circumstances such as those at issue in the main proceedings and pursuant to those same rules, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide. If that proves to be the case, it is also for that court to determine whether the refusal to make the amendment is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued”;

53 UN Human Rights Committee, Decision of 24 July 2007 in the case of *Kleckovski v. Lithuania*, Communication No. 1285/2004. The author claims that the legal requirement of the Lithuanian spelling of his name in official documents disregards an essential element of his identity and constitutes a breach of his rights under article 17, read alone and together with article 2, article 26 and article 27 of the Covenant. With regard to the claim that the author's name should be spelt using Polish characters, the Committee considers that the author has not substantiated any claim under the Covenant.

54 Letsas, G. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: 2009, p. 80–98.

55 Wherein it has been held that the Seimas, by establishing in the Concept, inter alia Item 1.6 thereof, as approved by its resolution, that only a man and a woman who are married or were married, as well as their children (adopted children), are regarded as a family, and in this way **narrowing** the content of the family as a constitutional institute, did not observe the concept of the family as a constitutional value, stemming from the Constitution, inter alia Paragraphs 1 and 2 of Article 38 thereof, which may be founded **not only on the basis of marriage**, see the Constitutional Court Ruling of 28 September 2011, *Official Gazette*. 2011, No.118-5564.



tional courts of foreign countries⁵⁶. This brings us to understanding why if it is still anticipatory to talk about one global legal system, it is certainly not about emerging global community of courts, which is constituted above all by the self-awareness of the national and international judges who play a part therein, particularly when making decisions on human rights issues⁵⁷;

5) in assessing particularistic standards through the control performed by supranational or international bodies **one is able to formulate new or further develop universal standards** – indeed, in some cases *v. Lithuania* heard by the GC of the ECtHR international standards for the HR protection were further developed⁵⁸. E. g. in *Ramanauskas* case the Court tried to explain in more detail criteria of delimitation of police incitement and use of undercover agents, particularly in tackling organised crime and corruption from the perspective of Article 6-1 requirements. While in *Cudak* case the Court in the context of the relation between the state immunity and the applicant's right of access to a court in the light of Article 6 § 1, the erosion of absolute immunity was confirmed once again in applying general international law, formula elaborated in above said case of *L. v. Lithuania*, ordering Lithuania to pass a piece of legislation within a specific period of time (3 months)⁵⁹ seen at the time of its adoption as a far reaching example of judicial activism of the ECHR⁶⁰, was used later by the ECHR in cases against other states, especially revealing a so-called systemic problems were mechanism of pilot judgments had been applied⁶¹. In this way international and national courts manage to bring together various standards from different particularistic contexts, gradually moving again towards development of new universal HR standards.

56 In its said Ruling of 28 September 2011 the CC referred to the judgement of the Constitutional Court of the Czech Republic of 20 February 2007 (No. 568/06), decision of 28 May 1998, the Constitutional Court of the Republic of Slovenia, ruling of 18 April 2007 of the Constitution of the Republic of Croatia, decisions of 26 February 1990 (No. 4/1990) and of 15 December 2008 (No. 154/ 2008) of the Constitutional Court of Hungary, decision of the Constitutional Council of the Republic of France of 29 July 2011 (No. 2011-155), rulings of 9 April 2003 (No. 1493/96, 1724/01) and of 20 September 2007 (No. 855/06) of the Federal Constitutional Court of Germany.

57 Slaughter A.-M. A Global Community of Courts, *Harvard International Law Journal*. Vol. 44, 2003, p. 191–219.

58 So far, the Grand Chamber of the ECtHR heard 3 cases against Lithuania: *Ramanauskas v. Lithuania*, Judgment of 5 February 2008, Application no. 74420/01, *Cudak v. Lithuania*, Judgment of 23 March 2010, Application no. 15869/02 and *Paksas v. Lithuania*, referred to above, which presumably was referred for the Grand Chamber more due to its very peculiar political context and its importance for the particular country.

59 The ECtHR in its said above Judgment adopted in the case of *L. v. Lithuania* ordered that „to satisfy the applicant's claim for pecuniary damage, is to pass the required subsidiary legislation to Article 2.27 of its Civil Code on gender reassignment of transsexuals within three months of the present judgment becoming final in accordance with Article 44 § 2 of the Convention“; or, „alternatively, should those legislative measures prove impossible to adopt within three months of the present judgment becoming final in accordance with Article 44 § 2 of the Convention, the respondent State is to pay the applicant EUR 40,000 (forty thousand euros) in respect of pecuniary damage“.

60 Popovic, D. Prevailing of Judicial Activism over Self-restraint in the Jurisprudence of the European Court of Human Rights, *Creighton Law Review*, Vol. 42 Issue 3, p. 361–396.

61 E. g. by the said above judgment in the case of *Greens and M.T. v. the United Kingdom*, concerning blind disfranchisement of voting rights of all convicted persons detained, found disproportional and violating Art 3 of Protocol 1 of the Convention, the UK was ordered to introduce legislative proposals to amend section 3 of the 1983 Act and, if appropriate, section 8 of the 2002 Act, within six months of today's judgment becoming final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers.

CONCLUSIONS

Universal dimension of HR is capable to particularise in different ways and then to re-join again through the cooperation of the transnational community of courts in this unending cycle of rights articulation⁶². Lithuanian courts participate on equal footing as a true members of transnational community of courts in this unending process by coupling together the universal and particularistic standards for HR protection, not only adjusting and supplementing national legal system in this regard but also participating in creation and further development of universal HR standards.

A highly pro-universalistic attitude of the Lithuanian courts of last resort confirm a strong trend in convergence of the national and universal standards – (which seems quite natural, bearing in mind that the legal system of Lithuania was created on the basis of universal standards of HR, prising them as a *raison d'être* of the democratic state under the rule of law), though still some limited space for particularistic standards remains, which should be used very carefully, always keeping in mind tension between universal and particular.

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WHAT MAKES A LEGAL SYSTEM LEGITIMATE? ANALYZING THREE MODELS OF PUBLIC JUSTIFICATION

Wojciech Ciszewski*

Jagiellonian University in Kraków, Poland

Ewa Matejkowska**

Jagiellonian University in Kraków, Poland

Abstract. It is a well-known fact that contemporary liberal societies face a significant problem of disagreement. Generally speaking, the notion of disagreement refers to situation of conflict when reasonable disputants cannot reach a solution to a given problem. Regardless of how impartial and good-willed disputants are, they cannot agree in their religious and moral convictions.

The fact of disagreement constitutes a serious problem especially for national legislator who seems to be situated between two tendencies. On the one hand, there is a deep differentiation of incomparable social values and beliefs concerning basic political matters. On the other hand, in many cases there is a necessity of taking authoritative decision. How to reconcile the multiplicity of standpoints with the requirement of conclusion in a way that will be legitimate and stable?

It is beyond doubt that in the light of above-mentioned problem legislator's actions should be based on sound reasons. However, what kind of reasons may give adequate support for lawgiver's decisions? Which reasons can serve as a basis for public justification? In our opinion, three most significant answers to the problem should be indicated. The first response states that the reasons are derived from the political compromise. The second answer refers to the moral minimum constituted by social consensus. And finally the third answer - the convergence model, which is opened to the widest scope of reasons.

All three propositions have some strong and weak points. In our paper we argue that the most defensible position is the consensus model. However, in our opinion, there are some areas where the consensus may be supported by competitive projects.

Keywords: disagreement, legitimacy, stability, consensus, convergence

INTRODUCTION

Immanuel Kant, in his famous essay *An Answer to the Question: 'What Is Enlightenment?'* written in 1784, advanced a thesis that it is possible for people to enlighten themselves. Human-kind is on a way to become fully autonomous and reasonable – historical progress leads people

* A graduate in journalism, philosophy and law. His main research interests concern various aspects of the theory of politics in the plural society; in particular he focuses on the issue of political justice and public reason. He is preparing his doctoral thesis at the Department of Legal Theory of the Jagiellonian University, Cracow.

** A graduated from the Jagiellonian University in Cracow in 2010, currently a PhD student of Law at the same University. She is interested in theoretical approaches to constitutionalism and administrative law.



from immaturity and childishness to full maturity. The Enlightenment is, generally speaking, the capacity to think by oneself and to make public use of one's reason. As Kant writes: *The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding!*¹. For the philosopher, the development of human capacities also signifies the progress in morality. The universal moral code based on reason will finally prevail over prejudice and evil forces in human beings will be suppressed. People will be brought closer together and particular thinking or passions will no more thwart hopes for a just and stable community guided by reason.

After more than two centuries of human history, we can state that Kantian social Enlightenment did not come to be. What is more, we should not wait for the new era like we are waiting for the arrival of Samuel Becket's Godot. At the end of last century, the liberal hope changed its assumptions. There were many prophets of the new approach, however, it was most clearly and persuasive formulated by John Rawls in his *Political Liberalism*². This American philosopher diagnosed the issue contrary to Kant. The use of practical reason cannot guide us to universal values and answers –just the opposite – the use of reason under circumstances of freedom leads us to a variety of standpoints and positions. The plain effect of one's free reflection is the phenomenon of moral and political disagreement.

Broadly speaking, the notion of disagreement refers to a situation of conflict when reasonable disputants cannot reach a solution to a given problem. Regardless of how impartial and good-willed the disputants may be, they cannot agree on their moral and political convictions. The phenomenon is very complex and complicated. Various disagreements may have different structure and explanation. They may be caused by value-pluralism and the fact that people hold different concepts of a good life. Different attitudes toward what is valuable from one's standpoint generate incommensurable views about rationality and morality. On the other hand, some disagreements may be a consequence of essential contestability of some concepts such as democracy, moral life or freedom. Generally, these various factors which deeply influence one's point of view hinder, in turn, a comprehensive agreement on moral and political issues. Rawls named all of them jointly as *burdens of judgment*³.

What is most important about the disagreement, is that contemporary political and legal thought treats this phenomenon as an obvious assumption, starting point of any political theory and necessary element of each convincing idea. Contemporary liberals were not constantly waiting for the *Kantian Godot*, they simply changed the paradigm.

Why is this philosophical paradigm shift so important for law? In our opinion, the fact of disagreement constitutes a serious problem especially for national legislator who seems to be situated between two contrary tendencies. On the one hand, there is a deep differentiation of incomparable social values and beliefs concerning basic political matters. On the other hand, in many cases there

1 I. Kant, An Answer to the Question: 'What is Enlightenment?'" <http://philosophy.eserver.org/kant/what-is-enlightenment.txt>

2 J. Rawls, 'Political Liberalism' (New York: Columbia University Press 1993)

3 Ibidem, pp. 54–58.

is the necessity of taking an authoritative decision. How to reconcile the multiplicity of standpoints with the requirement of conclusion in a way that is legitimate and stable? This question seems to be perhaps the greatest contemporary challenge faced by the national legislator.

The problem becomes even more important when we realize that the state has the right to use force and to coerce individuals. Citizens, on the other hand, are free and equal in their rights and they should be treated by the state as free and equal. Due to the fact of disagreement, it is highly probable that almost every act or decision will be controversial – every action of the legislator will be accepted by some and refused as groundless by others. Of course it does not mean that using force or coercion is morally prohibited. It means that every liberty-limiting action taken by the legislator should be based on sound reasons. However, we should ask what kind of reasons may give adequate support for lawgiver's decisions? Which reasons can serve as a basis for reasonable public justification?

In our paper we would like to indicate three most significant answers to the above-mentioned problem. These answers are three different models of reasonable public justification: compromise, consensus and convergence. Upon a brief presentation of each conception, we will consider the relations between them and, finally, address the question of their significance for legal theory.

* * *

The first response states that sound reasons for law are derived from the political **compromise**, the so-called *modus vivendi*. On this account, citizens hold different values, interests and goals. Each party wants to fully realize its particular interests and preferred view of the society by legal means. However, because neither person nor group is strong enough to dominate the legislative, citizens are constrained to *bargain* and to compromise with others. Parties have a choice of two options: on the one hand, continuing Hobbesian war of all against all (the situation of no legal regulation) and, on the other hand, concluding a contract which secures a minimum level of interests. Choosing the contract seems to be the *lesser evil*. Everybody profits by reaching a compromise, however not as much as one would wish to.

The conception of *modus vivendi* as a justification for legal regulation is an adaptation of the Hobbesian tolerance to modern circumstances established by value pluralism. The idea is based on a rather pessimistic conviction, that in contemporary multicultural societies any stronger value-foundation for collective actions is impossible. Even widely approved touchstones such as human rights and universally accepted legal principles (*nullum crimen sine lege, lex retro non agit*) seem to be nothing more than the result of a bargaining process. Their widespread acknowledgement is caused by the fact that parties aim at securing their basic needs, and it is precisely these standards that constitute essential human interests.

This mercantile model of justification has a one very serious weakness. In the face of shifting power it is endlessly open to renegotiation and renewing the bargain. Every regulation based on compromise lacks stability; it may lose its legitimacy overnight. *The legitimacy of any regime is*



*always partly a matter of historical accident*⁴. Finding a solution to this problem constitutes the main purpose sought by supporters of consensus and convergence models.

The second proposition refers to the moral minimum constituted by social **consensus**. According to it, the legislator should look for common moral commitments and base a justification of resolutions on normative assumptions which are non-controversial. The set of reasons on which legislator's actions are based is limited to those reasons, that are acceptable for reasonable citizens.

Therefore, consensus model divide all reasons for action, that can be given by the legislator, into two groups. Firstly, those universally acceptable, which are named by Rawls as *public reasons*. According to him, *to give public reasons is to give reasons that we can reasonably expect that others can reasonably accept as democratic citizens*⁵. The set of public reasons includes: political values, common sense, rules of thumb, rules of logical thinking, a narrow theory of rationality, as well as uncontroversial scientific evidence⁶. Secondly, we have sectarian reasons derived from controversial theories of good or, from the so-called comprehensive doctrines (broad moral systems of beliefs that include what is valuable in human life)⁷. Adherents of the consensus model claim that the state should not act in accordance with controversial views on what is good, such as religion, philosophy or private morality. Therefore, public reasons based on shared values are contrasted with sectarian ones, dependent on particular and contentious conceptions of what has worth in life. Only the first ones can give morally relevant basis for legislative acts. Because of the irresolvable disagreement among different theories of good, public reason is the best proposition to perform the role of a common standpoint. It is a form of common language adequate for the public sphere.

However, we should ask what it means, that a given value can be recognized as common. Adherents of public reason put special emphasis on one remarkable condition of arguments; precisely on the fact, that they are publicly accessible. Kevin Vallier sums up this requirement claiming that: *A's reason X is accessible to the public if and only if members of the public (at the right level of idealization) can see that X is justified according to **common evaluative standards***⁸. Public access is a normative standard, which characterizes what should be believed by rational, reasonable and well-informed citizens. Reasons, in order to fulfill these requirements, have to be broadly shared, as well as embedded in public political culture. It is important to realize that the legislator is allowed to distribute duties and to coerce citizens only in terms that are understandable and recognizable to ordinary reasonable citizens, who privately pursue different conceptions of a good life.

Consensus model is aimed at generating stability not as *lesser evil*, but stability *for the right reasons*. Legal order should be appreciated and supported by democratic citizens. The idea of public reasons constitutes an attempt to reconcile the fact of pluralism with social stability in

4 J. Gray, *Two Faces of Liberalism* (Cambridge: Polity Press 2000) p. 106.

5 J. Rawls, *The Idea of Public Reason* Revisted in: J. Rawls, *Collected Papers* (Cambridge, Massachusetts: Harvard University Press 2000) p.578.

6 J. Rawls, 'Political Liberalism' (New York: Columbia University Press 1993) pp. 216–220.

7 Ibidem, pp. 220–223.

8 K. Vallier, F. D'Agostino, 'Public Justification' [2013] *The Stanford Encyclopedia of Philosophy*, E. N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2013/entries/justification-public/>>.

liberal democracy. Nevertheless, critics of this view claim, that such reconciliation does not at all end in a success.

Adherents of **convergence** believe that the consensus solution does not take the fact of pluralism seriously. What is more, the disrespect for diversity implies unjustified constraints on freedom (especially freedom of thought) – the most important liberal value. Therefore, convergence model aims at securing stability for the right reasons, but not at the expense of the liberty principle.

Accessibility requirement constitutes a bone of contention between consensus and convergence supporters. For the former, accessibility provides mutual understanding and moral legitimacy of law. For the latter, it equips the state with another form of exert oppression against personal freedom. The coercion, justified solely by reference to public reasons, still lacks proper legitimacy. Why is it so? As stated above, the consensus model divides all state's reasons for action into two groups: public reasons and private (sectarian) reasons. The demarcation line between them is set by the accessibility requirement. Convergence theorists claim, that it simply rules out too much. They ask why somebody who holds a comprehensive religious view and supports legal order for his own private reasons should restrain and suppress his true and genuine motivation in favour of an argument, that can be accepted by an idealistic democratic citizen. At the same time, it deprives people of the right to put a veto on the coercive regulation based on their own reasons and values.

Convergence adherents postulate replacing the accessibility requirement with a demand of intelligibility. This more general principle requires that *A's reason R is intelligible to members of the public if and only if members of the public regard R as justified for A according to A's evaluative standards*⁹. As can be observed, common evaluative standards are replaced with normative standards referring to personal standpoint and rationality. In accordance to this statement, religious or moral comprehensive doctrines can provide arguments for or against legal regulations. K. Vallier states, for example, that typical Catholic argument against abortion is fully understandable for all members of the society¹⁰. Consequently, convergence theorists claim that a given law is legitimated if it is intelligible to all citizens guided by their own reasons.

CONCLUSION

It is beyond any doubt that all three propositions have some strong and weak points. All three use the same concept of moral legitimacy of law, but formulate completely different conceptions on this basis. The difference is brought to light when we analyze, on the basis of each model, all reasons that are sufficient to justify the legislator's actions. For *modus vivendi* theorists these are reasons derived from the social compromise – the choice of *lesser evil*. For consensus model these are public reasons, which are acceptable for every citizen, as they fulfill the accessibility requirement. The convergence model is open to the widest scope of reasons, because supporters of this proposition claim, that public justification should cover all those arguments, that are intelligible

9 Ibidem

10 K. Vallier, 'Consensus and Convergence in Public Reason' [2011] 25(4) Public Affairs Quarterly pp.261–279.



within the society. In the summary we would like to address the question of relations between the three above mentioned theoretical models.

The common answer is that these relations between models are temporal and vertical. In Rawls's opinion, we accept, firstly, a legal regulation as a mere *modus vivendi*. Secondly, in some time after a regulation takes effect, society will produce good public reasons for keeping the order. Ultimately, at the latest stage, people find good private reasons (derived from their comprehensive doctrines) that support the regulation.

In our opinion, three models of legitimacy are closely connected to the three different disciplines of social science and this connection explains the differences between them. The *modus vivendi* model seems to be derived from political science and justifies *bargaining practices* between society's representatives at the parliament. The consensus approach very well suits legal practices, especially the application of law. Finally, convergence standpoint appears to be close to sociology. We think that none of propositions is more true than the other, but each of them can be useful and valuable in different fields. Moral conceptions of legitimacy are just built upon ethics and purposes of a particular discipline.

Definitely, the most promising model for legal science is the consensus approach. It postulates seeking among public reasons an implicit justification of any legal regulation and, afterwards, interpreting the law in the light of uncovered justification. Institutions (especially institutions of constitutional law) very often require their rationale to be properly and coherently interpreted. As Joel Feinberg states, *'the reason' for the law, the reason that in fact supports it, may not then be the reason that impelled a legislator to vote for it. Sometimes we can construct an implicit rationale for the law that need not necessarily coincide with anyone's actual reasons or deep motives for supporting it, but that nevertheless provides it with a plausibly coherent rational reconstruction*¹¹. In our opinion, ideas on the consensus model of legitimacy and public reasons can successfully help to perform this function.

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¹¹ J. Feinberg, *'Harm to Self'* (New York, Oxford University Press 1986) p. 16.

THE RELEVANCE OF THE LONG-TERM INTERESTS IN THE DECISION MAKING PROCESSES OF COMPANY DIRECTORS IN THE UK, DELAWARE AND GERMANY: *'THE END OF HISTORY'* FOR DIRECTORS' FIDUCIARY DUTIES?

Katarzyna Chalaczkiewicz-Ladna*

University of Edinburgh, the United Kingdom

Abstract. Since the 2009 crisis, there is a need for governments to find a formula to take into account the long – term interest of companies. It is believed that one of the reasons for the financial crisis was the focus on short – term interest, the policy to increase the share price in order to distribute profit, whereas 'long – termism' was neglected. In consequence, taking decisions from a short term perspective appeared to have detrimental consequences for companies.

The main purpose of this paper is to critically examine to what extent the law imposes on the directors in the UK, Delaware and Germany the obligation to take into account the long-term consequences of their decisions. This will give the opportunity to have insights into whether the law on the directors' duties in the context of the long-term interests of the company is converging or not. Recent scholarship shows that there is no agreement as to whether divergence or convergence is happening among European and American corporations.

In a nutshell, it will be argued that directors' duties concepts differ in these chosen jurisdictions. The UK's and Delaware's law belong to the common law tradition with a well – developed body of case law, and Germany inherited the civil law tradition and a two-tier system. However, the long-term interests in the decision making processes of company directors is becoming more and more relevant in the UK, Delaware and Germany. This is an important issue in all three jurisdictions. Furthermore, it will be argued that although there are common principles of corporate governance across the countries, there remain differences in the directors' duties in the context of long-termism. These differences are deeply embedded in each country's tradition, history and culture, and will therefore not change or change only very slowly.

Key words: directors' duties, duty of loyalty, long-termism, short-termism

PAPER¹

Since the 2009 crisis, there is a need for governments to find a formula to take into account the long – term interest of companies. It is believed that one of the reasons for the financial crisis

* I am a 2nd year PhD student. The title of my thesis is 'The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: a critical evaluation'. I am interested in the company and comparative company law. Currently, I am tutoring several undergraduate private law courses. I have been also working as a research assistant to a few academics at the University. I am a Co-convenor of the Commercial Law Postgraduate Discussion Group and an editor in the Edinburgh Student Law Review. To continue, with fellow PhD students we are organising a PhD conference at the University of Edinburgh in December 2013. Moreover, in September 2012 I have presented a paper at the multidisciplinary PhD Research Conference, at the University of Birmingham.

¹ This paper presents only preliminary thoughts on the subject, as an author has started research on this topic fairly recently.



was the focus on short – term interest, the policy to increase the share price in order to distribute profit, whereas ‘long – termism’ was neglected. In consequence, taking decisions from a short term perspective appeared to have detrimental consequences for companies.

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The selection of jurisdictions began with the UK, because the Companies Act 2006 introduced a duty to promote the success of the company (s. 172) and the need arose – this regulation is ambiguous and unclear – to examine to what extent the law imposes on directors the obligation to take into account the long – term consequences of their decisions. Secondly, Delaware law was chosen because the concept of ‘long –’ and ‘short – termism’ has been examined by US scholars with respect to Delaware’s law, and because half of all large corporations in the United States are governed by this law. Delaware law belongs to the same ‘legal family’ as the UK (according to the most of taxonomies). Moreover, there is no language barrier between these jurisdictions. Furthermore, because German law is one of the leading European jurisdictions, it will also be examined, to determine if any guidance for UK’s directors could be taken from the duty of a company director formulated under German law to demonstrate due diligence and duty of loyalty (*Treupflicht*). Although German legislation is very influential and respected; there might be some linguistic and terminological problems² and also cultural differences between the chosen jurisdictions.

I am aware of challenges related to my research. There is no guarantee that chosen jurisdictions will be ‘comparable’. The three jurisdictions chosen for comparison differ significantly with regard to the concept of directors’ duties.³ The UK’s and Delaware’s law belong to the common law tradition with a well – developed body of case law, and Germany inherited the civil law tradition. Therefore, because of the possible differences in the directors’ duties between civil and common law countries, there is a chance that the ‘long – termism’ issue will not be suitable for comparison.

The concept of long- and short-termism is mostly examined under US and especially under Delaware law. Especially, the concept of long-termism and economics is extremely popular in US.⁴

2 See comments on the problems with translation and communication: B. Grossfeld, ‘The Strength and Weakness of Comparative Law’ (Oxford: Clarendon Press 1990) 165, and E. Öricü, ‘The Enigma of Comparative Law, Variations on a Theme for the Twenty – first Century’ (Leiden: Martinus Nijhoff 2004) 165.

3 For instance, they present difference approach towards duty of loyalty and duty of care; moreover the business judgment rule has been implemented in Delaware and Germany but not in the UK. For more details see chapter 12 and 13 of the A. Cahn, D. Donald, ‘Comparative Company law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA’ (Cambridge: University Press 2010).

4 See for instance: M. Jensen, ‘Value Maximization, Stakeholder Theory and the Corporate Objective Function’ [2010] 22(1) JACF 32; C. Bair, ‘Lessons of the Financial Crisis: The Dangers of Short-Termism’ 2011 The Harvard Law School Forum on Corporate Governance and Financial Regulation available at: <http://blogs.law.harvard.edu/corpgov/2011/07/04/lessons-of-the-financial-crisis-the-dangers-of-short-termism/>; S. Bainbridge, ‘Corporation Law and Economics’ (New York, NY: Foundation Press 2002)

However, it must be underlined that in comparison to the UK, long-termism is not mentioned in the Delaware's legislation.

First of all, M. Blair in 2003 has suggested that, in the face of corporate scandals, a number of prominent advocates for shareholder primacy have retreated to the position that directors in the US should attempt to maximize long-run share value performance, rather than short-term value.⁵ Furthermore, D. Rosenberg in his article from 2004 has argued⁶ that Delaware courts could not offer a coherent framework for understanding the most fundamental fiduciary duties imposed on corporate directors. Moreover, N. Grossman in the recent article⁷ has explained that in the US corporate boards face significant pressure to make decisions that maximize profits in the short run.⁸

To continue, it should be underlined that in spite of a rich debate under US law on a director's fiduciary duties not much has been said on the meaning and content of short- and long- termism.⁹ In Delaware long- termism does not have a fixed content. It varies by sector and by company and by nature of the business.¹⁰ Delaware has a very pro-managerial legislation (i.e. business judgment rule). Also, a question arises how business judgment rule influences long-termism.¹¹

Unfortunately, the debate on short-and long- termism is not as expanded under UK's law as it is in Delaware and USA in general.¹² Interestingly, s. 172 Companies Act 2006 – the duty to promote the success of the company – has attracted quite a reasonable amount of interest and comment in the US.¹³

Nevertheless, the long-term interest in the decision making processes of company directors in the UK is directly relevant, because of the s. 172 Companies Act 2006. This section states that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so

5 M. Blair, 'Directors' duties in a post – Enron world: why language matters' [2003] 38 WFLR Review 885 – 910, at 885.

6 D. Rosenberg, 'Making sense of good faith in Delaware corporate fiduciary law: a contractarian approach', [2004] 29 DJCL 491 – 529, in addition, in this paper author analysed the meaning of good faith and loyalty and offered a more coherent analysis of corporate directors' adherence to their fiduciary obligations.

7 N. Grossman, 'Turning a short-term fling into a long-term commitment: Board duties in a new era' [2010] 43 UMJLR 905.

8 *Ibid* – in the opinion of this author that pressure comes in part from executives who are financially rewarded for short-term profits despite the long-term risks associated with those profit-making activities. N. Grossman also argued that directors should generate long-term profits outside of the takeover context.

9 i.e. E. Elhauge, 'Sacrificing Corporate Profits in the Public Interest' [2005] 80 NYULR 733, at 756 – has only argued that the long-termism is even harder to define than short-termism

10 See e.i.: *Ibid.* at 769, C. Helms, M. Fox, R. 'Kenagy, Corporate short-termism: causes and remedies' [2012] 23(2), ICCLR 45, at 51-52, F. Brochet, M. Loumiotis, G. Serafeim 'Short-termism, Investor Clientele, and Firm Risk', Harvard Business School January, 2012, appendix A, available at: <http://acctgresearchconf.colorado.edu/brochetloumiotiserafeim.pdf>.

11 See for instance: S. Bainbridge, 'Corporation Law and Economics' (New York, NY: Foundation Press 2002) at 242–243, 412, 421–423.

12 See however i.e.: J. Grinyer, A. Russell and D. Collison 'Evidence of Managerial Short-termism in the UK' [1998] 9 BJM 13; J. Loughrey, A.Keay and L. Cerioni, Legal Practitioners, 'Enlightened Shareholder Value and the Shaping of Corporate Governance' [2008] 8 JCLS 79; A. Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' [2007] 29 SLR 577.

13 For example see: C. Williams and J. Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' [2005] 38 Cornell In'ILJ 493 at 500.



have regard (amongst other matters) to the likely consequences of any decision in the long term.¹⁴ Legal definition of long termism was not introduced; moreover, there is no guidance in the common law or UK Corporate Governance Code¹⁵ about the meaning of the long-termism.

The long-termism in the UK does not have a fixed content. It varies by sector and by company and by nature of the business.¹⁶ Very rarely definitions of long or short-termism could be found.¹⁷ Because of that, difficulties associated with measuring long-term and short-term performance arose. Short-termism is sometimes defined as: ‘foregoing economically worthwhile investments with longer-term benefits in order to increase reported earnings for the current period’.¹⁸ ‘Long-termism’ can be taken to mean: ‘the likely consequences of any decision on the continuous acceptance, over time, of the company’s activity within society’.¹⁹

Also, it has been said that the lack of a common definition of long-termism has left directors with little guidance about how to perform in practice.²⁰

It has been also underlined that directors may take into account the long-term interest but this is only provided when the action that they take promotes the success of the company for the benefit of the members as a whole.²¹ Furthermore, directors of a company must take the factors listed in s.172 (1)(a)-(f) into account, but there is no means by which any stakeholder, other than a shareholder, can enforce this, and thus the “must” becomes rather impotent.²²

Moreover, it has been argued that while s.172 provides an entreaty, in s. 172(1) (a), to manage whilst having regard for the long-term effects of an action, it is questionable whether it will in fact happen across the board. First, it will be difficult to enforce the long-term requirement, especially where directors resolutely maintain that they have acted in good faith. Second, managing for the long term is often antithetical to the interests of the company’s managers.²³

14 Companies Act 2006 s. 172 (1) (a).

15 UK Corporate Governance Code, June 2010, Financial Reporting Council, available at: <http://www.frc.org.uk/corporate/ukcgcode.cfm>, p.1 – it is only stated in the Code that: the purpose of corporate governance is to facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of the company.

16 See for instance: The Kay Review of the UK Equity Markets and Long-Term Decision Making, Final Report, July 2012 available at: <http://www.bis.gov.uk/kayreview>, at 9.

17 L. Sealy, S. Worthington, ‘Cases and Materials in Company Law’, (Oxford: Oxford University Press 2008) 293–294; A. Keay, ‘The Corporate Objective’ (Cheltenham: E. Elgar 2011) 82; For examples of long termism see: L. Cerioni, ‘The Success of the Company in s. 172(1) of the UK Companies Act 2006: Towards an ‘Enlightened Directors’ Primacy?’ [2008] 4 OLR 1, at 4ff.

18 J. Grinyer, A. Russell and D. Collision, ‘Evidence of Managerial Short-termism in the UK’, [1998] 9 BJM 15.

19 L. Cerioni, ‘The Success of the Company in s. 172(1) of the UK Companies Act 2006: Towards an ‘Enlightened Directors’ Primacy?’ [2008] 4 OLR 1, at 4–5.

20 S. Wen, ‘The magnitude of shareholder value as the overriding objective in the UK: the post-crisis perspective’ [2011] 26 (7) Journal of International Banking Law and Regulation 325, at 336.

21 A. Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s “Enlightened Shareholder Value Approach”’ [2007] 29 SLRev 577, at 592; Paul Davis ‘Gower and Davis Principles of Modern Company Law’ (London: Sweet & Maxwell 2008) – ‘The members’ interests’ are paramount; 508, 509; 513–515.

22 E. Lynch, Section 172: a ground-breaking reform of director’s duties, or the emperor’s new clothes? (2012) 33(7) Comp Law 196, at 200–201.

23 A. Keay, ‘The Duty to Promote the Success of the Company: Is it Fit for Purpose?’ August 20, 2010, University of Leeds School of Law, Centre for Business Law and Practice Working Paper, available at: <http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf>, p. 23–34.

Therefore, taking into account the above stated, it has been often argued that s.172 is only a tool for the education of directors as the only potential change ushered in by s.172,²⁴ perhaps causing directors to think more about operating in the long term.²⁵ It has been also said that, s. 172 offers directors a legislative lesson in good management and corporate social responsibility and acknowledges the reasonably obvious fact that directors will be more likely to achieve long-term sustainable success for the benefit of their shareholders if their companies behave responsibly.²⁶

The German law in the Stock Corporation Act (*Aktiengesetz*) sets out the duty of care and one element of the duty of loyalty in §§ 93 and 116. The duty of care requires directors in both the executive board (*Vorstand*) and the supervisory board (*Aufsichtsrat*) to comport themselves as “proper and prudent managers” (*ordentliche und gewissenhafte Geschäftsleiter*).²⁷

It should be also noted that the general standard of the duty of loyalty is, not expressly provided for in the statute, but has been extrapolated by German courts and legal scholars from the nature of the position that directors hold and the tasks they are required to perform (§§ 93(1), 116 AktG).²⁸ Moreover, long-termism is not directly mentioned in the German legislation,²⁹ as a part of director’s duties.

The duty of loyalty (*Treupflicht*) has been described as the duty in all matters connected with the interests of the company to focus solely on the good of the company, to the exclusion of the interests of the director and any third parties.³⁰ Moreover, board of directors should consider the interests of the corporation (*Unternehmen*), shareholders, employees and the general welfare. In all matters concerning the company the managing directors must employ the diligence of an orderly businessman. This general obligation of diligent management includes in particular the obligation of the managing director to use his best efforts and promote the purpose of the company; to comply with, and ensure the company’s compliance with, all applicable statutory and other legal obligations and requirements.³¹

This statement formulates only a general guideline. Therefore it is not possible to establish a clear instruction for directors, as to what they should take into account whilst taking a decision.

24 See for instance: *Supra n.22* at 202; A. Alcock ‘An accidental change to directors’ duties?’ [2009] 30 Comp Law 362 at 367.

25 A. Keay, ‘The Global Financial Crisis: Risk, Shareholder Pressure and Short-termism in Financial Institutions. Does Enlightened Shareholder Value Offer a Panacea?’ Centre for Business Law and Practice, School of Law University of Leeds, England, Working Paper, 20 May 2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839305, p. 29.

26 C. Nakajima, Whither ‘Enlightened Shareholder Value?’ [2007] 28 Comp Law 353, at 353.

27 *Supra n. 3*, 338–339; And also there p. 338–339: The main peculiarity about Germany is that it has two different boards and two different kinds of directors” supervisory directors and managing directors (we should remember however, that our other two jurisdictions also divide their directors into “executive” directors and non-executive” directors, “outside” or “independent” directors when the company is publicly listed, even if they do not employ two completely separate boards governed by statute).

28 *Ibid.* at 339.

29 Apart from § 87 I 2 Aktiengesetz (The Stock Corporation Act), the act from 06.09.1965, the last change 20.12.2012; where it is mentioned that the remuneration system of listed companies shall be aimed at the company’s sustainable development.

30 K. Hopt ‘Gross Kommentar zum Aktiengesetz’ (De Greyter Recht, Berlin 1999) § 93 mn. 145.

31 B. Meister, M. Heidehain, J. Rosengarten, ‘The German Limited Liability Company, Die deutsche Gesellschaft mit beschränkter Haftung’ (Frankfurt am Main : F. Knapp 2005) 83–84.



Moreover, the German Corporate Governance Code³² states that The Management Board is responsible for independently managing the enterprise in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value.³³

Therefore, taking into account the above stated, it seems that directors in Germany are also allowed to consider the relevance of the long-term interests in the decision making processes. However, at this stage of research it is difficult to ascertain if long-termism is being considered by directors.

To sum up, directors' duties concepts differ in these chosen jurisdictions. The UK's and Delaware's law belong to the common law tradition with a well – developed body of case law, and Germany inherited the civil law tradition and a two-tier system. Moreover, each of these jurisdictions requires that managers act in accordance with the standards of due care and loyalty; however they apply these concepts slightly differently in the context of long-termism. Furthermore, Germany and Delaware have adopted the 'business judgment rule', whilst this concept has not been implemented into the UK's law.

The long-term interests in the decision making processes of company directors is becoming more and more relevant in the UK, Delaware and Germany. This is an important issue in all three jurisdictions, despite the fact that, long-termism is directly relevant only in UK, because of s. 172. In all three jurisdictions there are problems with definition of this notion. It does not have a fixed content. It varies by sector and by company and by nature of the business. Could it be defined in the same way across the border? Does it have a chance to become an extra-territorial concept?

It must be also underlined that jurisdictions influence each other in this respect. The concept of long-termism was brought to the UK and continental Europe from US and there is also evidence of a vast comparative research in this area.³⁴ Therefore, this might be sign of functional convergence, as directors are able to exercise their discretion and consider the relevance of the long-term interests in the decision making processes. However, it is too early to establish how effective and relevant this concept will be in practice.

At this stage of research, it is very hard to formulate final conclusions and it appears that I have more questions than answers. However it could be argued that there are common principles of corporate governance across these three countries and functional convergence with regard to long-termism is possible. Nevertheless, there remain differences in directors' duties that will influence the content of long-termism. These differences are deeply embedded in each country's tradition, history and culture, and will therefore not change or change only very slowly.³⁵

32 German Corporate Governance Code as amended on May 15, 2012; available at: http://www.corporate-governance-code.de/eng/download/kodex_2012/D_CorGov_final_May_2012.pdf

33 German Corporate Governance Code, para. 4.1.1.

34 A. Keay, 'The Corporate Objective' (Cheltenham: E. Elgar 2011) 82; A. Mickels, 'Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the US and Europe' [2009] 32 *Hastings Int'l & Comp. L. Rev.* 271.

35 Based on: K. Hopt, 'Common Principles of Corporate Governance in Europe', in: J. McCahery, P. Moerland, T. Raaijmakers, L. Renneboog, 'Corporate Governance Regimes, Convergence and Diversity' (Oxford: Oxford University Press 2002) 193.

The main purpose of this paper was to critically examine to what extent the law imposes on the directors in the UK, Delaware and Germany the obligation to take into account the long-term consequences of their decisions. The current legal landscape in Delaware, Germany and in the UK has been presented.

Therefore, this paper has given the opportunity to have insights into whether the law on the directors' duties in the context of the long-term interests of the company is converging or not. It has been argued that although there are common principles of corporate governance across Germany, Delaware and UK, there remain differences in the directors' duties in the context of long-termism. These differences are deeply embedded in each country's tradition, history and culture, and will therefore not change or change only very slowly.

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ADMINISTRATION OF JUSTICE: COMPARATIVE ASPECT OF DIFFERENT NATIONAL LEGAL SYSTEMS

Miglė Dereškevičiūtė*

Vilnius University, Lithuania

Abstract. Every national legal system has its own approach towards the mechanism of the administration of justice. Different mechanisms of administration of justice, i.e. institutional schemes of administration of justice, are implemented in different countries. In Lithuania, the sole administrator of justice shall be the judiciary. However, there is a number of institutions, which basically perform analogous actions – decide whether a certain legal or natural person has breached the law in the respective sphere, impose fines, etc. Therefore, Lithuanian legal system to some extent faces uncertainties related to the concept and mechanism of administration of justice, more precisely – to the monopolisation and trust the administration of justice solely for the courts. Do other members of the European Union face similar problems? Does Court of Justice of the European Union have an approach to this problem? May all national legal systems in the European Union be assimilated with respect to this issue – is convergence necessary in this respect at all? This paper is dedicated to pose these questions and encourage the discussion concerning these issues.

Keywords: administration of justice, justice, courts, courts' system

INTRODUCTION

Every national legal system has its own approach towards the mechanism of the administration of justice. Different national legal systems have different understanding of how many instances are sufficient to finally solve the dispute (e.g. in some countries there shall be no less than two instances, others have a model of at least three instances, etc.), also have different distribution of subject matters of disputes (in some countries all disputes are settled by courts of general jurisdiction, in others – there is a number of specialised courts, e.g. family courts, administrative courts, constitutional courts, etc.). The mechanisms of the administration of justice in this paper shall be understood as the institutional scheme of administration of justice, i.e. which institutions contribute to the administration of justice.

* Miglė Dereškevičiūtė is a candidate for PhD in Law of the Department of Public Law of Law Faculty of Vilnius University. The subject matter of her PhD thesis is the administration of justice as exclusive function of courts. Her research interests in the broad sense are related to the public law – legal theory, constitutional law, philosophy of law, and, to some extent, administrative law. In 2010 Ms Dereškevičiūtė obtained the Master of Law degree in Vilnius University, she was also a student of Summer Law School on International Constitutional Law in Vienna University (2009). Currently Ms Dereškevičiūtė is an associate of the law firm LAWIN. She also conducts seminars of Legal theory for law students of the Law Faculty of Vilnius University. The latest publication of Ms Dereškevičiūtė is *Justice in Arbitration – is it equal to justice exercised by courts?* (co-author with Jaunius Gumbis) in: Roth/Geistlinger, Yearbook of International Arbitration Vol. II, Intersentia, 2012. Contact: Migle.Dereskeviciute@tf.vu.lt



In principle, rules of the administration of justice differ because of the different judicial systems, different circumstances of each jurisdiction, different phases of development of the legal system, different principles applied, etc. Therefore, each national legal system requires its own solution for the administration of justice.

Taking into account that nowadays there are many spheres of national legislation which turn to the direction of convergence, is there at least a slight chance that the mechanisms of administration of justice will converge?

This debate may not be easily resolved or perhaps even not capable of being resolved at all at an abstract level. Therefore, in this paper case-by-case analysis is chosen in order to illustrate how differently various national legal systems approach this question.

It is very important to mention that comparative law is always a hazardous enterprise. It may be a mistake to pick out isolated features of complex systems and attempt to compare them without careful attention to the larger structure.¹ However, this is exactly what will be done in this paper. Certain isolated features of national legal systems of EU Member States will be taken and, instead of trying to analyse every jurisdiction and consider what is happening in each of them (which would be an impossible task) the paper seeks to take an overview by considering a number of examples and suggesting whether one national system shall take over an example of another and converge or is the similarity between mechanisms of the administration of justice is unnecessary / impossible.

1. ADMINISTRATION OF JUSTICE IN THE REPUBLIC OF LITHUANIA

According to the Constitution of the Republic of Lithuania, the monopoly of the administration of justice in Lithuania belongs solely to the courts. Logical and systematic analysis of the provisions of the Constitution which state that in Lithuania the “state power shall be executed by the <...> Judiciary” (Paragraph 1 of Article 5 of the Constitution) and “justice shall be administered only by courts” (Paragraph 1 of Article 109 of the Constitution) suggests that the administration of justice is one of the key functions of state government, which is embodied by the courts.² Many authors argue that the administration of justice is the most important function of the judiciary, which no one else can fulfil.³

The Constitution does not explain directly what exactly do the words “justice is administered” mean. It is clear that justice is a multi-legal, political, as well as a philosophical category, which in principle cannot be defined briefly and in detail.⁴

Discussions about the essence of justice were initiated a very long time ago, this category was subject to changes of public order, political ideas, historical circumstances, etc. The essence of

1 D. J. Meltzer, ‘Member State Liability in Europe and the United States’ [2006] *International Journal of Constitutional Law* 39, In R. A. Schapiro, ‘Intersystemic remedies for governmental wrongs’ [2009] *University of Toledo Law Review*, Vol. 41 153–168

2 E. Šileikis, ‘Alternatyvi konstitucinė teisė’ (Vilnius: Teisinės informacijos centras 2005) 386–387

3 T. Birmontienė *et al.*, ‘Lietuvos konstitucinė teisė’ (Vilnius: Lietuvos teisės universiteto Leidybos centras 2002) 769

4 E. Šileikis, ‘Alternatyvi konstitucinė teisė’ (Vilnius: Teisinės informacijos centras 2005) 386–387

justice has not changed over the centuries. This is a conservative value, which has been recognized and nurtured at all times. Justice could be characterized very differently – as a legal rule, as a certain set of rules, as a virtue, or even as criterion for decision making of judges and people of other legal profession, etc.⁵

While administrating justice, court settles disputes between the parties, restores the balance between them, imposes fines, etc. In most of the countries, including Lithuania, there is a number of institutions, which basically perform analogous actions – decide, whether certain legal or natural person breached the law in the respective sphere, impose fines, etc. There are many institutions to be regarded as examples. One of them is the State Consumer Rights Protection Authority of the Republic of Lithuania. This institution coordinates state institutions' activities on protection of consumers, performs alternative consumers' disputes resolution, analyses consumer complaints, applies certain measures in case of breach of related laws, including imposition of fines, etc.⁶

Another example is the Competition Council of the Republic of Lithuania. This institution also has a right to examine certain cases falling within its jurisdiction, impose fines, etc.⁷ This institution even has a right to apply interim measures, seize evidence and search any premises with or without notice, which is a clear transplant of functions of the courts. In Lithuania there are more than one hundred of similar institutions which perform at least some part of analogous functions like courts.

Taking into account the similarity of these functions, what is the difference between such institutions and courts? Can these institutions be regarded as administrators of justice as well? Is the existence of such institutions and grant of such powers to them in compliance with the constitutional principle of administration of justice exclusively by the courts? Does this mechanism ensure the separation and balance of powers? May the person imposed with a fine by such institution expect that a fine will be imposed by an independent and competent organ and in accordance with principles of fairness, reasonableness, equity and other principles that are followed in the proceedings in court?

Obviously, the provisions of the Constitution of the Republic of Lithuania cause certain problems related to the concept and mechanism of the administration of justice. Do other members of the European Union face similar problems? Let us further examine some examples.

2. EXAMPLES OF JUSTICE ADMINISTRATION MECHANISMS IN OTHER NATIONAL LEGAL SYSTEMS OF EU MEMBER STATES

The provisions of the basic legal acts of a number of selected European Union Member States will be further analysed. This analysis does not pretend to perform somewhat in-depth analysis of these mechanisms – it is only an explorative look at different wordings of national legal acts in order to determine the differences of national legal systems.

5 S. Ratnapala, 'Jurisprudence' (New York: Cambridge University Press 2009) 318–357

6 <http://www.vvtat.lt/index.php?225846438>

7 http://kt.gov.lt/en/index.php?show=contacts&con_menu=compet

The closest wording to Lithuanian legal acts as described above in the analysed context may be found in the Constitution of Poland. Article 175 of the Constitution of the Republic of Poland sets forth that the administration of justice in Poland shall be implemented by the courts (the Supreme Court, the common courts, the administrative and military courts).⁸ No other institutions are allowed to intervene into the implementation of functions of the administration of justice except for the courts. However, the Constitution of the Republic of Poland does not explicitly provide a definition of “the administration of justice” as well. It is only clear that in the Republic of Poland similar institutions, having the right to carry out investigation proceedings, impose fines, etc., as described above also exist.⁹ However, the author of this paper was unsuccessful in trying to identify if there is any analogous discussion with regard to exclusivity of the function of administration of justice, like in Lithuania as discussed above.

Estonia has very similar wording of the Constitution as well: Article 146 of the Constitution of the Republic of Estonia states that justice shall be administered solely by the courts.¹⁰ Estonian legal doctrine seems to pose questions with respect to the administration of justice – it is observed in the legal doctrine that the tendency in Estonia is shifting towards diminishing of the judicial power and making it even more dependent on the executive branch, also that courts need to be protected from the legislative and executive authorities, first of all from the pressure of the executive branch in the administration of justice or in other fields of activity.¹¹

In the United Kingdom the task of administering justice is carried out by members of judiciary acting in The Queen’s name.¹² However, it may be observed that certain functions of the administration of justice are implemented by other institutions as well. For example, Environmental Agency of the United Kingdom takes action against those who fail to perform their environmental responsibilities – in the words of this institution itself, every year they “bring hundreds of offenders to justice, leading to millions of pounds of fines”.¹³ Legal doctrine observes that after the decision is taken in the Environmental Agency, the judicial review of such decision becomes very limited – judicial review is actually restricted to examining whether there is a recognisable public law right or wrong, not whether the judge disagrees with what the Agency has done.¹⁴ Therefore, the administration of justice is not only taken over from the courts by other institutions, but the judicial review of such decision is somewhat restricted.

Completely different situation may be observed in other countries, which name the courts not as the administrators of justice, but as the executors of the judicial power. For example the Czech Republic and Denmark.

8 The Constitution of the Republic of Poland [1997] as published in *Dziennik Ustaw* No. 78, item 483

9 http://www.uokik.gov.pl/what_we_do.php

10 The Constitution of the Republic of Estonia [1992] as published at http://www.wipo.int/wipolex/en/text.jsp?file_id=256637

11 P. Nuuma, ‘The Constitution of the Republic of Estonia about Separation of Powers and Courts’ [2005] Working Papers in Economics 15 Issue 125–128 53–62

12 <http://www.royal.gov.uk/MonarchUK/Queenandthelaw/QueensroleintheadministrationofJustice.aspx>

13 <http://www.environment-agency.gov.uk/aboutus/work/35696.aspx>

14 D. Mitchell, ‘A Defendant’s Perspective on Environmental Judicial Review and Access to Justice’ [2010] *Judicial Review* 15 Issue 3 252–262

Article 81 of the Constitution of the Czech Republic also sets forth that judicial power shall be exercised in the name of the Republic by independent courts.¹⁵ However, it does not name the function of the courts as “administration of justice”. It may be further explained by the fact that the Charter of Fundamental Rights and Basic Freedoms forming the part of constitutional order of the Czech Republic sets forth a wider mechanism of the administration of justice, including all the bodies of administrative authorities specified in the laws – Article 36 of the said Charter sets forth that everyone may assert, through the legally prescribed procedure, their rights before an independent and impartial court or, in specified cases, before another body.¹⁶

The function of the courts is described as “judicial power” in Denmark as well (Section 61 of the Constitutional Act of Denmark). Further, Section 62 of this Act states that the administration of justice must always be kept separate from the public administration. This means that the Courts must be independent from the Government and the public administration.¹⁷ This is closely connected to Section 3 of this Act, which concerns the tripartite division of power. Even in case a special court (for the purpose to hear a single, specific case) is established, such court under no circumstances has a right to pass a judgement – it may only examine the case.¹⁸

It may be seen that in case the courts are named not as the administrators of justice, but as the executors of judicial power, there is no big difference, whether courts are the only ones making the input into the process of justice administration – having no strict limits with regard to bodies of administration of justice in the main legislation allow the countries to vary more flexibly within their mechanisms of the administration of justice.

The simple examples above show that within the European Union the same functions of solving disputes, imposing the fines, etc. may be implemented by the courts as well as by certain institutions which have the mandate according to the law. For example, some countries entrust the supervision of competition for special agencies, others leave it for the courts.¹⁹ In the European Union, substantive law is harmonised in a wide range of topics, from human rights to transport and trade. It means that the same substantive law is usually applied in a number of spheres of our daily lives. But at the same time, the same substantive law is enforced following different procedural paths within different institutional mechanisms and designs.

15 Constitution of the Czech Republic [1992] as published at http://www.wipo.int/wipolex/en/text.jsp?file_id=190484

16 Charter of Fundamental Rights and Basic Freedoms Resolution of the Presidium of the Czech National Council [1992] as published at http://www.wipo.int/wipolex/en/text.jsp?file_id=190580

17 The Constitutional Act of Denmark [1953] with commentary as published at http://www.wipo.int/wipolex/en/text.jsp?file_id=178670

18 The Constitutional Act of Denmark [1953] with commentary as published at http://www.wipo.int/wipolex/en/text.jsp?file_id=178670

19 V. J. Power, ‘The relative merits of courts and agencies in competition law—institutional design: administrative models; judicial models; and mixed models’ [2010] *European Competition Journal* 91–127



3. LESSONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

After having analysed some examples, the paper will now look into the jurisprudence of the Court of Justice of the European Union. It is important in this context that this court has defined itself as an assistant in the administration of justice for the courts of the Member States of the European Union.²⁰

Article 267 of the Treaty on the Functioning of the European Union and its interpretation provides certain framework for judicial mechanisms in the European Union. This Article states that in case of question with regard to interpretation of the treaties of the European Union and validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union, national courts or tribunals may request the Court of Justice of the European Union to give a preliminary ruling.

In order to determine whether a body making a reference is a court or tribunal in the sense of European Union law, the Court of Justice of the European Union developed the following doctrine. Whether the court may be considered a court or tribunal in the sense of European Union law depends on a number of factors, including whether:

1. it is established by law,
2. it is permanent,
3. its jurisdiction is permanent,
4. it has an *inter partes* procedure,
5. it applies rules of law, and
6. it is independent.²¹

Therefore, it may be clearly seen that the jurisprudence of the Court of Justice of the European Union suggests that “courts” or “tribunals” shall have a broader meaning in the sense of European Union law. It may be concluded that the law of the European Union suggests that the term “courts” shall be understood in a broad sense.

Taking this explanation as a guideline, even in case the administration of justice is awarded for the courts only, the courts shall be understood in the broader sense and even if certain functions of the courts are transferred to other institutions, they shall be regarded as the administrators of justice as well. Therefore, the same procedural guarantees (like transparency, independence, etc.) shall be ensured in the procedures of such institutions as well.

France could be taken as an example here. The Administrative Supreme Court of France has interpreted Article 6 of the European Convention of Human Rights in a way that enforcement insti-

²⁰ *Pasquale Foglia v. Mariella Novello*, Case 244/80 [1980] ECR 03045, paragraph 18

²¹ *Vaassen (née Göbbels)*, Case 61/65 [1966] ECR 261; *Pretore di Salò v Persons unknown*, Case 14/86 [1987] ECR 2545, paragraph 7; *Danfoss*, Case 109/88 [1989] ECR 3199, paragraphs 7 and 8; *Almelo and Others*, Case C-393/92 [1994] ECR I-1477; *Job Centre*, Case C-111/94 [1995] ECR I-3361, paragraph 9, *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin*, Case C-54/96 [1997] ECR I-04961, paragraph 23

tutions shall be considered as courts or tribunals and they are under the strict obligation to provide to the parties all guarantees related to a fair, impartial and independent trial. For instance, persons of such institutions responsible for decision making may not play any role in the investigation.²²

It may be concluded that it does not matter which body is appointed as the administrator of justice under national legislation – all institutions, having the competence to perform functions related to implementation of justice at least in part, shall perform these functions following the due process, impartially, etc.

CONCLUSION: IS CONVERGENCE NECESSARY AT ALL?

As it can be seen from examples provided in this paper, rules of administration justice differ from one national legal system to other. This may be explained by the fact that national legal systems differ a lot. Even if it were possible to reach a conclusion on this issue, it is wholly wrong for any regime or solution to be imposed on other jurisdictions because each jurisdiction needs to have its own customized regime.²³ Therefore, it can be concluded that each national legal system requires its own solution for the administration of justice. In opinion of the author of this paper, in case the due process is respected in all of the bodies at least partly contributing to the administration of justice, convergence, i.e. assimilation of the mechanisms, is not necessary. However, it is the concern of every national legal system to ensure that the same principles of due process would be applied in all such institutions.

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JURISDICTION IN CIVIL AND COMMERCIAL MATTERS UNDER THE REGULATION NO 1215/2012 – BETWEEN COMMON GROUNDS OF JURISDICTION AND DIVERGENT NATIONAL RULES

Łukasz Dyrda*

Jagiellonian University in Kraków, Poland

Abstract. The paper presents and discusses convergences and divergences in determining the court that would be competent to hear the civil and commercial actions covered by the material scope of application of the Regulation No 1215/2012. The analysis is performed from the formal and substantial perspective. The first one concentrates on the source of rules of jurisdiction. And the second focuses on convergences and divergences in the application of rules of jurisdiction of the Regulation.

Keywords: Regulation No 1215/2012, jurisdiction, domicile

INTRODUCTION

In member states of the European Union (with the exception of Denmark¹) jurisdiction in most civil and commercial matters is governed by the uniform rules of the Regulation No 44/2001². The Regulation will be repealed by the Regulation No 1215/2012³, which will apply from 10 January 2015⁴. The Regulation provides for the general rule of jurisdiction; the defendant having his domicile in a member state shall, whatever his nationality, be sued in the courts of that member state. The provision is supplemented by special jurisdiction, repealed by comprehensive rules for insurance, consumer and employment contracts and by exclusive jurisdiction. However, the Regulation will not completely supersede the national rules of jurisdiction.

The issue of convergence and divergence in jurisdiction in civil and commercial matters covered by the scope of application of the Regulation can be analysed from different perspectives. It is possible to take the formal approach concentrating on the source of rules of jurisdiction – whether it is the Regulation or national laws. The problem may also be discussed focusing on the content of rules of jurisdiction. That is a substantial perspective.

* PhD Candidate, Chair of Private International Law, Faculty of Law and Administration, Jagiellonian University in Kraków, Poland.

1 However, Denmark concluded an agreement with the Community ensuring the application of the provisions of Regulation (EC) No 44/2001 in Denmark (Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62.

2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1; hereinafter: the Brussels I Regulation.

3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1; hereinafter: the Regulation.

4 With the exception of Articles 75 and 76, which will apply from 10 January 2014?

 FORMAL PERSPECTIVE OF CONVERGENCE AND DIVERGENCE

Article 4(1) of the Regulation provides that persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state⁵. This traditional solution, taking the perspective of the defendant⁶, has its roots in the Roman law (*maxim 'actor sequitur forum rei'*). The provision not only sets out the general rule of jurisdiction but it is also a criterion of applicability of the Regulation's rules of jurisdiction⁷. It means that the rules of jurisdiction of the Regulation apply when the defendant is domiciled in a member state (with a few exceptions). In other situations the Regulation refers to national law⁸ (Article 6(1)). The Court of Justice of the European Union⁹ denied the application of the doctrine *forum non conveniens*¹⁰ according to which a court can decline its jurisdiction if it is of the opinion that a court of another jurisdiction would be a more appropriate forum for the trial of the action¹¹. Although the solution seems to be attractive, it poses a threat to the uniformity and foreseeability of which court has jurisdiction. In the same judgment the Court emphasized that nothing in the wording of Article 4 suggests that its application is subject to the condition that there should be a legal relationship involving a number of member states. It follows that the Regulation applies even if the dispute is closely connected with non-member states as long as the defendant is domiciled in a member state or other connecting factor establishes jurisdiction of a member state and on condition that there is an international element¹². The Regulation does not apply to purely national cases.

In the European Commission's proposal¹³ for the recast of the Brussels I Regulation it was proposed that the rules of the revised Regulation be also applicable to the defendants domiciled in third states. The Proposal intended to eliminate the residual application of national laws¹⁴ by

5 The same provision can be found in the Brussels Convention of 1968 and the Brussels I Regulation.

6 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final.

7 This precision is required as other rules – especially those governing *lis pendens* and recognition and enforcement of foreign judgments apply irrespective of the domicile of the parties involved (see K. Weitz, 'Projektowane zmiany rozporządzenia nr 44/2001' in P. Grzegorzczak, K. Weitz (eds.), 'Europejskie prawo procesowe cywilne i kolizyjne' (Warszawa: LexisNexis 2012), 28, footnote 36). What counts is a material scope of application.

8 The notion of 'national rules' is not enough precise because it contains all rules which are not set by the European Union. These may be purely national rules but also conventional rules coming from bi- and multilateral conventions. The first used to be very popular in the member states which belonged to the soviet bloc. The most significant example of the latter type is Lugano Convention of 2007 being a parallel convention to the Brussels I Regulation.

9 Hereinafter: the CJEU.

10 Andrew Owusu v. Nugent B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd., Mammee Bay Club Ltd., The Enchanted Garden Resorts & Spa Ltd., Consulting Services Ltd., Town & Country Resorts Ltd., Case C-281/02 [2005] ECR I-1383.

11 P. Vlas in U. Magnus, P. Mankowski (eds.), 'Brussels I Regulation' (Munich: Sellier European Law Publishers, 2012), 79–80.

12 See Article 81 of the Treaty on the Functioning of the European Union, [2008] OJ C 115/47; hereinafter: the TFEU.

13 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, 3; hereinafter: the Proposal

14 With the exception of Article 6(1) of the Proposal.

taking the approach of full harmonisation¹⁵. Harmonisation was not, however, the aim of its own. The European Commission has argued that: ‘the diversity of national law leads to unequal access to justice for EU companies in transactions with partners from third countries: some can easily litigate in the EU, others cannot, even in situations where no other court guaranteeing a fair trial is competent. In addition, where national legislation does not grant access to court in disputes with parties outside the EU, the enforcement of mandatory EU law protecting e.g. consumers, employees or commercial agents is not guaranteed’¹⁶. At the same time, the proposed reasonable heads of jurisdiction conferring jurisdiction to member states only if they have a sufficient link with the dispute would eliminate exorbitant jurisdiction and would protect persons domiciled in third countries from unreasonable suits in member states¹⁷. This would be coherent with the Rome I and II Regulations¹⁸, which determine the applicable law irrespective of whether it is the law of a member state¹⁹. The European Commission was only partially successful and the Regulation still leaves room for divergent national rules of jurisdiction for the situations involving the defendant from a third state. However, the European legislator has decided that jurisdiction over consumer and employment contracts will be governed by the Regulation irrespective of the domicile of the defendant being a professional party.

Article 6 of the Regulation plays a very important role demarcating the application of the rules of jurisdiction set out in the Regulation vis-à-vis defendants domiciled outside the European Union²⁰. It follows that the defendant who is not domiciled in any member state may be brought before the courts of a member state on the basis of the Regulation if there is: a) exclusive jurisdiction of a member state, b) parties concluded a prorogation agreement²¹ or, which is a novelty in comparison to the Brussels I Regulation, c) there is a consumer or employment contract. As far as consumer contracts are concerned, the seller may be sued, regardless of his domicile, in the courts for the place where the consumer is domiciled. As a consequence, no national rules of jurisdiction can be invoked to establish jurisdiction and convergence between the member states is reinforced

15 K. Weitz, ‘Projektowane zmiany rozporządzenia nr 44/2001’ in P. Grzegorzczak, K. Weitz (eds.), ‘Europejskie prawo procesowe cywilne i kolizyjne’ (Warszawa: LexisNexis 2012), 29. The proposed model is similar to the one of the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1, which leaves no room for national rules of jurisdiction.

16 The Proposal, 3.

17 K. Weitz, ‘Projektowane zmiany rozporządzenia nr 44/2001’ in P. Grzegorzczak, K. Weitz (eds.), ‘Europejskie prawo procesowe cywilne i kolizyjne’ (Warszawa: LexisNexis 2012), 31.

18 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6 and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.

19 K. Weitz, ‘Projektowane zmiany rozporządzenia nr 44/2001’ in P. Grzegorzczak, K. Weitz (eds.), ‘Europejskie prawo procesowe cywilne i kolizyjne’ (Warszawa: LexisNexis 2012), 31. However, it must be emphasized that the universal character of a conflict-of-laws rule means that it determines law of any state. The universal character of rule of jurisdiction means that within its material scope of application it is the only source of rules of jurisdiction. It means that the Regulation containing universal rules of jurisdiction lists all types of connections that make the court competent to hear the dispute.

20 P. Vlas in U. Magnus, P. Mankowski (eds.), ‘Brussels I Regulation’ (Munich: Sellier European Law Publishers, 2012), 84.

21 It is no longer required that at least one party has to have his domicile in a member state.



because the area that was previously excluded from the direct application of the Regulation is now covered. The same is true for employment contracts. The employer may be sued in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

It is also necessary to keep in mind that the Brussels I Regulation contains provisions stipulating that when a professional (insurer, employer, seller) is not domiciled in a member state but has a branch, agency or other establishment in one of the member states, in disputes arising out of the operations of the branch, agency or establishment, he is deemed to be domiciled in that member state. The provision may still be found in the Regulation. However, it is of greater importance when insurance contracts are concerned because, unlike in the case of consumer and employment contracts, there is a prerequisite that the insurer has a domicile within the European Union²². If this is not the case, national rules of jurisdiction apply.

As already mentioned, if the defendant is not domiciled in a member state and there is no other ground of jurisdiction (like exclusive jurisdiction), national rules of jurisdiction shall apply. These still-existing divergent national rules, if based on weak connecting factors, may be considered as exorbitant. Although they seem to protect the interests of persons domiciled in the member state, they can be regarded as infringing the principle of sound administration of justice.

It must be emphasized that the rule conferring jurisdiction to the courts of a member state where the defendant is domiciled does not in any way affect the national rules of venue²³. However, with the exception of Article 7(6), heads of special jurisdiction gives competence to a certain court (they work both as rules of jurisdiction and venue) which means the higher level of unification of procedural laws. Obviously, the general rule of jurisdiction is common to many member states and the application of national rules of venue will usually lead to the same result as Article 4(1). It is true with regard to natural persons, since Article 62(1) of the Regulation is a conflict-of-laws rule which stipulates that in order to determine whether a party is domiciled in the member state whose courts are seized of a matter, the court shall apply its internal law (the *lex fori*). Whether the defendant is domiciled in other member state should be decided by the law of the member state in question (Article 62(2)). It means that courts have to apply national laws to determine whether (and where) the defendant is domiciled in one of the member states. This is an exception to the principle that the EU private international law regulations require autonomous interpretation. It may happen that one person will have several different domiciles but potentially negative consequences of that are mitigated by the fact that the domicile in the *forum* state prevails²⁴ and by the rules on *lis pendens*. The situation is different when it comes to companies and other legal persons or

22 H. Heiss in U. Magnus, P. Mankowski (eds.), 'Brussels I Regulation' (Munich: Sellier European Law Publishers, 2012), 334.

23 Venue rules deal with the internal of allocation of cases between the various courts of that Member State.

24 P. Jenard, Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C 59/1, 16.

associations. The Regulation in Article 63 provides for the autonomous definition of the domicile giving three alternative options (the plaintiff may freely decide if all three places are within the territories of the member states); i.e. statutory seat, central administration or principal place of business. It makes the common rules more transparent but at the same time the three alternatives increase the risk of conflict of jurisdiction which is, however, governed by the express provision of Article 29. Exceptionally, Article 24(2) confers exclusive jurisdiction in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs to the courts of the member state where legal person has its seat determined in accordance with the national rules of private international law. As far as trusts are concerned, the Regulation in Article 63(3) refers to rules of private international law of the member state in order to determine whether a trust is domiciled in the member state whose courts are seized of the matter.

Irrespective of the source of rules of jurisdiction, either based on the Regulation or on national rules, a judgment rendered by a member state court will be recognized and enforced under the Regulation. It follows that the European legislator accepts possible divergences emerging from national rules of jurisdiction and does not find them significant enough to modify the common rules of recognition and enforcement.

Despite the efforts to unify rules of jurisdiction, due to the fact that the Regulation: a) shall not affect any conventions to which the member states are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (Article 71), b) shall not affect the application of bilateral conventions and agreements between a third state and a member state concluded before the date of entry into force of the Brussels I Regulation which concern matters governed by this Regulation (Article 73), the uniform rules of jurisdiction do not always apply. What is more, there are still territories of the member states which are excluded from the Regulation pursuant to Article 355 of the TFEU.

SUBSTANTIAL PERSPECTIVE OF CONVERGENCE AND DIVERGENCE

The analysis does not limit to the formal perspective based on the limited scope of application of the Regulation. It happens that uniform rules governing the competence of a court to hear the dispute can be differently interpreted as for their scope (e.g., whether the matter in question is of contractual or non-contractual nature). In theory of private international law it is called the problem of characterization. This is not without significance. The tortious and contractual connecting factors can establish the competence of different courts which may endanger not only the uniformity of application of the European private international law measures but may also pose a threat to the parties (at least one of them) putting into question the foreseeability of the competent court and sound administration of justice.

This is not the only source of divergence. As the case-law of the CJEU shows, the connecting factors themselves may lead to different interpretations. The first decision regarding the special head of jurisdiction in torts was rendered in 1976, shortly after the entrance into force of the Brussels



Convention, when the Court of Justice decided that the place where the harmful event occurred must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, if they are not identical²⁵. Later the Court distinguished between the direct and indirect damage²⁶ and introduced the mosaic principle²⁷. When it comes to Article 7(1), it follows from the case-law that the place of performance of the obligation in question must be determined by reference to the substantive law determined by the rules of private international law of the *forum*²⁸. Fortunately, two most important contracts – the sale of goods and the provision of services have an autonomous definition of the place of performance of the contract. Other contracts fall within the scope of uniform conflict-of-laws rules under the Rome I Regulation. It means that irrespective of the court where the case is brought, the place of performance will be the same. Against the background of Article 7(1) one can observe a shift from a divergence emerging normative approach (the case-law under the Brussels Convention) to a converging factual approach defining autonomously place of performance for two most important contracts – the contracts of sales and services²⁹ (the express rule of the Brussels I Regulation and the Regulation). Since the purpose of this paper is not to discuss any specific area of civil and commercial matters covered by the Regulation, it suffices to stop at this very general stage which, however, perfectly shows that courts of member states had and still have many problems with uniform interpretation and proper localization of connecting factors.

With very few exceptions rules on jurisdiction of the Regulation are based on autonomous fact-based concepts. Thanks to this the courts of member states can overcome difficulties caused by differences between substantive laws of member states. The idea, usually strongly advocated by the CJEU, is that the same case understood as a collection of facts should fall under the same head of special subject matter jurisdiction³⁰. It also happens that the European legislator is himself the source of uncertainty which is clearly visible with regard to *actio pauliana*, *negotiorum gestio* or unjust enrichment.

One observation should be made regarding formally divergent national rules of jurisdiction called residual jurisdiction³¹. In certain matters, such as contracts, torts and branch operations, the majority of the member states have enacted specific rules, in line with the Brussels regime³².

25 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA*, Case 21-76 [1976] ECR 1735.

26 *Dumez France SA and Tracoba SARL v. Hessische Landesbank*, Case C-220/88 [1990] ECR I-49; *Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.*, Case C-364/93 [1995] ECR I-2719.

27 *Fiona Shevill v. Presse Alliance SA*, Case C-68/93 [1995] ECR I-415.

28 *Industrie Tessili Italiana Como v. Dunlop AG*, Case 12/76 [1976] ECR 1473.

29 P. Mankowski in U. Magnus, P. Mankowski (eds.), 'Brussels I Regulation' (Munich: Sellier European Law Publishers, 2012), 109.

30 Cf. H. Trammer, 'Z rozważań nad strukturą normy kolizyjnej prawa prywatnego międzynarodowego', 'Studia Cywilistyczne' [1969], vol. 13-14, 400.

31 Cf. Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations (http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf), 5.

32 Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their

It follows that these rules may be substantially convergent with the regime of the Regulation. However, this is not always the case and it happens that national rules are drafted not only differently but also they rely on totally different connecting factors³³.

CONCLUSION

The new Regulation seems to be the next small step towards uniform rules of jurisdiction. It improves convergence but at the same time leaves room for divergence between member states. However, the Regulation provides for rather clear and workable rules of jurisdiction.

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THE INTERACTION OF NATIONAL LEGAL SYSTEMS IN REGULATION OF MEDIATION

Egor Evtukhovich*

Voronezh State University, Russian Federation

Abstract. The main purpose of this work is to study the experience of legislative regulation of mediation in Russia and other countries in the context of national legal systems interaction. Mediation, as one of the most quickly developing alternative dispute resolution (ADR) procedures, is becoming or has already become the subject of legislative regulation in most developed countries of the world. As the sphere of practical application of mediation is extending, it is important to find out which trends of the procedure's development are common, and which are country-specific.

On the one hand we can find convergence of national legal systems in this field. First of all, similarities are determined by the fact that implementation of mediation at the national level is mostly based on the unified international model documents or directives. Another reason is the private nature of mediation as an informal procedure of alternative dispute resolution that objectively limits the circle of regulated aspects. That is why, for example, the approaches to the establishment of procedural principles, aims, mediator's status and stages of mediation don't differentiate a lot from country to country.

On the other hand, some aspects of mediation predetermine divergence of regulation, what can be clearly seen by the example of court-annexed mediation. Differences of regulation models of this specific legal institution at the national level can be explained by its close connection with public civil or commercial procedure in state courts, which have a great number of specific features on the ground. Another problem relating to the establishment of court-annexed mediation, is the application of mandatory mediation, which has already become an efficient practice in such countries as the USA, the Netherlands, Canada and Australia, though most of others reject this approach claiming that it violates the accessibility of justice principle.

Key words: mediation, convergence, court-annexed mediation, mandatory mediation

INTRODUCTION

It can be argued with certainty that mediation has become one of the most popular alternative dispute resolution (ADR) procedures worldwide. While the number of monographs and journal articles relating the development of this procedure is increasing, the sphere of its implementation is being extended in the legal practice of different states. It is therefore now unlikely that someone engaged in the world of law still confuses mediation with meditation. On the verge of the twenty first century, the regulation of mediation as a legal institution has become one of the universal tendencies for developed countries regardless of their belonging to the Anglo-Saxon (common law) or the Continental (civil law) system. As the primary practical experience in this field have

* Lecturer at the department of Civil law and procedure; post graduate Voronezh State University (law faculty).

already been gained, it is possible to search for similarities and singularities in approaches to the regulation of mediation in different states.

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Mediation is developing in a great number of countries, the sphere of its application is broadening, and sometimes it is starting to be considered as a separate profession. However, there is no conventional definition of this alternative procedure. With the enactment of a new legal act that regulates mediation or with the publication of a new book in this field, a new definition is often proposed. For the purposes of this work, mediation can be generally understood as a dispute resolution procedure with the participation of a third neutral party, called mediator, who facilitates disputants to resolve their dispute by negotiating a settlement without imposing a binding decision. Mediation can therefore be placed in the group of consensual procedures, in contrast to adversarial arbitration or litigation.

Although the claim that mediation emerged in the USA is rather unsubstantiated¹, it is obvious that the most active development and practical application of this method as a separate alternative dispute resolution procedure started in that country in the second half of the twentieth century due to a number of factors. Litigation has always been the primary way to resolve legal disputes, and the authority of state courts in the USA can hardly be overestimated; however, specialists have often pointed to the drawbacks of American civil procedure, among which the unpredictability due to jury participation in the consideration of civil cases, high cost and sometimes unreasonably long proceedings have been especially emphasized². The rapid growth in the number of civil cases resulted in the overload of state courts, which could aggravate the existing disadvantages and deteriorate the quality of justice. As a result of these negative tendencies, mediation has begun to be used as an efficient alternative method, mostly because of its private consensual nature, making it a universal and very convenient procedure for disputants. Mediation in the USA has become an integral part of the system of dispute resolution methods; it is a real alternative to litigation³, and in some cases it is used along with litigation.

Although civil procedure in the continental (civil) law system countries differs from the Anglo-Saxon model and has some important advantages, within the last two decades of the previous century mediation became a subject of comprehensive scientific research and legal regulation in these states, including Germany, the Netherlands, France and Austria. Although inquisitorial litigation in the above-mentioned countries seems to be more predictable and less expensive, the

1 Some authors consider mediation to be a kind of modern procedure with the intervention of third neutral party professionally facilitating disputants without making a binding decision, connecting its emergence with the elaboration of Harvard negotiation method in fourth quarter of the 20th century at Harvard university. See: Риссе Й. Будущее медиации – шансы американской модели медиации в Германии. Медиация в нотариальной практике (Москва (Волтерс Клувер) 2005) 87 (The Future of Mediation - Chances of American Model in Germany).

2 Langbein John H. "The German advantage in civil procedure" [1985] 52 U.Chi.L.Rev. 823–866;

3 See: Фишер Р., Юри Р., Паттон Б. "Переговоры без поражения: Гарвардский метод" (Москва (Эксмо) 2010) (Getting to Yes: Negotiating Agreement without Giving in);



problem of the overload of state courts is typical of it too. The basic precondition of this situation is a limited period of proceedings, considered as a guarantee of a right for a fair trial, provided by European Convention on Human Rights. As the limitation differs depending on the particular state, it seems to make the problem of courts overload less or more urgent, if not to solve it entirely. For example, in Russia, this period is generally limited by two months for proceedings in general jurisdiction courts and three months for proceedings in commercial (arbitrage) courts, which is not sufficient. As the number of cases is growing, courts can hardly manage their consideration within the above-mentioned period of time without the deterioration of justice quality. That is why there remains a strong public interest in the further development of mediation in Russia and in other countries belonging to the continental system, which must include the enactment of both special law regulating mediation and amendments of procedural codes.

Thus, many similarities in the ways of regulating the procedure at the national level can be found. The whole development and extension of contemporary mediation as a separate dispute resolution procedure can be described as a complex succession, which is based, on the one hand, on the specific national traditions and historical experience of consensual procedure implementation, and, on the other hand, on the universal negotiation techniques elaborated in the USA⁴. Isn't it an example of successful interaction between different jurisdictions?

From my point of view, three general factors determining the convergence in this sphere can be distinguished. First of all, contemporary mediation is based on very similar techniques, which has already been emphasized before. Some authors therefore point out the universality of the process structure, even though mediation is traditionally regarded as a non-formal procedure. Although there is no conventional approach to defining stages within mediation, it is likely that some actions are always taken regardless of the procedural model and particularity of the dispute. This structural universality describes the inner part of mediation and allows settling a great variety of issues.

The second factor is the private nature of mediation, which makes it impossible to regulate the entire procedure by legal rules. Mediation cannot be too formalised. The analysis of the mediation legislation of countries belonging to different legal systems and having diverse traditions shows that the scope of regulation does not differ a lot. The low level of formalism in comparison with adversarial dispute resolution methods is usually claimed to be an advantage of mediation⁵. As the procedure is based on the confidentiality principle, its inner part, including the actions of the mediator and disputants, can hardly be regulated by legal rules. This characteristic provides maximal control over the process by disputants, who are empowered to choose its direction. That is why laws mostly constitute the basic procedural principles and the organisational aspects of mediation, including the order of initiating procedure and of its termination by making a final agreement or not. The extent of such regulation can vary, especially when we speak about court-annexed mediation; nonetheless the inner part of the process remains flexible.

4 Здрок О.Н. Примирительные процедуры в гражданском судопроизводстве: понятие, классификация, тенденции развития [2012] Вестник гражданского процесса № 1 194 (Conciliatory proceedings in civil procedure: definition, classification, tendencies of development);

5 Носырева Е.И. Альтернативное разрешение споров в США (Москва (ОАО Издательский дом «Городец») 2005). 67 (Alternative Dispute Resolution Procedures in the USA).

The last factor is the effect of the official legal acts regulating mediation at the international level, which influence national systems a lot even if some of these acts are only recommendatory. European specialists often emphasize the impact of the directives of the European Parliament and Council, for example Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, which was supposed to be obligatorily implemented in national law by 2011⁶. The enactment of such acts can be considered as an important step in the unification of national legislation in this field. Another influential act is UNCITRAL Model Law on International Commercial Conciliation 2002, whose provisions have formed the basis of many national laws on mediation.

Despite the existence of apparent convergence factors, the development of mediation faces many problems, some of which are common practically for all jurisdictions, while others describe mostly national controversial approaches.

One of the most urgent problems is the exact definition of mediation. It can seem really strange that after so many attempts to describe and regulate mediation as a separate alternative procedure, there is still no convention regarding the precise content of this category. Moreover, this problem seems to be more or less common for both English speaking Anglo-Saxon system countries and their continental law partners. Generally the question is whether mediation (from Latin *medius* – taking a middle position between two opposite views or sides) means every dispute resolution process with the participation of a third neutral party – an intermediary, who facilitates disputants to settle their issues, but has no authority to make a binding decision, or just a separate kind of such procedure, which is more professional due to the participation of a mediator who is specially educated for using efficient negotiation technics. Even in English speaking countries, where the term “mediation” can describe both the general procedure and its separate professional kind, there are different approaches. Usually mediation is differentiated from conciliation since the mediator using special techniques cannot make proposals for a dispute resolution, while the conciliator can⁷. That is why even the so-called evaluative mediation, which implies a more active position of the mediator, is sometimes not considered to be true mediation⁸. In some cases mediation is differentiated from similar procedures due to the nature of the dispute⁹.

However, even more problems arise in the countries which have their own historical experience of the use of consensual procedures for resolving disputes, and relatively special terms for such procedures in their native languages. For example, the word “mediation” did not originate in German, where there are such similar terms as “*Schlichtung*” and “*Vermittlung*”¹⁰. In Russian, there is the term “посредничество”, which can denote the procedure of third party facilitation conciliation between disputants¹¹. Although the term “посредничество” seems to have been conventional and

6 Trencek T., Loode S. “Mediation “made in Germany” – a quality product” [2012] *Alt. Disp. Resol. Journal* 23 65.

7 Trencek T., Loode S. *Op. cit.* 62.

8 Kovach K. Love L. “Evaluative Mediation is an Oxymoron” [1996] 14(3) *Alternatives to the High Cost of Litigation*. Volume 14, Issue 3 31–32.

9 Kovach K.K. “Mediation in a Nutshell: second edition” (NY (Thomson Reuters) 2010) 331.

10 Trencek T., Loode S. *Op. cit.* 62.

11 Ожегов С.И. *Словарь русского языка* (Москва.1983). (The Russian Language Dictionary)

had been used in some laws, it was decided to borrow the foreign term “*mediation*”, which was officially constituted by the enactment of the Federal Law on Alternative Dispute Resolution Procedure with Participation of Mediator (Mediation Procedure) in June, 2010 (hereinafter the Law on Mediation)¹². Unfortunately, this law did not solve the problem of terminology, which was crucially important for the implementation of the procedure. Moreover, it is rather difficult to understand how ‘mediation’ corresponds to “посредничество”. Mediation is defined as a dispute resolution method with the facilitation of the mediator, used on a voluntary basis and aimed at the achievement of a mutual decision. It can therefore be concluded that the basic characteristic of mediation is the participation of a special person – the mediator, who is considered to be a professional. Still the law does not define the difference between the mediator and the ordinary intermediary (in Russian, the word “посредник” denotes both the concepts). It means that it is not necessary for mediation to be conducted by a person with a specific educational level and predetermined skills (necessary to mediate as a professional), because the non-professional mediator is just required to reach the age of eighteen and not to have former convictions. This problem may seem to have a rather theoretical character, but this is so owing to the almost absolute absence of practical mediation implementation as a legal procedure in Russia.

It is problematic to propose a definition of mediation, for the purpose of efficient legal regulation, based just on its inner procedural aspects (the model of mediation, the role of the mediator), since, it has already been claimed, the nature of mediation is private, which implies impossibility and inadvisability of the entire process regulation. The only workable criterion is either the connection of mediation with the activity of a specially trained professional – the mediator, or its identification with general consensual procedure with the participation of a third neutral party. Otherwise, there will inevitably remain collisions in legal practice.

There are many criteria which can be used to identify different types of mediation. For the purposes of this work, the most important are the criteria of connection between mediation and litigation. According to this classification, mediation can be subdivided into three general types: out-of-court, before-court and court-annexed (sometimes court connected, court-based). Out-of-court mediation is the classical private model, which has practically no direct connection with litigation (apart from the influence of confidentiality on evidence rules) and is regulated by special procedural legislation. Before-court mediation is conducted before initiating proceedings in court and is considered as a necessary condition of such initiation owing to law provision or the agreement of disputants.

The definition of court-annexed mediation seems to be the most controversial. On the whole, such procedure can be described as mediation which is implemented after the official initiation of proceedings in court, so the subject of this procedure is simultaneously the case in law. The necessary feature of court-annexed mediation is that it is conducted within litigation, and therefore

¹² О примирительной процедуре с участием посредника (процедуре медиации): Федеральный закон № 193-ФЗ [2010] Российская Газета (the Federal Law on Alternative Dispute Resolution Procedure with Participation of Mediator (Mediation Procedure))

has some impact on it, which necessitates the participation of the court in organising mediation process. The function of the court is making rulings which initiate mediation, make a break in proceedings, fix the termination of mediation process and renew the proceedings. If disputants achieve an agreement, proceedings are terminated in the order provided by the procedural code. As the organisational aspects are regulated not only by a special procedural law, this type of mediation has a complex nature and can be described as an interaction private and public law. However, mediation remains independent as the court has no opportunity to interfere in the inner part of procedure. That is why even though court-annexed mediation is strongly connected with litigation, it remains separate and cannot be considered as one of the court procedure stages. The main aim of regulation in this sphere is to find a balance and prevent legal collisions, which will provide real coordination of the two procedures. The main aim of regulation in this sphere is to find a balance and prevent legal collisions, which will provide real coordination of the two procedures. It is necessary to move from the existing alternative “mediation or litigation” to their real cooperation, while saving the independence of the first one¹³

One of the most interesting problems concerning the development of mediation in different countries and practically dividing all the states into two groups is the implementation of mediation as a compulsory procedure. That is why another important criterion for classification is how mediation is initiated. If procedure is conducted only on the ground of voluntary agreement of disputants, it is usually called voluntary. By contrast, the mediation in which disputants have to participate due to a law provision or a court order, is called mandatory. It is important that disputants are obligated to take part in such procedure, but not to end it by reaching an agreement. Mandatory mediation is always connected with litigation and can be either before-court or court-annexed. The main negative consequence of the failure to participate in such procedure is the inability to use litigation as a dispute resolution method, which can be reflected in the rejection of claim acceptance or making judgment, depending on the particular stage of civil procedure. Although there is successful experience of implementing this model in such countries as the USA, the Netherlands, Australia, and Germany, mandatory mediation is claimed to violate the accessibility of the justice principle. The use of mediation as mandatory procedure does not deprive disputants of their right of a fair trial; it just postpones the moment of its enjoyment after attending mediation sessions. In this case, mediation is considered somewhat like obligatory before-court procedure, many types of which are part of the existing legislation.

CONCLUSION

Since the modern civil procedure in different countries is changing nowadays, it becomes even more important not to concentrate only on the small aspects of particular procedural system, but to search for some global tendencies, which characterise the convergence or divergence of na-

¹³ Борисова Е.А. “Российская процедура медиации: концепция развития” [2011] Вестник гражданского процесса №1 70 (Russian mediation procedure: the concept of development).

tional legal systems. One of such tendencies is the development of alternative dispute resolution procedures, especially mediation. This consensual procedure provides the solution of many urgent problems of contemporary judicial systems, some of which seem to be more or less typical of all jurisdictions. Mediation is a universal method, which can be used solely or in cooperation with any adversarial procedure, even though remaining independent from it. However there are many factors, determining the similarity of approaches to the regulation of mediation, there are still many problems, discouraging its development. That is why it is important to generalise the gained experience of mediation implementation and elaborate new ways for further improvement of the whole dispute resolution system. The main purpose of modern procedural law is to harmonise the application of existing procedures, which must cooperate, but not contradict, for an effective and appropriate protection of human rights and legal interests.

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WHOSE FAULT IS IT?

Chiara Feliziani*

“La Sapienza” University of Rome, Italy

Abstract. Since *Francovich*, ECJ held that it is inherent in the system of the Treaty that individuals are entitled to seek compensation for damages caused by the breach of their treaty rights by Member States and that the right to damages is not conditional on that infringement being culpable.

Recently, the Court adopted this point of view in *Stadt Graz v. Strabag*, where it held that directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law conditional on a finding that the contracting authority is at fault.

Although this statement is in compliance with a long-standing case law of the ECJ, its importance lies in the possibility to influence those legal systems where the public administration’s liability has never been clearly established. This is, for example, the case of Italy where, even if a recent legislative reform introduced the action of damages against public administration, scholars and domestic courts are still debating about the substantive conditions that must be fulfilled in order to exercise that right to reparation.

For this reason, the paper compares the Italian approach to the theme with the ECJ point of view, looking for both convergences and divergences and focusing especially on the weakness of the domestic idea of the public administration’s liability. Therefore, the paper tries to contribute to the ongoing debate providing a reading of the topic in compliance with the EU law and the ECJ case law, especially for what concerns the substantive conditions that must be fulfilled in order to exercise the right to reparation.

Keywords: PA liability, infringement of EU law, fault, right to damages, public procurement law.

I. THE BEGINNINGS OF THE STATE’S LIABILITY IN THE EU LEGAL ORDER

There is a cornerstone in the history of the State liability in the EU legal system. With no doubt, it is represented by the *Francovich* case¹ of 1990, even if – according to some scholars² – a sort of “warning sign” may be already seen in *Van Gend & Loose*³.

* Phd student of European and Comparative Administrative Law at “La Sapienza” University of Rome, Italy, holds an LLM (2009) and a law degree cum laude (2007) from the University of Macerata. She is assistant professor of constitutional and administrative law and since 2011 she has a fellowship to hold lessons of European Administrative Law at “La Sapienza” University. In 2011 she was visiting research fellow at the School of Law, King’s College, London and in 2012 she carried on her studies at the EUI, Fiesole. She wrote several articles in the fields of constitutional, environmental and administrative law for both Italian and international reviews. In 2010 she was admitted to the Italian bar.

1 *Francovich and Bonifaci v. Italy*, Case C – 6 and 9/90 [1991], ECR I – 02735. For a comment to that judgment see, *inter alia*, M. Cartabia, “Omissioni del legislatore, diritti sociali e risarcimento dei danni (a proposito della sentenza *Francovich* della Corte di Giustizia delle Comunità europee)” [1992] GIC 505.

2 R. Bifulco, “Responsabilità dello Stato per violazione del diritto del diritto UE” [2010] Dig.disc.pubbl. 506.

3 *Van Gend & Loose*, Case C – 26/62 [1963], ECR 13. In that case the preliminary ruling was focused on “whether Article 12 of the EEC Treaty has direct application within the territory of Member State; in other words, whether nationals of such a

Before that, in its earliest case law⁴ the European Court of Justice has often ensured the enforcement of the EU law by emphasizing the principle of national procedural autonomy⁵ of Member States. In *Rewe*⁶, for example, it held that “in absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from direct effect of Community law”. In other words, the Court did not recommend Member States to create new *ad hoc* remedies, as long as the principles of equivalence⁷ and practical possibility⁸ (later named effectiveness) have been respected.

Differently, in *Francovich* for the first time the ECJ held that “the *principle* of State liability for harm caused to individuals by breaches of Community law for which the State can be held responsible *is inherent in the system* of the Treaty”⁹. It is easy to understand that such a statement has represented a “revolution”, as it has crumbled “one of the oldies dogma of the European *jus publicum*: the legislator’s infallibility”¹⁰. More specifically, in that case the Republic of Italy has been condemned to pay damages to the applicants because of the legislator’s failure to implement Directive 80/987 on the protection of employees in the event of their employer’s insolvency. According to the Court, in fact, “although the provisions of the Directive lacked sufficient precision to be directly effective, they nevertheless clearly intended to confer rights upon individuals (...) [who, in this case,] have been deprived through the State’s failure to implement them”¹¹.

Thus – considering the existence of State liability for breach of EU law as a basic principle of the European legal system – the ECJ pointed out that an action for compensation must be available in every national legal order, otherwise “the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened”¹².

State can, on the basis of the Article in question, lay claim to individual rights which the Courts must protect”. The ECJ held that the “Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble of the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens”.

Moreover, others “warning signs” can be seen, for example, in *Humblet*, Case C – 6/60 [1960] ECR 559; *European Commission v. Italy*, Case C – 39/72 [1973] ECR 101; *Russo*, Case C – 60/75 [1976] ECR 45.

4 For example, see *Factortame Ltd*, Case C – 213/89 [1990] ECR I – 2433; *Amministrazione delle finanze v. San Giorgio*, Case C – 199/82 [1983] ECR 3595; *UNECTEF v. Heylens*, Case C – 222/86 [1987] ECR 1651.

5 With regard to the principle of national procedural autonomy see, inter alia, D. U. Galetta, “L’autonomia procedurale degli Stati membri dell’Unione Europea: Paradise Lost? Studio sulla c.d. autonomia procedurale: ovvero sulla competenza procedurale funzionalizzata” (Torino: Giappichelli 2009) and H. W. Micklitz – B. de Witte (eds), “The European Court of Justice and the Autonomy of the Member States” (Cambridge: Intersentia 2012).

6 *Rewe – Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case C – 33/76 [1976] ECR 1989.

7 P. Craig – G. De Burca, “EU Law. Text, Cases and Materials” (Oxford: OUP 2011) 220. “(...) The principle of equivalence or non discrimination, meaning that the remedies and forms of action available to ensure the observance of national law must be made available in the same way to ensure the observance of EU law”.

8 P. Craig – G. De Burca [7] “(...) The principle of practical possibility, meaning that national rules and procedures should not make the exercise of an EU law right impossible in practice”.

9 *Francovich and Bonifaci v. Italy*, p. 35.

10 R. Bifulco, [2].

11 *Francovich and Bonifaci v. Italy*, p. 23.

12 *Francovich and Bonifaci v. Italy*, p. 33.

At the same time, the Court specified that the State liability gives rise to a right to compensation only when some conditions are fulfilled. First, “the result prescribed by the directive should entail the grant of rights to individuals”. Secondly, “it should be possible to identify the content of those rights on the basis of the provisions of the directive”. Finally, there should be “a causal link between the breach of the State’s obligation and the loss and damages suffered by the injured parties”¹³. Whereas, none reference to the fault of the State has been made by the ECJ.

Moreover, in the following judgments the Court developed those considerations and went on to specify the substantive conditions that must be fulfilled in order to exercise the right to reparation. In *Brasserie du Pecheur SA – Factortame*¹⁴, for example, the Court pointed out that “the State is liable whichever of its organs is responsible for the breach and regardless of the internal division of powers between constitutional authorities”¹⁵. Furthermore, in that case it dealt with the matter of the requirement of fault and it expressly pointed out that the right to damages is not conditional on that infringement being culpable. In fact, according to the ECJ, the “imposition of such a supplementary condition would be tantamount to calling in question the rights to reparation founded on the Community legal order”¹⁶.

II. THE CONTRACTING AUTHORITY’S LIABILITY ACCORDING TO THE ECJ: THE *STADT GRAZ V. STRABAG* CASE

Recently, the Luxemburg Judges adopted the same point of view in *Stadt Graz v. Strabag*¹⁷, where they held that directive 89/665¹⁸ must be interpreted as precluding national legislation

¹³ *Francovich and Bonifaci v. Italy*, p. 40.

¹⁴ *Brasserie du Pecheur Sa – Factortame*, Cause C-46/93 and C-48/93 [1996] ECR I 1029. For a comment to that judgment see, *inter alia*, F. Capelli, “L’obbligo degli Stati a risarcire i danni per violazione delle norme comunitarie” [1997] 1 DCI 55.

¹⁵ R. Davis, “Liability in Damages for a Breach of Community Law: Some Reflection on the Question of Who to Sue and the Concept of the State” (2006) 31 ELRev 69. Thus, the ECJ in the following case law has recognized also the liability of both executive and judicial national organs. See, respectively, *Lomas*, Cause C-5/94 [1996]; *Kune and Heitz*, Cause C-453/00 [2004] ECR I-837, R. Caranta, Note (2005) 42 CMLRev 179 and *Kobler*, Cause C-224/01 [2003] ECR I-10239; *Luchini*, Cause C-119/05 [2007] ECR I-6199, A. Biondi, Note (2008) 45 CMLRev 1459; *Olimpiclub Srl*, Cause C-2/08 [2009] ECR I-7501. More recently, with regard to the domestic Courts’ liability for breach of EU law see *European Commission v. Republic of Italy*, Cause C-379/10 [2011], D. U. Galetta, Note (2012) 2 Riv. It. Dir. Pub. Comunit., 424. Furthermore, with the debate arisen from that judgment in Italy, see also R. Conti, “Dove va la responsabilità dello Stato-giudice dopo la Corte di Giustizia” [2012] 2 Corr. Giur. 1993; G. M. Flick, “La responsabilità civile dei magistrati. Le proposte di modifica tra disinformazione e realtà” [2012] 11 www.federalismi.it; M. Nisticò, “Dalla Corte di giustizia una censura al diritto vivente in tema di responsabilità dei magistrati” [2012] 1 Quad. Cost. 149; E. Scoditti, “Violazione del diritto dell’Unione europea imputabile all’organo giurisdizionale di ultimo grado: una proposta al legislatore” [2012] Foro it. 22; G. Strozzi, “Responsabilità degli Stati membri per fatto del giudice interno in violazione del diritto comunitario” [2009] 4 Dir. un. eur. 881.

¹⁶ *Brasserie du Pecheur Sa – Factortame*, p. 79.

¹⁷ *Stadt Gradz v. Strabag*, Cause C-314/09 [2010] ECR I-08769. For a comment to that judgment see, if you want, C. Feliziani, “Responsabilità della pubblica amministrazione senza colpa? Riflessioni a margine di una recente sentenza della Corte di Giustizia” [2011] 10 Foro amm. CdS 3014.

¹⁸ Council Directive (CD) 89/665 concerning coordination of the laws, regulation and administrative provisions relating to the application of review procedure to the award of public supply and public works contracts [1989] OJ L395, as amended by Council Directive (CD) 92/50 [1992] OJ L209. Among scholars see F. Merusi, “La natura delle cose come criterio di

which makes the right to damages for an infringement of public procurement law conditional on a finding that the contracting authority is at fault.

More in details, in 1998 Stadt Graz announced an EU-wide invitation to tender by open procedure for the manufacture and supply of bituminous hot mix asphalt, specifying in the invitation that the place of performance was Graz (Austria) and that the period of performance would start 1th March 1999 and would end 20 th December 1999. Fourteen tenders were submitted and the best bidder was Held & Frank Bau GmbH (HFB), who had enclosed with its tender a letter in which it stated, ‘by way of supplement’, that its new asphalt mixing plant, which was to be constructed in the coming weeks in the municipality of Großwilfersdorf, would be operational only from 17 May 1999.

On 5 May 1999, Strabag – the first excluded tenderer – brought the review proceeding before the procurement review body of Land Steiermark in which it stated that HFB did not possess a hot mix asphalt plant in Land Steiermark, which made it technically impossible for it to perform the contract at issue. Therefore, it claimed that HFB’s tender should be excluded. The action was dismissed by the review body by decision of 10 June 1999 and four days later Stadt Graz awarded the contract to HFB.

Vice versa, in 2003 the Independent Administrative Tribunal of Land Steiermark – which, in 2002, has taken over the powers of the procurement review body – held that the award of the contract by Stadt Graz had not been lawful. Thus, aware of such a decision, Strabag has brought an action against Stadt Graz before the ordinary Courts for damages. The Court of first instance held that the action was well founded, concluding that Stadt Graz had erred by not carrying out a review of the tenders and by awarding the contract to HFB, despite the clear defect in the latter’s tender. Nevertheless, that decision was upheld on appeal, where judges held that “it was still necessary to examine whether Stadt Graz was *at fault* concerning its decision to award the contract to HFB, without taking into consideration the fact (...) [in its tender it] indicated that it was unable to comply with the performance periods of the contract at issue”¹⁹.

Therefore, Stadt Graz lodged before the *Oberster Gerichtshof* a review on a point of law against the judgment given on appeal. The *Oberster Gerichtshof* decided to stay the proceeding and to ask to the ECJ to clarify if Articles 1, p. 1²⁰ and 2, p.1, lett. c)²¹ of Directive 89/665 preclude a national rule under which claims for damages for the contracting authority’s infringement of Community procurement law are subject to the requirement of fault, including where that rule is applied in

armonizzazione comunitaria nella disciplina sugli appalti” [1997] 1 Riv. it. dir. pubbl. comunit. 39; G. Montedoro, “Verso il diritto comunitario europeo degli appalti: spunti di riflessione in tema di effettività della tutela” [1995] 2 Foro amm. 2118.

¹⁹ *Stadt Gradz v. Strabag*, p. 23.

²⁰ Article 1, p. 1, of Directive 89/665 provides: ‘The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.’

²¹ Article 2, p. 1, lett. c) of Directive 89/665 provides: “The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to: (...) c) award damages to persons harmed by an infringement”.

accordance with a presumption that fault lies with the contracting authority as a body and its reliance on a lack of individual abilities, hence on a lack of personal fault, is excluded?”²²

In solving the “riddle”, the Court moved from the analysis of the scope of the Directive 89/665, that is “to guarantee judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts”²³. For this reason it ruled “that Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defense that it cannot be held accountable for the alleged infringement”²⁴.

III. BRINGING THE GAP BETWEEN THE EU CASE LAW AND THE DOMESTIC CONSERVATIVE DOCTRINES ON LEVIATHAN’S LIABILITY IN PUBLIC PROCUREMENT LAW INFRINGEMENTS

As it has been noted, “in its case law the ECJ has Europeanized”²⁵ both the legal framework of the Member States liability for breaches of EU law and the substantial conditions under which this liability occurs. Nevertheless, the EU law has not completely eroded the role of Member States, so that the domestic law is still keeping intact a relevant space. In fact, first of all, “the Europeanization of liability regimes for breaches of EU law must be considered as minimum harmonization”²⁶. And, secondly, several substantial and procedural matters concerning the [State liability] are still governed by domestic liability law, provided that the principles of equivalence and effectiveness are met”²⁷.

Thus, although *Stadt Graz v. Strabag* is perfectly in compliance with the long-standing case law of the ECJ described above, its importance lies in the possibility to influence those legal systems

22 *Stadt Gradz v. Strabag*, p. 29.

23 *Stadt Gradz v. Strabag*, pp. 31 and 43.

24 *Stadt Gradz v. Strabag*, p. 45.

25 R. Seerden, “Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis” (Benelux: Intersentia 2012) 308. See also M. Eliantonio, “Europeisation of administrative Justice? The influence of ECJ’s case law in Italy, Germany and England” (Groningen: European Law Publishing 2008).

26 R. Seerden [25]. See *Stad Graz v. Strabag*, p. 33: “However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, *inter alia*, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45). If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts (see, by analogy, *GAT*, paragraph 46)”.

27 R. Seerden [25]. See *Stad Graz v. Strabag*, p. 34. “Although, therefore, the implementation of Article 2(1)(c) of Directive 89/665 in principle comes under the procedural autonomy of the Member States, limited by the principles of equivalence and effectiveness, it is necessary to examine whether that provision, interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision such as that at issue in the main proceedings from making the award of damages conditional, in the circumstances set out in paragraph 30 of this judgment, on a finding that the contracting authority’s infringement of the law on public contracts is culpable”.



where the public administration's liability has never been clearly established²⁸. This is, for example, the case of Italy where, even if a recent legislative reform introduced the action of damages against public administration²⁹, scholars and domestic courts are still debating about the substantive conditions that must be fulfilled in order to exercise that right to reparation.

In studying in depth both the state of art and perspectives of the public administration liability in Italy, it could be useful moving by saying that it represents a quite new matter of the national legal debate³⁰. Until 1999, in fact, there were at least a couple of theoretical obstacles which prevented the acknowledgement of the non contractual liability of the public administration. First, the old idea that "the King cannot wrong" and, secondly, the fact that according to Article 3 of the L. 20 March 1865 n. 2248, All. E, citizens were allowed to claim compensation in front of administrative Courts in a very limited number of cases³¹.

Differently, in 1999 the Italian Supreme Court in a very famous judgment³² held that there aren't admissible limits to the compensation for loss that public administrations have caused to citizens. For this reason, the statement has represented a "revolution" in the Italian legal order, as well as in 1991 the *Francovich* case was considered in the European Union law system.

28 E. Scotti, "Liceità, legittimità e responsabilità dell'amministrazione" (Napoli, Jovene 2012) 37 – 62. Moreover, see also G. Falcon (ed), "Il diritto amministrativo dei Paesi europei" (Padova: Cedam 2005); D. Sorace (ed), "La responsabilità pubblica nell'esperienza giuridica europea" (Bologna: Il Mulino 1994); L. Torchia, "La responsabilità della pubblica amministrazione", in G. Napolitano (ed.), "Diritto amministrativo comparato" (Milano: Giuffrè 2007).

29 Article 30, legislative decree 2 July 2010 n. 104, Annex 1. For a comment to that action see P. Chirulli, "Il giudice amministrativo alla prova delle riforme: l'azione risarcitoria autonoma e la difficile costruzione di una responsabilità civile "di diritto pubblico" in una prospettiva di diritto comparato, in AA. VV., "Studi in onore di Vincenzo Atripaldi" (Napoli, Jovene, 2010) 1021 – 1060. Moreover, see also E. Follieri, "Le azioni di condanna" in F. G. Scoca (ed.), "Giustizia amministrativa" (Torino: Giappichelli 2013); E. Picozza (ed.), "Codice del processo amministrativo" (Torino: Giappichelli 2010); A. Sandulli (ed.), "Diritto processuale amministrativo" (Milano: Giuffrè 2013); M. A. Sandulli, "Il risarcimento del danno nei confronti delle pubbliche amministrazioni: tra soluzione di vecchi problemi e nascita di nuove questioni" [2011] 7 *www.federalismi.it*; A. Travi, "Lezioni di giustizia amministrativa" (Torino: Giappichelli 2011).

30 Before 1999, just few scholars dealt with this topic. For example, see R. Alessi, "Responsabilità da interessi legittimi" [1968] XV *Nss. D. I.*; E. Cannada Bartoli, "La responsabilità della pubblica amministrazione" (Torino: Giappichelli 1976); M. Nigro, "La responsabilità per lesione di interessi legittimi" in Id., "Scritti giuridici" (Milano: Giuffrè 1996); A. Romano, "Giurisdizione amministrativa e limiti della giurisdizione ordinaria" (Milano: Giuffrè 1975); F. Satta, "I soggetti dell'ordinamento. Per una teoria della responsabilità civile della pubblica amministrazione" [1977] 1 *Riv. dir. civ.* 1517 – 1553; Id., "Responsabilità della pubblica amministrazione" [1986] II *Enc. giur.* 1893; F. G. Scoca, "Per un'amministrazione responsabile" [1994] 9 *Giur.Cost.* 4053.

31 First of all, see A. Romano – R. Villata (eds.), "Commentario breve alle leggi sulla giustizia amministrativa" (Padova: Cedam 2009). Moreover, see also E. Cannada Bartoli, "La tutela giurisdizionale del cittadino verso la pubblica amministrazione" (Milano: Giuffrè 1964); M. Nigro, "Giustizia amministrativa" (Bologna. Il Mulino 1979); A. Piras, "Interesse legittimo e giudizio amministrativo" (Milano: Giuffrè 1962); A. Romano, "I caratteri originari della giurisdizione amministrativa e la loro evoluzione", in AA. VV., "Atti del Convegno celebrativo Cento anni di giurisdizione amministrativa" (Napoli: Editoriale Scientifica 1986); Id., "Diritto soggettivo, interesse legittimo e assetto costituzionale" [1980] V *Foro it.* 258.

32 C. Cass., S.U., 22 July 1999 n. 500. For a comment to that judgment see, first of all, A. Romano, "Sono risarcibili; ma perché devono essere interessi legittimi?" [1999] I *Foro it.* 2487. Moreover see R. Caranta, "La pubblica amministrazione nell'età della responsabilità" [1999] I *Foro it.* 3209; F. Fracchia, "Dalla negazione della risarcibilità degli interessi legittimi all'affermazione della risarcibilità di quelli giuridicamente rilevanti: la svolta della Suprema Corte lascia aperti alcuni interrogativi", [1999] I *Foro it.* 2487; P. Stella Richter, "Prime riflessioni sulla sentenza n. 500 del 1999 delle Sezioni Unite della Cassazione relativa alla risarcibilità della lesione degli interessi legittimi" [1999] 10 *Giust. civ.* 1067.

However, long prior to 1999 – according to some scholars³³ – Article 13 of L. 19 February 1993 n. 142 can be considered a forerunner in the domestic “history” of the public administration liability. In fact, that provision, adopted by the Italian legislator to comply with the same Directive taken into account by ECJ in *Stadt Graz v. Strabag*, stated that citizens, who suffer a loss because of breaches of community procurement law by public administrations, are allowed to claim compensation. Whereas, at that time the provision has been underestimated by both the domestic doctrine³⁴ and the Italian jurisprudence, according to which it had a marginal relevance as it was referred just to a specific sector, that is public contracts³⁵. For this reason scholars usually affirm that in Italy the problem of the public administration liability is boomed thanks to the above mentioned judgment of 1999³⁶, followed – one year later – by a very important reform of the system of administrative justice³⁷.

Nevertheless, after that “revolution” both scholars and domestic Courts had to deal with the problem of developing a legal framework for the public administration’s liability. In fact, from the *revirement* of 1999 it has arisen the concern of shaping an almost new legal institute³⁸. And this has been the most difficult aspect of the new “era”, as it is testified by the fact that the debate is still ongoing³⁹.

More in particular, even if both the ECJ and the Italian Supreme Court (in its judgment of 1999) seemed to qualify the public administration liability as non-contractual, in the domestic legal debate there were so many contrasting voices that part of the doctrine has talked about “models of liability”⁴⁰. In fact, in addition to the non-contractual liability theory, someone has moved for different qualifications of the public administration’s responsibility, such as contractual⁴¹; “social contact”⁴²; pre-contractual⁴³ and even “special”⁴⁴.

33 In particular see F. Merusi [18].

34 A. Romano, “Sulla pretesa risarcibilità degli interessi legittimi: se sono risarcibili, sono diritti soggettivi” [1998] 1 Dir. amm.

35 C. Cass., S.U., 5 marzo 1993 n. 2667; C. Cass., S.U., 20 aprile 1994 n. 3732.

36 See n. 32.

37 L. 21 July 2000 n. 205. For a comment see E. Cannada Bartoli, “Osservazioni minime sul cumulo di azioni nella L. 21 luglio 2000 n. 205” [2001] Giur.it. 1514; A. Romano, “Giurisdizione ordinaria e giurisdizione amministrativa dopo la L. n. 205 del 2000 (epitaffio per un sistema)” [2001] 3 Dir. proc. amm.; P. Stella Richter, “Il principio di concentrazione nella legge di riforma della giustizia amministrativa” [2000] 2 Giur.it. 437.

38 G. Falcon, “La responsabilità dell’amministrazione e il potere amministrativo” [2009] 2 Dir. proc. amm. 241.

39 See, for example, E. Follieri, “Il modello di responsabilità per lesione di interessi legittimi nella giurisdizione di legittimità del giudice amministrativo: la responsabilità di diritto pubblico” [2006] 1 Dir. proc. amm. 18; E. Scotti, “Appunti per una responsabilità dell’amministrazione tra realtà ed uguaglianza” [2009] 3 Dir. amm. 522; D. Sorace, “La responsabilità risarcitoria delle pubbliche amministrazioni per lesione di interessi legittimi dopo 10 anni” [2009] 2 Dir. amm. 379; A. Travi, “La giurisprudenza della Cassazione sul risarcimento dei danni per lesione di interessi legittimi dopo la sentenza delle sezioni unite 22 luglio 1999 n. 500” [2004] I Foro it. 794; F. Trimarchi Banfi, “La responsabilità civile per l’esercizio della funzione amministrativa: questioni attuali” (Torino: Giappichelli 2009).

40 P. Chirulli, “Risarcimento del danno da bando di gara illegittimo e modelli di responsabilità” [2005] 4 Riv. giur. ed. 1275. Moreover, see also E. Follieri, “Pluralità di modelli di responsabilità amministrativa e possibile unificazione sotto il modello comunitario” [2008] 3 Dir. proc. amm. 703.

41 G. Falcon [38].

42 M. Protto, “La responsabilità della P.A. per lesione di interessi legittimi come responsabilità da contatto amministrativo” [2001] 1 Resp. Civ. Prev. 235. See also Cons Stato, V, 12 March 2010 n. 1467.

43 G. M. Racca, “La responsabilità precontrattuale della pubblica amministrazione tra autonomia e correttezza” (Napoli: Jovene 2000).

44 G. Falcon [38].



Consequently, the same thing can be said also with regard to the substantive conditions that must be fulfilled in order to exercise that right to reparation⁴⁵, included the necessity of demonstrating that the public administration is at fault. In fact, neither the Italian Supreme Court in 1999 nor the following jurisprudence have been able to definitively clarify this aspect⁴⁶.

According to the most part of doctrine, this is due to the fact that since the beginnings scholars and domestic courts went on to specify the contents of public administration's liability drawing inspiration from the civil law, instead of building an independent framework of rules⁴⁷. Thus, today the institute of public administration's liability is demanding its whole autonomy and discussions for the construction of its legal framework are still in progress, even if in 2010 the Italian legislator expressly introduced an *ad hoc* action of damages against public administration⁴⁸.

For this reason, already at a first look the ECJ judgement in *Stadt Graz v. Strabag* has been considered as a (possible) good source of inspiration for domestic Courts, as well as for both scholars and legislator, at least with regard to the role of the public administration's fault in the public procurement infringements⁴⁹.

That idea has recently been confirmed by a judgment of the Italian Counsel of State in *All System S.p.A. v. Municipality of Milan*⁵⁰. The facts are quite similar to those examined with regard to *Stadt Graz v. Strabag*. In 2007 the Municipality of Milan announced an invitation to tender by open procedure for the supply of the security service at the courthouse, specifying in the invitation that the period of performance would start 15 th June 2007 and would end 14 th June 2010. In 2007 All System S.p.A., one of the tenderer, brought an action before the administrative Court (TAR Lombardia) for the annulment of the invitation. The judge of first instance rejected the action but its judgment was upheld on appeal⁵¹.

Thus, in 2009 the Municipality of Milan announced a new invitation to tender for the supply of the same service and, this time, All System S.p.A was the best bidder. Unfortunately, the company was admitted to succeeding in the contract just from 24 th September 2009 instead of from the beginnings, that is 15 th June 2007. Consequently, it brought another action before the administrative Court, claiming the compensation of loss. TAR Lombardia rejected the action, affirming that claims for damages for contracting authority's infringement of procurement law are usually

45 F. De Leonardis, "Sui presupposti del risarcimento del danno per lesione di interesse pretensivo" [2009] 2 Giorn. dir. amm. 150.

46 Recently see E. Scotti [28]. Moreover, see: S. Cimini, "La colpa nella responsabilità civile delle amministrazioni pubbliche" (Torino: Giappichelli 2008); Id., "La colpa è ancora un elemento essenziale della responsabilità da attività provvidi mentale della P.A.?" [2011] 3 Giur.it.; F. Elefante, "La responsabilità dell'amministrazione da attività provvidi mentale" (Padova: Cedam 2002); F. Fracchia, "L'elemento soggettivo nella responsabilità dell'amministrazione" [2008] 2 Dir. pubbl. 445; G. M. Racca, "Gli elementi della responsabilità della pubblica amministrazione e la sua natura giuridica" in AA. VV., "Responsabilità della pubblica amministrazione e risarcimento del danno innanzi al giudice amministrativo" (Milano: Giuffrè 2003); F. Trimarchi Banfi, "L'elemento soggettivo nell'illecito provvedimento" [2008] 1 Dir. amm. 67.

47 For instance, see P. Chirulli [29] and E. Scotti [39].

48 See n. 29.

49 This was the idea expressed in C. Feliziani [17].

50 Cons. Stato, V, 8 November 2012 n. 5686.

51 TAR Lombardia, Milan, 28 July 2008 n. 3052 and Cons. Stato, V, 27 August 2009 n. 5096.

subject to the requirement of fault, while in that case facts showed the public administration was not culpable⁵². Therefore, All System S.p.A lodged before the Counsel of State a review of the judgment, as – according to the applicant – the right to compensation could not be considered conditional on a finding that the contracting authority is at fault.

The Counsel of State held that the action was well founded and therefore it upheld the judgment given by the Court of first instance. More in detail, the administrative Court of Appeal based its decision on the influence that the EU (procurement) law has on the domestic legal order⁵³ and, in so doing, it explicitly mentioned the ECJ judgment in *Stadt Graz v. Strabag*. In fact, the Counsel of State – after recalling that the Italian debate about the substantive conditions that must be fulfilled in order to exercise the right to reparation against the public administration is still ongoing – underlined the importance of the ECJ judgment, recognizing that it is capable to indicate the right route to the national Courts.

Therefore, the Counsel of State held that according to Directive 89/665, as interpreted by the ECJ, claims for damages for the contracting authority's infringement of procurement law are not subject to the requirement of fault. Otherwise "the full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened"⁵⁴. Thus, in force of the principle of supremacy⁵⁵, Italy as well as the other Member States have to comply with that rule and provide procedural conditions governing the action for compensation against public administrations in compliance with the requirements of the EU procurement law.

The importance of the mentioned judgment lies, first of all, in representing a *revirement* in the Italian jurisprudence about the public administration liability⁵⁶. Secondly, it is very significant because the Counsel of State shows to recognize, not only the formal supremacy of the EU law, but, above all, the practical necessity of homogeneity of the procedural rules governing actions for damages across Member States. Only in this way, in fact, both the effectiveness of the EU law and the protection of the rights which it grant to European citizens can be really ensured.

52 TAR Lombardia, Milan, 14 June 2010 n. 1811.

53 See F. Merusi and G. Montedoro [18]. Moreover, with regard to the influence that EU law has on the Italian administrative law see: S. Cassese, "L'influenza del diritto amministrativo comunitario sui diritti amministrativi nazionali" [1993] 3 Riv. It. Dir. Pubbl. Comunit. 329; V. Cerulli Irelli, "Trasformazioni del sistema di tutela giurisdizionale nelle controversie di diritto pubblico per effetto della giurisprudenza europea" [2008] 2 Riv. it. dir. pubbl. comunit. 432; F. de Leonardis, "La tutela cautelare. Principi comunitari ed evoluzione della giurisprudenza amministrativa europea" [1996] 3 Dir. proc. amm. 670; D. De Pretis, "Italian administrative law under the influence of European law, [2010] 1 IJPL; M. Eliantonio, [25]; D. U. Galetta, "Giustizia amministrativa italiana e diritto comunitario: problemi e prospettive di sviluppo nell'ottica di una giustizia amministrativa europea" [1999] 5 Riv. it. dir. pubbl. comunit. 1003; M. A. Sandulli, "Diritto europeo e processo amministrativo" [2008] 1 Riv. it. dir. pubbl. comunit. 37.

54 See also *Francovich and Bonifaci v. Italy*, p. 33.

55 See, *inter alia*, M. P. Chiti, "Diritto amministrativo europeo" (Milano: Giuffrè 2011) and P. Craig – G. de Burca [7].

56 E. M. Barbieri, "Sulla inutile ricerca della colpa della pubblica amministrazione in caso di lesione di interessi legittimi" [2011] 6 Riv. ita. Dir. pubbl. comunit. 1083, who recalls the previous Italian jurisprudence and underlines its conservative shape.



IV. FINAL REMARKS

The paper compares the European and the Italian approach to the theme of public administration's liability, with specific regard to the substantial conditions that must be fulfilled in order to exercise the right to damages for an infringement of public procurement law.

After recalling the EU fundamental principles as elaborated by the ECJ masterpieces case law, the paper gives account of the Italian approach to the theme and tries to analyse its weakness. The core argument is that the most part of difficulties arise from two correlated factors. First, the topic of public administration's liability is a new one in the contest of Italian administrative law. In fact, the Supreme Court recognized the duty of public administration to pay damages caused by the breach of law just in 1999. Secondly, and consequently, since the beginnings scholars and domestic Courts went on to specify the contents of public administration's liability drawing inspiration from the civil law, instead of building an independent framework of rules .

Those factors give arise to a quite confused situation and, therefore, the debate on the judicial regime of the public administration's liability is still ongoing, even if a recent legislative reform has introduced an *ad hoc* action of damages. This is particularly true as far as the requirement of fault is concerned. In fact, part of both doctrine and jurisprudence is still debating if the right to damages for public administration's liability must be conditional on that infringement being culpable⁵⁷.

Nevertheless, recently the Italian Counsel of State in *All System S.p.a. v. Municipality of Milan* – complying with the ECJ judgment in *Stadt Graz v. Strabag* – held that the right to damages for an infringement of public procurement law by a contracting authority is not subject to the requirement of fault, as the imposition of such a supplementary condition would be tantamount to calling in question the rights to reparation founded on the EU law.

In this way the Italian judge tries to bridge the gap between EU case law and the domestic conservative doctrines on Leviathan's liability in public procurement law infringements. Therefore, it is possible to posit that if in the next future national administrative Courts will follow the route opened by the Counsel of State in *All System S.p.a. v. Municipality of Milan*, there will be more convergences than divergences between the Italian and the European approach to the public administration's liability, at least as far as the procurement law is concerned.

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COLLECTIVE REDRESS V. CLASS ACTIONS – CONVERGENCE OR DIVERGENCE BETWEEN THE EUROPEAN AND AMERICAN SOLUTIONS ON GROUP LITIGATION?

Maciej Gac*

University of Toulouse, France; Jagiellonian University in Kraków, Poland

Abstract: The goal of the following article is to analyze the issue of convergence between the American and European approach to group litigation. It is particularly important from the EU's perspective, since it has still not established a common approach to group litigation. Despite several attempts of its introduction, the European concept of collective-redress, based on the rejection of American-style class actions, is still far from being settled. In fact, there exist several national solutions in this matter, however, they often differ with respect to most fundamental issues. In consequence, individuals are faced with a complex legal patchwork of solutions which are applied by some Member States but not by others, what often results in a forum shopping, limited legal transparency and unequal protection of private parties within the EU. In the same time, the American approach to group litigation, despite its high efficiency and great protection of individuals against law violations, struggles with problems such as abusive litigation, risk of over deterrence and fear of massive claims at the side of enterprises. Taking the abovementioned into consideration, the following article tries to answer if it is possible to find a compromise between those two apparently divergent approaches. It also tries to determine if the European Union can establish effective system of group litigation without referring to the American experience. And finally, it aims to establish if the American and European models of group litigation are immanently divergent, or whether there is a possibility for a transatlantic convergence.

Key words: group litigation, collective redress, class actions, convergence, divergence.

I. INTRODUCTION

Group litigation¹ is an issue of ongoing debate in the European Union (EU). From the beginning of XXI century the European Commission (EC) was trying to claim, that in order to guarantee effective protection of individuals injured by law violations, it was required to introduce a mechanism allowing to group their interests in a fight for their rights.² In the opinion of the EC, it would limit

* PhD Candidate at the Jagiellonian University and University of Toulouse specializing in European competition law. Academic teacher at University of Toulouse, Jagiellonian University and University of Tarnopol.

¹ Group litigation is defined by the European Commission as: "any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices", EC Public consultation, *Towards a Coherent European Approach to Collective Redress*, pt. 7, available at: http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf

² See for example Neelie Kroes (previous EC Commissioner responsible for competition) claiming that collective redress is a "mechanism necessary to give consumers and small businesses a realistic and efficient possibility to obtain compensation in cases of scattered damage", MEMO/09/135.

the costs of proceedings, increase the possibility of obtaining a proof of violation and extend the access to justice. This reasoning was also supported by the European consumers, stating that they would be more willing to defend their rights in court if they could join a group action.³

The starting point for the EC's proposals on group litigation was an attempt to create a European-style collective redress, being a response to the American concept of class actions.⁴ In consequence, several elements of the US system, such as discovery rules, contingency fees or opt-out mechanism, were rejected. The main argument behind such solution was a desire to avoid the risk of abusive litigation, often evoked as a principal drawback of the American-style class actions.⁵

Nevertheless, after one decade of debate on group litigation, the common European approach to collective redress is still missing in the EU. In fact, there exist several national solutions in this matter, however, they often differ with respect to most fundamental issues.⁶ The EC even states, that every national system is unique and there are no two national mechanisms that are alike in this area.⁷ In consequence, individuals are faced with a complex legal patchwork of solutions which are applied by some Member States but not by others, what often results in forum shopping, limited legal transparency and unequal protection of private parties within the EU.

For those reasons it can be argued, that the European approach to group litigation, based on a general presumption of divergence between the American and European legal systems, and rejection of instruments working effectively in practice in the US, has failed its exam. On the one hand, it did not lead to the introduction of a common European approach to collective redress, and on the other, it left a room for development of different national laws on group litigation. In consequence, the fear of American-style abusive litigation was replaced by the risk of forum-shopping, unequal access to justice and limited legal transparency. Moreover, the possibility of transatlantic collective claims, so useful in the modern globalized economy, was significantly limited.

Taking the abovementioned into consideration, the following article will try to answer if it is possible to develop an effective European mechanism of collective redress without transposing certain elements of the American-style class-actions. By reference to the main principles of the American and European mechanism of group litigation it will try to determine, if the American and European approaches to group litigation are immanently divergent, or whether there is a possibility for a transatlantic convergence.

3 See Flash Eurobarometer, *Consumer attitudes towards cross-border trade and consumer protection*, Flash EB Series # 299, according to which 79% of the European consumers stated that they would be more willing to defend their rights in court if they could join a group action, available at: http://ec.europa.eu/public_opinion/flash/fl_299_sum_en.pdf

4 See Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005; White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 2.4.2008; and Green Paper on Consumer Collective Redress, COM(2008) 794 final.

5 V. Pinotti, D. Stepina, *Antitrust Class Actions in the European Union: Latest Developments and the Need for a Uniform Regime*, *Journal of Competition Law & Practice*, vol. 2, no. 1, p. 25-26.

6 *Overview of existing collective redress schemes in EU Member States from 2011*, July 2011, available at: <http://www.europarl.europa.eu/document/activities/cont/201107/20110715AIT24242/20110715AIT24242EN.pdf>

7 EC Public consultation, *Towards a Coherent European Approach ...*, p. 9.

II. AMERICAN AND EUROPEAN MODEL OF GROUP LITIGATION – IS THERE A ROOM FOR RAPPROCHEMENT?

The American and European model of group litigation are foreseen as mechanisms permitting to reduce asymmetry in the position of enterprises and individuals injured by law violations. In order to achieve this goal, they offer to private parties several legal mechanisms intended to strengthen their position and increase a level of their legal protection. Nevertheless, as it will be showed in further analysis, the solutions proposed in both legal systems often differ as far as fundamental issues are concerned. For this reason, many opponents of the American-style class actions argue, that convergence between the American and European model of group litigation cannot be achieved.

This reasoning has its justified grounds, however, it has also a principal drawback, i.e. a purely legal character. As a result, it ignores the fact that convergence between different legal systems is not only a legal process but also a cultural phenomenon. And as such, cannot be explained only by a simple comparison of legal mechanisms proposed in each system of law, but requires understanding of a cultural background determining their existence. Therefore, before referring to the main principles of the analyzed models of group litigation, a short reference to the American and European culture of law enforcement seems to be required. Only in this manner, differences between those two approaches can be understood, and a question of their eventual convergence may be answered.

1. Litigation versus enforcement culture – two approaches to the enforcement of law

The fundamental difference between the American and European approach to the enforcement of law stems from a distinction between “litigation” and “enforcement culture”.⁸ While the first is typical for the US legal tradition, the later is strongly rooted in the legal culture of the EU Member States. The consequences of such distinction are crucial for the both systems of law enforcement, and in particular, for a specific construction of group litigation in each of them.

The so-called “litigation culture” can be characterized by a particular activism of private parties in the enforcement of legal provisions. It is often described as a specific style of legal contestation, in which construction of claim, search for legal arguments and gathering of evidence, are dominated not by judges or public authorities, but by disputing parties.⁹ The grounds for increased litigant activism in the US are both cultural – skepticism towards governmental and legal authority, and legal - liberal discovery rules, lawyer-dominate fact gathering, highly entrepreneurial modes of legal practice. As a result, the position of individuals in the enforcement of their rights is much stronger under the American law, than in a classical system of law enforcement, foreseeing a dominant role of a state

⁸ R.A. Kagan, *American and European Ways of Law: Six Entrenched Differences*, available at: http://www.law.columbia.edu/center_program/legal_theory/papers/spring06?exclusive=filemgr.download&file_id=941783&rtcontentdisposition=filename%3DRAKonat10-30-05.pdf

⁹ *Ibidem* p. 4,

in the application of legal provisions. Such construction has also its important consequences for the system of group litigation, which in the context of “litigation culture”, becomes a natural consequence of law enforcement and a mean by which individuals can effectively exercise their rights.

On the other hand, the European legal tradition is based on a so-called “enforcement culture”. It assumes that the principal obligation for the enforcement of law rests on public authorities. In consequence, the activity of private parties in the execution of legal provisions is limited, and their eventual participation in the system of law enforcement has only supplementary character.

The repercussions of the aforementioned differences between the American and European culture of law enforcement are crucial for the specific elements of group litigation mechanisms. While the American system tries to give far-reaching privileges to individuals in their fight against law violations, the European solution aims to guarantee a right balance between the interests of individuals, enterprises and public authorities. Those specific elements will be analyzed in details in the following point, however, at this stage a following question can be asked: “Whether the cultural diversity between the American and European model of law enforcement may prevent a transatlantic convergence of group litigation mechanisms?”

2. Class actions versus collective redress – comparison of main principles.

a) Opt-out v. opt-in.

The first element, often analyzed when a group litigation is concerned, refers to the conditions under which parties injured by law violation can join a group action. In this matter significant difference can be observed between the American and European solution.

The US-system is based on the principle of opt-out. It foresees that the outcome of class action proceedings is binding to all members of a particular group, unless they have opted-out from the claim. In other words, a victim of law violation, in case of an action being brought, has to clearly refuse its eventual participation in the group, in order not to become its member. The consequence of such construction is that, if a party does not express his will to withdraw from a group, it is assumed as its part and loses a right to the eventual individual claim.

The aforementioned solution is criticized by the EC. Despite the fact that the opt-out system guarantees higher level of deterrence and greater number of victims covered by a claim, the EC argues that it can lead to an excessive litigation and is difficult to adapt to the legal traditions of Member States.¹⁰ In the opinion of the EC, the fact that in the opt-out system a plaintiff initiates private action on behalf of an unidentified group of people can simply lead to abuse. In consequence, the EC argues in favor of the opt-in collective actions, which by requiring victims of violations to express their will in order to participate in the proceedings, guarantee better protection of their rights and avoidance of the creation of a so-called “litigation culture” in Europe.¹¹

¹⁰ Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, 2.4.2008, pt. 67.

¹¹ D. Waelbroeck, *Private Enforcement: Current Situation and Methods of Improvement*, in: *The reform of EC competition law*, ed.: I. Lianos, I. Kokkoris, Kluwer Law International 2010, p. 28.

The distinction between opt-out and opt-in, analyzed from the first sight, may illustrate an immanent incoherence between the American and European approach to group litigation. Nevertheless, a deeper analysis of this issue, especially by reference to the national proposals on group litigation, shows that this American solution can be accommodated to the European legal tradition. As an example we can give a Dutch system, often evoked as the most efficient European system of group litigation, which foresees an opt-out mechanism.¹² Also other European jurisdictions, such as Portugal, Bulgaria, Denmark or Spain, provide for the opt-out construction.¹³ And finally, several EU Member States consider opt-out mechanism as a possible remedy to a general low participation resulting from the opt-in solution.¹⁴

b) Discovery rules v. limited access to proof.

The second area of possible divergence between the principles of American and European system of group litigation concerns access to evidence. While the American model speaks in favor of broad discovery rules, the EC, as well as several national jurisdictions, try to preserve the rules on the protection of information being in the possession of defendants.¹⁵

According to the Rule 8(a) of the Federal Rules of Civil Procedure¹⁶, a party initiating civil action before the American judge is required to set forth so-called “notice pleading”. The delivery of this document, consisting of a statement of grounds for the court’s jurisdiction, statement of claim, and demand for judgment, already entitles a plaintiff to issue discovery requests. Through such requests plaintiff can ask for discovery from other party of several information, especially those which can confirm the violation of law. Moreover, it can issue a request for admission, which asks the party to admit or deny the truth or factual matters. Such broad scope of elements covered by discovery requests, and a facility with which certain information can be obtained, significantly strengthen position of plaintiffs in case of eventual dispute. And as some authors even state: *“It enables them to file claims without initially having evidence that would be anywhere near sufficient to prove their case in court.”*¹⁷

In comparison to the American solution, the EC is much more preservative as far as disclosure of documents being in the possession of defendants is concerned. The reason for that is a fear of abuse, often evoked by the EC as a main drawback of the American system. As it states in the White Paper on damages actions in the area of competition law: *“Whilst it is essential to overcome this structural information asymmetry and to improve victims’ access to relevant evidence, it is also*

12 Overview of existing collective redress schemes in EU Member States from 2011, pt. 30

13 J.H. Beisner, *“Opt-In” vs. “Opt-Out” Procedures in Collective and Representative Litigation*, p. 5, available at: <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/optoutpaper.pdf>

14 Overview of existing collective redress schemes in EU Member States from 2011, pt. 40.

15 J.H. Beisner, C.E. Borden, *Expanding Private Causes of Action: Lessons from the US Litigation Experience*, presented at the U.S. Chamber Institute for Legal Reform 2006 Legal Reform Summit (Washington D.C., October 2006), p. 1.

16 Federal Rules of Civil Procedure from 1st December 2010, available at: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf>

17 A. P. Victor, C. V. Roberts, *Consumer enforcement of federal and state antitrust laws in the United States*, in *VI Conference Antitrust between EC law and national law*, ed. E. A. Raffaelli, Bruxelles 2005, p. 363.

important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses."¹⁸ In consequence, the EC argues in favor of a minimum level of disclosure. In its opinion, only such solution can allow that excess would be avoided and overly broad and burdensome disclosure obligations would not be imposed on defendants.¹⁹

Despite this principal difference in the approach to access to evidence, the recent European case-law on access to proofs shows certain evolution in this matter.²⁰ It concerns the recognition by the Court of Justice of the EU (CJEU), that in order to guarantee effective mechanism of individuals protection, and reduce the asymmetry between injured parties claiming for damages and enterprises infringing the law, a wider access to proofs is required.²¹ Therefore, also in this area, being evoked as one of the point of divergence between the American-style class actions and European model of collective redress, eventual rapprochement cannot be excluded.

c) Contingency fees v. loser pays principle.

The last element which illustrates potential incoherence between the American and European approach to group litigation refers to the issue of financing. This matter is particularly important from the point of view of individuals, which often condition their decision on launching a claim on its costs and financial resources being in their possession.

Firstly, it shall be noted, that while in most of the European jurisdictions the costs of a successful party are paid by the losing one – so called “loser pays principle”, in the American system the costs of defendant do not have to be reimbursed by a plaintiff, even if he loses his case.²² Secondly, it shall be stated that the American-style class actions are based on the contingency fees principle. It assumes that a plaintiff is not obliged to pay any fees to his attorney, unless and until the plaintiff collects damages. The remuneration of attorney constitutes a certain percentage of damages granted to the injured party. Due to such construction, the costs of legal proceedings are significantly limited. Moreover, the financial risk of initiating group action is reduced. In consequence, both individuals, injured by law violations, and lawyers, representing groups of claimants, are more keen to initiate and conduct collective claims.

Referring those principles of the American-style class actions to the European model of group litigation we can state, that overruling loser-pays principle in Europe is hard to imagine. First of all, it is strongly rooted in a legal tradition of all Member States. And secondly, it is evoked by the EC as one of the main safeguards against abusive litigation in the European system.²³ Nevertheless,

18 White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, p. 2.2.

19 Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, 2.4.2008, pt. 103.

20 See especially the Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, European Court Reports 2011 Page 00000.

21 G. Goddin, *The Pfleiderer Judgment on Transparency: The National Sequel of the Access to Document Saga*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 1, p. 40-42.

22 D. Woods, *Private enforcement of antitrust rules – modernization of the EU rules and the road ahead*, Loyola Consumer Law Review 2004, p. 437.

23 EC Public consultation, *Towards a Coherent European Approach to Collective Redress*, p. 23.

the questions can be raised as far as contingency-fees are concerned. As the national solutions on group litigation illustrate, contingency fees are one of the features making a system of group litigation more attractive to the victims of violations. By giving example of Poland, which introduced a possibility of success fees in 2009²⁴, we can state, that such method of financing is regarded, both by individuals claiming for compensation, and lawyers representing groups of claimants, as an important factor in undertaking decision on initiating and conducting a claim. For this reason we can ask, if the EC's opposition towards contingency fees, arguing against such a solution, can be still upheld without limiting the attractiveness and efficiency of a discussed instrument?

The comparison of main principles of the American and European model of group litigation illustrates, at the first sight, that their eventual rapprochement may be hard to achieve. The legal differences concern such fundamental issues as formation of a group, collection of proof and financing of claim. Also the cultural disparities, can make the eventual interference between American and European model of group litigation a difficult task. Nevertheless, as the aforementioned analysis also shows, recent changes made at the European level²⁵, as well as development of group litigation mechanisms in the national legal orders²⁶, force us to ask the question if a door for the convergence between European and American model of group litigation shouldn't be newly opened? Or in other words, can the EU still refrain itself from referring to the American experience, while trying to propose a common European collective redress mechanism?

In order to answer this question, two issues will be analyzed in Chapter II. Firstly, the benefits of transatlantic convergence. And secondly, the mechanisms for the eventual rapprochement of the American and European solutions on group litigation.

III. INTERFERENCE BETWEEN AMERICAN AND EUROPEAN SYSTEMS OF GROUP LITIGATION – SHALL THEY CONVERGE?

1. Benefits of transatlantic convergence

a) introduction of efficient mechanisms verified in practice

As it was mentioned in the introduction, the EU still struggles with astonishing diversity and total underdevelopment of private enforcement mechanisms.²⁷ The novelty of a concept of group litigation within the EU, force both the EC and national legislators, to propose solutions which eventual efficiency is hard to determine. It results in highly divergent solutions within EU Member States and difficulties with obtaining a common approach to collective redress at the EU level.

²⁴ Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym (Dz. U. z 2010 r. Nr 7, poz. 44).

²⁵ Development of a concept of private enforcement in the area of competition law (CJEU judgments in *Courage* and *Manfredi* cases); increasing access to evidence in cartel cases (CJEU judgment in *Pfleiderer* case); positive results of public consultation on common European approach to collective redress (EC Public consultation, *Towards a Coherent European Approach to Collective Redress*).

²⁶ Introduction of a group litigation mechanism in 17 MS; establishment of solutions based on the American experience in several countries (e.g. Netherlands, Denmark, Portugal, Poland).

²⁷ Comparative report, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, p. 1, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

For this reason it can be stated, that a reference to the American system of class-actions could bring important answers to the problems of the European group litigation. The over 40-year experience in the application of class-actions²⁸ and practical efficiency of instruments introduced in the American system cannot be ignored. Moreover, as the American experience shows, that only by the introduction of far-reaching mechanisms, allowing to reduce the asymmetry in the position enterprises and private parties fighting for their rights, the efficiency of group litigation can be achieved.

Undoubtedly there is also a “dark side” of the American-style class-actions which cannot be neglected. It refers to the abusive litigation, risk of over deterrence or finally a fear of massive claims. Those elements shall be taken into consideration, however, their significance should not be exaggerated. That is because, as it was mentioned in Chapter I, the consequences of each legal solution shall be interpreted with reference to the legal context in which it is applied. In other words, while the liberal discovery rules, limited costs of proceedings or opt-out mechanism can often lead to abuse when applied in the system of increased litigant activism, its eventual consequences may differ in the legal systems based on the “enforcement culture”. As the example of Netherlands, Denmark or Portugal show, the introduction of the American-style mechanisms, under the condition of being adapted to the European specificities, can lead to the positive effects.

The American experience in the application of group litigation procedure can be also important source of inspiration for development of more efficient mechanisms in the EU. As an example we can give recent changes brought in the American law²⁹, i.e. increase in the judicial control over group claims and limitation of the risk of forum-shopping, which if properly understood by the European legislator, can allow to develop more efficient solutions at the European level.

And finally, rapprochement of the American and European systems of group litigation can allow to develop more universal solutions within the EU. That is because, a reference to the external model, well-established in practice, can increase the chances for its eventual acceptance by the EU Member States.

b) opening a door for transatlantic collective claims

As a second positive aspect of convergence between the American and European system of group litigation we can evoke increasing chances for the transatlantic collective claims. The transatlantic collective claims can be described as group actions which cover by its scope not only EU undertakings or citizens, but also entities outside of the EU. In consequence, the issues such as competent jurisdiction, applicable law or finally recognition of foreign judgment may become actual. As the recent judgment of the American courts illustrate³⁰, the lack of common international approach to the issue of group litigation, and incoherence between the American and European

²⁸ Class actions exist in US since 1938, when the Congress promulgated the Federal Rules of Civil Procedure, bringing into life the class action device. However, it was not until 1966, when the class action mechanism gained its current shape under the revision of art. 23 of Federal Rules of Civil Procedure.

²⁹ The U.S. Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d), 1453, and 1711–1715.

³⁰ *Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571, 2009 WL 855799 (S.D.N.Y. Mar. 31, 2009); *In re Alstom SA Sec. Litigation*, 253 F.R.D. 266 (S.D.N.Y. 2008).

legal systems, can cause significant problems to individuals initiating transatlantic collective claims, and as a result, lead to the limitation of their protection.

The reasons for those difficulties are of a double nature. Firstly, they result from the fact the United States are not a party to any international agreement regarding the recognition of class judgments.³¹ And secondly, they stem from the differences between the American and European approach to group litigation. As the *Vivendi* and *Alstom* cases have illustrated, the American system of opt-out can run a serious risk of violation of certain fundamental principles of the European national legal orders, such as *nul ne plaide par procureur* rule or “dispute over a right” principle, what in consequence, can be the ground for non-recognition of the American class judgment by the European courts. As a result, even in a case of law violation confirmed by the court, individuals may be deprived of the requested protection.

This problem, having particular significance in the context of modern, globalized economy, is also recognized by the European and American legal doctrine.³² As many authors claim, the lack of rules on recognition and different approach to group litigation, can deprive individuals of the possibility of effective execution of their rights in the international context. As a possible solution to this problem, the convergence between the American and European approach to group litigation can be proposed. It could lead to the creation of the important grounds for the international recognition of class-actions judgments, and in consequence, to the strengthening of individuals protection. Moreover, it could allow to avoid eventual risks of non-recognition, such as forum shopping or violation of *res judicata* principle.

2. Mechanism of rapprochement

a) Cooperation of public authorities at international level.

The first possible mechanism of rapprochement can be the cooperation of European and American authorities at the international level. In such manner the experiences from both sides of Atlantic can be exchanged and solutions working effectively in practice in one legal system can be adapted to the other. The area of law in which such cooperation has already led to convergence between the European and American solutions is competition law. By the use of international forums, such as International Competition Network and New Transatlantic Agenda³³, the European and American authorities were undertaking collective works with a view of guaranteeing better coherence of their legal systems. In consequence, certain US legal mechanisms, being initially regarded as constructions foreign to the European legal culture, could have been adopted to the European environment. As the best example we can give leniency policy, which was initially

31 D.L. Bassett, *The future of international class actions*, speech made on Southwestern Law School's Symposium entitled, “2021: International Law Ten Years From Now”, p. 27, available at: http://www.swlaw.edu/pdfs/lawjournal/18_1bassett.pdf

32 See for example: D.L. Bassett, *The future of international class actions ...*; P.G. Karlsgodt, *World class actions. A guide to group and representative actions around the globe*, Oxford University Press 2012.

33 The New Transatlantic Agenda (1995), available at: http://ec.europa.eu/external_relations/us/new_transatlantic_agenda/text.htm.

criticized as incoherent with the European legal tradition, but once introduced in the European Union, became a principle weapon of the European public authorities in their fight against cartels.

b) Convergence through the activity of Member States.

As a second possible way of convergence between the American and European system of group litigation we can evoke the activity of Member States in the introduction of collective redress mechanisms. As it was already mentioned at the beginning of this article, different group litigation procedures can be recognized in 17 Member States of the EU. Undoubtedly, situation in which Member States develop their own collective redress mechanisms runs a serious risk of incoherence, but in the same time, it may lead to introduction of innovative solutions, being a possible source of inspiration for the European Union. As its examples we can give Dutch opt-out mechanism or Polish success-fees, which while adopted to the European specificity, have led to the increase in the protection of individuals injured by law violations and higher efficiency of group litigation mechanism. Therefore, it can be stated, that introduction of certain American-style group litigation instruments at the national level, may subsequently lead, in a “bottom-up” manner³⁴, to their establishment in the EU.

c) Court of Justice’s case-law

The last instrument giving a chance for rapprochement between the American and European solutions on group litigation is the jurisprudence of the CJEU. As the recent case-law shows, the CJEU’s rulings can give grounds for opening a door for a transatlantic convergence. It results from the fact, that from beginning of XXI century the CJEU is trying to strengthen the position of individuals in their fight for rights granted by the Treaties.³⁵ Such evolution can be regarded as an attempt to modernize previously described “enforcement culture” by adding an important element to its classical concept, i.e. increased role of private parties in the system of law enforcement. This evolution can be especially observed in the area of competition law, where the CJEU is trying to argue that guaranteeing individuals a right to execute their rights granted by the EU law, in case of their violations, is an element necessary for its efficient enforcement.³⁶

Despite the fact, that such reasoning of the CJEU does not provide a direct reference to the American solutions on law enforcement, especially those concerning group litigation, it illustrates that certain changes shall be made at the EU level in order to guarantee more efficient protection of individuals injured by law violations. For this reason it can be argued, that also the CJEU’s case-law, intended to reduce asymmetry in the position of enterprises and individuals trying to execute

34 Bottom-up initiatives can be described as the solutions developed by the Member States and proposed at the EU level with a view of ameliorating a functioning of the European law. They are opposed with top-down initiatives which refer to the solutions developed by the European Union and proposed for the introduction in the national legal orders.

35 See for example judgment of the Court of 20.09.2001, Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, European Court reports 2001 Page I-06297 or Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C- 298/04, *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619.

36 Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, pt. 26.



their rights, can be a factor allowing for the eventual rapprochement of the American and European solutions on group litigation.

IV. CONCLUSION

In view of the aforementioned analysis it can be stated, that in order to develop an effective European mechanism of collective redress, the question of convergence with the American system of class actions shall be revisited. The lack of common European approach to collective redress, diversity of national solutions on group litigation and finally prolonged discussion on the introduction of the analyzed instrument at the EU level, raise doubts on the efficiency of the European system of law enforcement. Moreover, it runs important risk of limited individuals' protection, or even its lack, in case of law violations having transatlantic character.

For those reasons certain authors try to argue, that upholding exclusion of American experience in the area of group litigation can hinder development of an effective European approach to collective redress.³⁷ Through the rejection of such instruments as more liberal discovery rules, limited costs of proceedings or higher flexibility in the formation of a group, the EC may waste the chance of introduction of an effective European group litigation mechanism that would respond to the needs of European citizens. Undoubtedly, the eventual rapprochement between American and European solutions on group litigation should not take a form of simple "transplantation" of the American mechanism into the European legal order, but would require its adaptation to the specificities of the European culture. Nevertheless, as the several national examples show, such an attempt is possible to succeed.

In consequence, it can be claimed that modern approach to collective redress cannot be based on a simple rejection of the US-style class actions, but rather requires attempt to find a possible way for the rapprochement of both legal systems. By the use of the aforementioned convergence mechanisms, legal differences could be diminished and cultural diversities could become a source of inspiration. Because as Rodolfo Sacco stated while referring to the problem of convergence between different legal systems, without variation we would not progress, but if we want to progress, the variety shall be the source of openness, rather than reluctance towards other legal systems.³⁸

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³⁷ A. AiQ, *'Class Actions in Europe? Dutch and Italians Say "Yes"; EU Says "Maybe"'*, (2009) 4947 *The Legal Intelligencer*, 7.

³⁸ R. Sacco, *Diversity and Uniformity in the Law*, *The American Journal of Comparative Law*, vol. 49, No. 2 (Spring 2001), p. 174.

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FORMATION OF LEGAL SYSTEM OF LITHUANIA: HISTORICAL MEMORY AND INTEGRATIONAL PROCESS

Konstantin Ivanov*

Herzen University in Saint Petersburg, Russian Federation

Abstract. During the period of 1990–2009, in the legal system of the Republic of Lithuania, fundamental changes have occurred: exit from the USSR, the adoption of a new Constitution, the process of codification of the Lithuanian law, integration into the European Union. The Republic of Lithuania, of course, has its own characteristics.

Formation of the legal system of the Republic of Lithuania in 1990–2009 has a lot of important events. For nineteen years of legal system of Lithuania were obvious achievements and some omissions. Thus, for a more comprehensive analysis of the legal system of the Republic of Lithuania is advisable to periodization to identify features at each stage. The author proposed the following periodization: from 1990 to 1996; from 1996 to 2004; from 2004 to 2009 biennium. The periodization is guided by the fundamental and significant events in the life of the Lithuanian State, significantly affecting the legal system.

The independence of Lithuania as a political act has given rise to the need for changes in legislation, above all, constitutional. This in turn led to the transformation of law and legal practice and the subsequent impact on the changes in legal culture. This sequence shows a systematic change and the “intersectionality” of main elements (aspects of) the legal system of the Republic of Lithuania.

Modern lawyers include legal culture of Lithuania to complex and transition in its structure. The author found that the legal culture of the modern Lithuanian society is based on four components: the legacy of Soviet Lithuania, the elements of legal culture of interwar years, the influence of the experience of foreign countries, and finally, national legislative practice of the Republic of Lithuania. In addition, the formation of legal culture has a significant role and the Catholic Church.

Integration into the EU as one of kinds of globalization shows us the introduction of a new system of lawfulness and the rule of law.

Keywords: Lithuania, legal system, integrational law

INTRODUCTION

Lithuania – one of the countries which has a history of statehood for centuries. In 2009, the Republic of Lithuania noted 1000 years mention the word “Lithuania”, and the Grand Duchy of Lithuania was one of the largest states of medieval Europe. In 1990, the Republic of Lithuania declared the restoration of independence, and large-scale legal reforms followed by in the state.

* Doctor of law, associated professor. Graduated Herzen University in Saint Petersburg in 2008 and currently works in European Humanities University as associated professor. The sphere of the scientific interest are the European Union law, the integration of the Republic of Lithuania into EU and its historical and law aspects, the effect of the EU law into Lithuania’s law. Konstantin Ivanov is the author of a book – “The integration of the Republic of Lithuania into EU: law and history issues” (2010, Saint Petersburg) and Formation of legal system of the Republic of Lithuania: 1990–2009 (2013, Vilnius)



Now, after twenty years, is very important to analyze the relevant issues of formation of the legal system of the Baltic states in the period 1990–2009. The legal system of the Republic of Lithuania has changed dramatically: the output from the Soviet Union, the adoption of the new Constitution, the codification of Lithuanian law, the integration into the European Union. The Republic of Lithuania, of course, has its own characteristics. At this stage, it seems necessary to analyze all of these features, successes and failures in the development of the elements of the legal system of Lithuania. The Republic of Lithuania has decided not typical question of restoration of independence, which has affected the legal system. New legal system was based on the law of interwar Lithuania, the legal heritage of the USSR and the latest developments in the legal field.

LEGAL SYSTEM OF LITHUANIA: HISTORICAL MEMORY

Doubtless, analyzing the problems of the formation of the legal system of the Republic of Lithuania in 1990–2009., it is important to address the sources of Lithuanian statehood as the Republic in 1918–1939. This period is one of the most difficult and dramatic in the history of Lithuania. Declaration of independence, the constitutional reform, the fight for the Lithuanian lands, the establishment of the first public institutions such as the President, the Cabinet of Ministers. In addition, significant development had civil and criminal law. All of this is of interest to study the relationship of Lithuania restored its statehood in 1991 and Lithuanian interwar years. Restoring the lost independence in 1991, Lithuania has taken a basis that was in the interwar period. Again, the institution of the presidency. The judicial system is also built on the model of those years. Of course, differences in the early 90's were, but the foundations were laid in the 1920s.

We can not neglect the preamble, where in addition to the basic values of the Lithuanian society, also mentioned the loyalty of Lithuanian law centuries-old traditions of the state. Here, in the preamble, homage is paid to the legal foundation – Lithuanian Statute, the former Constitution of the Republic. Consequently, the new constitutional order of Lithuania will be built based on the experience of previous constitutional acts and achievements of legal science in Lithuania.

The interwar Lithuanian legal system is marked among other features of the rapid development of constitutionalism. In a short period the country had several temporary and permanent constitutions. This choice of the Lithuanian legislator is not accidental. The existence of the Constitution already says a lot for the state and its people, gives a significant weight in the international arena. For a relatively short period of the adoption of several constitutions is a minimum achievement in the legal field. First Constitution was adopted on November, 2, 1918. It should be noted that, despite the temporary nature of the Constitution, it was a good example of constitutionalism among Western Europe. A few days later the president of Lithuania was appointed Prime Minister, who created the first government of independent Lithuania.

Despite the seemingly unified Soviet legislation Lithuania had its differences. These differences are expressed not only in the presence of their national constitution, but also in certain areas of law. And most likely, it is also largely influenced the modern Lithuanian state.¹

¹ From Soviet republics to EU member states: a legal and political assessment of the Baltic states' accession to the EU (by Peter Van Elsuwege) 2008, The Netherlands, p 528

We should indicate that at first glance, the Lithuanian SSR was blindly following the norm, for example, in civil or criminal law of the USSR, but in fact this period of the history of law in Lithuania is also the features. If constitutional law has developed especially under the Soviet Union, the rules of civil, criminal, family and labor had its own characteristics in Lithuanian law. It is important to point out that in general, all three Baltic countries have had great success, but in the regulation of the legal branches has succeeded mostly by Lithuania. It is extremely important to review and analyze the rules of the Lithuanian civil, criminal, family and labor laws of the Soviet period because after the restoration of independence in the 1990 Republic of Lithuania was in no hurry to change the rules of private law, and for a long time there were Soviet law, but with some restrictions.

The Civil Code of the Lithuanian SSR had considerable originality as it used to legal-technical methods, and content of a number included in a code of laws. The code has a lot of this that can be successfully received by the other codes of the Union republics in the further development of Soviet civil law. This, of course, has had creative legislative and research teams in the preparation of the Baltic republics of the civil codes. The Civil Code of the USSR recognized the following institutions of civil law: property rights, contract law, copyright law, patent rights, inheritance law. Very clear at that time is governed by the conflict rules. Thus, the main results of the development of the legal system of Lithuania to 1990 is the legal heritage of the interwar republic: the emergence of institutions such as the Lithuanian Presidency, strengthening the role of Parliament in the legal system, the codification of law. Undoubtedly, the codification of the law has not been fully completed, and can be explained a little period of time to develop these areas of law as a criminal and civil. As for the right of Soviet Lithuania, here you can find the following results: the creation of the Soviet legislation on the basis of the law in force in Lithuania for a long time. The civil rights of the Lithuanian SSR, was an example to other Soviet republics in the degree of development of the structure of the legal language of legal logic of the existing rules of civil law. Advances in science of the Soviet period in Lithuania favorably influenced by the legal system of Lithuania.

Therefore, Lithuania by 1990 came with a rich history of the legal system. After changing a few ways of life, political organization of society, this Baltic state managed to create its legal system to the achievement of law and the inter-war Soviet years. As a characteristic feature of the Lithuanian legal system is that it can not be attributed to the classical Roman-Germanic system. In many areas of the law the sources of codified Soviet law are still in force. Besides, we obtain a variant of the transitional provisions of the legal system, the Soviet system law to the Roman-Germanic. In some areas of law are entitled to be governed by the Lithuanian Soviet law, while others introduced new sources of codified law. Thus, it can be classified as Lithuanian law post-Soviet group of Romano-Germanic law. Despite this obvious difference worth noting rights of Lithuania on the laws of other countries of the former Soviet Union. Lithuanian legal system in this case can be combined into an autonomous group, along with Estonia and Latvia. Despite the affinity of legal systems, the Lithuanian law has its own special features. Selection form a source of law, language, writing, close to European standards and very different from the law of the countries of the CIS



INTEGRATION INTO EU AND LEGAL SYSTEM OF LITHUANIA

The formation of the legal system of the Republic of Lithuania in 1990–2009. has many important events. For nineteen years of formation of the legal system of Lithuania were obvious achievements and some omissions. The author suggests the following periods: from 1990 to 1996., from 1996 to 2004., from 2004 to 2009. . The basis of this periodization was based on fundamental and significant events in the life of the Lithuanian state, greatly influenced the legal system. The first phase began in 1990, the restoration of independence, the introduction of the Constitution of Lithuania. The signing of the agreement on associate membership in the EU in 1996 to change the legal system of Lithuania, forcing quickly implement rules of EU law into national law in Lithuania. Accession to the EU in 2004 has accelerated the integration and legal impact on the legal system, changing its shape. In 2009 the Lisbon Treaty, which further reformed the law not only to the EU but also the legal system of Lithuania.² Established by the author giving primary and secondary EU law is supreme legal force in Lithuania.

Despite the obvious desire to modernize the Lithuanian legal system these changes were much slower than in the other countries of the former Soviet Union and even not as fast as in Latvia and Estonia. Thus, it appears that by 2000 years is still the basis of the legal system of Lithuania is the codes that have been adopted in the Soviet era, but with reservations and additions. It is time for the global implementation of new regulations. In addition to the rapid development of the codification of criminal law and civil law developed. If the rules of the old penal code can be changed, supplemented, the reconstruction of the civil law was required immediately. But even here the Lithuanian legislator not jumps to hasty introduction of the new Civil Code. The country has changed not only the political and constitutional situation, but there were very different economic relationships that previous acts not regulated. Moreover Lithuania desire to integrate into the EU require the construction of a new Civil Code in accordance with European law. Sure, it was important to not only implement the rule of private law in its legal system, but it does not hurt and the market economy, to protect domestic producers, an active participant in civil relations. Moreover when writing of the Civil Code of Lithuania was considered an important principle of EU law – *acquis*, but those rules should enter into the legal system of Lithuania separately without disturbing the stability of civil relations.

Modern lawyers include the legal culture of Lithuania to the complex in its nature. Legal culture of contemporary Lithuanian society is based on four pillars: the legacy of Soviet Lithuania, elements of the legal culture of the interwar years, the impact of the experience of foreign countries, and finally, the national legislative practice of the Republic of Lithuania. All of this together makes the modern legal culture of the Lithuanian society is extremely advanced. Sure, back to the origins of Lithuanian statehood interwar years, you can find a lot of what has been, along with institutional and legislative aspects resuscitated in the recovery process of the state. First of all, this system

² Monar J. Maintaining the Justice and Home Affairs *Acquis* in an Enlarged Europe. In: Justice and Home Affairs in the EU, P. 40.

of government – the historical memory of the inter-war years as idealized bodies perfectly functional. The legal system of interwar Lithuania and commitment to it in the 90's an important part of modern society in Lithuania. Restoring independence, Lithuania had to follow the examples of other countries with developed legal culture. In addition to respect for international law, Lithuania looking for examples of well-functioning legal systems. Obvious such example was Germany and the Scandinavian countries. Thus, international experience, foreign success also had a proper influence on the legal culture of Lithuania. Lithuanian society saw the respect and enforcement of the laws of perfection judiciary and other foreign countries.

In terms of enforcement, in Lithuania since the 90s had all the prerequisites for the development of legal culture. The legal profession in Lithuania was in demand, but not so in terms of prestige or high pay, but rather, in terms of legal knowledge as such. The growth and importance of international law, the provision of new branches of law have led to train more lawyers. Role of international law to resolve issues within the EU, and often beyond being lost, which makes the modern legal culture generally closed to European values and norms. For the doctrine of European law, as well as for theorists of international law, the question remains the relation of European Union law and international law.³ With the entry of the Republic of Lithuania to the European Union entrenched process of convergence of legal methods and tools, norms and standards in the legal order. European integration as a form of globalization shows us a new system of law and order. National authorities, both legislative and judicial lose their importance to the supranational bodies of the European Union. Even in the European Union law theorists agree to the idea that European integration leads to gradually move away from the concept of law in the legal model in which it was decided in the national legal systems.⁴

The outcome of the legal system of the Republic of Lithuania as a member of the EU include the following: the transfer of many spheres of life, and regulations to the supranational level of the European Union, giving EU law, both primary and secondary higher legal force in Lithuania. Moreover, the apparent significant changes in the legal system of Lithuania and, in some areas of the law after the EU integration. These changes are as positive and some negative. The last stage of European integration has coincided with the change of the legal system of the Republic and the Treaty of Lisbon rules have changed not only the individual branches of the law, but in turn contributed to the legal system of Lithuania as an EU member.⁵ Legal culture and the rule of law have undergone considerable change after the entry of Lithuania into the European Union.

CONCLUSION

Most new acts are adopted in the early 2000s. The author found that the basic rights of the Lithuanian SSR acts at the time of their adoption were quite progressive, and the need for their

3 Jesser V., Hofland A., Varga C. *European Legal Cultures*. Sydney, 1996. p 494

4 Grabbe H., "European Union Conditionality and the «Acquis Communautaire» [2002] *International Political Science Review / Revue internationale de science politique*, Vol. 23, No. 3, p. 249

5 Järvelaid P. *Estonian Legal Culture on the Threshold to the 21st Century //*, 29 *Int'l J. Legal Info.* 75 (2001) p 75



immediate replacement was not. On the other hand, adopted on the earlier formation of Soviet Lithuania, it was necessary to bring in the shortest time according to changes in Lithuania. Sure, that was necessary to write new civil and penal codes. Moreover, the codification took place in the period of integration into the EU and Lithuania had the time to reform the legal system. The author reveals the slow nature of the legal reforms associated with gradual formation of the legal system of the state

Modern lawyers include the legal culture of Lithuania to the complex transition in structure. The author found that the legal culture of contemporary Lithuanian society is based on four pillars: the legacy of Soviet Lithuania, the elements of the legal culture of the interwar years, the impact of the experience of foreign countries, and finally, the national legislative practice of the Republic of Lithuania. In addition, the establishment of the legal culture has a significant role and the Catholic Church. The process of developing the rule of law in Lithuania is rather complicated. Primarily, this is due to the radical changes that followed the restoration of independence. An important characteristic of the rule of law is its structure, which defines the scope of relations. The author reveals the rapid growth of private legal relations in this period. Among them can be distinguished civic and business relationship. Much more active compared to the Soviet period in the history of Lithuania and municipal relationship. Qualitatively changed the state-legal (or constitutional) legal relations connected primarily with the regular elections to the bodies of state power and local self-government. The above can be called the Lithuanian legal system sufficiently well and logically constructed and highly-functioning. Historical and legal aspects of the consideration elements of the legal system of the Republic of Lithuania provides a new look at the process of reform in the future and could be a useful model for the development of the legal systems of other countries in the former Soviet Union.

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CONVERGENCE IN POLISH LABOUR LAW. THE IMPACT OF EUROPEAN UNION LAW

Żaneta Jakubiec*

Jagiellonian University in Kraków, Poland

Abstract. Polish accession to the European Union resulted the necessity to adjust Polish Law to the EU legal regulations. The creation of the European standard is a derivative developed and solidified and over the past years the concept of the right to be an individual member of the European Union. However, the adoption of common standards has become blurred. In the wake of the desire for unification of national legal systems there is a continuous process of approaching legal systems, and also economic systems. It should be noted that of particular importance is the unification of the legal systems from the countries that did not participate in the creation of European standards before accession to the European Union. Value analysis is the process of convergence of legal systems, cultures and for the opening of shared borders. Thus being forced to search for new joint solutions that will prove to be effective throughout the various countries.

In addition, to approaching the different legal systems, it can also be seen as a process of heading in the opposite directions. Individual systems and even legal institutions, despite their common roots, they begin to function differently. In conclusion we can ascertain how far the divergence of the legal system in terms of Polish membership within the European Union. As we know independent countries in the regulatory field become increasingly limited and the same problem arises with the boundaries of national autonomy law.

The ultimate purpose of the paper will attempt to determine whether the laws made by the European Union lead to the convergence or divergence to domestic legal order.

Keywords: convergence, divergence, Polish Labour Law, European Union Law.

INTRODUCTION

In the first place, by determining what are the convergence and divergence, and the origins of contemporary discussion of the issue. Convergence, etymologically from the Latin – *convergere*, is conformed and the presence of certain features in common. In the absence of primary relatedness, thereby simplifying the aspiration to universality law¹. Divergence, etymologically from the Latin – *divergere*, differentiation means in this case, the transformation leading to the differences in legal systems².

* Master of Law, PhD student on Department of Labour Law and Social Policy of the Jagiellonian University. A graduate of the Faculty of Law and Administration from Silesian University. During studies I worked in the Section of Labour Law in the Students Legal Consulting Office. Also, an auditing student of 2nd year Philosophy M.Phil. at the Faculty of Social Sciences from Silesian University. I am particularly interested in labour law, social insurance law and the theory of law. At this time partaking in research in the field of labour law in conjunction with administrative law.

1 L. Drabik, E. Sobol eds., 'Polish language dictionary' (Warsaw National Scientific Publishing 2007) 308.

2 Id.. at 144.



Convergence and divergence as two opposing forces, influence the creation and application of law and its interpretation, as a result the final impact is on the legal system – at the national level and at the international level. Universality in the law enforcement as a result of globalization, and the divergence is maintained due to the impact of political factors, and in particular through cultural factors³. It is considered that the desire to harmonize legal systems, result in the pursuit of simplicity and legal certainty⁴.

In addition, it should be noted that the study of the convergence of legal systems must take into account not only the content of the legislation, but also the development of a comprehensive doctrine and interpretation of acts of the branch of law rules for legal reasoning and consequently have to take into account the economic background⁵.

The concept was not invented by theorists of law, but was inspired by other sciences. Convergence is often discussed with reference to the biological sciences, however the source of the concept about the convergence of the law is political theories and economic sciences⁶.

In order to clarify and above all the understanding of those processes that affect the legal system, at first should consider how the national legal systems are universalized and how to differentiate. Historically, the interaction of legal systems are an interesting phenomenon, since ancient times until today, when continuing interest is the universalization of rights under the participation of the European Union⁷.

Also, the problem of the mutual influence of statutory law, relevant most European countries and culture common law, attributed to Great Britain should be discussed, and the mixed systems such as Malta, where mutual relationships and influence seem to imply a multitude of institutions, including a variety of terms and meanings of legal science⁸.

* * *

Among the various tools for describing the interaction legal systems, which due to the formula of this study will not be discussed, an important role is in the form of law implementing the directives. Obviously the concept has been formed on the basis of experience resulting from the operation of European Union Law. Harmonization, in its essence, results in unifying of legal systems of the members of the European Community. Its purpose is to ensure the compliance to the rules

3 R. Tokarczyk, 'Creating of law: between culture of statutory and culture of common law' in 'Konwergencja czy dywergencja kultur i systemów prawnych?' (O. Nawrot, S. Sykuna, J. Zajadło eds., Warszawa: C.H. Beck 2012) 21.

4 J.H. Merryman, 'On the Convergence and Divergence of the Civil Law' in 'The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative' (J.H. Merryman, Hague: Kluwer Law International 1999) 17,27 cited in T. Stawecki, 'Convergence and divergence of legal systems in the field of creation of law' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadło eds., Warszawa: C.H. Beck 2012) 39–40.

5 T. Stawecki, 'Convergence and divergence of legal systems in the field of creation of law' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadło eds., Warszawa: C.H. Beck 2012) 40.

6 Id.

7 Id. at 24–25 .

8 See A. Doczekalska, 'Multilingualism of the law and convergence of legal cultures in Europe and Canada' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadło eds., Warszawa: C.H. Beck 2012) 177.

and standards that are defined in the acts of primary law and of secondary law. These directives mentioned⁹ have a very important role in the convergence of Polish Labour Law¹⁰.

Two indicated processes, the aforementioned convergence and divergence, can be seen on the level of national law and supranational law. In the domestic system of law, we study how the national level unifies the practice application of the provisions of law. Then, when the national processes is overlap with a background of other cultures and legal systems, we are dealing with a transnational dimension¹¹.

Convergence occurs at the stage of participating countries in the development of international law, by agreeing and adopting treaties which takes place at the supranational level. Another way in which there is a convergence, is the taking over of established and proven solutions from foreign legal systems and legal cultures, without creating common standards. This process takes place at a national level, although it has a transnational dimension, because it usually assimilates from a foreign system and is not taken from their own¹².

It should be noted that the convergence of legal systems realizing the universalization of rights, has already become a common process. It is considered to be functional and useful, but political changes can have a considerable influence upon it, and is often limited by it. This argument is needed to preserve national legislative autonomy, as well as the position of the doctrine, which can have direct consequences to the development of law in the direction of universalist, or to express the pursuit of particularism¹³.

Law of the European Union should not be considered just as a collection of international agreements, or as part of or tools to complement national legal systems. European Union rules are a self-contained set of rights, that are specifically autonomous. The doctrine states that even if the law of the Union, which is independent from the legal systems of the Member States, should never be considered as a system that can be superimposed by another¹⁴.

Due to the fact that the legal system of the European Union is based on the principle of subsidiarity, it is assumed that only if certain rules are applied uniformly, then they can replace national rules. Such as the case when implementation by the EU standards can be achieved in other ways, for example it is preferable to modify the existing legislation¹⁵.

9 See, e.g., Council Directive (EC)2000/43 of implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180; Council Directive (EEC) 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288; Council Directive 9 (EC) 94/33 on the protection of young people at work [1994] OJ L 216.

10 T. Stawecki, 'Convergence and divergence of legal systems in the field of creation of law' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadlo eds., Warszawa: C.H. Beck 2012) 34 – 39.

11 L. Leszczyński, 'Convergence in the law and the universalization of legal axiology. Example reception and dialogue of law judgments' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadlo eds., Warszawa: C.H. Beck 2012) 104.

12 Id. at 105–106.

13 L. Leszczyński, 'Convergence in the law and the universalization of legal axiology. Example reception and dialogue of law judgments' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadlo eds., Warszawa: C.H. Beck 2012) 115.

14 L. Florek, 'European Labour Law' (Warsaw: LexisNexis 2005) passim.

15 K. Walczak, 'European Labour Law and its impact on Polish legislation' (Warsaw: National Labour Inspectorate PIP 2003) 6–17.

In the Polish case law on justifications of judgments issued by the courts and the decisions of the Supreme Court and the doctrine, it is assumed that there is a duty to apply the interpretation of national law in conformity with Community law¹⁶. The background of pro-European interpretation, creates a lot of problems and its often leads to inappropriate conclusions. Pro-European interpretation of the provisions of national labor laws often, apart from the express wording in some cases, makes the practice of even basic methods of interpretation of high-risk, and in extreme cases even unsuitable. It so happens that it comes not to exist in national law prohibitions or injunctions. It should be noted however that the frequency of its use is higher, the lower the quality of national legislation to implement the directives of the European Union.¹⁷

Undoubtedly encouraged by the pro-European interpretation of the case law of views presented by Court of Justice, among them the belief that, for example, as in the case of the conflict with national legislation aim, instantiated in directive, the directive takes precedence¹⁸.

When interpreting a national rule of law, that has been introduced as a result of the implementation of the European Union directive, it is necessary to interpret them that achieved the standards were adopted European Union Law.¹⁹ The obligation to pro-European interpretation of harmonized national law, according to the principle of loyalty to Member States of the Union, which is the rule of the Treaty on European Union. It is noted that the pro-European interpretation, however, should be used only when a complicated provision of national law is incompatible with its directives.

In addition to approaching the different legal systems, it can be seen that the process is going in the opposite direction, thus it happens that the individual systems, even legal institutions, despite their common roots, begun to function differently.

In particular, it should be noted that it is not without significance that this is the cultural base of the national legal system. The specifics of each nationality is different, and has different expectations of the law,²⁰ as more attempt to change the petrified institutions often arouses resentment and fear²¹. In addition, it should be noted that the language of national law is of course difficult. It is not only complicated to achieve the reception of law, but sometimes even to introduce the legal system of the directive, since it is impossible to render the essence of institutions in more than twenty languages (in the case of EU legislation) with any hope of clarified understanding²².

16 See, e.g., The District Court, the judgment of 16 September 2010, ref. act V Pa 88/10; The Supreme Court of the Poland, the judgment of 9 March 2011 ref. act III SK 38/10.

17 G. Orłowski, 'Pro-European interpretation of Labour Law' (Warsaw: Monitor Labour Law [2010] 8 passim).

18 The obligation to pro-European interpretation was confirmed and elaborated in the numerous judgments by Court of Justice. See, e.g., Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud, Case C-307/05 [2007] ECR I-7109.

19 Marleasing SA v La Comercial Internacional de Alimentacion SA, Case C - 106/89 [1990] ECR I-4135.

20 T. Stawecki, 'Convergence and divergence of legal systems in the field of creation of law' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadlo eds., Warszawa: C.H. Beck 2012) 43.

21 See, e.g., Announced a draft directive on the enforcement of Directive 96/71/EC - Posting of workers in the framework of the provisioning of services: enforcement of Directive 96/71/EC available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:017:0067:0080:EN:PDF>.

22 A. Doczekalska, 'Multilingualism of the law and convergence of legal cultures in Europe and Canada' in 'Convergence or divergence of cultures and legal systems?' (O. Nawrot, S. Sykuna, J. Zajadlo eds., Warszawa: C.H. Beck 2012) 143.

Creating an European Union Law must take into account the diversity of cultures and legal systems of the Member States. To fulfill this assumption, the new legal concepts created by EU Law should not be directly taken from the national legal order, but from independent concepts relevant to EU Law, thus making them of neutral terminology. It is important not only to create a new legal concept under European Union Law, but also to use the correct terminology for the designation. It should avoid the use of any reimbursement from a particular state law. It is noted that the origins of the language and the terminology of EU Law, is necessary to the 'deculturalisation' national legal languages²³.

It appears, unrelated to any national legal system, the neutral language of the law, that could be used in different legal systems may facilitate the convergence of legal cultures. However, it is noted that the neutral terms created and used at European Union level are often translated into the language and terminology of national law.

CONCLUSION

The ultimate aim of this paper is to determine whether the laws made by the European Union could lead to convergence or divergence within the domestic legal order. A clear conclusion is difficult, but obviously you can point to a convergence trend. In retrospect unifying of the Polish legal system to the European Union Law, is obvious due to the influence of being a member of European Union, and also prior to the preparation for entry into the European Union²⁴, as well as participation in other organizations²⁵, which were initiated many years ago. It is hard to appreciate the achievements already earned by the founding countries, resulting from other cultural attitudes.

With this view in mind, it is the right measure to systematize the social and economic life, not to mention the huge impact of globalization and the general trend towards universalization. In particular, while remaining in the continental legal system, the European Union should assume that is in continuous convergence of legal systems. Convergence is, however, not only on a national level, but also at the level of transnational basis. This process is primarily the harmonization and unification of the legal systems within the European Union. The quest for unity is one of the aims²⁶, and given that it is a voluntary organization therefore it should be assumed that as a Member State it agrees to donate a certain autonomy to the community. However, that it is not the state that will determine the process of convergence, but a multitude of realization that is so broad that an as a result it has become a reality.

²³ Id., passim.

²⁴ See, e.g., Europe agreement Europe agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part drawn up in Brussels on 16 December 1991, available at http://polskawue.gov.pl/files/Dokumenty/uklad_europejski/Europe_agreement.pdf.

²⁵ See, e.g., The International Labour Organization. More about membership – A. Świątkowski, 'Public International Labour Law. Vol 1' (Warsaw: C. H. Beck 2008) 3 – 9.

²⁶ The Treaty on the Functioning of the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.



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THE MAIN CHANGES AND DYNAMICS OF COMPETITION LAW RULES IN POLAND AND LITHUANIA IN THE PERIOD OF 1990–2004

Magdalena Kozak*

University of Wrocław, Poland

Abstract. The last twenty-five years of changes of the past-communist societies led to the creation of a free-market competition and development of regional markets in Central and Eastern Europe.

The competition law in such countries like the Republic of Poland and the Republic of Lithuania have been developing under the strong influence of supranational and international law. The legal system have been changing from rather chaotic and incomplete to fairly sophisticated and rigid structure model. Nowadays Polish and Lithuanian competition law is based on the same rules as the competition principles which already exist in European Union law. On a practical level, Poland and Lithuania had to change the rules of a centrally planned economy and become a democratic country with a fully developed market economy. The process of harmonization of national competition principles with the European Union law was not a simple task. The process of implementing of European Directives into Polish and Lithuanian law, consumer protection aspects, the block and individual exceptions and the forms of state aid determined changes in law and the way of thinking about competition and consumer rights.

Impact of adaption to the European Union system (and same accession) on the structure, administration, rules of procedure and practise of the national system was tremendous. The number of newly adopted regulations was enormous, but a major problem was still inadequate enforcement of law.

Compatibility of legal systems with “Western” standards was finished after the day of accession into the European Union and transitional period.

This article is aimed at presenting the main changes and dynamics of competition law rules in Poland and Lithuania in the period of 1990–2004.

Keywords: competition policy, law, European Union, Lithuania, Poland

The main purpose of competition policy is to ensure proper functioning of the free – market state. The competition policy includes such matters as: prohibition of cartels, merger control, abuse of a dominant position in the market or block exemptions and equal treatment of public and private enterprises. In that case, the competition policy should be discussed in two ways. Firstly, the relations between same companies and interactions between enterprises and consumers. Secondly, regulations and relations between companies and state (especially in public aid matters).

* PhD Candidate in Political Science, University of Wrocław, Faculty of Social Sciences, Chair of European Studies



“WEST DIRECTION”

The competition law in such countries like the Republic of Poland and the Republic of Lithuania have been developing under the strong influence of supranational and international law. The legal system have been changing from rather chaotic and incomplete to fairly sophisticated and rigid structure model. The idea of the economic integration of the European Union was based also on the concept of free competition. On a practical level, Poland and Lithuania had to change the rules of a centrally planned economy principles and become a democratic country with a fully developed market economy. At the turn of 1990's, Poland and Lithuania together with other Central and Eastern European countries faced a choice of political and economic development path. They had to change the rules of a centrally planned economy principles and become a democratic country with a fully developed market economy. Independence did not solve the economic problems and, in fact, only had initiated them. Each country has concluded cooperation agreements in order to structure and facilitate the cooperation.

“POLAND’S WAY”

The first step of Poland's economic integration with the European Union was signing of the “first generation” agreements on trade, commercial and economic cooperation in 1989. This document was a natural step of the future membership in the European Union and started “Europeanization process”. The first act, which initiated Poland's process of integration with the European Union was the Europe Agreement. The Europe Agreement defined the legal rules of implementation of political and economic union. It came into force on 1st February 1994, but its part of about trade relation came into force earlier – on 1st March 1992. The official application for Poland's accession to the European Union was submitted in 8th April 1994. Huge steps were taken in competition policy during the accession negotiations. The Commission recommended Member States to open negotiations with Poland on 31st March 1998 (on 13th October 1999 accession negotiations were started with Lithuania).

The negotiations on the “Competition Policy” in Poland was official opening on 19th May 1999. The negotiations in this field was preliminary concluded on 20th November 2002¹. Before the end of 2002 accession negotiations with Poland, Lithuania and other applicant countries were closed.

As far as the technical (and also political) point of view is concerned, the negotiations in competition policy were truly complicated. The process of harmonization of national competition rules with the European Union law was by no means a simple task. Notably Poland tried to find some exemptions in the European Union state aid regulations. The free economic zones and state aid for coal, shipbuilding and steel industries were a main reason why the negotiations in this chapter were far more complexed in Poland. The Polish government would like to leave the free economic zones regulation to companies, which started their activity in that kind of zones before

¹ Council of Ministers, Raport na temat rezultatów negocjacji o członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej [2002] www.kprm.gov.pl

1st January 2001. What is more, Poland applied for higher limits of public aid for enterprises, which have to adjust their activity to environment standards. The problem was resolved through special transitional periods and additional limits of public aid for big companies in free economic zones. Furthermore, the automotive industry also achieved notable support².

The introduction of monitoring system of state aid for entrepreneurs was a main problem in Poland. In order to create a suitable conditions for the implementation of Article 63.4b of the Europe Agreement³ the government had to adopt a number of legislative acts and provided adequate enforcement of law. According to provisions of this Article *'Each Party shall ensure transparency in the area of public aid, inter alia, by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid'*. Creation of efficient procedures and institutions for monitoring public aid required was regulated by law. The government established a number of normative acts in this field, for example: in case of guarantees and sureties given from the state budget – The law on public finance of 26st November 1998⁴ or in field of privileges – Act of 20th October 1994 on Special Economic Zones⁵. Poland had to create a clear system, which would help in getting information about public aid. The President of the Office for Competition and Consumer Protection started act as the authority monitoring granting state aid to that country. All objectives and scope of law changes, also in competition policy, were included in the National Programme of Preparation for Membership in the European Union, which were accepted by the Council of Ministers on 4th May 1999⁶.

Implementation of the European Union Directives into the Polish and Lithuanian law, consumer protection aspects and the forms of state aid determined changes in law and the way of thinking about competition and consumer rights. Specific European Union legislation in Poland was, for instance, established through Act of 15th December 2000 on Competition and Consumer Protection⁷ (and relevant implementing regulations to this Act), Act of 2nd July 2004 on *Freedom of Economic Activity*⁸ and a lot of particular Council of Ministers Regulations – like principles of block exemption or regulation on the appropriate rules of control of concentration between undertaking. The issuance of that kind of regulations had to be aimed at the harmonisation of the anti-trust policy through imposition of particular requirements in such areas as: control of concentration level, abuse of a dominant market position, merger control and merger control procedures, the provisions relating

2 *Ibidem*

3 Europe agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [16.12.1991] http://polskawue.gov.pl/files/Dokumenty/uklad_europejski/Europe_agreement.pdf

4 The law on public finance of 26st November 1998 [1998] OJL No 155, item 1014

5 Act on Special Economic Zones of 20th October 1994 [1994] OJL No 123, item 600 of 1994; OJL No 141, item 692; OJL No 106, item 496 of 1996

6 Council of Ministers, the National Programme of Preparation for Membership in the European Union [1999] www.kprm.gov.pl

7 Act on Competition and Consumer Protection of 15th December 2000 [2000] OJL No 122, item 1319 of 2000

8 Act on Freedom of Economic Activity of 2nd July 2004 [2004] OJL No 173, item 1807 of 2004



to block and individual exemptions from the ban on competition restricting agreements, imposition of fines and agreements between entrepreneurs. The number of newly adopted regulations were enormous, but a major problem was still inadequate enforcement of law. According to that case, the intermediate aims of full compliance of Polish (and Lithuania) antimonopoly law with the law of the European Union, were also to ensure the effective enforcement of regulatory framework by strengthening the institutional capacity of the supervisory bodies on the market.

“LITHUANIA’S PATH”

For decades, the economy of Lithuania was permanently associated with the Union of Soviet Socialist Republic. The most significant barrier in the early years of the economy was the lack of currency in Lithuania. Transactions were made in barter or paid in dollars. The situation changed in 1992, when Lithuania became a member in the International Monetary Fund and withdrew from the “ruble zone” (thus introduced litas in 1993). In the same year, the government of Lithuania (Seimas) adopted the Law on Competition⁹. In 1993 Lithuania signed a trilateral agreement with Latvia and Estonia (Free Trade Agreement, which came into force in 1994). The government of Lithuania ratified the European Treaty and enacted the Resolution No 1049 on harmonization of national legislation with the *‘acquis communautaire’* in 1996¹⁰. After the Agenda 2000, when The European Commission noted that changes in economics and progress in harmonisation process was not enough to start the initiation of membership talks, the government of Lithuania adopted the Resolution No 961. It was a more comprehensive program of changes, also in field of competition policy. Lithuania took the Resolution No 1202 of On Preparation for the Programme of Accession Partnership (1997) and Resolution No 1305 of Programme for Lithuania’s Preparation towards EU Membership (1998)¹¹. After the first and second Report on Lithuania’s Progress towards EU Membership, which were presented to the European Commission in 1999, accession negotiations has started on 13th October 1999. Adoption of Lithuania’s position in competition policy was placed on 31st March 2000. The negotiations in this field was official opening on 19th May 2000¹².

Although the Polish, as the Lithuanian, parliament has passed numerous laws in competition field, which mainly based on western standards. Most of that solutions didn’t form a coherent system. For example, initially in Lithuania competition policy was executed pursuant to the Law Competition regulation by the State Price and Competition Office, which was established by an act of Lithuanian government. This act gave the State Price and Competition Office authorisation to the enforcement of law in certain unfair competition activities and consumer rights. On the other hand, the government still kept rights to setting subsidies, soft loans for specific enterprises or

9 More about: K. Maniokas, G. Vitkus (ed.), ‘Lithuania’s Integration into the European Union. Summary of the Study on the Status, Perspectives and Impact’ (Vilnius: European Integration Study Center 1997) 105

10 K. Maniokas, R. Vilpišauskas, D. Žeruolis (ed.), ‘Lithuania’s Road to the European Union. Unification of Europe and Lithuania’s EU Accession Negotiation’ (Vilnius: Eugrimas 2005) 509–510

11 *Ibidem*

12 *Ibidem*, 527

tax benefits, which might interfere with fair competition¹³. The activity of that bodies helped to promote competition policy and the economic growth itself.

Main and particularly interesting problems in competition policy in Lithuania were on the fuel markets. Problems existed both in retail and wholesale fuel trade industries, where there were no free competition. The case of the Lithuanian fuel trade market showed how specific are the countries with *small open economies and how attention should be paid to create an adequate competition policy and which could take into account all features of the economy*¹⁴.

At the end of November 2001 Lithuania preliminary concluded the negotiations on the chapter 'Competition Policy'. Lithuania was one of the first country (with Estonia and Latvia), who terminated the accession negotiations in this field¹⁵. The progress of enforcement of competition law and policies, changes in law, main cases, for example in block and individual exemptions or abuse of dominant position were presented in Annual Report on Competition Policy Developments in Lithuania¹⁶.

CONCLUSION: CONVERGENCE OR DIVERGENCE?

Nowadays Polish and Lithuanian competition law is based on the same rules as the competition principles which already exist in the European Union law. The competition law in Central and Eastern Europe countries have been development under the strong influence of the European standards. It should be noted that the European Union legislation (adoption, implementation and enforcement of the '*acquis communautaire*') was also a factor in the design process of competition law in that countries. The negotiations determined the whole conditions under which each candidate country will join to the European Union. All candidate countries had to adopt the whole '*acquis communautaire*'. The significant part of that regulations constituted competition rules (for instance, provisions of the Treaty establishing the European Community: Articles 77, 90, 92–94 and provisions of the Treaty establishing the European Coal and Steel Community: Articles 4 and 54). Consequently, Lithuania and Poland seek to harmonize its competition policy with the European Union competition policy, but it was not a serious problem for that countries. Arnoldas Klimas and Giediminas Rainys rightly notes, that: '*the main problem here (was) the insufficient degree of public awareness and the insufficient readiness of economic entities to be guided by competition legal norms in their economic activities*'¹⁷. Changes in the way of thinking and the mentality required a lot of time.

13 W. Weidenfeld (ed.), 'Central and Eastern Europe on the Way into the European Union: Problems and Prospects of Integration In 1996' (Gütersloh: Bertelsmann Foundation Publishers 1996) 145

14 More about: I. Baužytė, K. Kučaidze, 'The importance of competition policy implementation in a small economy: The case of the Lithuanian fuel trade market' [2011] *Ekonomika* Vol. 90(1)

15 K. Maniokas, R. Vilpišauskas, D. Žeruolis (ed.), *op. cit.*, 130

16 OECD Competition Committee Annual Report on Competition Policy Developments in Lithuania [2002] and Annual Report on Competition Policy Developments in Lithuania [2003] www.oecd.org.

17 K. Maniokas, G. Vitkus (ed.), *op.cit.*, 108



Progress made in creation of good administrative practise and legal approximation was admirable. Poland, Lithuania and other eight candidates countries finished the negotiations on 13th December 2002. The Accession Treaty was signed on 16th April 2003. Then, after the ratification of the Treaty, Poland and Lithuania with other countries became the members of the European Union (on 1st May 2004). Impact of adaption to the European Union system (and same accession) on the structure, administration, rules of procedure and practise of the national system was tremendous. Compliance of Polish and Lithuanian competition law, as well as antimonopoly law, with the European regulations was achieved through full harmonization (in fact, the European Union Regulations unify the legal system, which becomes immediately enforceable as law in all Member States simultaneously¹⁸) of national legal system with the system of the European Union.

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¹⁸ More about: J. Barcz (ed.), 'Instytucje i prawo Unii Europejskiej. Podręcznik dla kierunków zarządzania i administracji', (Warsaw: LexisNexis 2011) 229–231

INTEGRATION OF MEDIATION IN TO LATVIAN LEGAL CULTURE

Ivars Kronis*

Rīga Stradiņš University, Latvia

Abstract. Mediation is one of the few mechanisms in which the parties are trying to reach a mutually acceptable agreement for their dispute resolution by the help of a third. Implementation of the legal regulation of mediation in Latvia began with the development of Concept “On mediation implementation in the resolution of civil disputes” in 2007. The necessity to develop legal regulation of mediation also derived from Directive No. 2008/52/EK issued by European Parliament and Council on May 21, 2008 about the certain aspects of mediation in civil and commercial case. Although according to Part 1 of Section 12 of the Directive Latvia should perform the measures for the implementation of Directive latest till May 21, 2011, the Law on Mediation in Saeima (Parliament) still is not adopted. Nevertheless, author shortly discusses the proposed regulation of mediation. Firstly a brief exposition and assessment of the need, extent and significance of mediation in Latvian society will be given and secondly, it discusses the introduction of mediation in Latvia. The article concludes with suggestions for future research.

Keywords: Alternative dispute resolution, civil disputes, mediation.

INTRODUCTION

The problem of effective and expedient resolution of disputes persists and is a subject of continuous discussions in the legal systems of many countries worldwide. The Philosopher of Laws Francis Bacon has noted in this context that: “It is generally better to deal by speech than by letter and by the mediation of a third than by a man’s self.”¹ It means therefore that a third person is required to assist in seeking resolution to a dispute.

Normally, we treat disputes as something negative, namely, as harsh words and adverse emotions. Disputes, however, can also be positive: one should remember that “*truth is born of arguments*”. Disputes also present an opportunity to express freely the opinion and to drive at certain common solution, eventually much better than any of the starting points.² A high-sounding dispute can also bring to good result as a catalyst to better future relations.³

It should be noted that no society is capable of avoiding conflicts between individuals resulting from infringement of the rights or interests protected by the law. It is, however, possible

* Dr. Ivars Kronis; E-mail: ivars.kronis@rsu.lv

1 J. H. B. Roney, ‘Alternative Dispute Resolution: A Change In Perception’ [1999] 10 (11) International Company and Commercial Law Review 329.

2 V. Viķe-Freiberga, ‘Valsts prezidentes uzruna Saeimā’ [2004], access via Internet, http://www.president.lv/pk/content/?cat_id=2191&art_id=2564 (referred on 4 March 2013).

3 J. Bolis, ‘Mediācija’ (Rīga: Juridiskā koledža 2007) 16.

to create a friendly social and legal environment for expedient, amicable resolution of such conflicts.⁴

Mediation is among the most neutral approaches to resolution of conflicts, since an impartial third party involved in the process helps the parties to reach voluntary, negotiation-based resolution of dispute. Such alternative approach to dispute resolution is also recognized as the most effective one, since the third party may not take any binding decision. On the one hand, the developed legal regulation of mediation is a novelty in the legal system of Latvia and in the approach to settlement of disputes; on the other hand, mediation as alternative approach to settlement of dispute may not be treated as an unexpected procedure in Latvia. Mediation has longstanding traditions worldwide.

Legal proceedings is the most traditional and common form of dispute resolution; resolution of civil disputes, however, is also possible extra-judicially, not only before national judicial authorities, under the so-called alternative procedure. Alternative settlement of disputes has been listed among the key political priorities of European Union (EU). In the opinion of the European Commission, no judicial system is capable of resolving effectively all conflicts arising in the community by judicial means alone.⁵ Mediation is an alternative form of dispute resolution.

The first steps in mediation have already been made in Latvia, so that it is reasonable to discuss the most controversial issues of mediation and to analyze the possibilities available to lawyers in mediation process. It should be noted that mediation-related studies conducted in Latvia until present have been quite fragmentary.⁶

Empiric basis of such study comprise the works and collections of Latvian as well as overseas scientists, periodicals and prime sources, legal acts, statistic data, Internet resources and other publicly available information as well as previous research conducted by the Author.⁷

The key methods of research include analytic, comparative, inductive and deductive method.

I. DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION AND PRECONDITIONS TO INTEGRATION OF THE MEDIATION INSTITUTE

Since ancient times, long before different nations established their state and law, human lives involved conflict situations and disputes to be resolved by some arbitrator. The “arbitration” instance was not necessary a formal court or justice with special authority. It could as well be a tribal meeting, a chieftain and the elders, or some wise men – in general any third party, be it a neighbor or the first-comer who was capable of resolving the point of contention.⁸

4 I. Žalėnienė, A. Tvaronavičienė, ‘The main features and development trends of mediation in Lithuania: the opportunities for lawyers’ [2010] 1 (119) *Jurisprudencija* 228.

5 Green paper COM on alternative dispute resolution in civil and commercial law [2002] 196 final.

6 For example, J. Bolis, ‘Mediācija: Pielietojums Amerikas Savienotajās valstīs un perspektīvas Latvijā’ [2010] A daļa, 64.sējums, 1./2. Numurs *Latvijas Zinātņu akadēmijas Vēstis*.

7 This report is based on the ideas started in the article by I. Kronis, ‘A New Law – A New Chance for Mediation in Latvia’ [2012] 1 (1) *Social Innovations for Global Growth* 123 – 139.

8 M. Haritonovs, ‘Par tiesām un tiesnešiem’ (Rīga: Zinātne 1979) 5.

Alternative dispute resolution (hereinafter – ADR) includes different processes and methods, such as negotiations, arbitration, early, impartial assessment, expert’s opinion; in general, mediation, along with conciliation, trends to become the most commonly used ADR process in Europe.⁹

Latvia has a long history of existence and development of institutions related to alternative dispute resolution (ADR), including such institutions where an intermediary is involved. According to the opinion referred to in literature,¹⁰ the very first occasions mentioned in relation to the referral to arbitration institutions on the present territory of Latvia include the arbitration award dated to 1258 where, similar to the Roman Law, Archbishop Albert representing the public authority conciliated the Bishop of Kurland and the German Order.

Despite of the fact that formation of the fundamentals of national rule of law in Latvia started in the beginning of 19th century, historical formation of certain private law institutions started much earlier, marking the origins of such institutions including arbitration.¹¹ Nowadays, regulations for resolution of disputes by arbitration courts in general are established in Latvia. Civil Procedure Law¹² governs the basic matters of operation of arbitration courts as well as the enforcement of rulings rendered by them. The legislator’s approach to include regulation on arbitration court in the form of separate chapter of, rather than annex to Civil Procedure Law or an autonomous law, was based on the historical aspect, since in Civil Procedure Law of 1938¹³ regulation on arbitration court formed a sub-title in separate chapter of conciliation procedure. The above tradition was preserved in Civil Procedure Law enacted in 1998, so that the institution of arbitration is governed by Part D and the recognition and enforcement of arbitration awards rendered abroad – by Part F of Civil Procedure Law.

Mediation is the most impartial way for resolving conflicts, compared to resolution by arbitration court, because an impartial third party is involved during this process to reach voluntary, negotiation-based resolution of dispute.. From the view of restoring social peace, this alternative dispute resolution approach is also the most effective one, since the third party is not allowed to make any binding decision.¹⁴

Mediation has experienced rapid development in the last decades, and it is increasingly seen by the international community¹⁵ as a universal, trans-judicial approach to resolution of disputes that meets the challenges of modern world where we have the difficult task imposed on us to

9 Conception ‘Implementation of mediation in resolution of civil disputes’ (informative part), access via Internet, <http://polsis.mk.gov.lv/LoadAtt/file65116.doc> (referred on 4 March 2013).

10 A. Auza, ‘Šķirētības institūta izcelsme, veidošanās un attīstības atsevišķi vēsturiskie un teorētiskie aspekti Latvijā’ In: ‘Juridiskās zinātnes aktuālās problēmas’ (Rīga: Apgāds Zvaigzne ABC 2012) 28; LVVA Parchment and paper documents (archival collection) Fond 5561 Description 2 Document 6.

11 A. Auza, ‘Šķirētības institūta izcelsme, veidošanās un attīstības atsevišķi vēsturiskie un teorētiskie aspekti Latvijā’ In: ‘Juridiskās zinātnes aktuālās problēmas’ (Rīga: Apgāds Zvaigzne ABC 2012) 24.

12 Civilprocesa likums [1998] 326/330 Latvijas Vēstnesis.

13 F. Konradi, T. Zvejnieks, ‘Civilprocesa likums ar paskaidrojumiem’ (Rīga: Valsts tipogrāfijas izdevums 1939) 436-443; V. Bukovskis, ‘Civilprocesa mācības grāmata’ (Rīga: 1933) 568–579.

14 I. Žalėnienė, A. Tvaronavičienė, ‘The main features and development trends of mediation in Lithuania: the opportunities for lawyers’ [2010] 1 (119) Jurisprudencija 228.

15 T. Shamlikashvili, ‘Mediation in the neighbouring countries: the case of Russia’ (Note, European Parliament 2011) 4.

keep balance between globalization that inexorably intervenes in the lives of national communities and individuals, and the natural human disposition to satisfaction of personal interests and needs.

Through a long evolution process, mediation has gradually become a way to overcome conflicts, differences and disputes that provides an opportunity and enables the parties to achieve their challenged goals through the most important aspect of mediation: providing equivalent opportunities for the opponent to pursue their rights and interests, rather than achieving their own goals on the account and to the detriment of the opponent.¹⁶

Mediation is described in scientific literature¹⁷ as a way to thoroughly considered, mutually acceptable solution based on the consensus of the parties to dispute. Mediation means participation of an impartial third party – mediator – in dispute resolution procedure. Mediator as a third party has the task to guide the voluntary participants of mediation procedure to a mutually acceptable and sustainable solution that reflects their interests and requirements. The achieved solution has to guarantee mutual satisfaction of the conflicting parties. Successful mediation means that there are neither winners nor losers; it rather means the situation where all stakeholders are mutual winners.

Introduction of the legal regulation of mediation in Latvia, which was started from development of the concept “Introduction of mediation for resolution of civil law disputes” (hereinafter – the Mediation Concept)¹⁸ in 2007 (approved by Cabinet Regulations No 121 of 18 February 2009), which was aimed at exploring proposals for development of mediation as an autonomous approach to resolution of civil law disputes in Latvia, ensuring the relation (interaction) of civil proceedings and mediation through proposing the solutions for introduction of pure mediation model and court-related mediation models, and identifying the preconditions to successful implementation of such models, resulted in drafting of Mediation Law.¹⁹

Further, the need for developing legal regulation of mediation was dictated by the Directive 2008/52/EC of the European Parliament and of The Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter – the Mediation Directive).²⁰ The EU Directive therefore provided notable contribution to the establishment of legal base for mediation in Latvia. In fact, the Directive was among the basic guidelines to drafting of the Mediation Law.

Taking into consideration the above-stated, the drafted legal regulation of mediation is, on the one hand, a novelty in the legal system and resolution of disputes in Latvia; on the other hand, mediation as an alternative dispute resolution procedure may not be treated as unexpected in Latvia,²¹ since mediation in Latvia dates back to 1998 when *Jānis Bolis* started offering mediation studies at Riga School of Law and other educational establishments.²² Financial support was pro-

16 T. Shamlikashvili, ‘Mediation in the neighbouring countries: the case of Russia’ (Note, European Parliament 2011) 4.

17 See *id.*, 4.

18 Conception ‘Implementation of mediation in resolution of civil disputes’ (informative part), access via Internet, <http://polsis.mk.gov.lv/LoadAtt/file65116.doc> (referred on 4 March 2013).

19 Mediation Draft Law, access via Internet, <http://www.mk.gov.lv/lv/mk/tap/?pid=40240788&mode=mk&date=2012-09-04> (referred on 4 March 2013).

20 Directive 2008/52/EC on on certain aspects of mediation in civil and commercial matters [2008] OJ L 136.

21 N. Kaminskiene, ‘Teismine mediacija Lietuvoje. Quo vadis?’ [2010] 9 (1) *Socialinis darbas* 55.

22 J. Bolis, ‘Mediācija: Pielietojums Amerikas Savienotajās valstīs un perspektīvas Latvijā’ [2010] *A daļa*, 64.sējums, 1./2. Numurs *Latvijas Zinātņu akadēmijas Vēstis* 40.

vided in 2005–2007 by the European Union, including to raise public awareness of the mediation and its role in resolution of differences, and to training of new mediators.

It can be observed²³ that the interest among society and professionals has highly increased in the recent years. Since mediation differs from other dispute resolution methods, such as conciliation, negotiations, arbitration and court, it has its own philosophic orientation and methodology. Some professionals present themselves as mediators, and mediation has become a syllabic discipline offered by universities.²⁴

The Mediation Draft Law is developed to determine the unitary basic principles of mediation and the basic regulations to provide explanation to the meanings that refer to mediation as well as to provide the qualitative mediation.

The developed Mediation Draft Law in its initial issue contains 20 Articles that are presented in 5 (I. – V.) sections. First (I.) section – *General Regulations*; Second (II.) section – *Basic principles of mediation*; third (III.) section – *mediation process*; Fourth (IV.) section – *mediation recommended by the court*; Fifth (V.) section – *Certified mediator*; and *Transition regulations*. It can be seen from the view of law systematization that the system underlying the Mediation Law is sequential, however it can also be seen that the task force entrusted with drafting the law has applied wider approach to law including the norms that regulate mediation recommended by the court. Extension of the norms that regulate mediation recommended by the court to the Mediation Law, rather than including them in civil Procedure Law, may not be perceived unambiguously. As Natalija Kaminskiene indicates, it is recommended to determine the regulation of court mediation in the level of Civil Procedure law, thus providing the integrity and systematization of proceedings standards. The regulation of court mediation in the Proceedings law would show the clear politics of court mediation promotion and state support.²⁵

II. THE ROLE OF MEDIATION IN DISPUTE RESOLUTION SYSTEM FOR THE TODAY'S LATVIAN COMMUNITY

According to the viewpoint in German culture, the law has divine origin because it is the God who guides and determines human fates.²⁶ Such a viewpoint was based on belief that any man before court was dependent on the will of God. In other words, no party to dispute could know in advance in whose favor would the court adjudicate. Mediation, on the contrary, enables and entitled the parties to control not only the text of the reached agreement but also the procedure for reaching and drafting such agreement. This feature makes mediation a special institution among different approaches to resolution of disputes.²⁷

Litigation in Latvia is not as expensive as in other Western countries, yet the principle of winning

²³ See *id.*

²⁴ See *id.*, 40.

²⁵ N. Kaminskiene, 'Teismine mediacija Lietuvoje. Quo vadis?' [2010] 9 (1) *Socialinis darbas* 57.

²⁶ A. Līcis, 'Prasības tiesvedībā un pierādījumi' (Rīga: Tiesu namu aģentūra 2003) 12.

²⁷ T. Shamlikashvili, 'Mediation in the neighbouring countries: the case of Russia' (Note, European Parliament 2011) 19.

or losing and the risk of loss, depending on the outcome of the matter, inevitably encourage the competing parties to consider mediation as a tool to reach agreement.

Mediation is understood by structured voluntary cooperation process during which the parties seek to reach mutually acceptable agreement to resolve differences between them with the help of mediator.²⁸ The key features to be emphasized there include the fact that mediation is based on certain structured pattern (identification of topics for negotiation; identification of facts and positions; identification of needs and interests; development of solutions, and agreement); it is voluntary (the parties have agreed willingly and voluntarily to seek settlement of differences by means of negotiations); it involves active and creative cooperation of the parties in developing mutually acceptable solutions that are based on understanding of the motives, interests and needs of each party, and on their willingness to reach agreement.

The parties are therefore treated as “hosts” of the conflict and therefore responsible for resolution thereof. The mediator has special role to play in dispute resolution procedure: he may not make decision on the points of fact, and he is even not allowed to propose any options to the parties for settlement of the conflict.²⁹

The power and effect of the described form of mediation basically stems from the fact that “the mediator participating at negotiations makes no ruling. He has no decision-making authority above the parties, and his sole task is to use his experience, knowledge and skills to resolve the conflict and help the parties to drive at solution that is acceptable to both parties and serves, to the extent practicable, the interests of the competing parties”.³⁰

A number of other specific features derive from the above-described one, including some that demonstrate the notable advantageousness of this procedure. This is true, for example, in respect of the high level of freedom available to the parties in terms of procedural arrangements, such as time and place, as well as form of presentation of the material. Thanks to the level of flexibility, mediation differs notably from the conventional litigation that involves binding requirements in terms of the time and place of court meeting, procedure for submitting evidence, and the format of statements and petitions filed with the court.³¹

According to literature,³² mediation is not only a legal institution but also an important social institution. Such allegation is proven by efforts and support on part of public authorities during the recent years, thus providing preconditions to successful introduction of mediation in the legal culture of Latvia as well as its social life in general. Despite of this, the well-known saying should be kept in mind that:³³ “*The one who is willing to work seeks for possibilities, while the one who is unwilling – for reasons*”; it may be therefore concluded that the enactment of Mediation Law

28 Mediation Draft Law Section 1, Part 1.

29 T. Shamlikashvili, ‘Mediation in the neighbouring countries: the case of Russia’ (Note, European Parliament 2011) 19.

30 *See id.*

31 *See id.*

32 *See id.* 5.

33 M. Džondžua, ‘Parādu atgūšana. Kredītu pārvaldības tehnoloģija un psiholoģija’ (Rīga: Turība 2006) 103.

should become a milestone not only in terms of improvement of the Latvian legal system but also in terms of general development of society as well as higher humanization of the judicial system.

On the other hand, Mediation Law serves as signal to those who believe in it and encourage them to increase their social activity.³⁴ The favorable position of European Union towards mediation, as well as the rapid distribution of information in society, the increased volume of civil and commercial relations, and the need to resolve the arising disputes whilst preserving the partnership relations between the parties and protecting their commercial or private secrets present the necessary preconditions to the introduction of mediation.³⁵

The Latvian community of professional mediators is growing. Training program for mediators, including regular continued education, has been established in accordance with the due procedure.

It has been pointed out that the legal community of Latvia is consolidating their efforts in order to ensure successful introduction of mediation and to provide high quality mediation services (quality is of utmost importance, in particular during the early development stage of the new institution, when lack of professionalism can have adverse effect on the image of institution), so that informed demand for mediation can be formed and sufficient supply can be ensured to meet such demand.

The measures to be taken include application to entrepreneurs and other professional and social groups. Apart from that, active measures take place to introduce mediation in the education system in order to promote constructive dispute resolution culture, starting from school age.³⁶

Activities of professional body of certified mediators shall be undertaken by Mediation Council.³⁷ Mediation Council shall be a professional self-government body. The key tasks of Mediation Council shall include *training, examination, certification and attestation of certified mediators*. Preconditions to certification shall include: the person meets the requirements set for certified mediators and has completed training course for mediators, and successfully passes the examination of certified mediator. Attestation of certified mediators takes place every five years.³⁸ Though even no common global model is established, it is emphasized that such procedure would ensure the precondition to establishing unified, coordinated policy for future development of the new institution. In addition, it would serve the purpose of regulating the mediation activities and quality assurance of mediation services, whilst avoiding excessive involvement of the Government. Mediation Council established for this purpose shall form the basis on which self-regulation vehicle of mediation would develop in Latvia.³⁹

To conclude, the key issue inherent to all and any court rulings is the enforcement. The amount of non-enforced judgments remains rather high. The principle of delegating to parties the right to control the content and procedure of resolving dispute by means of negotiation enables handling of this problem situation, given the enforcement ratio of court rulings.⁴⁰

34 T. Shamlikashvili, 'Mediation in the neighbouring countries: the case of Russia' (Note, European Parliament 2011) 5.

35 N. Kaminskiene, 'Teismine mediacija Lietuvoje. Quo vadis?' [2010] 9 (1) Socialinis darbas 54.

36 T. Shamlikashvili, 'Mediation in the neighbouring countries: the case of Russia' (Note, European Parliament 2011) 6.

37 Mediation Draft Law Section 18, Part 1

38 Mediation Draft Law Section 19

39 T. Shamlikashvili, 'Mediation in the neighbouring countries: the case of Russia' (Note, European Parliament 2011) 6.

40 See *id.* 20.



In comparison, in Lithuania the Law on Conciliatory Mediation in Civil Disputes became valid on July 31, 2008. The number of settlements in the courts of the Republic of Lithuania has significantly increased and it can be appreciated positively.⁴¹

It should be also noted that mediation is not a panacea to all problems, even though this approach, given its increasing popularity, receives more and more appreciation, stating even that mediation is capable of replacing virtually any other forms of social cooperation.⁴² This is not true, of course. Though mediation is indeed a highly useful and effective approach to dispute resolution where seemingly incompatible properties, such as humanity and pragmatism, are combined, yet its application is limited. Active development and application of mediation is only possible in society with established powerful, independent and stable judicial system.⁴³

Regardless of method used to dispute resolution, the parties (disputants) always rely on the existence of judicial system that is capable of ensuring availability of justice even in extremely complicated situations.⁴⁴ It means that improvement and strengthening of judicial system alone would guarantee successful development of the mediation institute.

Mediation as a novelty in the Latvian law system has double-edged nature. On the one hand, it may present certain threat to the status of lawyers in society and to their financial income; on the other hand, it presents new opportunities to lawyers.⁴⁵

CONCLUSION

Formation of legal base and institutionalization of mediation is certainly among the most important steps towards further expansion of mediation in Latvia. It should be concluded that the process of introducing mediation shall be completed no sooner than mediation becomes an integral part of dispute resolution system; therefore, mediation would promote the improvement of relations, restoring of communication, and the ability to ensure balance between personal interest and maintenance of relations in future.

To conclude analysis of the introduction of legal regulation of mediation, the key benefits expected from the introduction of mediation will hopefully include not only unloading of courts but also shifting the attitude in society towards conflicts and their resolution; namely, mediation is not only an alternative to judicial settlement of dispute but also a factor that forms the conscience that any differences arising between the parties are personal to such parties who are responsible for it.

41 N. Kaminskiene, 'Teismine mediacija Lietuvoje. Quo vadis?' [2010] 9 (1) *Socialinis darbas* 57.

42 T. Shamlikashvili, 'Mediation in the neighbouring countries: the case of Russia' (Note, European Parliament 2011) 20.

43 *See id.*

44 *See id.*

45 I. Žalėnienė, A. Tvaronavičienė, 'The main features and development trends of mediation in Lithuania: the opportunities for lawyers' [2010] 1 (119) *Jurisprudencija* 239.

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CONVERGENCE ON SHAREHOLDER PRIMACY MODEL OF CORPORATION – ENDLESSLY CONTESTED ISSUE?

Eglė Lauraitytė*

Vilnius University, Lithuania

Abstract. Over the past few decades one of the key questions occupying corporate law scholarship has been whether the laws converge and more specifically whether the shareholder primacy model becomes global. Nevertheless the legal scholarship still does not provide a clear picture on convergence towards shareholder primacy model. Thus this article reviews some examples of scholarly debate on convergence towards the shareholder primacy model of the corporation and comments on possible reasons for a long lasting disagreement. The article discusses the concept of convergence and shows that complexity and uncertainty of the notion itself is one of the reasons for various interpretations of convergence towards shareholder primacy. The article also discusses some theoretical insights on the development patterns of corporate scholarship and concludes that academic consensus regarding supremacy of shareholder primacy model is unlikely to occur.

Keywords: shareholder primacy model, convergence, scholarship trajectories

1. INTRODUCTION

Over the past few decades, one of the key questions in corporate law has been whether corporate laws and corporate governance models are becoming global.¹ Probably the most prominent prediction on convergence in corporate law was made by US professors H. Hansmann and R. Kraakman in the article “*The End of History For Corporate Law*” (2001)². The authors indicated that company law in the main jurisdictions to the large extent reflects the shareholder primacy model, and even greater convergence will be seen in the future.³ Moreover, they claim convergence is rapidly increasing and will occur in the legal scholarship as well, *i.e.* academics will come to a consensus regarding the supremacy of shareholder primacy model. However, the legal scholarship does not provide a clear picture on this convergence in law.⁴ Even less clear is whether we are seeing any consent in academia on the supremacy of such model.

* LL.M, Phd candidate, Vilnius University, Faculty of Law, Lithuania.

1 F. Gevurtz, “The Globalization of Corporate Law: The End of History or a Never-Ending Story?” [2011] 86 Washington Law Review 476.

2 H. Hansmann, R. Kraakman, “The End of History for Corporate Law” [2001] 89 Georgetown Law Journal.

3 *Ibid* p. 439–443, 468.

4 *E.g.* see T. Yoshikawa, A.A. Rasheed, ‘Convergence of Corporate Governance: Critical Review and Future Directions’ [2009] 17 Corporate Governance: An International Review 402 (The authors claim that “the empirical evidence that has accumulated over the last decade provides only minimal support for the “end of history” predictions that H. Hansmann and R. Kraakman advanced with prophetic zeal and normative inevitability”).

In the light of this discussion, this article reviews some examples of scholarly debate on convergence towards the shareholder primacy model of the corporation and comments on possible reasons for a long lasting disagreement. The article discusses the concept of convergence and shows that complexity and uncertainty of the notion itself is one of the reasons for various interpretations of convergence towards shareholder primacy. With regard to prediction on academic consensus on shareholder primacy model, the article discusses some theoretical insights on the development patterns of corporate scholarship. The purpose of this article is to contribute to the methodological aspects of legal scholarship on the issue of convergence (however, in no way diminish the importance of convergence scholarship⁵).

2. SHAREHOLDER PRIMACY, ALTERNATIVE MODELS AND DISAGREEMENT IN THE SCHOLARSHIP

A few characteristics of the shareholder primacy (or shareholder orientated) model described by H. Hansmann and R. Kraakman are that (i) the managers of the corporation must manage the corporation in the interests of its shareholders; and (ii) other corporate constituencies, such as creditors, employees, suppliers, and customers should have their interests protected by contractual and regulatory means rather than through participation in corporate governance.⁶ The shareholder primacy model is claimed to be the most efficient and is contrasted with other models such as labour- and stakeholder- oriented models⁷, which recognize the interests of other stakeholders (such as employees, creditors, suppliers, customers, local communities, etc.).⁸

The German corporate governance system is usually characterized as taking the stakeholder approach.⁹ Moreover, probably the most prominent legal rule representing labour orientated model is the German law regarding employee participation on the boards of the companies (co-determination).¹⁰ The co-determination rule generally requires a certain number of the board

5 The comparative studies, which are typically a part of the convergence literature, provide a lot of significant insights on specific solutions of the existing problem. Also specific case studies of legal transplants can give a lot of insights on phenomenon of convergence (e.g. for discussion on legal transplantation of fiduciary duties see: H. Fleischer, 'Legal Transplants in European Company Law – The Case of Fiduciary Duties' [2005] 2 *European Company and Financial Law*).

6 For additional characteristics of shareholder primacy model please see *Ibid* No. 2, p. 441. For other description of the models see, e.g. S. M. Bainbridge, 'The New corporate governance in theory and practice' (Oxford: Oxford University Press 2008) 10; J.R. Boatright, 'Shareholder Model of Corporate Governance' In *Encyclopedia of Business Ethics and Society*. Ed. Robert W. Kolb. (Thousand Oaks, CA: SAGE Publications 2008; H. Easterbrook, F.D. Fischel, Daniel 'The Economic Structure of Corporate Law' (US: Harvard University Press, 1991) 10–35.) 1908–1913. Please note that even though scholars provide different descriptions of the shareholder primacy model, it seems that characteristics specified above are included in most of them.

7 *Ibid* No. 2, p. 443 – 449.

8 Please note that the description of stakeholder models in the legal literature as well as the views of academics to what constitutes such model differ to the great extent. Thus the above description only shows a general principle and is a simplification of a vast scholarly debate.

9 K. J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' [2011] 59 *Am. J. Comp. L.* 7.

10 Sometimes described as "... perhaps the most irritating feature of German corporate law for foreign entrepreneurs, in particular those with an Anglo-American background." (M. Schulz, O. Wasmeier, 'The Law of Business Organizations' (Berlin, Heidelberg: Springer-Verlag 2012) 68).



members to be elected by employees; thus, granting rights to employees to influence the company's decision-making process.¹¹ The first employee participation act dates back to 1951, nevertheless, another act of one-third co-determination was adopted in 2004.¹² Thus, the co-determination has been affirmed repeatedly by unions, politicians, and top managers.¹³ Interesting to note, in approximately half of the Member States of the European Union, representation of the employees on the board is also mandatory in the private sector of the economy (although not to the same extent as in Germany).¹⁴

The above description of co-determination rule does not allow drawing any general conclusions on non-convergence or divergence issues. Moreover, there is no doubt that great similarity already exists in corporate law among different jurisdictions¹⁵ and, thus, one rule of co-determination only shows one puzzle of the whole picture. However, the German corporate governance system, characterized by the rule of co-determination, can serve as an example of quite opposing scholarly interpretations on what it proves. For example, some authors use the German rule of co-determination to show that convergence on shareholder primacy model has not occurred.¹⁶ Others admit that the German corporate governance system shows some convergence with shareholder-oriented governance systems, but expect that the stakeholder-oriented perspective will persist since it is still deeply rooted in egalitarian view and the rule of co-determination has not been seriously challenged.¹⁷ At the same time, H. Hansmann and R. Kraakman still claim to be right on their predictions.¹⁸

11 Please note that German law also provides for three regimes of board-level co-determination, which differ as to their scope of application, as well as to the extent of participation rights granted (for more detailed discussion see *Ibid* p. 68-70).

12 *Ibid* p. 69.

13 Tuschke, M. Luber, 'Corporate Governance in Germany: Converging Towards Shareholder Value-Oriented or Not So Much?' In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., A.A. Rasheed, T. Yoshikawa (New York: Palgrave Macmillan 2012) 83.

14 see P.L. Davies, K.J. Hopt, 'Boards in Europe – Accountability and Convergence' [2013] *American Journal of Comparative Law* Forthcoming 5 at <http://ssrn.com/abstract=2212272>.

15 see R. Kraakman, et. al., 'The Anatomy of Corporate Law. A comparative and Functional Approach. 2nd Edition' (Oxford: Oxford University Press 2009) 5-16. Also for historical analysis of convergence of corporate law see *Ibid* No. 1, p. 480-494.

16 C.D. Clarke, 'The past and future of comparative corporate governance' In *Research handbook on the Economics of Corporate law*. Ed. Claire A. Hill and Brett H. McDonnell (UK: Edward Elgar 2012) 408. Also see A. Hackethal, R. H. Schmidt, M. Tyrell, 'Banks and German Corporate governance: on the way to a capital market-based system?' [2005] 13 *Corporate Governance: An International Review* 397-407 (claiming that stakeholder orientation in Germany has not been replaced by single-minded or radical shareholder orientation).

17 *Ibid* No. 13, p. 88.

18 *E.g.* in their recent article the authors claim that convergence has proceeded even faster than they might have predicted and their normative claim is holding up extremely well (H. Hansmann, R. Kraakman, 'Reflections on the End of History for Corporate Law' In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., A.A. Rasheed, T. Yoshikawa (New York: Palgrave Macmillan 2012) 33). However, their claim seems to be less strong than in the initial article (*Ibid* No. 2): the authors question how far the convergence will go and how long it will persist; also admit that the model still causes substantial disquiet in continental Western Europe (H. Hansmann, R. Kraakman, 'Reflections on the End of History for Corporate Law' In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., A.A. Rasheed, T. Yoshikawa (New York: Palgrave Macmillan 2012) 36).

3. VARIOUS CRITERIA OF CONVERGENCE

One of the reasons for this dissent or confusion in corporate law is the complexity and uncertainty of convergence concept itself.¹⁹ Convergence can be described by various criteria²⁰ and though scholars debate on the seemingly same issue “convergence towards shareholder primacy model”, at more specific level their analyses address quite different aspects of converge. Because of this, it is important to review what main criteria shape the concept of convergence. The below discussion has twofold purpose: to show the possible sources of confusion in legal scholarship on convergence towards shareholder primacy model and to contribute on the clarification of concept of convergence.

3.1. What is converging?

First of all, convergence can be described as convergence in form or convergence in function.²¹ The former relates to increasing similarities in terms of legal frameworks and institutions; the latter suggests that different countries may have different rules and institutions, but may still be able to perform the same function (*e.g.* as ensuring fair disclosure or accountability by managers).²² When discussing convergence in form, it is also important to define exactly what law is converging: positive law or soft law as well as whether it is national, EU, or international. For example, some authors predict convergence due to voluntary acceptance of the listing requirements by foreign corporation (*i.e.* soft law), as oppose to convergence in positive law²³.

The importance of answering the question, what is converging, can be illustrated by the different interpretations of the German rule of co-determination. Some authors see the German law of co-determination as a sign of non – convergence towards shareholder primacy model.²⁴ The opposite view seems to be taken by others, who claim that even though the positive German law has not changed, “Germany has already abandoned mandatory codetermination for firms that do not already have it”²⁵, because of the legislation at the EU level, *e.g.* possibility to choose the

19 The uncertainty of the concept is also implied by other authors (see *Ibid* No. 16 (Clark), p. 409).

20 For more extensive discussion on convergence criteria see T. Yoshikawa, A.A. Rasheed ‘The Convergence of Corporate Governance: Promise and Prospects’ In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., T. Yoshikawa, A.A. Rasheed (New York: Palgrave Macmillan, 2012) 4–6. For discussion on methodological dimensions of convergence see M. M. Siems ‘Convergence in shareholder law’ (Cambridge: Cambridge University Press 2008) 23–26.

21 See R. J. Gilson, ‘Globalizing Corporate Governance: Convergence of Form or Function’ [2001] 49 *The American Journal of Comparative Law* 1. Also see discussion on *de jure* and *de facto* converge J. Kogan, et al. ‘Globalization and Similarities in Corporate Governance: A Cross-Country Analysis’ [2006] 88 *Review of Economics and Statistics*.

22 For discussion on convergence criteria also see T. Yoshikawa, A.A. Rasheed ‘The Convergence of Corporate Governance: Promise and Prospects’ In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., T. Yoshikawa, A.A. Rasheed (New York: Palgrave Macmillan, 2012) 3.

23 *Ibid* No. 21 (Gilson). Also J.C. Coffee, ‘The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications’ [1999] Columbia Law School Center for Law and Economic Studies Working Paper <http://ssrn.com/abstract=142833>.

24 *Ibid* No. 16, p. 408.

25 H. Hansmann, R. Kraakman, ‘Reflections on the End of History for Corporate Law’ In *The Convergence of Corporate*

European Company (SE) legal form, which allows flexible, consensus-based labour codetermination²⁶. Other authors also comment on other alternative possibilities of “disarming” the German rule of co-determination from the functional perspective.²⁷ Moreover, some non – convergence arguments seem to be based not even on the legal rules or practices, but on ideological issues: *e.g.* some authors claim that the German corporate governance system is characterized by egalitarian, stakeholder-oriented view.²⁸

3.2. Convergence toward what?

The answer to this question mainly concerns the directions of convergence. Some authors describe convergence as moving or being directed towards each other or towards the same place, purpose or result.²⁹ Such definition presents an array of possible trajectories towards convergence. To be more specific, it is possible that, *e.g.* (i) US law are converging to German law or *vice versa*; (ii) the laws of these jurisdictions converging to some hybrid law; (iii) the laws of several jurisdictions converge towards certain normative model.³⁰ Nevertheless distinct directionalities of convergence, the extant literature generally examines convergence in terms of the adoption of some elements of the Anglo-American or US governance system and practices by countries and firms outside the Anglo-American zone.³¹

The ambiguity surrounding directions of convergence can be seen as another source of confusion in shareholder primacy convergence debate. For example, it is not quite clear whether the description of the shareholder primacy model by H. Hansmann and R. Kraakman is theoretical or refers to US law: in the recent article the authors explain that the model should be understood as normative; on the other hand, the initial article implies in several occasions that this model is reflected in US or Anglo – American law or that the law on both sides of the Atlantic will ultimately converge on a single regime.³² Moreover, it is quite common in corporate governance legal scholarship to give the example of US corporate law as representing shareholder primacy model.³³ Due to such ambiguity and generalization, the debate on convergence towards shareholder primacy accumulates as it addresses normative model as well as specific US laws.

Governance: Promise and Prospects. Ed., A.A. Rasheed, T. Yoshikawa (New York: Palgrave Macmillan 2012) 35.

26 Ibid No. 9, p. 57.

27 Ibid No. 21 (Gilson), p. 340–341.

28 Ibid No.13, p. 83.

29 K.Y. Testy, ‘Commentary: Convergence as movement towards a counter hegemonic approach to corporate governance’ [2002] 24 Law & Policy 433.

30 Yoshikawa, A.A. Rasheed ‘The Convergence of Corporate Governance: Promise and Prospects’ In *The Convergence of Corporate Governance: Promise and Prospects*. Ed., T. Yoshikawa, A.A. Rasheed (New York: Palgrave Macmillan, 2012) 4.

31 Ibid.

32 *E.g.* see Ibid No. 25, p. 46; Ibid No. 2, p. 450, 454, 455. 458.

33 *E.g.* Ibid No. 9, p. 28.

3.3. How to measure convergence?

Even though presumably it is possible to define the object of convergence and its direction, it is much more difficult to come up with certain commonly acceptable criteria of what similarity indicates convergence. Some scholars claim that still there is no operational agreement on the threshold of similarity that would constitute convergence.³⁴ This insight seems accurate, given the different understanding among scholars, on whether the discussed rule of co-determination should be seen as evidence for non-convergence or not.³⁵

Another important factor for measuring convergence is time. Based on historical analysis of corporate laws, some authors show that corporate laws are in a constant process of convergence and divergence as they move from one norm to another, and then to another or back again.³⁶ If convergence is a constant process with never definite result, it is important to track the development of laws or practices within a certain period time.³⁷

The discussed criteria only partially illustrate the complexity of convergence and provide some explanation why one cannot see a consensus in the scholarship whether the convergence towards shareholder primacy model is occurring, have occurred or not. Also, although the above discussion does not claim to offer definite list of criteria formulating the concept of convergence, they still can serve as some guidance for obtaining clearer results on convergence issue in legal scholarship.

4. CONSENSUS ON SUPREMACY OF SHAREHOLDER PRIMACY MODEL AMONG ACADEMICS – IS IT POSSIBLE?

As mentioned above, another prediction made by authors H. Hansmann and R. Kraakman was that the ideological attraction of the shareholder primacy model will become indisputable among academics.³⁸ Despite this provocative claim at least a few arguments show that this prediction is unlikely to occur.

First of all, when reviewing the scholarship on shareholders primacy one can immediately find a vast amount of literature opposing the supremacy of the shareholders primacy model. In very broad terms, most of the opposing views take more pluralistic approach towards the corporation and argue for broader purposes of corporation than mere shareholder value maximization. The examples of such opposing views can be found in the recent discourse on corporate social responsibility³⁹ and sustainability of company law⁴⁰. Moreover, the opposing views can be also seen in the

34 Ibid No. 4, p. 402.

35 See Ibid No. 1, p. 490, Ibid No. 16, Ibid No. 35.

36 Ibid No. 1, p. 485 – 494.

37 For discussion on the temporal dimension of convergence see M. M. Siems 'Convergence in shareholder law' (Cambridge: Cambridge University Press 2008)17.

38 Ibid No. 2, p. 468.

39 E.g. M. Kerr, *et. al.*, 'Corporate social responsibility: a legal analysis' (Canada: LexisNexis Canada 2009).

40 E.g. B. Sjaafjell, 'Towards a Sustainable European Company Law. A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case' (The Netherlands: Kluwer Law International 2009).

field of law and economics (from which originates the normative explanation of the shareholder primacy model).⁴¹ One of the reasons for this seemingly endless dispute is its normative nature, which always involves choice of values.

Also an academic debate on even a narrower issue – German rule of co-determination – cannot be seen as arriving to consensus. Some prominent German scholars although admitting certain weaknesses of such rule, recognize its potential due to social factors (*e.g.* increasing social inequality and social unrest).⁴² Others seem to rely on normative arguments (*e.g.* emphasise the underlying ideology, which sees firms as social institutions).⁴³ As empirical studies do not provide clear evidence on the impact of co-determination on the corporation (*e.g.* profitability), the scholarly debate has not come to its end.⁴⁴

The impossibility of consensus in academia regarding the supremacy of shareholder primacy model can be also explained by general trends in law scholarship development. According to professor B. Cheffins, (corporate) law scholarship evolves within certain trajectories.⁴⁵ First trajectory is based on the idea that knowledge “accumulates” as part of a “progress” towards a better understanding of the matters under study.⁴⁶ Second is based on T. Kuhn’s concept of paradigm shift (*i.e.* accumulation of inexplicable anomalies within the established field of scholarship, might culminate into scientific revolution, which eventually might cause the shift of existing paradigm).⁴⁷ Third, trajectory claims that academic ideas are generated due to the market forces.⁴⁸ The fourth trajectory shows a “cyclical” reoccurrence of scholarship ideas.⁴⁹ The essence of cyclical trajectory is that at least to some degree the academic analysis of legal issues constitutes a continuing conversation about pivotal questions.⁵⁰ Fifth trajectory is based on the idea that legal scholarship occurs due to certain fads and fashions.⁵¹

As the research shows the issue of supremacy of the shareholder primacy model seems to fall in the “cyclical” trajectory of legal scholarship.⁵² This is because the question “on whose behalf

41 A good example is M. Blair, L.A. Stout, ‘A Team Production Theory of Corporate Law’ [1999] 85 Virginia Law Review (contesting the legitimacy of the shareholder primacy model based on economic model of entity as team production). Also see their later work (*e.g.* M. Blair ‘Corporate Law and the Team Production Problem’ In *Research Handbook on the Economics of Corporate Law*. Ed. Claire A. Hill, Brett H. McDonnell. (UK: Edward Elgar Publishing Limited 2012); L.A. Stout, ‘The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public’ (San Francisco, CA: Berrett Koehler Publishers Inc. 2012).

42 Ibid No. 9, p. 29.

43 Ibid No. 13, p. 83.

44 Ibid No. 9, p. 55.

45 B. R. Cheffins, ‘The Trajectory of (Corporate Law) Scholarship’ [2003] at <http://ssrn.com/abstract=429624> describing five trajectories of corporate law.

46 For more detailed discussion see Ibid p. 3–7, 34–37.

47 See T. S. Kuhn, ‘The Structure of Scientific Revolutions. 2nd Ed.’ (USA: The University of Chicago, 1970) 52–111. Also for more detailed discussion regarding application of T. Kuhn theory to company law scholarship see Ibid No. 45, p. 37–39.

48 For more detailed discussion see Ibid No. 45, p. 9–13, 39–42.

49 For more detailed discussion see Ibid No. 45, p. 13–17, 42–45.

50 Ibid No. 45, p. 14.

51 Ibid No. 45, p. 17 – 21, 45–49.

52 Ibid No. 45, p. 44.

are companies run?” has stretched from at least the 1930s to the present day.⁵³ Thus the scholars periodically have challenged and probably will challenge the legitimacy of shareholders primacy (or *vice versa* stakeholder) model of the corporation. On the other hand, the existence of this enduring question might also be a sign of scientific revolution as described by T. Kuhn.⁵⁴ This is because in order for a paradigm to shift, the new theory must not only be able to cope with the anomalies that caused a crisis for the old theory, but also must address satisfactorily most existing problems.⁵⁵

It is important to note that professor B. Cheffins points out various limitations of such trajectories and shows that none of them can capture precisely or fully the development of scholarship.⁵⁶ Regardless the trajectory one believes can explain the development of scholarship the best, it looks like any consent or “end of history for corporate law” in academia is unlikely to occur. This is simply because all of the trajectories imply *change* and *development* in scholarship.⁵⁷

5. CONCLUSIONS

The various characteristics of the concept of convergence reveal its complexity and also provide some explanation why there is no consensus whether the convergence towards shareholder primacy model is occurring, have occurred or not. Moreover, the discussed patterns of legal scholarship development and normative nature of the question itself show that consent in academia on this issue is unlikely to occur. Regardless, any ambiguities surrounding the debates of convergence in corporate law, the scholarship on this issue provides a lot of valuable insights on existing laws and practices in corporate law and the phenomenon of convergence itself.

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⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid 2, 49–51.

⁵⁷ Also see A. Sommer, ‘Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later’ [1991] 33 *Del. J. Corp. L.* L.A. (The author analyses the issue of purpose of the company and indicates that “one of the characteristics of corporation law, and indeed, perhaps of life, is that few issues are ever settled conclusively”).



7. J.C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' [1999] Columbia Law School Center for Law and Economic Studies Working Paper <http://ssrn.com/abstract=142833>.
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THE SYNTHESIS OF COMPARATIVE AND SOCIO-LEGAL RESEARCH AS THE ESSENTIAL PREREQUISITE TO REVEAL THE INTERACTION OF NATIONAL LEGAL SYSTEMS

Vitalij Levičev*

Vilnius University, Lithuania

Abstract. As it is clearly indicated in its title, the conference paper shall accordingly cover examination of the three interrelated aspects of legal methodology: comparative legal research, socio-legal research and the pattern of their synthesis in the context of the acquiring of the scientific knowledge on the interaction of national legal systems. Through the elucidation of mentioned methodological layers and their relation, the author will quest for the answers on the following questions: Whether strict distinction between comparative and socio-legal research has outlived its utility? Is it possible to efficiently synthesize comparative and socio-legal research in the joint pattern of scientific legal inquiry? If the efficient synthesis of comparative and socio-legal research is possible, how such kind of methodology should be shaped in the context of the research on the interaction of national legal systems?

Keywords: methodology, comparative research, socio-legal research, methodological synthesis, interaction of national legal systems

INTRODUCTION

What methodological pattern is the most efficient in order to reveal the interaction of national legal systems? Should such kind of legal research be doctrinal, socio-legal, comparative or should it adopt comprehensive methodological synthesis? The author will quest for the answers on these and related questions by analysing the interconnection between comparative legal research and socio-legal studies.

The main body of the conference paper consists of three interrelated sections. The first part is devoted to the discussion of the traditional distance between comparative legal research and socio-legal studies and indented to elucidate the concepts of methodological trends and the reasons of their demarcation. The second section is designed for the examination of history and current tendencies of the methodological synthesis between comparative legal research and socio-legal

* PhD student, Department of Public Law, Faculty of Law, Vilnius University, is currently preparing doctoral thesis on methodological problems of legal science at the Vilnius University. Research interests of the author include Legal Methodology, Legal Theory, Philosophy of Law, Comparative Law, Social Philosophy and Philosophy of Science. E-mail: vitalij.levicev@gmail.com



studies. In the last part of the paper the possibilities of methodological synthesis in the research on the interaction of national legal systems are presented. The paper is summarised by brief accumulative conclusion.

COMPARATIVE LEGAL RESEARCH AND SOCIO-LEGAL STUDIES: TRADITIONAL DEMARCATION

Awareness for the utmost importance of the comparative legal research was reached at least six decades ago: 'In a world shrinking at an ever accelerating rate because of a relentlessly expanding, uniformity imposing technology, both opportunity and need for the comparative study of law are unprecedented'¹. Likewise positions of the socio-legal studies (comparing with the black-letter approach) improved as dramatically as it was perfectly expressed by Roger Cotterrell: 'All the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as social phenomena, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies.'² What is more, the importance of socio-legal research "is not only in what it has achieved, which is considerable, but also in what it promises".³ Presently in light of rapidly growing significance of the comparative legal research and socio-legal studies more and more frequently legal scholars employ both mentioned approaches in order to conduct their legal research in more detailed, fruitful and comprehensive way. Nevertheless the traditional demarcation⁴ of these two methodological approaches is still fairly vivid even today and that stimulates to discuss an important methodological question – whether strict distinction between comparative and socio-legal research has outlived its utility?

The concept 'comparative legal research' is most commonly referred as 'comparative law' – linguistically imprecise term (nevertheless most widespread one). Instead of 'comparative law' author of this conference paper advocates for the usage of more coherent and diverse terminology – 'comparative legal science', 'comparative legal research', 'comparative legal method' (taking into the consideration corresponding context, i.e. whether one is referring to branch of legal science / academic discipline, tool of construction, mean of understanding legal provisions, etc.). In order to elucidate comparative trend of legal research it is essential to mention its methodological scope. Conventionally we can distinguish five possible categories (suggested by Hug and adopted by Cruz): (a) comparison of foreign systems with the domestic system in order to ascertain similarities and differences; (b) studies which analyse objectively and systematically solutions which various systems offer for a given legal problem; (c) studies which investigate the causal relationship between different systems of law; (d) studies which compare the several stages of various legal systems; and (e) studies which attempt to discover or examine legal evolution generally according to periods and

1 M. S. McDougal, 'The comparative study of law for policy purposes: value clarification as an instrument of democratic world order' [1952] 1 *Am J Comp L* 24

2 R. Cotterrell, 'Law's Community' (Oxford: Oxford University Press 1995) 296

3 *Ibid.* 314

4 P. de Cruz, 'Comparative law in a changing world' 2nd ed (London: Cavendish Publishing 1999) 10

systems⁵. Nevertheless this categorisation is almost hundred years old, it is still provides us with appropriate representation of comparative legal research (at least in its general form).

The character of the methodological scope of socio-legal research is more difficult to define. Socio-legal studies cover a range of disciplinary contexts within the social sciences and law, and relate the legal to the sociological, political and economic dimensions of human activity. The essence of socio-legal research might be described as an appreciation of interdisciplinary relationships and an application of such a perspective to problems. Some researchers are likely to be interested in evaluating normative approaches within one or more economic processes and social, cultural or scientific phenomena affect the development and application of law. Other may be interested in civil justice or the legal professions with a focus on civil justice processes and their relation to procedure and views of the state, funding, consumer views or tribunal services, etc.⁶

The presence of 'many points of similarity and overlap' between comparative legal research and socio-legal studies is beyond any doubt even for the supporters of the demarcation between these two fields of scientific legal inquiries: 'In view of its general aims, comparative law needs legal sociology as much as legal history and legal ethnology. Both legal sociology and comparative law are engaged in charting the extent to which law influences and determines man's behaviour, and the role played by law in the social scheme of things'⁷. Nevertheless they provide more or less sound arguments for the demarcation: 'One fundamental difference between the two is that sociology covers a much wider field than comparative law, and, as Zweigert and Kotz explain, while sociology of law, through field studies and empirical observation, simply observes how the legal institutions operate, comparative law concerns itself with the question of 'how the law ought to be', by studying the rules and institutions of law in relation to each other.⁸ Watson⁹ has also emphasised the autonomy of law, legal ideas and legal tradition which transcend purely sociological or socio-historical explanations'.¹⁰

More detailed discussion of the traditional distance between comparative legal research and socio-legal studies is comprehensively delivered by Annelise Riles¹¹. On the socio-legal side Riles provides four reasons of the demarcation: (1) socio-legal studies (especially in United States and United Kingdom) in mid-twentieth century were profoundly domestic because of the influence from Legal Realism; (2) the main focus on 'law in action' rather than 'law in the books' translated into relatively little interest in state law and institutions; (3) law and society scholars drew from the Weberian tradition a strong commitment to the separation of fact from value in empirical research.

5 Ibid. 7

6 M. Salter; J. Mason, 'Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Dorchester: Pearson Education Ltd. 2007) 139

7 P. de Cruz, 'Comparative law in a changing world' 2nd ed (London: Cavendish Publishing 1999) 10

8 K. Zweigert; H. Kotz, 'An introduction to comparative law' (Amsterdam and New York: North-Holland Pub. Co. 1977) 9–10

9 A. Watson, 'Legal Transplants: *An Approach to Comparative Law*' (Edinburgh: Scottish Academic Press 1974) 183

10 P. de Cruz, 'Comparative law in a changing world' 2nd ed (London: Cavendish Publishing 1999) 10

11 A. Riles, 'Comparative Law and Socio-legal Studies' In 'The Oxford Handbook of Comparative Law' (Oxford: Oxford University Press 2006)

Social science was assumed to be descriptive, not normative; (4) socio-legal scholars tended to view comparative lawyers' efforts to compare the laws of numerous jurisdictions, to actually engage in ideal typic categorizations in the Weberian tradition, as lacking sufficient attention to context and hence partaking of the methodological amateurism of an earlier era.¹² For the part of comparative lawyers following arguments are provided: (1) to the extent that comparative law focused on state law, socio-legal scholars seemed to have relatively little expertise to contribute; (2) some comparative lawyers drew a distinction between 'comparative law', which they took to entail an explicit comparison of the rules or institutions of two or more jurisdictions, and 'the study of foreign law' – the more contextual, ethnographic or historical studies of socio-legal scholars that usually focused on only one jurisdiction at a time; (3) numerous commentators have critiqued comparative law's traditional unfortunate lack of attention to non-European legal systems.¹³

Nevertheless, regardless traditional demarcation, even the most determined supporters for the methodological delimitation between comparative legal research and socio-legal studies are forced to admit that in late twentieth century 'a new conversation has begun to emerge between socio-legal scholars and comparative lawyers'¹⁴.

THE SYNTHESIS OF COMPARATIVE AND SOCIO-LEGAL RESEARCH

The methodological synthesis of comparative and social-legal research is rooted deep in the history of the Western thought. Early attempts to conjoin these two methodological trends can be found in the works of J. J. Rousseau¹⁵ and Ch. Montesquieu¹⁶, later – M. Weber¹⁷, K. N. Llewellyn¹⁸, L. H. Morgan¹⁹ and many others²⁰. A good example of the early attempt to build foundation for the fruitful methodological synthesis between comparative legal research and socio-legal studies took place at the Law School of Columbia University in New York in the 1920s. The whole experiment is described in detail by B. Currie²¹: 'The first difference consisted in the organisation of materials in terms of social and economic problems rather than legal doctrine. Secondly, the proposals proceeded on the assumption that certain non-legal materials were directly and pointedly relevant. Thirdly, courses utilised statutory materials to an extent which was unusual. Each of these features emphasised the role of creative reason, as opposed to deduction from a priori principles in the

12 Ibid. 783–784

13 Ibid. 784–785

14 Ibid. 789

15 J. J. Rousseau, 'The Social Contract' (orig. 1743) (Harmondsworth: Penguin 1968)

16 Ch. Montesquieu, 'The complete works of M. de Montesquieu' (orig. 1777) [Farmington Hills: Gale ECCO 2010]

17 M. Weber, 'Max Weber on Law in Economy and Society' [Cambridge, MA: Harvard University Press 1966]

18 K. N. Llewellyn; E. A. Hoebel, 'The Cheyenne Way' [Norman: University of Oklahoma Press 1941]

19 H. S. Maine, 'International Law: A Series of Lectures Delivered Before the University of Cambridge 1887' [London: John Murray 1888]

20 A. Riles, 'Comparative Law and Socio-legal Studies' In 'The Oxford Handbook of Comparative Law' (Oxford: Oxford University Press 2006) 776–777

21 B. Currie, 'The Materials of legal Education' [1955-56] 8 Journal of Legal Education 1

solution of social and legal problems'²². Notwithstanding Columbian experiment in many aspects was a failure²³, it can be evaluated as a landmark for the future more successfully attempts of synthesising comparative legal research and socio-legal studies.

The traditional distance between comparative legal research and socio-legal studies began to decrease in the second half the twentieth century concerning 'two principal subjects—the study of legal institutions other than those of Europe, North America and Latin America on the one hand, and the (often related) study of 'legal pluralism' on the other'²⁴. Nowadays it is obvious that 'socio-legal studies has seen a tremendous growth of interest in international and transnational subjects' and comparative legal research 'has engaged more with empirical studies and with social theory'²⁵. According to A. Riles 'one finds everywhere today signs of a new rapprochement'²⁶ between these two methodological trends. Presently rapid synthesis between two mentioned methodological trends is proceeding in research fields under the topics of legal profession, law and development, rule of law, harmonization projects national and local effects of global legal forms, renewed debates about Legal pluralism, and even more intensively – concerning legal transplants and legal culture²⁷.

Summarising contemporary tendencies (and before progressing to the methodological synthesis in the context of the research on the interaction of national legal systems), it is important to finally answer on the utility of strict distinction between comparative and socio-legal research. Is it correct to delimitate socio-legal studies from comparative legal research on the basis of the transnational focus? Whether the autonomy of law, legal ideas and legal tradition transcend purely sociological or socio-historical explanations?²⁸ Whether sociology of law, through field studies and empirical observation, simply observes how the legal institutions operate and comparative law concerns itself with the question of 'how the law ought to be'²⁹

Firstly, the transnational focus both in comparative legal research and socio-legal studies is indispensable – both fields are reconfigured around 'the transnational character of even the most local of regulatory practices'³⁰. Secondly, the stark distinction of law and society has already outlived its utility³¹ – the autonomy of law, legal ideas and legal tradition from the society is under severe stress and is unable to defend itself. Finally, the distinction between normative and descriptive argument is no longer a fruitful way of delineating boundaries between comparative legal research and socio-legal studies: 'it is now generally agreed that we need not choose between 'theoretical' and 'empirical'

22 G. Wilson, 'Comparative Legal Scholarship' In 'Research Methods for Law' (Edinburgh: Edinburgh University Press 2007) 90

23 Ibid. 90

24 A. Riles, 'Comparative Law and Socio-legal Studies' In 'The Oxford Handbook of Comparative Law' (Oxford: Oxford University Press 2006) 785

25 Ibid. 789

26 Ibid. 777

27 Ibid. 789–799

28 A. Watson, 'Legal Transplants: An Approach to Comparative Law' (Edinburgh: Scottish Academic Press 1974) 183

29 K. Zweigert; H. Kotz, 'An introduction to comparative law' (Amsterdam and New York: North-Holland Pub. Co. 1977) 9-10

30 A. Riles, 'Comparative Law and Socio-legal Studies' In 'The Oxford Handbook of Comparative Law' (Oxford: Oxford University Press 2006) 799

31 Ibid. 800-801

work. Although Law and Society scholars have long shown some antipathy towards ‘theory’ and comparative lawyers have shown some antipathy towards empiricism, there is consensus now that scholarship in both fields needs to be both theoretically informed and empirically grounded – and that different mixes of these two elements should be encouraged and appreciated’³².

In conclusion of the discussion on the synthesis of comparative and socio-legal research, one more important aspect is to be clarified. In legal literature often three methodological approaches are distinguished: doctrinal (black-letter), socio-legal and comparative³³. However the author of this conference paper argues that it is methodologically incorrect to classify legal researches into three mentioned groups as *separate* trends of scientific inquiry, i.e. comparative approach is not independent field of legal methodology, but rather specific dimension of both doctrinal and socio-legal approaches (Table 1).

Table 1

	Doctrinal (black-letter) approach	Socio-legal approach
	Domestic research of ‘law in books’	Domestic research of ‘law in action’
Comparative approach	Transnational research of ‘law in books’	Transnational research of ‘law in action’
Comparative interdisciplinary approach	Transnational research of <i>both</i> ‘law in books’ and ‘law in action’	

The proposed classification (in table above) may lead some legal scholars to unexpected conclusion that real dichotomy exists not between comparative legal research and socio-legal studies, but rather lies in comparative legal research itself, i.e. dichotomy between doctrinal and socio-legal approaches in comparative legal research. Yet synthesis of doctrinal and socio-legal approaches within comparative legal methodology is possible and gives birth to the *comparative interdisciplinary approach*, an approach which is able to comprehensively coincide with contemporary trends in legal methodology.

METHODOLOGICAL SYNTHESIS IN THE CONTEXT OF THE RESEARCH ON THE INTERACTION OF NATIONAL LEGAL SYSTEMS

As it was thoroughly discussed above, the new rapprochement³⁴ between comparative legal research and socio-legal studies is evident and the ongoing process of methodological synthesis between these two trends is clearly manifest. But how such kind of methodology should be shaped in the context of the research on the interaction of national legal systems? Can (should) the

32 Ibid. 802

33 M. Salter; J. Mason, ‘Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research’ (Dorchester: Pearson Education Ltd. 2007)

34 A. Riles, ‘Comparative Law and Socio-legal Studies’ In ‘The Oxford Handbook of Comparative Law’ (Oxford: Oxford University Press 2006) 789

synthesis of comparative and socio-legal research be approached as the essential prerequisite to reveal the interaction of national legal systems?

In order to answer the questions raised above, let us examine possible pattern of comparative and socio-legal methodological synthesis in research on the interaction of two³⁵ national legal systems (Legal system A and Legal system B) (*Table 2*).

Table 2

Legal system A		Legal system B	
▼ Domestic research of 'law in books'	▼ Domestic research of 'law in action'	▼ Domestic research of 'law in books'	▼ Domestic research of 'law in action'
▼ Domestic research of <i>both</i> 'law in books' and 'law in action'		▼ Domestic research of <i>both</i> 'law in books' and 'law in action'	
▼ Transnational comparative research of <i>both</i> 'law in books' and 'law in action'			
▼ INTERACTION OF NATIONAL LEGAL SYSTEMS			

By presenting the pattern of comparative and socio-legal methodological synthesis, author of the conference paper strives to reveal three methodologically significant points. Firstly, both the doctrinal ('law in books') and socio-legal ('law in action') dimensions of law must be present in the comprehensive research of the interaction of legal systems. Absence of either will unavoidably prevent approaching actual interaction of selected legal systems – without social context researcher risks to leave behind deeper layers of legal actuality, while depending only on 'law in action' one stands the hazard of losing the nature of law itself.

Secondly, in order to reveal the interaction of legal systems it is absolutely insufficient merely to define and collate domestic law of selected legal systems. If one is interested in discovery of the actual interaction – the comprehensive interdisciplinary comparative analysis has to be adopted.

Finally, it is crucially important to mention that when one is researching on the *interaction* of national legal systems, it is not enough to merely establish correlations of 'law in books' or 'law in action' or both between selected legal systems. The golden rule of scientific inquiry – *cum hoc ergo propter hoc* (correlation does not imply causation) – must be kept in mind at all times. A correlation between two variables does not necessarily imply that one causes the other, i.e. established correlations are insufficient of revealing the interaction – true causal relationship between selected legal systems. In order for a correlation to be established as causal, the cause and the effect must be connected through an impact mechanism, i.e. the comprehensive research on the interaction

35 The pattern discussed in this conference paper is equally applicable in case of research on the interaction between three and more legal systems.



between legal systems requires analysing not just causes and effects, but also the related impact mechanisms. The attempts to complete such formidable tasks will require extensive usage of experiments and regression analysis³⁶.

CONCLUSION

Late twentieth century was marked by the beginning of the new conversation between socio-legal scholars and comparative lawyers. Today we can conclude that strict distinction between comparative and socio-legal research has outlived its utility. Moreover, real dichotomy exists in comparative legal research itself (between doctrinal and socio-legal approaches). Comparative interdisciplinary approach – the synthesis of doctrinal and socio-legal approaches within comparative legal methodology – is able to comprehensively coincide with contemporary methodological trends.

The synthesis of comparative and socio-legal research methodologies is the starting point in long demanding voyage of scientific inquiry for the revelation of the interaction of national legal systems. Before embarking on this profound journey one must (1) carefully consider the necessity of inclusion in the research both doctrinal and socio-legal dimensions of law; (2) be prepared for the comprehensive interdisciplinary comparative analysis and (3) pursue to research not only causes and effects of the interaction of national legal systems, but also the related impact mechanisms.

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³⁶ The application of such methods in social sciences is especially challenging matter.

THE COMPARATIVE ANALYSIS OF THE INSTITUTES OF PENAL EFFECT MEASURES IN THE LITHUANIAN AND POLISH CRIMINAL LAW

Justyna Levon*

Vilnius University, Lithuania

Abstract. The article analyzes the institutes of penal effect measures, currently existing in Lithuania and Poland. Author states that the aforementioned are linked by an array of similarities (inter alia by the context of their emergence and purposes) which illustrates the existence of the convergence of legal systems of these countries in the field of the criminal sanctions. In addition, the article presents a unique comparative table of how penal effect measures are enshrined in Lithuanian and Polish criminal codes. Such a perspective allows one to clearly identify the convergence of the two criminal law systems when it comes to this particular institute.

Key words: penal effect measures, criminal policy

INTRODUCTION

After the restoration of the independence of the Republic of Lithuania (1991), the legislator and the criminal law scientists searched for an alternative to the criminal policy which had existed in the Soviet occupation times and was directed at punishing and intimidating the person.¹ As the idea was to rationalize the criminal policy, a decision was made to abandon the division of criminal sanctions into *penalties* and *additional penalties*, which had existed in the Criminal Code of the Lithuanian Soviet Socialist Republic² (hereinafter referred to as the LSSR CC) and to leave only penalty institute. It was also decided to create the new criminal sanctions institute – *penal effect measures* and to include them into the new Criminal Code³ (hereinafter referred to as the CC).

Although the Article 67, which outlines the aforementioned institute, is the only article of the General Part of the CC, which from the day of its enactment has already been altered or amended as many as five times, it still remains one of the least investigated. Few Lithuanian criminal law researchers have discussed this institute (V. Pavilionis, G. Švedas, R. Drakšas). Moreover, Lithuanian scientists mainly analyze just one type of penal effect measures – confiscation of a property. Namely

* PhD candidate, Vilnius University, Faculty of Law, Criminal Justice Department; levon.justyna@gmail.com

1 See also: V. Kalpokas, 'Baudžiamosios politikos tyrimai Lietuvoje' in G. Sakalauskas (*et al*), 'Baudžiamoji politika Lietuvoje: tendencijos ir lyginamieji aspektai. Teisės instituto mokslo tyrimai, 8 tomas' (Vilnius: Teisės institutas 2012) 36–43.

2 Lietuvos Tarybų Socialistinės Respublikos įstatymas dėl Lietuvos Tarybų Socialistinės Respublikos Baudžiamojo kodekso patvirtinimo. Lietuvos Tarybų Socialistinės Respublikos Baudžiamasis kodeksas. Valstybės žinios. 1961, Nr.: 18 -148.

3 Lietuvos Respublikos Baudžiamojo kodekso patvirtinimo ir įsigaliojimo įstatymas. Baudžiamasis kodeksas. Valstybės žinios. 2000. Nr. 89-2741.

the lack of scientific publications and a continuing evolution of the institute prove the novelty and the relevance of the chosen topic.

What is more, according to the explanatory notes of the CC project, submitted in 1999⁴, the CC considered the achievements and reflected the tendencies of the development of criminal law science prevailing in Europe during the last decade of the 20th century. While drafting this legal act *in genere* and the separate institutions thereof, criminal law scientists tried to apply the experience of other countries in a creative manner, not limiting themselves to the criminal law of one particular state. The provisions of the criminal law of Germany, England, Holland, Italy and other countries had been researched and then adapted into Lithuanian criminal law system. At a danger of sounding cocky, this article is the first scientific analysis where by the help of historical, comparative and systematic methods the penal effect measures' institute is briefly discussed in a context of foreign countries' experience.

It is considered that the emergence and formation of the institute of penal effect measures in Lithuania was mostly influenced by the experience of Polish rule-making and criminal law science. Moreover, the institutes of penal effect measures, currently existing in both Lithuania and Poland, are linked by an array of similarities which confirms the existence of the convergence of legal systems of these countries in the field of criminal sanctions. Such findings can be drawn by paying attention to several aspects.

THE EMERGENCE OF THE PENAL EFFECT MEASURES IN POLAND AND LITHUANIA

The context of the genesis of the institute of penal effect measures in Lithuania and Poland was of comparable nature. While adopting the institute of penal effect measures in Lithuania it was stressed that the old denominations were related to such system of criminal sanctions which allowed the imposition of additional penalty only along with the primary penalty. Such system was not necessarily reasonable since several of the additional penalties, provided for by the LSSR CC, could have been imposed separately, i.e. as the primary penalty. What is more, some of the additional and primary penalties had no differences in terms of their "punitive content", i.e. in terms of the restriction of rights and freedoms or the establishment of the responsibilities. Imposition of such additional penalties along with the primary penalties most often resulted in a distortion of the principle of the criminal liability individualization.⁵ For example, a fine could have been imposed as a primary as well as the additional penalty. As V. Piesliakas states, the confiscation of property in LSSR CC was quite a serious additional penalty superseded in its gravity only by the penalty of imprisonment.⁶ A similar

4 Lietuvos Respublikos Baudžiamojo kodekso projektas. Nr. P-2143A. 1999-11-18. Available at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=90162> accessed on 2013-04-01. Lietuvos Respublikos Baudžiamojo kodekso projekto Nr. P-2143A aiškinamasis raštas. Available at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=90163> accessed on 2013-04-01

5 R. Drakšas, 'Baudžiamoji atsakomybė ir jos realizavimo problemos' (Vilnius: Justitia 2008) pp. 195–197.

6 V. Piesliakas, 'Neteisėtu būdu gautų pajamų konfiskavimas Lietuvos baudžiamojoje teisėje: siekiai ir realybė' [2011] Jurisprudencija Nr. 18(2) 676.

situation is noticed in the history of the Polish criminal law as well. In the Criminal Code of 1932 criminal sanctions were divided into primary and additional penalties. The primary penalties could have been imposed individually while the additional penalties only together with the primary ones. In 1969, when the new Criminal Code of Poland was formed, the system and imposition requirements of the criminal sanctions were slightly amended. For the first time additional penalties could have been allocated not only along with the primary penalties, but separately as well. As stressed by several Polish researchers, although in certain cases this amendment was reasonable in terms of criminal policy, additional penalty actually became the main (primary) penalty. This resulted in nonconformity of the denominations of the declared penalty types and cases of their practical application. In addition, the assumption that additional penalty is a “supplement” to the primary penalty, which in turn allowed believing that additional penalties were milder than the primary ones, became erroneous because, truthfully, there were cases when the additional penalty was harsher than the primary one.⁷ To eliminate the said discrepancies the Polish government abolished the additional penalties’ institute and enacted penal effect measures’ institute (pol. *środki karne*) slightly earlier than the Lithuanian government, i.e. in the new Criminal Code of Poland (hereinafter referred to as the PCC) as early as year 1997.⁸

THE INSTITUTE OF THE PENAL EFFECT MEASURES AS THE TOOL OF RATIONAL CRIMINAL POLICY

As it is enshrined in the Article 41 of the CC, a *penalty* is a measure of compulsion applied by the State, which is imposed by a court’s judgement upon a person who has committed a crime or a misdemeanour. The purpose of a penalty shall be: 1) to prevent persons from committing criminal acts; 2) to punish a person who has committed a criminal act; 3) to deprive the convicted person of the possibility to commit new criminal acts or to restrict such a possibility; 4) to exert an influence on the persons who have served their sentence to ensure that they comply with laws and do not relapse into crime; 5) ensure implementation of the principle of justice. On the other hand, the Article 67 of the CC, which presents the types of *penal effect measures*, does not outline the definition of the analysed institute. It only states that “penal effect measures must assist in implementing the purpose of a penalty”. According to this provision, Lithuanian scientists till nowadays try to develop the definition of the penal effect measures’ institute. As the CC commentary authors V. Pavilonis and G. Švedas declare, the aforementioned are “compulsory measures, which are highly similar, though not identical, in their content and nature to penalties, and which are imposed by the State”.⁹ As R. Drakšas states, “these measures are more of an educational nature rather than

7 See also: A. Marek (*et al*), ‘System prawa karnego. Tom 6. Kary i środki karne. Poddanie sprawcy próbie’ (Warszawa: Wydawnictwo C.H. Beck 2010) pp. 21–34.

8 Ustawa z dnia 6 czerwca 1997 r. Kodeks karny. Dz.U. 1997. Nr. 88 poz. 553.
Available at < <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553> > accessed on 2013-04-01.

9 A. Abramavičius (*et al*), Lietuvos ‘Respublikos baudžiamojo kodekso komentaras. Bendroji dalis. 1–98 straipsniai’ (Vilnius: Teisinės informacijos centras 2004) 378.

punitive one”.¹⁰ Leaving the discussion on the concept of penal effect measures outside of work, it should only be emphasized that penal effect measures both in Lithuania and Poland *seem* to be related by the purposes of the said institute declared by the legislators and criminal law researchers. First of all, the Polish legislator, as well as the Lithuanian one, did not enshrine the definition of penal effect measures in the CC. What is more, Polish scientists name essentially analogous reasons of including the penal effect measures in the CC as the Lithuanian scientists do. When creating the institute of penal effect measures, the Polish researchers sought to highlight the fact that judges should view this institute as a “tool of rational criminal policy”, the primary goal of which is not to increase repression but rather to emphasize the meaning of the prevention. When adopting the institute, they stated that in terms of their nature penal effect measures are highly similar to penalties, however, while the main purpose of each penalty is to punish a person, the main goal of separate penal effect measure should be defined as prevention.¹¹

Individual or general prevention are not the only purposes of the penal effect measures named by the criminal law scientists in Lithuania and Poland. One of the main features of the rational criminal policy is the reimbursement of the losses caused by criminal acts. Certainly, strengthening the interests of the victims of criminal offences in the criminal justice could be listed as one of the reasons for the emergence of the discussed institute both in Lithuania and Poland. Taking into account the set of international legal acts, criminal law scientists aimed to create the system of legal sanctions that would represent a new “philosophy of punishment”.¹² The system that would concentrate on the prevention and compensation as well as repression. This is why the list of both Lithuanian and Polish penal effect measures includes such criminal sanctions as: “obligation to fix the damage or reimburse the losses”, “contribution to the fund of the victims of crimes”, etc. On the whole, the system of penal effect measures provided for in both Polish and Lithuanian CC has many similarities that deserve a broader analysis.

THE SYSTEM OF PENAL EFFECT MEASURES ENFORCED IN LITHUANIA AND POLAND

The context of the emergence and the declared purposes are not the only aspects connecting the penal effect measures institutes enforced in Lithuanian and Polish CC. Although the Lithuanian CC provides for 10 and the Polish CC for 13 penal effect measures, however their actual contents almost entirely reflect each other. For example, currently the penal effect measures institute in Poland consists of: 1. deprivation from public rights – such penal effect measure exists in Lithuania

10 R. Drakšas, ‘Baudžiamoji poveikio priemonės kaip baudžiamosios atsakomybės realizavimo forma’ [2004] *Teisė* 50 pp. 28–29.

11 See also: A. Marek (*et al*), ‘System prawa karnego. Tom 6. Kary i srodki karne. Poddanie sprawcy probie’ (Warszawa: Wydawnictwo C.H. Beck 2010) pp. 381–435.

12 See also: M. Melezini, ‘Samoistne orzekanie srodka karnego. Zalozenia i rzeczywistosc’ in ‘Aktualne problemy prawa karnego. Ksiega pamiatkowa z okazji Jubileuszu 70 urodzin Profesora Andrzeja J. Szwarca’ (Poznań: Wydawnictwo naukowe 2009) 381.

as well; 2. prohibition of being employed at a particular position, carrying out certain occupational or economic activities, 3. prohibition of carrying out any activities related to upbringing, treatment and education of under-aged children or of providing foster care, 4. prohibition to participate in mass events, 5. prohibition to visit casinos and prohibition to partake in gambling, 6. prohibition to drive vehicles – these penal effect measures partially correspond with the concept of the penal effect measures named *prohibition to use special rights* and *deprivation of the right to be employed in a certain position or to engage in a certain type of activities* included in the Lithuanian CC; 7. obligation to refrain from appearing at certain environments or locations, prohibition to communicate with particular persons, prohibition of close proximity to certain persons or prohibition to leave particular location without permission from court, 8. order to leave the premises, where the aggrieved party is present – these measures partially mirror *prohibition to come near the aggrieved* outlined in the list of Lithuanian penal effect measures. 9. forfeit - corresponds with the concept of confiscation of property as the penal effect measure adopted in Lithuania; 10. obligation to fix the damage or reimburse the losses – in the Lithuanian CC one of the penal effect measures is defined as *reimbursement or elimination of property loss*, as well; 11. an amount of money to be paid to a particular person, 12. pecuniary obligation – these penal effect measures essentially correspond with one of the punitive measures adopted by the Lithuanian legislator and defined as *payment of a contribution to the fund of crime victims*, and etc. To sum up, it should be noted that even though the list of penal effect measures enforced in PCC is slightly broader than the Lithuanian one (see Table 1 below) it is of very comparable nature.

Table 1

LITHUANIAN CRIMINAL CODE ARTICLE 67.	POLISH CRIMINAL CODE ARTICLE 39.
1. prohibition to use special right (<i>lt. uždraudimas naudotis specialia teise</i>)	1. deprivation from public rights (<i>pol. pozbawienie praw publicznych</i>)
2. deprivation from public rights (<i>lt. viešųjų teisių atėmimas</i>)	2. prohibition of being employed at a particular position, carrying out certain occupational or economic activities (<i>pol. zakaz zajmowania określonego stanowiska, wykonywania określonego zawodu lub prowadzenia określonej działalności gospodarczej</i>), 2a. prohibition of carrying out any activities related to upbringing, treatment and education of under aged children or of providing foster care (<i>pol. zakaz prowadzenia działalności związanej z wychowaniem, leczeniem, edukacją małoletnich lub z opieką nad nimi</i>), 2b. obligation to refrain from appearing at certain environments or locations, prohibition to communicate with particular persons, prohibition of close proximity to certain persons or prohibition to leave particular location without permission from court (<i>pol. obowiązek powstrzymania się od przebywania w określonych środowiskach lub miejscach, zakaz kontaktowania się</i>)

LITHUANIAN CRIMINAL CODE ARTICLE 67.	POLISH CRIMINAL CODE ARTICLE 39.
	<p><i>z określonymi osobami, zakaz zbliżania się do określonych osób lub zakaz opuszczania określonego miejsca pobytu bez zgody sądu),</i></p> <p>2c. prohibition to participate in mass events <i>(pol. zakaz wstępu na imprezę masową),</i></p> <p>2d. prohibition to visit casinos and prohibition to partake in gambling <i>(pol. zakaz wstępu do ośrodków gier i uczestnictwa w grach hazardowych),</i></p> <p>2e. order to leave the premises, shared with the aggrieved party <i>(pol. nakaz opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym)</i></p>
3. deprivation of the right to be employed in a certain position or to engage in a certain type of activities <i>(lt. teisės dirbti tam tikrą darbą arba užsiimti tam tikra veikla atėmimas)</i>	3. prohibition to drive vehicles <i>(pol. zakaz prowadzenia pojazdów)</i>
4. compensation for or elimination of property damage <i>(lt. turčinės žalos atlyginimas ar pašalinimas)</i>	4. forfeit <i>(pol. przepadek)</i>
5. unpaid work <i>(lith. nemokami darbai)</i>	5. obligation to fix the damage or reimburse the losses <i>(pol. obowiązek naprawienia szkody lub zadośćuczynienia za doznaną krzywdę)</i>
6. payment of a contribution to the fund of crime victims <i>(lt. įmoka į nukentėjusių nuo nusikaltimų asmenų fondą)</i>	6. an amount of money to be paid to a particular person <i>(pol. nawiązka)</i>
7. confiscation of property <i>(lith. turto konfiskavimas)</i>	7. pecuniary obligation <i>(pol. świadczenie pieniężne)</i>
8. prohibition to approach the victim <i>(lt. draudimas prisitarti prie nukentėjusio asmens)</i>	8. public announcement of court decision <i>(pol. podanie wyroku do publicznej wiadomości)</i>
9. participation in the programmes addressing violent behaviour <i>(lt. dalyvavimas smurtinį elgesį keičiančiose programose)</i>	
10. extended confiscation of property <i>(lt. išplėstinis turto konfiskavimas)</i>	

CONCLUSION

In conclusion, it can be stated that the penal effect measures institute adopted in Poland in 1997 and the ones presented by the Lithuanian legislator in a year 2000 are of the similar *emergence nature*. Both institutes represent similar *purposes* in a criminal policy context. Moreover, although the Lithuanian CC provides for 10 and the Polish CC for 13 penal effect measures, however their actual *content almost entirely corresponds*.

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ENERGY POLICY OF THE EUROPEAN UNION AND ITS INFLUENCE ON EU ECONOMIC COMPETITIVENESS

Karol Magoń*

Cracow University of Economics, Poland

Keywords: energy policy, common market, economic competitiveness, shared competencies.

INTRODUCTION

Energy policy is a one of the most important challenge which European Union encounters nowadays. It is obvious that it is in the best interest of the European Union as well as each Member State to implement competitive, integrated and fluid internal energy market which is able to operate efficiently and flexibly to ensure affordable and secure energy supplies to households and business. Energetic resources are very rare, it is suspected that in 100 years Earth would run out of not only an oil but also gas reserves. It is very probable that essential for each economy energetic resources may become embers of international conflict¹. Furthermore not only the energetic security is a burden but also environmental issues which has an international affection – the environmental policy of a particular country would be useless if its neighbour countries avoid any struggle. Globalization processes, dynamic technological development and proportionate rising of social and commercial needs causes that with the laps of time a human beings require more and more energy to sustain and to optimize Economy's efficiency and competitiveness², moreover the pollution of earth, air and water is getting worse. As underlined by the Commission's Energy Roadmap 2050³, achieving the full integration of Europe's energy networks and systems and opening up energy markets further are essential in making the transition to a low-carbon economy and maintaining secure supplies at the lowest possible cost. It is said that the main reason for common energy policy in the UE is considerable disproportion between countries which own-production of energy or energetic resources owned are not enough and those which produce, are able to produce or transport the energy to

* Karol Magoń Academic degree and current academic status: PhD (Law) student at Andrzej Frycz Modrzewski Cracow University. Preparing PhD thesis on: *"Alternative Dispute Resolution (ADR) as an instrument of investors' protection in Polish legal system"*. Information about candidate's scientific activities and research interests: Institution: Cracow University of Economics.

1 For instance: in 2007 Arctic quarrelsome territories rich of energetic resources - between U.S.A, Russia, Canada, Denmark and Norway (S. Rayment, *'Russia accused of annexing the Arctic for oil reserves'*, Telegraph 2007); October 2010 - embargo on China on rare resources supply imposed by Japan; Petrol crisis in 1973.

2 According to data revealed by IEA and Publisher by the European Commission - in 1990 r. used up globally 8,4 Gtoe (million ton oil equivalent) of the energy while in 2020 it is supposed that we would spend annually approximately 14,9 Gtoe of the primal energy.

3 COM (2011) 885.

them. High degree of energy consumption index, inadequate level of production and distribution infrastructure, unstable energy prices, significant dependence on gas and oil supply from abroad (especially from Russia Federation) and strict liabilities in accordance to environmental protection⁴, including climate safety regulations, give rise to necessity of undertaking some proper and purposive actions on the EU level. Consequently, the European Union as a whole and each Member State as particular, may lose the competitive edge at the international trade balance not only for U.S.A but also for China, India or Russia. Do European Union wants to be a second-row player? Weather it is unquestionable that alteration of energy policy in the EU is required the problematic still remains how far should European legislator go in regulating those issues and which method of integration should be used here – convergence or divergence – to make the energy market efficient and how such would influence on the Europeans Unions competitiveness? The main purpose of this paper is firstly to present the main fundamental future models which are discussed in the European Union of the market energy than to analyse the legality of methods which are to be used to bring those proposals into life and assess its implication on competitiveness of the EU.

APPORTIONMENT OF COMPETENCIES – CURRENT STATUS QUO IN THE EU.

European Union's energy law is a part of *acquis communautaire* consisting of primary and derivative normative acts which regulates exploitation of energy, namely: production, distribution, transmission, trade and storage of the “energy” under any form: electrical, nuclear, renewable, carbonic, gaseous and petrol. However the Treaty of Lisbon⁵ does not define in any way how “energy” or “fuels” shall be meant⁶. Currently the energy sector in the European Union is harmonized on the basis of indirectly effective directives rather than directly executed in member states regulations. Thus the effectiveness of hole energy market of the European Union depends on the correctness of directives implementation into each member states' legal system. Moreover, due to the fact that energy policy is meant as strategic sector of the economy, under lobby of energetic companies, each member states is rather not eager to pass the competency to state and to execute the energy policy onto the European stage. Currently energy law in the European Union is regulated in one Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity⁷, and in several directives which constitutes a core of energy law⁸. Also Court of Justice

4 In March 2007 the Member States passed so-called “climate and energy package”, a set of binding legislation which aims to ensure the European Union meets its ambitious climate and energy targets for 2020.

These targets, known as the “20-20-20” targets, set three key objectives for 2020: a 20% reduction in EU greenhouse gas emissions from 1990 levels; a raising the share of EU energy consumption produced from renewable resources to 20%; a 20% improvement in the EU's energy efficiency.

5 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007], OJ C-306/01.

6 A.J. Bradbrook, 'Energy Law as an Academic Discipline', (JENRL 1996), 194.

7 OJ L-176 15/07/2003 P, 0001-0010.

8 Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to main-



of the European Union in several crucial judgments has précised the scope and interpretation of the European Union's energy law⁹, which has been highly qualified in future Commission's decisions¹⁰. Under the above mentioned regulations in the European Union has been created energy

tain minimum stocks of crude oil and/or petroleum products; Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment; Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants; Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users; Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission Grids; Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils; Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE); Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons; Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market; Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices) (Text with EEA relevance); Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants; Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC – Statements made with regard to decommissioning and waste management activities; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC; Council Directive 2003/92/EC of 7 October 2003 amending Directive 77/388/EEC as regards the rules on the place of supply of gas and electricity; Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

9 Namely: *Costa vs. Enel*, Case 6/64 [1964] ERC 585; *Almelo, Gemeente vs. Energiebedrijf Ijsselmij*, Case C-393/92 [1994] ECR I-1447; *Commission vs. Italy*, Case C-157/94 [1997] ECR I-5789; *Commission vs. Netherlands* Case C-158/94 [1997] ECR I-5699; *Commission vs. France* Case C-159/94 [1997] ECR I-5816; *Commission vs. Spain* Case C-160/94 [1997] ECR I-5699; *Preussen Elektra AG vs. Scheleswag AG* C-379/98 [2001] ECR I-2099.

10 92/167/EEC: Commission Decision setting up a Committee of Experts on the Transit of Electricity between Grids; 95/539/EC: Commission Decision setting up a committee of experts on the transit of natural gas through grids; 96/391/EC: Council Decision laying down a series of measures aimed at creating a more favourable context for the development of trans-European networks in the energy sector; Decision No 1254/96/EC of the European Parliament and of the Council laying down a series of guidelines for trans-European energy networks; 97/559/EC: Commission Decision amending Decision 92/167/EEC setting up a Committee of Experts on the Transit of Electricity between Grids; 98/285/EC: Commission Decision amending Decision 95/539/EC setting up a Committee of experts on the transit of natural gas through grids; 98/559/EC: Commission Decision concerning the appointment of new members and the renewal of the terms of office of the members of the Committee of experts on the transit of electricity between grids set up under Commission Decision 92/167/EEC [notified under document number C(1998) 2884]; 1999/23/EC: Council Decision adopting a multiannual programme to promote international cooperation in the energy sector (1998-2002); 1999/24/EC: Council Decision adopting a multiannual programme of technological actions promoting the clean and efficient use of solid fuels (1998 to 2002); Decision No 646/2000/EC of the European Parliament and of the Council adopting a multiannual programme for the promotion of renewable energy sources in the Community (Altener) (1998 to 2002); Decision No 647/2000/EC of the European Parliament and of the Council adopting a multiannual programme for the promotion of energy efficiency (SAVE) (1998 to 2002); 2000/761/EC: Commission Decision defining the specifications of projects of common interest

market in both electricity and gas sectors and liberalization in these sectors with a view to achieving a fully operational internal market has been speed up. So-called Treaty of Lisbon and energetic third-package has become a milestone in creating efficient common market in whole European Union. Firstly the “energy” has been appreciated under the Treaty of Lisbon amendments as one of eleven economy sectors where the Union and the member states have got so-called shared (divided) competencies (Article 4 point 2 letter i of Treaty on functioning of the European Union - hereinafter as “Treaty”). Secondly to the Treaty has been added separate chapter concerning the energy policy (“Title XXI”). Thirdly Treaty directly has indicated the obligation to act in compliance with energetic solidarity. After Lisbon amendments the division of competencies between European Union and member states over energy regulations is rather clear. According to Article 2 point 2 of the Treaty on the functioning of the European Union¹¹ – *“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”* Thus Member States executes their competencies concerning the energy regulations under the provision of passing the competency and only in the scope in which the Union has not executed its competency or explicitly has resigned of doing it. Article 4 point 2 letter i of the Treaty, which constitutes the “energy” as shared (divided) competency is rather an endeavour of codification of former achieved consensus than a new method of cooperation between Member States. In Commission’s opinion new chapter over energy policy combines the principles of each three Constituting Treaties¹² and explains the purposes of the Union concerning energy policy, available to the Union means and procedures of stating particular regulations and finally constitutes the common energy market in the European Union¹³. In Title XXI of the Treaty there is only one Article 194 which states the purposes of European Union’s energy policy: *“1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament*

identified in the sector of the trans-European energy networks by Decision No 1254/96/EC of the European Parliament and of the Council (notified under document number C(2000) 2683) (Text with EEA relevance); 2002/837/Euratom: Council Decision adopting a specific programme (Euratom) for research and training on nuclear energy (2002-2006); Decision No 1230/2003/EC of the European Parliament and of the Council adopting a multiannual programme for action in the field of energy: „Intelligent Energy – Europe” (2003-2006); 2003/796/EC: Commission Decision on establishing the European Regulators Group for Electricity and Gas [2003].

11 Consolidated version of the Treaty on the functioning of the European Union, [2010] OJ C-83/47.

12 Commission’s Report addressed to the Council, [1996] SEC(96) 496 final version.

13 L. Hancher, ‘The New EC Constitution and the European Energy Market’, [in:] M.M. Roggenkamp, U. Hammer, ‘European Energy Law. Report II’, (Antwerp–Oxford 2005), 3.



and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c). 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature." Although Lisbon changes have clarified the competency division between the EU and Member States, it is still ambiguous how far may the European legislator go in stating and then executing the policy, for instance may the Council and Parliament pass a regulation which would create a separate Office which would be legible for dealing with the parties over the energy supply and would pass the quotas over the member states concerning the minimal/maximal energy produced. Firstly mentioned in Article 194 of the Treaty purposes may be achieved only if means taken are in scope of common market in the European Union, secondly bear in mind the environmental sustainable development and if they are passed in the spirit of solidarity¹⁴ between Member States. Thirdly, the subsidiarity, conferral and proportionate principles which determine when the EU is competent to legislate, and contributes to decisions being taken as closely as possible to the citizen. The principle of subsidiarity is established in Article 5 of the Treaty on European Union and indicates that in all cases, the EU may only intervene if it is able to act more effectively than Member States. The Protocol on the application of the principles of subsidiarity and proportionality lays down three criteria aimed at establishing the desirability of intervention at European level: (1) does the action have transnational aspects that cannot be resolved by Member States? (2) would national action or an absence of action be contrary to the requirements of the Treaty? (3) does action at European level have clear advantages? The principle of subsidiarity also aims at bringing the EU and its citizens closer by guaranteeing that action is taken at local level where it proves to be necessary. In conclusion, above given arguments shows that European Union even is obliged to create efficient common market for energy, it is not unlimited in the means adopted, which cannot go beyond what is necessary. Consequently the pillars of functioning of the European Union determine to what extent the EU can exercise its competences conferred upon it by the Treaty. Moreover, according to point 2 of the Article 194 constituting the genuine procedure for implementing energetic policy purposes stated in point 1 of the aforementioned Article - any other procedural basis like Article 114 or 119 of the Treaty is forbidden and stating the law under those sole basis would be a violation of fundamental procedural regulations¹⁵.

14 C. Mik, 'Solidarność w prawie Unii Europejskiej. Podstawowe problemy teoretyczne', (Warszawa 2009), 29–86; E. Piontek, K. Karasiewicz, 'Quo Vadis Europa III?', (Warszawa 2009), 540. Solidarity have not been explicitly defined (however similar notion occurs in Article 122) thus it is said that it should be interpreted in the light of Article 4 point 3 of the Treaty constituting the loyalty principle.

15 T. Wälde, 'Energy in the Draft EU Constitutional Treaty', (OGEL 2003), 4; G. Rashbrooke, 'Clarification or Complication – The New Energy Title in the Draft Constitution for Europe', (JENRL 2004), 380–381.

COMPETITIVENESS OF THE EUROPEAN UNION AND THE COMMON MARKET

Present EU legal regulations are inadequate to the circumstances encountered. Nowadays every Member State is solely on its own hand dealing with third parties over the sort of energy acquired, re-sold, transported or over energy price. In compliance with above mentioned principles up for now below mentioned objectives aiming at market's liberalisation have been achieved to create efficient common market for energy, in particular¹⁶:

- more competitive pricing and more liquid and transparent wholesale markets – market opening, increased cross-border trade and market integration, and stronger competition. Taxation barriers have been removed by convergence of value VAT tax regulations. Monopolies have been forbidden, import/export regulation over market differentiation and discrimination of individuals have been constrained;
- more secure supplies – enhanced coordination and transparency in relations with third countries, minimal amounts of resources have been stated which have to be stored by each member state to secure the energetic safety of the Union. Energy supplies have been diversified especially by giving stronger emphasis on renewable energy (wind, air, solar, geothermal, biomass);
- cooperation between supervisory offices concerning energy exploitation in member states has been implemented;
- freedom of movement of energy has been widely executed and protected¹⁷.

Development of the energy sector in Europe should be multilateral in order to maintain economic competitiveness and reduce dependence on imports. The most important thing in the European energy sector is to ensure security, which is connected with diversification policy. The EU has a number of ways to ensure security – a great chance would be to increase liquid gas imports from the United States – a fundamental importance will have a report about the influence of gas exports on the US economy, which is scheduled to be submitted to Congress in the beginning of 2013. Another possibility is to build Nabucco gas pipeline, whose construction is expected to be much less expensive thanks to an agreement signed between Turkey and Azerbaijan. Another chance is presented by development of infrastructure – cross-border connections and LNG terminals as well as gas mining from shale deposits. As above given there is still much to do in European Union's international competitiveness concerning the energy sector and its safety.

SUMMARY:

A well-functioning internal energy market is crucial to provide Europe with secure, sustainable and affordable energy supplies. Yet, the EU internal energy market remains far from completed.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Making the internal energy market work [2012], 2012/663 final version.

¹⁷ M. Politt, 'The arguments for and against ownership unbundling of energy transmission networks in Energy Policy' (Volume 2008), 704–713.

In recent years, positive developments towards more market opening and integration have been registered¹⁸. In particular, increased trade in energy is a positive sign of better functioning markets – in 2008 the European energy market was worth around 620 billion Euros (€ 440 billion in electricity and € 180 billion in natural gas). Secondly, energy market become more competitive – between 6 000 and 10 000 wholesale energy transactions are estimated to take place every day; in 2009, wholesale prices have responded positively to falling demand in electricity and gas, caused by the economic crisis. Nevertheless, significant obstacles to open, integrated and competitive markets in electricity and gas remain in Europe. In the first place, interconnection capacity between Member States remains generally insufficient and certain regions, such as the Baltic States, the Iberian Peninsula and the United Kingdom and Ireland remain isolated. In 2002, the European Council set the target for all Member States to have a level of electricity interconnections equivalent to at least 10% of their installed production capacity by 2005. In 2010, 9 Member States still did not meet this target. Also within Member States, in particular in the electricity networks in Central Europe, bottlenecks exist which prevent fluid transmission of energy within and between countries. Secondly, although Western Europe profited from the availability of cheap LNG, Central and Eastern Europe only received small amounts of that additional supply as gas systems remain relatively isolated from the rest of the continent. Even if interconnections exist, the absence of harmonisation of market rules in the different Member States leads to market segmentation and higher transaction costs, which constitutes a barrier in particular for smaller players. This can even lead to the inefficient situation where gas and electricity flow from high-price areas to low-price areas. Furthermore, too many hindrances remain to trade across borders: in gas integrated cross-border transmission services are not yet available, booked but un-used capacity is not offered to other market parties and trading and balancing rules create obstacles to market integration; in electricity the implementation of market coupling is still at an early stage and trading in longer term products can be difficult. Finally, energy regulators at national level do not always dispose of the necessary powers and resources to enforce the applicable rules, nor do they have the statutory independence required to enforce correct application of EU legislation in all Member States. Despite many cases of non-compliance with the rules on access to the gas and electricity networks, national regulators often do not have sufficient powers to impose penalties. For instance, energy markets in the majority of the Member States remain highly concentrated with little evidence of new entry of independent suppliers and decreasing wholesale prices in electricity and gas have not always been passed on to the retail consumers. As given above much has to be done by the European Union to stay put in the so-called global energetic competition. It is obvious that Member States should gather their strengths to become more powerful player, however the competences passed onto the EU shall be adopted very rationally. The means should be appropriate to the aims of actions taken. Moreover particular interests of each Member States have to be respected.

¹⁸ The internal energy market – time to switch into higher gear (non-paper), source: http://ec.europa.eu/energy/gas_electricity/legislation/legislation_en.htm

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EDUCATION FUNDING IN THE LIGHT OF THE PRINCIPLES OF GOOD GOVERNANCE A case study of Belgium and the Netherlands

Dominique de Meyst*

Ghent University, Belgium

Mariëtte D.C. van der Tol**

Utrecht University, the Netherlands

Abstract. The issue of equal funding of education by the State is, at least in the Netherlands and in Belgium, strongly connected to the concept of the separation of church and state, and of state neutrality. In fact, this goes for most western countries. The interpretation of this concept, however, diverges considerably.

Both countries have dealt with ideological controversies and disputes on education funding. In both countries, this led to the exclusion of funding of schools other than publicly established – The latter often being liberal and secular. This was based on the separation concept.¹ An inclusive stand on funding seemed impossible by the time. Though, over time, Belgium and the Netherlands came to (more or less) equal funding after their respective ‘school struggles’. However, both countries explain their systems differently on a constitutional level. Belgium bases its system on the freedom of opinion, whereas the Netherlands founded its system in the principle of non-discrimination

Other countries, too, have to neutrally balance the rights of different social groups. It becomes clear that there is an international angle to the freedom and organization of education, which should result in a lot of countries reaching a comparable standard.

This paper argues that the principles of good governance add a new dimension to this discussion. Under the principles of effectiveness and accountability, the State is to uphold established quality standards in education. To this, all schools are equally subsidized regardless any particular character, as the latter is the primary responsibility of the parents. This is appropriate in a postmodern and pluralist society, as inclusive education funding serves the interest of participatory citizenship and the development of individual identities.

* Dominique de Meyst is PhD student and teaching assistant in the field of Constitutional Law at Ghent University, Belgium. Email: Dominique.DeMeyst@UGent.be;

** Mariëtte D.C. van der Tol is student in the Legal Research Master (Constitutional law and good governance) and Politics and Society in historical perspective (Citizenship) at Utrecht University, the Netherlands. Email: M.D.C.vanderTol@students.uu.nl.

¹ By now, one should also include schools of religious minorities as Islamic schools, but also for example schools that work on the basis of alternative pedagogical insights.

EDUCATION FUNDING – SEPARATION OF STATE AND CHURCH – DEMOCRACY – CITIZENSHIP – RULE OF LAW – GOOD GOVERNANCE

1. Structure of the paper

This paper compares the education system of Belgium and the Netherlands, using their respective constitutions as an instrument of comparison in a historical perspective. Then, the concepts of the separation of church and state and of state neutrality are shortly addressed, after which is argued that education, being a public interest, should be actively accommodated by the State. It should also uphold certain quality standards. Particularities beyond that are the responsibility of the parents. This is explained by means of existing human rights treaties and the principles of good governance, leading to equal funding and demanding an inclusive stand.

2. Two constitutions in a historical perspective

Following the French Revolution and Napoleon's expansion, the Congress of Vienna decided to form the United Kingdom of the Netherlands out of the territories currently known as Belgium, the Netherlands, and Luxembourg. However, this unification could not undo the religious schism that ran along their common border. Traditionally, the southern part of the Kingdom was mainly populated by Roman Catholics, while the population in the north generally adhered to varieties of Protestantism. Among the political peculiarities caused by these religious differences, was the particular complicated process of drafting a constitution for the newly founded United Kingdom of the Netherlands. The constitution discriminated the southern Catholics, fuelling emancipatory tendencies. This led up to a revolution in 1830, causing the United Kingdom to split up. Both the Netherlands and Belgium once again started the process of drafting new constitutions, in which the relation between state and church were heavily discussed.

In the Netherlands, only publicly established schools were publicly funded in the nineteenth century. The constitution of 1848 turned out a liberal one. Among other things, this liberal constitution compelled the State to provide for education,² as the liberals were convinced that appropriate education would deliver good citizens.³ However, the question remained what kind of education should be provided. Protestants were aiming for public education based on general Christian values, while Catholics would have agreed to as little as publicly subsidized Catholic schools. In the end, the liberals won over the Christian dissension and installed an education system without any regards to religion, as dictated by the principal of state neutrality and the separation of state and church institutions.

By the end of the nineteenth century, the school struggle intensified. Quality standards were rigorously increased. Only public schools received financial support, while other schools, by lack

² Article 194 of the Dutch Constitution 1848.

³ I. De Haan 'Het beginsel van leven en wisdom. De constitutie van de Nederlandse politiek in de negentiende eeuw', (The rise of the Dutch State, its constitution and its politics in the nineteenth century), Reeks 'De natiestaat. Politiek in Nederland sinds 1815', (Amsterdam: Wereldbibliotheek 2003), 36.



of this support could hardly meet the new standards. Though, a majority of children attended religious schools which were not funded by public resources. This struggle was eventually settled in the Pacification agreement of 1917 in which the tensions between roughly four ideologies were settled (liberals, socialists, roman Catholics and Protestants; political parties were only formed later on). In the constitution, equal funding for all schools was laid down in Article 23. This article encompasses a commitment of the government to take care of education with respect to religious differences. It also refers to objective quality standards, which will be discussed later on in this paper. Article 23 contains a so-called social right, which is, by its very definition, a standstill clause.

Belgium also had its share in school struggles.⁴ Despite the (by 1830 standards) very liberal constitution, state funded education remained religiously tainted. Both liberals and Catholics tried to (re)gain control over the education system. The first clash (1878-1884) was settled in favour of the Catholics. The liberal government had tried to corner catholic education using a wide variety of legislation. It forgot, however, that it only represented – because of for instance census suffrage – a rather insignificant part of society and despite their attempts were unable to stop the steep growth of catholic ('free') schools. The feud between state schools and catholic schools resurfaced several decades later (1950-1958), the former being outnumbered by the latter but the latter struggling financially. In the 1958 School Pact, the government agreed to more or less equal financing, uniform quality standards and democratic access to the school of one's choice. The corresponding articles in the Belgian constitution are the Articles 19 and 24, respectively propagating the freedom of education (but not its funding as such), and the freedom of speech and religion. The system of more or less equal funding is constitutionally based upon an existing article on the freedom of opinion. Besides diverse publicly financed school, parents are free to establish other confessional and non-confessional schools. However, religion is here defined as an opinion. This is an important difference with the Dutch system which is mainly based on non-discrimination and equality.

Noticeably, despite diverging constitutional foundations, education funding in both countries is now perfectly comparable.

Nevertheless, under present conditions, the system of equal funding is increasingly discussed again. Some think that the State should no longer finance all kinds of schools, but provide for public neutral education. This might possibly constitute discrimination on the sole base of religion, which is strongly condemned in several treaties. It affects the neutrality of the State itself and the principle of equal respect and concern.

3. The concept of the separation of state and church

The concept of the separation of state and church was initially about an institutional separation, as this was not yet practice in the nineteenth century. It can be considered an unwritten principle

4 J. De Groof 'De grondwetsherziening van 1988 en het onderwijs – De schoolvrede en zijn toepassing' (Constitutional change of 1988 and education. Schoolpeace and its practice) (Brussels: Story Scientia 1989); J. De Groof 'Het levensbeschouwelijk karakter van de onderwijsinstellingen' (The ideological and religious character of educational institutes) (Brugge: die Keure 1995).

of constitutional law. Religious and public institutions have their own tasks and responsibilities, and the judiciary is reluctant in religious disputes.⁵

The perspective on the separation of state and church extended its orders to all corners of the society, including education. In public spaces, non secular symbols were increasingly abolished, resulting in a discussion in which headscarves for example are abolished officially for reasons of good communication.⁶ Religion would belong in the private domain. The qualification of religion as just an opinion instead, might disregard the fact that religious people may regard it as their identity, or even a way of life.⁷ This development is generally recognizable in western societies. Sometimes, the discussion seems to have a certain hostile character. This development does not suit a pluralist society.

It is the question whether the described extension is legitimate in legal terms. The State is an abstract legal entity and as such it needs to remain neutral. Society, on the contrary, is rather concrete. So what does state neutrality then entail?

4. State neutrality

Let us first state that the notion of state neutrality seems to be a utopia in itself. A society is formed by the collective of individuals, and a whole range of different views and opinions may exist and many ideologies and worldviews are struggling for room. State neutrality is then about a fair representation of the differences in the State's institutions which are obliged to observe the principle of equal concern and respect.⁸ The State needs to neutralize these dynamics in society, executing its competences neutrally. This neutrality requires, for example, that unequal measures and laws need to be sufficiently justified.

As to the funding of schools, the principle of equal concern and respect is of vital importance. Education is an important way to prepare the children for a future in society. As this society is pluralist, schools should be as well. School choice is in principal the sole responsibility of the parents, who usually have the full authority over their minor children.⁹ This freedom to raise their children and send them to schools according to their convictions, is stipulated in several European and international treaties. This is explained below.

5 A.J. Nieuwenhuis, 'Tussen Keulen en Parijs. Naar een duidelijker regeling van de verhouding tussen staat en religie in Nederland' (Between Köln and Paris, towards a more defined vision upon the separation of staat and religion in the Netherlands) (2010) Tijdschrift voor Religie, Recht en Beleid 2010 (1) 1.

6 The issue of headscarves is widely debated in both Belgium and the Netherlands. Verbeeck explains this as the tension between freedom of education and freedom in education. B. Verbeeck 'Neutraal en toch divers' (Being neutral and yet diverse) (2008) Ethiek & Maatschappij (11) 3, 13-25.

7 A.J. Nieuwenhuis, 'Tussen Keulen en Parijs. Naar een duidelijker regeling van de verhouding tussen staat en religie in Nederland' (Between Köln and Paris, towards a more defined vision upon the separation of staat and religion in the Netherlands) (2010) Tijdschrift voor Religie, Recht en Beleid 2010 (1) 1.

8 Dworkin writes: 'Government must not only treat people with concern and respect, but with equal concern and respect.' R. Dworkin 'Taking rights seriously' (London: Duckworth 1997) 272 ff..

9 Groof and Noorlander argue that the freedom of education should be interpreted accordingly as a right of the parents. J. Groof & C.W. Noorlander 'Nieuwe contouren van de vrijheid van onderwijs' (New contours of the freedom of education) (2012) TvCR/Januray, 64-65.

5. Human rights perspectives

International treaties and courts are also very concerned with the freedom and neutrality of education. Noteworthy in that regard are Article 18 UDHR, Article 13 ICESCR and Article 4 of the Convention Against Discrimination In Education. These treaties convey, as a whole, the freedom of thought, conscience and religion. The freedom of religion and the right to education are, as has been shown above, clearly interlinked. It also follows from the international treaties that primary education must be compulsory and free. Even though, according to ICESCR, public schools probably depend on the ruling majority, as primary education should supposedly be free, this goes for *all* kinds of schools. As for secondary schools, the first concern in international law is to make it generally available and accessible.

Article 18 UDHR refers to the freedom of thought, conscience and religion. This right includes the freedom to have convictions, change them and manifest them in public as well. The right to education refers to the freedom of religion. Elementary education must be compulsory and free. This education must strengthen the personal development of children as well as the respect for human rights. Important is the fact that the child's parents have the prior right to choose the kind of education.¹⁰ The freedom of education is elaborated in Article 13 ICESCR. A distinction is made between public schools and *other* schools, for example language or faith schools. The character of such public schools is not addressed. It seems logical that in democratic societies, such character depends on the wishes of the ruling majority. So the ICESCR does not make a fundamental choice for neutral schools. The interesting thing is that the charter does only distinct the way schools are established. It does not say that schools, other than public schools should not be funded by public authorities. On the contrary, it states that elementary education should be free and that parents may choose the kind of school the child will attend. As to secondary schools, the State's obligation is in the first place to make this kind of education 'generally available and accessible', so free education is strongly recommended.

In Article 4 of the Convention against discrimination in education, the positive State obligation of making primary free and secondary education generally available and accessible is repeated, regardless the school's character. The covenant emphasizes that *other* schools should comply with minimal educational standards. This covenant literary forbids that no person or group should be compelled to receive religious instruction inconsistent with his or their conviction. The logical explication would be that no religious instruction may be compulsory for non religious children.¹¹ But this can be turned the other way around as well.

Within the Council of Europe, the freedom of education is guaranteed in Article 2 first protocol to the ECHR, which emphasizes the right of parents 'to ensure such education and teaching

¹⁰ Under Article 8 of General Comment no. 22 on Article 18 ICCPR, it the Committee found that the 'right of parents and guardians to ensure religious and moral education cannot be restricted'.

¹¹ In countries where the vast majority of the population adhered to one religion, the manifestation of the observances and symbols of that religion could constitute pressure on the students who did not practice that religion. D. McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?', (2011) *Human Rights Law Review*, 11:3, 468.

in conformity with their own religious and philosophical convictions'.¹² The ECHR delivered also some interesting case law in the field of religious symbols in public schools. In the Lautsi case, Mrs. Lautsi and her children were not protected against their government, upholding Christian heritage in public schools.¹³ Pierik subsequently emphasizes that minority convictions should enjoy more protection.¹⁴

Lovejoy cites the Court, saying that the concept of a democratic State needs to maintain true religious pluralism.¹⁵ Furthermore, since there is not a strong European consensus when it comes to the implications of the neutral secular State, the Court leaves the states a quite wide margin of appreciation,¹⁶ which means that the Court only reluctantly assesses a possible breach of proportionality. In fact, the Court is not offering much protection in favour of religious minorities resident in both 'neutral', outspoken secular countries and countries with a strong religious majority as the dominant standard.

None of these treaties oblige states to finance all the schools. In principle, states are just required to organize and finance education. However, primary education should be free, which is a minimum core obligation. This leads to the conclusion that both public and special primary schools should receive full public funding.¹⁷

In many Western-European countries for example, a majority of children attends other than public schools. Over time, a whole range of schools has been established. In a mature society, there should be room for all sorts of schools. As the State should be neutral, it needs to accommodate education equally. So the State just provides for education and the specific flavour of the schools is up to the primary responsibility of the parents. They should be actually free in their choice. High fees for special schools would constitute a hindrance to this freedom.

6. Education as a public interest

In the light of democracy and citizenship, free education is of vital interest. In historical perspective, education has for a long time been regarded as an instrument to deliver good state

12 McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?', (2011) *Human Rights Law Review*, 11:3 457. 'This reflected the decision in Folger in which the Court held that complaints concerning religious education should be considered under Article 2 of P1 as the *lex specialis* in the area of education.'

13 Another well known example are the cases of Leila Sahin and Dahlab. In these cases, an expression of Muslim faith of wearing a headscarf in a public university and at school, was found opposite to the secular character of the State. Both cases are heavily criticized by Evans and Elver, who both reject stereotyping Islam. Elver even finds secularism itself intolerant. H. Elver, 'The Headscarf controversy, secularism and freedom of religion' (New York: Oxford University Press 2012) 81-83.

14 R. Pierik, 'Het EHRM en het Europese rechtsstatelijk deficit', (The ECtHR and the Europe's deficit of the Rule of Law) (2012) *NJB* (19), 1382-1389.

15 C.D. Lovejoy, 'A glimpse into the future: what Sahin vs. Turkey means to France's ban on ostensibly religious symbols in public schools', (2006) *Wisconsin International Law Journal*, vol. 24 no. 2, 677; ECHR, 13 December 2001, no. 45701/99, *Case of Metropolitan Church of Bessarabia and others vs. Moldova*.

16 'There was no European consensus on the way to interpret the concept of secularism in practice, so that States had a wider margin of appreciation in the matter.' McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?', (2011) *Human Rights Law Review*, 11:3, 467.

17 M. Sepúlveda (and others) 'Human Rights Reference Handbook' fifth edition (Reykjavik: The Icelandic human rights centre 2010) 271.



citizens, capable or entering the public and political scene. Education was part of the civilization offensives in the nineteenth century. This perspective proved to be fruitful, although democratic conventions did changed since then.¹⁸

As individuals need to become more and more articulated to advocate their individual interest, educating the people provides a basis for participation. Again, the society and the 'civil society' are pluralist in nature. Children have to be specifically prepared to participate in this playing field. This stimulates the further development of the individualizing civil society, which on his part serves as a fundament of democracy in action.¹⁹

So education is a public interest and therefore, public resources are to be equally distributed in order not to disturb equal chances of these children in the future pursuing their interests.

7. The new dimension of good governance

The principles of good governance refine the existing concepts of the rule of law and democracy.²⁰ These principles entail the principle of transparency, participation, effectiveness, accountability, human rights, and properness.²¹ To a certain extent, these principles are founded in the rule of law and democracy; but where constitutional theory and practice meet each other, good governance adds a new dimension.

Principles of good governance are being developed throughout Europe, which is now a lead of departure when discussing the convergence of constitutional systems. The principles of good governance could possibly modify sharp elements in constitutional conventions which merely reflect nineteenth century contrasts and conflicts, providing a basis to effectuate the concept of the inclusive society.

Education funding is historically embedded in fundamental rights, which are to a large extent part of the formal rule of law. However, the exact right concerned differs per country. Democracy is affected as education serves the formation of individuals as state citizens, which is a public goal as explained above. But a returning motif is the or-or approach, instead of and-and. Good governance proves its merit towards education, especially through the principles of effectiveness and accountability. The State is bound to guarantee certain quality standards in education. As to the general quality, the difference in public schools and other schools blurs: quality standards as established by the State are beyond discussion.²² As this quality serves the public interest regarding

18 The Dutch Education Council published in august 2012 an extensive rapport on citizenship and education stressing that citizenship is the core of education, especially in a pluralist society. It also argued that citizenship is part of educational quality. See: Advice 'Verder met burgerschap in het onderwijs' (Further with citizenship in education) (The Hague: Educational Board 2012).

19 R.D. Putnam 'Making democracy work' (New Jersey: Princeton University Press 1993).

20 G.H. Addink 'Het concept van goed bestuur in het bestuursrecht en de praktische consequenties daarvan' (Good governance in theory and practice) (2012) *Ars Aequi* April.

21 G.H. Addink 'Good governance: concept and context', to be published.

22 A parallel tension exist between too progressive quality standards that may impair the constitutional freedom of education. D. Mentink & B.P. Vermeulen 'Artikel 23' (Artikel 23) in: A.K. Koekkoek (ed.) '*de Grondwet. Een systematisch en artikelsgewijs commentaar*' (the Constitution article by article explained) (Deventer: Kluwer 2000) 266; And although

citizenship, the State has to financially meet the needs of all schools. Here, the difference between public and other schools is not that relevant.

The dichotomy remains relevant as to the creation of a school, admission requirement, and employment of staff and employees. The creation of a school should be free to parents – as it indeed is in many western countries – as parents bear the prime responsibility. These schools may be ‘free schools’, ‘excellent schools’, or religious schools in its diversities. The State has to remain outside such particularities, as this generally falls outside the scope of its competence of providing qualitative education. However, the State has to guarantee access to public schools that are bound to be neutral, and needs to actively support the creation of public schools. Interestingly, such parental involvement is currently also promoted in the sphere of public schools, as such involvement proves to stimulate the functioning results of schools.

The principles of participation and proportionality underpin these findings. It seems not proportionate to exclude the children of any amount of tax payers from free education for the sole reason of a non-public nature of a school. After all, the very idea of education as paid for by state resources occurred from a liberal state in need of active and participatory citizens. Education prepares children for a future as a citizen in the pluralist society. Therefore, they should be able to be educated according to their and their parents’ perspectives, so they are generally prepared to participate in that society.

8. Conclusions and recommendations

Education is an explicit public interest and therefore a public responsibility. It does not matter, in this regard, that the constitutional clauses leading to education funding, differ. Diverging constitutions are clearly able to reach a similar result, being that the State has to provide for appropriate education. This obligation is reinforced in various ways by international treaties. So the question is not if the State has to provide for education, but how this is done appropriately.

The State has a positive obligation to provide for sufficient access to public schools which are generally accessible. School choice on an ideological or religious level is the sole responsibility of the parents, as international treaties confirm as well. The State has no constitutional competences here beyond constitution and controlling quality standards. Indeed, rather than focusing on the difference (both in funding and other) between religiously tainted schools and public (neutral) schools, nowadays educational policy has shifted towards concern for objective quality standards. This is where the principles of good governance come into play. Under these principles, the State is bound to guarantee a certain (minimum) standard in education. One consequence is that the State is to provide for funding *equally*, regardless of any particular character of the school. By now, the

established quality standards may be available, control and inspection lead to further tensions with educational freedom. Therefore, the inspection of a school’s quality should meet the principles of transparency and proportionality. See F.J.G. Janssens ‘Toezicht op kwaliteit in het onderwijs’ (Monitoring quality of education) <http://www.utwente.nl/gw/om/Members/Toezicht.pdf>, (last visited 28 March 2013).

neutral state no longer refers to merely refraining from any religious preferences, but to actively accommodating these differences in society. This approach tends to be more lenient, being rather and-and than or-or. The dichotomy of public and other schools is outdated.

The funding of education is not only an issue in the Low Countries. Guided by the relevant international treaties and the principles of good governance, it should be a realistic goal for every country to provide equal funding to every school and focus on objective quality standards. This approach is tailored to postmodern pluralist societies as those societies have to deal with many minority interests. It starts with the development of an own identity, but it reaches out to the functioning of a present day society.

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SOFTWARE AGENTS AS INTERNATIONAL ISSUE – CAN WE AFFORD DIVERGENCE?

Rafał Michalczak*

Jagiellonian University in Kraków, Poland

Abstract. We live in the globalised world which, due to rapid development of communication technologies, become smaller and tighter. From the legal point of view, especially in the economics we could observe interweaving factors of national and international regulations which are in constant interplay. Nowadays economics is global system with no parts which can be treated separately. This situation is contribution of modern communication means, strictly speaking: development of the Internet. But beside positive impact this improvements create completely new category of problems.

According to Bank of England and TABB Group data for 2010 more than half stock trading in the USA and more than one third in the Europe (both in volume and value) couldn't be simply ascribed to humane traders. It is consequence of a progress in algorithmic trading – an introduction of so called high-frequency trading made by programs (which could be also called software agents).

After short introduction in the subject of SA (putted at the background of “artificial intelligence & law”) I'd like to try to answer a question: “Whether we can afford divergence in regulation of such international issue as software stock traders?” SA are hitherto unregulated issue. It is said, that it may have many negative consequences (e.g. 2010 Flash Crash). Many countries (Germany, USA) are starting debate about fundaments of such regulations. I think, that it is high time to realize SA problem is immanently international and unified regulation (even if only at the elementary level) will be beneficial for all participants of legal and economic systems. I'll support my hypothesis with theoretical investigations on how differences in status of SA could make international trade very difficult or even impossible. I'll try to show that for the first time in history background created by philosophy of artificial intelligence have practical implication for legal policy.

Keywords: Autonomous software agents, HFT, liability, contract law

INTRODUCTION

We live in the globalised world which, due to rapid development of communication technologies, become smaller and tighter. From the legal point of view, especially in the economics we could observe interweaving factors of national and international regulations which are in constant interplay. Nowadays economics is a global system with no parts which can be treated separately. This

* Mgr (Master) Rafał Michalczak is a PhD student at the Faculty of Law and Administration at the Jagiellonian University in Kraków. He graduated law (master degree) and philosophy (bachelor degree). Currently, beside preparation of PhD thesis in law he also prepares master thesis in philosophy. His scientific interests oscillate between philosophy of technology and philosophy of artificial intelligence and their influence on legal theory and practice. Especially he is interested in a role of artificial intelligent agents in the legal system. His field of scientific investigations also covers theoretical aspects of implementation of expert systems to model legal reasoning.

situation is a consequence of modern communication means, strictly speaking: development of the web. But beside positive impact this improvements create completely new category of problems.

I will focus on very specific problem: theoretical and policymaking aspects of using software agents in equity trading. At the beginning I introduce and clarify shortly main concepts. I also point main theoretical problems. Then I bring some evidences, that the issue is on the one hand very up-to-date and on the other extremely important. On such background I try to consider possible answers for the question whether we can afford divergence in regulation of software stock traders. I claim that varied regulation in different countries wouldn't be sufficient solution. I also claim, that without deeper consideration and attempt to build unified model of making contracts by software agents such approach will be ineffective to some degree.

* * *

At the beginning I have to define key concepts of this paper. Of course the most important one is "software agent". There is many difficulties with this term, especially when we try to find legal definition. It might be useful to refer to United Nations Convention on the Use of Electronic Communications in International Contracts which in article 4 defines "Automated message system" as "a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system"¹. This definition seems not very clear, especially with such abstract notions as "computer program or an electronic or other automated means" – it is extremely difficult to imagine nowadays any automated mean with mentioned properties, that is not a computer program. It is of course the consequence of so called technological neutrality, which means, that legal acts are "intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used"².

The most important part of this definition is, where it is stressed that software program should act "without review or intervention by a natural person each time an action is initiated or a response is generated by the system". The main aspect of software agent (or, to use more technologically neutral term: artificial agent) is its autonomy. To provide a definition from the canonical artificial intelligence textbook: agent is "an autonomous entity which observes through sensors and acts upon an environment using actuators and directs its activity towards achieving goals"³. This definition is very wide: if we think a little we could easily realize that it could be applied also to natural agents as humans or animals. But it has to be emphasized, that it isn't applicable only to material beings; the most important ones are software agents, that act in virtual (which isn't hear an opposition

1 United Nations Convention on the Use of Electronic Communications in International Contracts 2005 art. 4 http://treaties.un.org/doc/Treaties/2005/11/20051128%2004-23%20PM/Ch_X_18p.pdf

2 http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf

3 S. Russell, P. Norvig, 'Artificial Intelligence A Modern Approach' (Upper Saddle River, New Jersey: Prentice Hall 2009) 34



for “real” but for “material”) environment through specific sensors and actuators suited for a virtual world. The short and easy example, which may be futuristic but is the best way to illustrate the whole idea is an virtual agent (this time in legal meaning as a person who is authorized to act on behalf of another to create a legal relationship with a third party⁴). It means the virtual entity which by use of semantic web is able to take care about one’s daily affairs e.g. register she/he to a doctor, plan meetings, buy everyday goods⁵.

Mentioned applications are very illustrative but also only experimental. So they are useful to introduce main concepts although aren’t very practical. But the focal area of this paper is more refine version of software agents, which isn’t only experimental. Moreover it has great importance in the world of economics and, by this application, for everyday life of everyone of us.

According to Bank of England and TABB Group data for 2010 more than half stock trading in the USA and more than one third in the Europe (both in volume and value) couldn’t be simply ascribed to humane traders. It is consequence of a progress in algorithmic trading – an introduction of so called high frequency trading made by programs (which due to adopted convention I will call software agents). High frequency trading is “a type of strategy that is engaged in buying and selling shares rapidly, often in terms of milliseconds and seconds”⁶. Of course such speed exclude typical human traders because decisions have to be made extremely quick. Moreover it excludes any real supervision over the behaviour of software programs, which play their economic games only between themselves.

Mentioned software programs are very sophisticated and complicated tools. Although I don’t want to consider this issue in detailed way, it has to be stressed, that the sophistication has very grave consequences. Strictly speaking the behaviour of that programs is unpredictable; due to application of heuristic algorithms and techniques of machine learning they could be analyze rather in empirical way (by observation of patterns of their actions). According to view of some legal theoreticians it is even sufficient condition to ascribe to the programs some kind of autonomy understood legally⁷. Worth noting is fact, that according to some views the most sufficient way to regulate such issue is to introduce new type of person to contract law – electronic person constructed in the similar way as legal person⁸.

Nowadays we witness rising interest in regulating described branch of equity trading. Hitherto use of software agents was mostly unregulated. From the one perspective it could be seen as perfectly normal. If one is advocate of *laissez-faire* or other liberal or libertarian doctrine it seems that it is the best way to proceed with such free market issues. Use of specific tools which aren’t harmful or couldn’t be considered as unfair business practices is totally admissible. But even

4 E.g. Polish Civil Code 1964 art. 95-109

5 T. Berners-Lee, J. Hendler, O. Lassila, ‘Sieć semantyczna’ [2001] Świat nauki 7/2001 43

6 J. A. Brogaard, High Frequency Trading And Its Impact On Market Quality [2010] http://www.futuresindustry.org/ptg/downloads/HFT_Trading.pdf 4

7 S. Chopra, L. White, ‘A Legal Theory for autonomous artificial agents’ (Michigan: University of Michigan Press 2011) 9

8 Ibid. 153

doctrines which emphasize value of unbounded freedom in economics (when the most extreme are rejected) agree, that the state have to protect citizens against the most harmful proceedings.

The necessity of the protection appeared in the most vivid way during the so called “Flash Crash 2010”. One of the analysis described this event in following words: “On May 6, 2010, in the course of about 30 minutes, U.S. stock market indices, stockindex futures, options, and exchange-traded funds experienced a sudden price drop of more than 5 percent, followed by a rapid rebound”⁹. To make this picture more illustrative it may be good to bring actual market value that disappeared: in the half an hour market value decreased by 1 trillion USD. The event realized that some regulation in the whole area of computer based trading are inevitable.

There are few ongoing attempts to regulate algorithmic trading. In the United States the Commodity Futures Trading Commission debates on the definition of high frequency trading¹⁰. In the European Union take place the discussion about amending of The Markets in Financial Instruments Directive 2004/39/EC and so called The Market Abuse Directive 2003/6/WE. Although due to insufficient restrictions German parliament tries to enforce special legislation for high frequency trading called “Hochfrequenzhandelsgesetz” (Full title: “Entwurf eines Gesetzes zur Vermeidung von Gefahren und Missbräuchen im Hochfrequenzhandel”)¹¹.

Main problem which isn't linked to merits of the regulations is its form. United States are trying to create their own definitions and regulations. European Union is trying to make its own legal boundaries but due to characteristics of EU legislative process (it is time-consuming and it isn't very elastic) some member countries are trying to regulate this issue by their own like Germany mentioned before. There is no need to argue that in modern economic system if something is prohibited in one place it will emerge in the other place. For example while the German state try to prohibit high-frequency trading the Warsaw Stock Exchange adapts new trading system (UTP) which main aim is to allow high-frequency trading. In Poland although detailed regulations of the issue don't exist.

But there is second problem. Every single of this attempts base on the assumption that what is unnatural and dangerous is the great speed of transaction and it tendency to overreaction which doesn't correspond to real economics. Although it is possible to find some notions about autonomy of such programs e.g. “Proposal for a directive of the European Parliament and of the council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council” contain description: “Many market participants now make use of algorithmic trading where a computer algorithm automatically determines aspects of an order with minimal or no human intervention”¹² there is no emphasis on this aspect.

9 A. A. Kirilenko, A. S. Kyle, M. Samadi, T. Tuzun, “The Flash Crash: The Impact of High Frequency Trading on an Electronic Market” [2011] <http://dx.doi.org/10.2139/ssrn.1686004> access: 26.03.2013 2

10 <http://www.aima.org/en/regulation/markets-regulation/high-frequency-trading/index.cfm> access: 25.03.2013

11 <http://dip21.bundestag.de/dip21/btd/17/116/1711631.pdf> access: 25.03.2013

12 Proposal for a Directive Of The European Parliament And Of The Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast) - Presidency compromise 2013 <http://register.consilium.europa.eu/pdf/en/12/st11/st11645.en12.pdf>



There is a question though whether we can afford divergence in regulation of software stock traders? As I pointed out the biggest problem is the lack of the unification in the field of use of software agents. Current trend is to make national regulations in countries which telecommunication infrastructure allow high-frequency trading or to blindly develop such infrastructure only to allow introduction of the method in countries which are still unable to maintain sophisticated versions of computer base trading. There is no effort to pass more general regulations on multinational level. As I tried to show the consequences of completely unregulated algorithm trading would be very grave. International regulations would provide general framework that would protect countries which are new in the field of high-frequency trading against mistakes, which were already committed.

Moreover in my opinion there exist even more efficient way. High-frequency trading is a part of wider issue – contracts made by autonomous software agents. Of course there is a possibility to treat only symptoms of misbehaviour of such software programs as in mentioned legal acts. But the better way would be to find fundamentals of this problem and try to look for an answer for the question how to construct liability framework when the new party emerge – some kind of electronic entity which is able to make their own, unpredictable decisions.

CONCLUSION

I tried to show the brand new problem in the field of theory of law – autonomous software agents. I chose high frequency trading as the most vivid example of the issue. I showed that it isn't merely theoretical problem. In fact, it is the major issue in the world of economics. I also tried to show, that different national regulations would bring more problems than solutions, in consequence of highly internationalized nature of modern economics.

Although I think, that some regulations are crucial I'm sure that overregulated legislation would bring troubles. There are some opinions, that even very emergence of high-frequency trading is a consequence of too strict legal prohibitions¹³. In my opinion the best way is not to regulate only part of the problem. The most efficient would be to try investigate whole problem from its fundamentals. It would be of course harder task but it would be more beneficial.

As I mentioned contracts made by computer programs are a brand new issue. The regulatory task would require deeper studies. Although it would have practical consequences the theoretical background would be inevitable. By calm investigation, which isn't driven by momentary needs, legislators reinforced by legal theoreticians would create new model of contracts, which would be sufficient for word with exponentially growing impact of the technological factor. Legal theory merged with philosophy of artificial intelligence would provide detailed overview of the issue of autonomous artificial agents in the law and offer lawmakers an insight preventing against temporary and partial regulations which would have to be changed shortly after introduction.

¹³ <http://www.cnbc.com/id/100276801> access: 27.03.2013

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JUDICIAL COOPERATION IN CIVIL MATTERS IN THE EUROPEAN UNION

Iwona Miedzińska*

University of Warsaw, Poland

Abstract. The subject of this paper is a judicial cooperation in civil matters as a instrument of the convergence of national legal systems of civil law. Author tells about history and content of judicial cooperation in civil matters, especially about progress in the areas of competence, recognition and enforcement of judgments in matrimonial cases and those involving parental responsibility for joint children and notification and service of judicial and extra-judicial documents in the Member States in civil cases. Will discuss this based on the main legal acts adopted on the matter and the case law of the Court of Justice of the European Union.

Keywords: judicial cooperation, civil matters, national legal systems of civil law, Court of Justice of the European Union

INTRODUCTION

The subject of this paper is a judicial cooperation in civil matters. Main hypothesis assumes that judicial cooperation in civil matters is an example of convergence of national legal systems, because solutions and legal institutions, adopted at the European Union level, regulate the cooperation between Member States (MS) in this area of integration. In the study area, we can use the following theories: liberal intergovernmentalism, the new institutionalism and multi-level governance. These theories are different interest, so they give the final results of a combination of interest for the purposes of research, thus satisfying the researcher. Among the useful methods are system analysis method, institutional and legal analysis and decision-making method.

Even Article 220 of the Treaty of Rome included the possibility of cooperation between Member States of the European Community to the simplification of formalities governing the reciprocal recognition and enforcement of judicial decisions. Even so, before the Treaty of Amsterdam, judicial cooperation in civil matters based mainly on the international agreements. The Treaty of Amsterdam incorporated judicial cooperation in civil matters to the area of the Community, even though it is not made subject to the Community decision-making procedures under the general

* Master of Arts in Political Science; Political Science PhD Student at the Department of Journalism and Political Science at the University of Warsaw, student at the Faculty of Law at the University of Warsaw. The author is interested in the legal and political dimensions of European integration. Her research interests are focused on an Area of Freedom Security and Justice of the European Union, mainly on judicial cooperation in civil matters. She is also interested in foreign policy of the European Union, especially in the role of the High Representative of the Union for Foreign Affairs and Security Policy of the European Union's institutional system.

law. After the entry into force of the Treaty of Lisbon¹ in 2009, legal cooperation in civil matters is being developed in accordance with the ordinary legislative procedure. However, family law is subject to a special legislative procedure: However, family law is subject to a special legislative procedure: the Council decides unanimously, after consulting the European Parliament.

GENERAL LEGAL FRAMEWORK

Judicial cooperation in civil matters is the sphere of European integration within the Area of Justice, Freedom and Security², regulated in the Title V Treaty on the Functioning of the European Union (TFUE). According to the Treaty of Lisbon, its aims are to establish closer cooperation between the national institutions of the Member States. It seeks to remove the obstacles arising from inconsistencies between different systems of law and administration, and thus facilitate European Union (EU) citizens access to justice. It is based on the principle of mutual recognition and enforcement of judgements and of decisions resulting from extrajudicial cases. Such cooperation, in accordance with article 81 paragraph 1 TFUE, may include the adoption of measures for the approximation of the laws and regulations of the MS.

For these purposes, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure³, shall adopt measures, in particular when it is necessary for the proper functioning of the internal market, aimed at ensuring:

- “the mutual recognition and enforcement between Member States of judgements and of decisions in extrajudicial cases;
- the cross-border service of judicial and extrajudicial documents;
- the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- cooperation in the taking of evidence;
- effective access to justice;
- the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- the development of alternative methods of dispute settlement;
- support for the training of the judiciary and judicial staff”⁴.

There is an exception in the form of a special legislative procedure, which is applicable to the field of family law with cross-border implications. In accordance with article 81 paragraph 3 TFUE, in such cases the Council shall act unanimously after consulting the European Parliament. It should be noted that the Council, on a proposal from the Commission and acting unanimously

1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing The European Community [2007] OJ C306/01

2 About the evolution and legal basis for cooperation in this area of European integration see: P. Wawrzyk, ‘Przestrzeń wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej’ (Warszawa: Wydawnictwo Poltext 2012) 13-88

3 Ordinary legislative procedure is described in article 294 TFUE

4 Article 81 paragraph 2 TFUE

after consulting the European Parliament, can decide which aspects of family law with cross-border implications may be the subject of acts adopted by the ordinary legislative procedure. Then the proposal shall be notified to the national Parliaments, which may object within six months of the date of such notification and then the decision shall not be adopted. In the absence of national Parliaments object, the Council may adopt the decision.

Currently, judicial cooperation in civil matters is specifically assisted by the 'Civil Justice' programme, through support the training of lawyers and strengthening networks for disseminating and exchanging information⁵. As part of the general programme 'Fundamental Rights and Justice', it contributes to the creation of a European area of justice in civil matters, based on the principles of mutual recognition and trust. The 'Civil Justice' programme was established by the Decision of the European Parliament⁶ and of the Council on 25 September 2007 for the period from 1 January 2007 to 31 December 2013. It has four main general objectives:

- to promote judicial cooperation in civil matters in order to create a European area of justice in civil matters based on mutual recognition and trust;
- removing obstacles to the good functioning of cross-border civil proceedings between Member States;
- allows individuals and businesses to enforce their rights throughout the European Union, in particular by improving access to justice;
- to improve the contacts, networking and the sharing of information between judicial and administrative authorities and the legal professions with the aim of better mutual understanding and exchange of knowledge.

At this point it should be mentioned about the Stockholm Programme⁷, which provides a roadmap for EU's work in the area of justice, freedom and security for the period 2010-14. Its aim is to meet the future challenges and strengthening the Area of Justice, Freedom and Security by taking into account the interests and needs of citizens.

Quite an important document is the Convention on Choice of Court Agreements⁸, which is used in international cases to exclusive choice of court agreements concluded in civil or commercial matters. It does not apply to a number of other matters referred to in Article 2, such as the status and legal capacity of natural persons, maintenance obligations and other family law matters (including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships), the carriage of passengers or goods, marine pollution, competition matters, the validity of legal persons, the validity of intellectual property rights, etc. Furthermore, it shall not apply to

5 From 1 January 2002 to 31 December 2006 general framework for Community action in order to facilitate judicial cooperation in civil matters contained Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters [2002] OJ L115/1

6 Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme 'Civil Justice' as part of the General Programme 'Fundamental Rights and Justice' [2007] OJ L257/16

7 The Stockholm Programme – an open and secure Europe serving and protecting citizens [2010] OJ C115/1

8 Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements [2009] OJ L133/1

arbitration and related proceedings. An exclusive choice of court agreement may be concluded by two or more parties to designate the courts (one or more specific courts) of one contracting state as having jurisdiction in disputes relating to a particular legal relationship. This agreement must be made in writing or by other means that allow the information to be accessed subsequently.

Convergence of national civil law systems is supported by the European Case Law Identifier (ECLI), which will enable each national case law to be numbered in accordance with a standard code, thus facilitating legal research on the Internet. The Council invites MS to introduction of a ECLI and a minimum set of uniform metadata for case law⁹. Citizens, legal professionals and national authorities should therefore have a tool which enables case law to be searched easily.

Sources of law in the field of judicial cooperation in civil matters in the EU is open to all legal instruments referred to in article 288 TFUE: regulations, directives, decisions, recommendations and opinions. This area also include international agreements concluded in this respect by the MS and the EU. In the field of judicial cooperation in civil matters assumed that the most important acts are usually the form of regulations¹⁰.

AUTONOMOUS INTERPRETATION IN THE FRAMEWORK OF JUDICIAL COOPERATION IN CIVIL MATTERS

Instruments issued under judicial cooperation in civil matters are part of EU law, therefore legal terms contained in them should have similar meaning throughout the EU. They are single, autonomous interpretation, generally detached from the scheme of national law, of course if there is no express or implied reference to national law. In this way, for example by terms such as “civil and commercial matter”, “a judgment of a court” or “an official document” can not be interpreted on the basis of the criteria of national law, but in the spirit of the law and the scheme of the EU. For example, in case C-283/09 the Court of Justice of the European Union (CJEU) stated that term “costs” shall be autonomous interpretation accordance with Union law and is not dependent on the qualifications made on the basis of national law. “If the question of costs were to be made dependent on the national definition of that concept, that would run counter to the spirit and purpose of Regulation No 1206/2001, which is intended to enable requests for the taking of evidence to be executed quickly and simply”¹¹.

THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION – SELECTED JUDGEMENTS

The concept of ‘civil and commercial matter’ is subject to many publications and extensive case law of the CJEU and national courts, which shows that it is an autonomous of the legal systems

9 Council conclusions inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law [2011] OJ C127/1

10 See: W. Sadowski, M. Taborowski ‘Współpraca sądowa w sprawach cywilnych’ (Warszawa: Instytut Wydawniczy EuroPrawo 2011) 22-25

11 *Artur Weryński v Mediatel 4B spółka z o.o.*, Case C-283/09 [2011] ECR I-00601

of the MS. We can say that for the qualification of the case as a civil or commercial matter are important elements which characterize the legal relationship existing between the parties or of the subject¹². In practice, quite important is the institution of *lis pendens*, regulated by Regulation no 44/2001¹³. Proceedings before a court of a MS excludes the possibility of conducting proceedings in the courts of other Member States, which by virtue of the provisions of this regulation would be entitled to a national jurisdiction to hear the matter, at least until a final finding of lack of jurisdiction by the court of the first MS. In case C-116/02¹⁴ CJEU has held that the obligation to suspend the proceedings by the court before which the case is pending and a ban after testing the jurisdiction of the court before which the case is pending, first, involves the court as provided by the agreement of the parties have been entitled to the exclusive jurisdiction of the dispute.

Regulation no 44/2001 also includes simplified procedure for a declaration of enforceability of a foreign judgement, which is subject to the feasibility of the territory of the Member State concerned. This procedure is used in accordance to the recognition and enforcement. Regulation does not regulate fully all aspects of the declaration of enforceability, and therefore should be used supplementary national procedural rules in this regard¹⁵. CJEU judgement in Case C-420/07¹⁶ is a very good example that shows how the Court examines the grounds for refusal to certify the enforceability of foreign court. CJEU reminded that the court can not refuse to recognize the judgement of another Member State only because it considers that the decision by national or EU law has been misapplied. National court may refuse to recognize the judgement, if the error of law mean that the recognition or enforcement of the judgement should be regarded as a manifest breach of the fundamental principle of the legal order of the MS. CJEU has also held that it can not be denied recognition and enforcement of a judgement given in default of appearance, if the defendant can appeal against the judgement and if any appeal allowed him to plead that the document instituting the proceedings or an equivalent document has not been served on him at the time and in the manner to enable the preparation of the defence.

In Case C-443/03¹⁷ CJEU pointed out, that the national court must ensure compliance with the rights of the parties to the dispute. In particular, it should ensure that the recipient of the document have sufficient time to prepare his defence and to ensure that the party sending the document did not suffer the negative consequences of the refusal to accept the untranslated document. The operative part of the Case C-14/07¹⁸, the CJEU stated that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document,

12 This is due to, inter alia, the judgments in cases: C-167/00, C-271/00, C-266/01, C-343/04. See: W. Sadowski, M. Taborowski 'Współpraca sądowa w sprawach cywilnych' (Warszawa: Instytut Wydawniczy EuroPrawo 2011) 52-53

13 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1

14 *Erich Gasser GmbH v MISAT Srl*, Case C-116/02 [2003] ECR I-14693

15 For example, in Poland are mainly provisions of the Code of Civil Procedure of the international civil.

16 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Case C-420/07 [2009] ECR I-03571

17 *Götz Leffler v Berlin Chemie AG.*, Case C-443/03 [2005] ECR I-09611

18 *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, Case C-14/07 [2008] ECR I-03367

provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subject-matter of the claim and the cause of action.

CONCLUSION

As is apparent from the above, judicial cooperation in civil matters is an example of convergence of national legal systems of civil law. The solutions and legal institutions, adopted at the European Union level, regulate the cooperation between Member States in this area of integration. Especially to emphasize the importance of institutions such as mutual recognition and enforcement of judgements, service of documents, European Enforcement Order, European Payment Order and European small claims procedure.

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EU COMPETITION LAW – NO PLACE FOR NATIONAL RULES?

Darius Miniotas*

Vilnius University, Lithuania

Abstract. The paper examines the role and discretion of national competition authorities in applying competition rules to hardcore vertical restraints and the correlation of this discretion with the goal of market integration. The paper focuses on one specific type of vertical restraint – prohibition (restriction) of parallel trade within the context of pharmaceutical industry. The paper discloses that due to the very specific economic and legal environment of the pharmaceutical sector, agreements restricting parallel trade of pharmaceuticals should not be condemned as anticompetitive and harming consumer welfare in all cases. It is discussed whether it is reasonable that extremely negative attitude towards such agreements is more conditioned upon the zealous pursuit of European Union’s internal market integration goal than legal or economic logic and whether national competition authorities should be bound by the same integration goal as well. The paper concludes that national competition rules must preserve a degree of autonomy and find their place within the system of EU competition law.

Keywords: Regulation 1/2003, European Commission, National competition authorities, Hardcore vertical restraints, Parallel trade

INTRODUCTION

Last decade has been very interesting in terms of development of the EU competition law. On 1st of May 2004 Council Regulation 1/2003¹, also known as “Modernisation Regulation”, came into effect, bringing the end to the cumbersome and much-criticised European Commission’s (hereinafter – **the Commission**) centralised enforcement of competition law. It abolished individual notification system under Article 101 of Treaty on the Functioning of the European Union (hereinafter – **TFEU**) and granted the power for the national competition authorities (hereinafter – **NCAs**) and courts to apply Articles 101 and 102 TFEU directly. In essence it meant that the power to apply EU competition rules has been decentralised from the prevailing dominance and sole discretion of the Commission and assigned to competition authorities and courts of each of the 27 Member States.

Such decentralisation naturally poses a threat to uniform application of EU competition rules throughout the Member States as different NCAs may differently interpret and apply Articles 101 and 102 TFEU thus potentially creating legal uncertainty. The Commission addressed this problem in Article 3 of the Regulation 1/2003 by establishing so called convergence rule. Under this

* PhD student at Law Faculty of Vilnius University, Department of Private Law. The author has been interested in competition law since 2007 and is currently pursuing doctoral degree in the field of hardcore vertical restraints. He also practices as an attorney specialising in EU and Lithuanian competition law.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

rule the NCAs have not only the possibility, but also an obligation to apply Articles 101 and 102 TFEU together with the national competition rules in all cases where the effect on trade between the Member States is affected. In practice this means that while applying the competition rules established in the Treaty, the NCAs have to follow the precedents and guidance provided by the Commission and the Court of Justice.

The convergence rule undoubtedly contributes to avoiding divergence in application of EU competition rules in different Member States. This means that equal market conditions and game rules are established for companies operating throughout the European Union, bringing legal certainty and predictability in the assessment of the business conduct of the undertakings.

However, this also means that the Commission preserves its dominance on EU competition policy matters. With the help of newly established European Competition Network the Commission keeps a close eye on the competition law developments in Member States, seeking uniform and consistent application of EU competition rules.

Considering that most Member States have adopted competition laws which are similar or even identical to Articles 101 and 102 TFEU, the question arises whether NCAs have any discretion to deviate from the practice and policy of the European Commission while applying competition rules within their jurisdiction in cases where legal and economic context of the assessed practices potentially requires such deviation.

The paper concentrates on this problem by analysing the application of competition rules to hardcore vertical restraints, with the focus on recent practices related to restriction of parallel trade.

1. Hardcore vertical restraints in EU competition law

Vertical agreements having the provisions which restrict parallel trade and establish resale price maintenance measures since the beginning of application of EU competition rules were treated as hardcore restraints, having as their *object* the appreciable restriction of competition; consequently they were held as *per se* infringing Article 101(1) TFEU.² In cases of such restrictions it is not required to establish³ or observe⁴ the anti-competitive effects of the agreements; they are held to automatically infringe Article 101(1) TFEU by their object. *De minimis* doctrine⁵ and Block Exemption Regulation⁶ do not apply to these types of restraints.

Although such restrictions in theory may be individually exempted by applying Article 101(3) TFEU and proving benefits and efficiencies brought by the restrictions, practice shows that the

2 A. Jones, B. Sufrin, 'EC Competition Law: Text, Cases and Materials. 2nd ed.' (New York: Oxford University Press 2004) 628-635; R. Whish, 'Competition Law. 6th ed.' (New York: Oxford University Press 2009) 116.

3 *VdS v Commission*, Case 45/85 [1987] ECR 405, para 39.

4 *Trans-Atlantic Conference Agreement*, Case IV/35.134 [1999] OJ L95/1.

5 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C368/07.

6 Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.



Commission is reluctant to apply individual exemption to hardcore vertical restraints and considers them to be detrimental to competition basically in all cases.⁷ This position leads to the conclusion that hardcore vertical restraints are effectively *de facto per se* prohibited and the possibility of individual exemption is more mirage than reality.

In order to understand the fierce position of the Commission towards the hardcore vertical restraints a slight deviation into the area of goals of the EU competition law is required.

2. Goals of EU competition law

EU competition law is a peculiar legal system for it pursues at least two major and equal goals: (i) the promotion and achievement of market integration between the Member States, and (ii) the promotion of effective and undistorted competition. These goals may be respectively defined as the “integration goal” and the “economic goal”.⁸ In recent years the consumer welfare has been placed as central and ultimate objective of the competition law by many, even the Commission itself⁹, and these goals may be seen as equal measures for the achievement of this ultimate objective.

However, the goals of the EU competition law are in potential conflict with one another. The integration goal pursues the homogeneity of different markets existing in Member States which means that measures restricting or limiting the supply of goods or services to different markets or creating different distribution conditions are always seen as an obstacle for creation of a single market and thus contrary to the respective integration goal. On the other hand, territorial restrictions in certain distribution systems are proven to be economically efficient and facilitating the competition. A good example is exclusive distribution agreements where usually each distributor is assigned a specific territory (usually a country) where he can resell supplier’s products and is prohibited to sell to the territories of other distributors. The supplier may also agree that it will not sell its products directly into the territories granted to its distributors.¹⁰ Such type of agreement clearly contravenes the vision of integrated and unified EU market. Nevertheless, exclusive distribution agreements, with certain restrictions, are an allowed practice within the EU as the Commission acknowledges the efficiencies which these distribution systems bring to the competition, mainly related to protection of the investments and savings in logistics costs due to economies of scale.

Exclusive distribution is an example of a clash between the two goals of the EU competition goal resulting in “economic goal’s” precedence over the “integration” goal. It is also a very rare example of such precedence. The Commission is famous for its obsession regarding market integration and is ready to go great lengths in order to achieve the single market objective. Unfortunately,

7 For example of Commission’s position regarding resale price maintenance see L. Peepkorn, ‘Resale Price Maintenance and It’s Alleged Efficiencies’ [2008] 4/1 European Competition Journal 201, 203.

8 S. Bishop, M. Walker, ‘The Economics of EC Competition Law: Concepts, Application and Measurement. 3rd ed.’ (London: Sweet & Maxwell 2010) 5.

9 See, for example, the speech of the then European Commissioner for competition policy Neelie Kroes given in London in September 2005, available at http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm.

10 R. Whish, ‘Competition Law. 6th ed.’ (New York: Oxford University Press 2009) 628.

this means that an agreement which aims to restrict cross-border trade will be treated with great suspicion and scrutiny and all the economic efficiencies brought by such agreement will be questioned to the extreme depths. This situation results in undertakings having an enormous burden of proof which they need to overcome in order to get “green light” from the Commission. Such position comes at great cost – ignorance of the impact on economic welfare prohibits creation of economically sound competition rules. Focus solely on the market integration goal can even result in negative outcomes to the economic welfare of the individual Member States and deprive the NCAs of the possibility to adopt decisions which best serve the interests of their national markets and its consumers. A good illustration of such tendencies is *GlaxoSmithKline* dual pricing case¹¹, concerning GlaxoSmithKline’s attempts to prevent parallel trade of its pharmaceuticals out of Spain.

3. GlaxoSmithKline dual pricing case

Prices of prescription pharmaceuticals throughout the EU are to a very large extent regulated by the governments of different Member States. This results in large differentiations of prices between the Member States, amounting to gaps of 30% or more and in cases of certain pharmaceuticals – up to 100%. For example, prices in Spain and Greece are much lower than in the United Kingdom, France or Germany. Such regulatory environment is extremely favourable to opportunistic parallel trade – wholesalers in Spain and Greece order huge quantities of pharmaceuticals from the manufacturers at a lower price applicable in those markets and then export the pharmaceuticals into the much higher priced regions of the EU. This trade model creates huge profits for the wholesalers, but brings much less, if any, benefits to the consumers, as the imported pharmaceuticals are sold barely below the level of the government-set official price. This is done for the sole purpose of profit maximisation. In addition, such trade model disrupts and distorts the supply of the pharmaceuticals to the exporting national markets as the manufacturer cannot keep up with the increasing orders from the wholesalers. Furthermore, it creates the risk that due to large quantities of exported pharmaceuticals, consumers of national markets may face shortages and the manufacturer at a certain point may terminate supply to such exporting national markets altogether.

GlaxoSmithKline is a major manufacturer of pharmaceuticals. In order to manage the daily growing demands of wholesalers for supply of pharmaceuticals into the national market of Spain which were later exported into higher priced territories, GlaxoSmithKline introduced a dual pricing system – pharmaceuticals which were intended for selling within national market of Spain were sold at a price set by the Spain government, and pharmaceuticals intended for parallel trade were sold at a higher price. GlaxoSmithKline, knowing that such pricing model is clearly not in line with the Commission’s practice in the field of parallel trade, notified it to the Commission and sought exemption pursuant to Article 101(3) TFEU. Supporting its arguments by three economic studies,

¹¹ *Glaxo Wellcome*, Case 2001/791/EC [2001] OJ L302/01; *GlaxoSmithKline Services v. Commission*, Case T-168/01 [2006] ECR II-2969; *GlaxoSmithKline Services v. Commission*, Joined cases C 501/06 P, C 513/06 P, C 515/06 P and C 519/06 P [2009] ECR I-09291.



GlaxoSmithKline highlighted the harm which parallel trade brings to the consumer welfare and indicated pro-competitive benefits as well economic efficiency which are the result of such restrictions.

Unsurprisingly, the Commission rejected the presented efficiency arguments and held that such pricing model infringes Article 101(1) TFEU, contravenes the single market imperative and therefore is considered as unlawful. However, on the appeal both the General Court and the Court of Justice stated that the Commission was too quick to reject the arguments presented by the GlaxoSmithKline and indicated that a more thorough assessment of the presented efficiency arguments is required. As a result, the initial decision of the Commission was annulled.

This case clearly illustrates how the Commission's judgement may be clouded in the zealous pursuit of its 'Holy Grail'. Restriction of parallel trade in the pharmaceutical sector has at least three major arguments justifying its usage. *First*, parallel trade may only be beneficial to the consumers in the importing countries and only with the condition that parallel traders set the price sufficiently below the government-set maximum price. *Second*, the exporting countries may face disruptions, shortcomings or even terminations of supply of pharmaceuticals, thus putting the consumers in such countries at a severe disadvantage. *Third*, parallel trade is beneficial only to the consumers with higher ability to pay as it tends to harmonise prices by slightly reducing the prices in the higher priced countries and at the same time creating pressure in the lower priced countries to adapt to the higher price¹², thus creating the need for a certain unified price. As a consequence the welfare of the consumers living in the lower priced countries is significantly reduced as they are forced to pay the price which they do not want or even cannot pay.

The question arises what is the role of NCAs in such cases where the effects on practices approved by the Commission due to their contributions to the creation of a single market may cause inefficiencies in the national markets of the Member States or even harm to its individual consumers. The integration goal is alien to the national systems of competition law; therefore in theory NCAs should be free in assessing the practices which traditionally were held as restricting competition, however in certain legal and regulatory conditions emerging as pro-competitive and efficient. This means that the competition authorities of Spain and Greece should assess practices related to restricting parallel trade in an entirely different light than the Commission. In fact Greece Competition Commission in another case has already held that the same GlaxoSmithKline did not abuse its dominant position by refusing to satisfy orders from the wholesalers and thus unilaterally restricting parallel trade. Such conduct was objectively justified in large part due to the reasons indicated above.

Nevertheless, it is very likely that the Commission shall use all its powers granted by the Modernisation Regulation in order to ensure a decision which would be in line with the single market objective. Whether such forced convergence of application of EU competition rules really contributes to the best interests of consumers in different Member States and in different national markets remains to be seen.

¹² J. Drexler, 'Healing With Bananas – How Should Community Competition Law Deal With Restraints On Parallel Trade In Pharmaceuticals?' In *Technology and Competition* (Bruxelles: Larcier, 2009) 582.

Conclusion

It may be concluded that while the Commission's will to pursue the single market objective is admirable to a certain extent, a degree of autonomy for the NCAs in order to ensure the welfare of the consumers of the national markets is nevertheless required. Lack of such autonomy and absolution of integration goal shall prevent creation of economically sound competition rules and unavoidably restrict the discretion of the NCAs to pursue goals of their national competition law systems. Therefore national competition rules must persist and find their place in the increasingly unifying internal market of the European Union.

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ASSISTED REPRODUCTIVE TECHNOLOGIES: A STATE MATTER

Alessia Minieri*

Pavia University, Italy

Abstract: My essay analyses the state of assisted reproductive technology (ART) law in Italy, a field that, despite numerous attempts, still lacks a comprehensive regulation.

Due to ethical and bio-legal issues arising in connection with national statutes, (I) I will describe the main features and issues of ART practice such as access to service, the definition of cryopreservation of pre-embryos, the legal value of surrogacy arrangements, the scope of gametes and, in particular, I will evaluate different activities that are either regulated or even prohibited. I will try to explain (II) the main characteristics of European systems and (III) the prevailing trends in other countries.

In conclusion, (IV) I will focus on the critical points of the Italian “*norme in materia di procreazione medicalmente assistita*” (“rules governing medically assisted reproduction”), introduced by statute no. 40 of 2004, emphasizing that some of these rules have been both repealed by the Italian Constitutional Court and rejected by the European Court of Human Rights.

Key Words: ART/ cryopreservation/ embryo donation/ MAR/ PGD/ surrogacy arrangements

I. INTRODUCTION: GUIDELINES AND DEFINITIONS

Rights to sexual and reproductive health are generally recognized as an integral part of the right to health¹. From the 1994 International Conference on Population and Development (ICPD) in Cairo and the Fourth World Conference on Women held in Beijing in 1995, States started to recognize the importance of a comprehensive approach to sexuality. The objectives of the ICPD Programme of Action (that is, to reduce maternal mortality, break down AIDS and improve rights to sexual and reproductive health) have direct implications upon rights to sexual and reproductive health² such as freedom to control one’s body, the right to an efficient health system and an easy access to information on sexual and reproductive health issues. Accordingly, States have the obligation to guarantee adequate services and information on medically assisted reproduction.

There is no consensus on a worldwide accepted definition of ART. The closest to an international definition may be found in the glossary provided by the World Health Organization³: “*all*

* Final year student at the Law School in Pavia (single-cycle 5-year degree course), currently attending the International and Comparative Law course.

1 Commission on Human Rights resolution no. 2003/28 concerning the right of everyone to the enjoyment of the highest attainable standard of physical and mental health [2003] E/CN.4/RES/2003/28

2 Human Right Council Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health GE.10-13403 (E) 020610 [2010] A/HRC/14/20/Add.3

3 Glossary developed by 72 clinicians, basic scientists, epidemiologists and social scientists gathered together at the WHO headquarters in Geneva.

treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor."

Hereinafter, there is a terminology provided by WHO in order to contribute to a more standardized communication among professionals responsible for ARTs practice.

Cryopreservation: the freezing or vitrification and storage of gametes, zygotes, embryos or gonadal tissue.

Embryo donation: the transfer of an embryo resulting from gametes (spermatozoa and oocytes) that did not originate from the recipient and her partner.

Fertilization: the penetration of the ovum by the spermatozoon and combination of their genetic material resulting in the formation of a zygote.

Gestational carrier (surrogate): a woman who carries a pregnancy with an agreement that she will give the offspring to the intended parent(s). Gametes can originate from the intended parent(s) and/or a third party.

In vitro fertilization (IVF): an ART procedure that involves extracorporeal fertilization.

Infertility (clinical definition): a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.

Intra-Cytoplasmic Sperm Injection (ICSI): a procedure in which a single spermatozoon is injected into the oocyte cytoplasm.

Medically Assisted Reproduction (MAR): reproduction brought about through ovulation induction, controlled ovarian stimulation, ovulation triggering, ART procedures, and intrauterine, intracervical and intravaginal insemination with semen of partner or donor.

Preimplantation Genetic Diagnosis (PGD): analysis of polar bodies, blastomeres or trophectoderm from oocytes, zygotes or embryos for the detection of specific genetic, structural and/or chromosomal alterations.

Sperm recipient cycle: an ART cycle in which a woman receives spermatozoa from a donor who is someone other than her partner.

II. ART PRACTICE THROUGHOUT THE EUROPEAN UNION⁴

What follows is a table summarizing the national legislations on ARTs. As you may notice with a first reading, the legislation of each country varies according to its socio-economic, historical, political, religious and cultural background. As a result, there are important regulatory and legal divergences among nations in the provision of ART services.

Country	MAR legislation	Access to IVF/ICSI	Gametes donation	Cryopreservation and PGD
Austria	<i>Fortplantungsmedizingesetz</i> (01.07.1992); Tissue safety Law (19.03.2008)	Heterosexual couples only	Sperm donation	Allowed, Forbidden
Belgium	Regulation of IVF Centers Law (15.02.1999); Law on embryo research (11.05.2003); Law on conditions reimbursement laboratory (04.06.2006); Tissue and cell directives (19.12.2008).	Homosexual couples and single women	Allowed	Both Allowed
Bulgaria	MAR is covered by a general health law	Lesbian couples and single women	Embryo donation allowed	Both Allowed
Croatia ²	No specific legislation in place.	Allowed	Sperm donation	Partly allowed, Forbidden
Cyprus	MAR is covered by a general health law	Homosexual couples and single women	Allowed	Both Allowed
Czech Republic	No data could be obtained on the existence of MAR- specific legislation	No restrictions mentioned	Post-mortem use of gametes partly allowed	Forbidden, Allowed
Denmark	Statute no. 923 of 2006, 284 of 2007, 534 of 2008	Homosexual couples and single women too	No embryo donation (only for research)	Partly allowed, Allowed
Estonia	Assisted fertilization and Protection of the Embryo Law	Allowed	Allowed	Allowed, Forbidden

⁴ European Parliament and Council Directive (EC) 2004/23 concerning setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L102/48 (Cell and Tissue Directive); European Parliament and Council Directive (EC) 2006/17 implementing Cell and Tissue Directive concerning certain technical requirements for the donation, procurement and testing of human tissues and cells [2006] OJ L38/40 (Cell and Tissue Directive); European Parliament and Council Directive (EC) 2012/39 amending Cell and Tissue Directive concerning certain technical requirements for the testing of human tissues and cells [2012] OJ L327/24 (Cell and Tissue Directive)

² Croatia is set to become the 28th member state of the European Union on 1 July 2013.

Country	MAR legislation	Access to IVF/ICSI	Gametes donation	Cryopreservation and PGD
Finland	Act of Assisted Reproduction (22.12.2006); Act of Medical use of human organs, tissues and cells (02.02.2001)	Homosexual couples and single women too	No embryo donation. Identifying info	Both Allowed
France	Statute no. 800 of 2004	Married or co-habiting couples at least for two years	No embryo donation	Allowed, Partly allowed
Germany	<i>Gesetz zum Schutze von Embryonen</i> (13.12.1990); <i>Gesetz über Qualität und Sicherheit von menschlichen Geweben und Zellen</i> (20.07.2007)	Heterosexual married or co-habiting couples only	Sperm donation for IUI only. Identifying info	Both partly allowed
Greece	Statute no. 3305 of 2005	Heterosexual couples and single women	Embryo donation allowed	Both Allowed
Hungary	MAR is covered by a general health law	Heterosexual couples and single women	Allowed	Both Allowed
Ireland	MAR is covered by a general health law	Allowed	Allowed	Both Allowed
Italy	Statute no. 40 of 2004	Heterosexual married or co-habiting couples only	Forbidden	Both Partly Allowed
Latvia	MAR is covered by a general health law	Allowed	Allowed	Both Allowed
Lithuania	MAR is covered by a general health law	Heterosexual couples only	Forbidden	Forbidden, Allowed
Luxembourg	MAR is covered by a general health law	Allowed	Allowed	No legislation
Malta	MAR is covered by a general health law	Allowed	Allowed	Both Forbidden
Netherlands	Act on In Vitro Fertilization (01.04.1998); Embryo Act (20.06.2002); Law on data from donors for artificial reproduction (25.04.2002); Law on safety and quality of human tissues (06.02.2003).	Homosexual couples and single women too	Post-mortem use of gametes allowed. Identifying info	Both Allowed
Poland	MAR is covered by a general health law	Allowed	Allowed	Both Allowed
Portugal	Statute no. 32 of 2006	Allowed	Allowed	Allowed, Partly allowed
Romania	No specific legislation in place, only statute no. 95 of 2006 based on Cell and Tissue Directive	Allowed	Allowed	Both Allowed

Country	MAR legislation	Access to IVF/ICSI	Gametes donation	Cryopreservation and PGD
Slovakia	No data could be obtained on the existence of MAR- specific legislation	Allowed	Allowed. Identifying info.	Both Allowed
Slovenia	Act on infertility treatment and procedures of biomedical assisted procreation (28.07.2000); Act for quality and safety of tissues and cells (02.07.2007)	Allowed	Forbidden	Forbidden, Allowed
Spain	Royal Decree no. 1301 of 2006	Lesbian couples and single women	Post-mortem use of gametes allowed	Both Allowed
Sweden	Statute no. 286 of 2008	Married or co-habiting couples only	Allowed. No Embryo donation. Identifying info	Allowed, Partly allowed
United Kingdom	The Human Fertilisation and Embryology Act 1990, 2008; The Human Reproductive Cloning Act 2001.	Married or co-habiting couples and single women	Allowed. Identifying info	Allowed, Partly allowed

Reasons for crossing borders: the reproductive tourism. A survey conducted by the **European Society of Human Reproduction and Embryology**⁵ (ESHRE) shows that, among all the reasons for crossing borders, legal reasons are prevailing for patients coming from Italy (70.6%), Germany (80.2%), France (64.5%), and Norway (71.6%). Instead, access difficulty is pivotal for UK patients (34.0%).

Country of residence	Legal Reasons	Access Difficulty	Better Quality	Previous Failure
Italy	70.6	2.6	46.3	26.1
Germany	80.2	6.8	32.8	43.5
France	64.5	12.1	20.6	18.7
The Netherland	32.2	7.4	53.0	25.5
UK	9.4	34.0	28.3	37.7
Sweden	56.6	13.2	24.5	5.7
Total %	54.8	7.0	43.2	29.1

Going into detail, the aforementioned survey shows that the majority of patients cross borders for legal reasons apart from the Dutch or UK citizens. Thus legal barriers are a major factor,

⁵ ESHRE Final Report (SANCO) 2008/C6/05 concerning comparative analysis of medically assisted reproduction in the EU: regulation and technologies [2008] (http://ec.europa.eu/health/blood_tissues_organ/docs/study_eshre_en.pdf)

whether because of age (France), banned techniques (Italy and Germany) or sexual preference (France and Norway).

Civil status and sexual orientation of the patient. In Sweden only couples have access which explains the high proportion of single women (43.4%) seeking treatment abroad. In France the legal requirement to be in a heterosexual couples in order to have access to ART explains why 39.2% of French patients are homosexual and 16.4% single (the situation is going to change since the equal marriage law has recently been approved by the French Parliament)⁶.

EU countries where surrogacy arrangements are not prohibited. Surrogacy is an arrangement in which a woman carries and delivers a child for another couple or person. The surrogate may be the child's genetic mother (so-called traditional surrogacy) or she may be genetically unrelated to the child (so-called gestational surrogacy). *Altruistic surrogacy* is a situation where the surrogate mother receives no financial reward for her pregnancy or the relinquishment of the child and it is permitted in Hungary, the Netherland and the UK (including LGBT). *Commercial surrogacy* is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in the uterus of a surrogate mother and it is legal in Croatia, Cyprus (including LGBT), Denmark and Latvia.

It is noteworthy that many EU countries do not have any provisions on surrogacy: Belgium, Czech Republic, Finland, Greece, Ireland, Lithuania, Luxembourg, Malta and Romania.

III. GLOBAL TRENDS:

A SUMMARY OF THE MOST SIGNIFICANT LEGISLATIONS ON ARTS.

Brazil. PGD is allowed, excluding sex selection. Altruistic surrogacy⁷ is allowed but surrogate must be related to the prospective parents. Post-mortem⁸ use of gametes is possible whether the approval from the donor prior to death has been obtained. Access: no age limit for women who want IVF. Lesbians, homosexuals and single women are eligible for treatment.

Canada. In 2006 the Assisted Human Reproduction Act allowed: surrogacy (excluding Quebec), gametes and embryo donation, the use of embryos and stem cells in research and the use of embryos and gametes to assist contraception. The same act banned human and stem cells cloning, the use of growing embryos for research, sex selection and the sale of reproductive material.

China. IVF/ICSI are allowed since 2001. Sex selection is only permitted for the prevention of X-linked genetic diseases and research on surplus embryos is allowed. Embryo donation is allowed but the sale of embryos is banned. Surrogacy is forbidden. Reproductive cloning is prohibited,

⁶ By contrast no British woman left because of sexual orientation, in fact the Human Fertilisation and Embryology Act (1990 c.37) never forbade access to lesbian couples.

⁷ *Surrogacy by country.* Altruistic surrogacy is also allowed in Australia, Canada (excluding Quebec) and Iceland. Commercial surrogacy is allowed in Armenia and Georgia (including LGBT), India, Israel, Russia, South Africa, Ukraine, Thailand and the (some states of) US.

⁸ *Posthumous reproduction by country.* Techniques of sperm and embryo freezing makes the birth of a child whose genetic father is dead technically possible. A valid written consent of the father is required in Argentina, Belgium, Latvia, the Netherlands, New Zealand, Spain, UK and (some states of) US. In Brazil, Greece and Israel the each request must be evaluated by a court.



whilst therapeutic cloning is practiced. PGD is permitted when there is a serious risk of damage to the offspring.

India is one of the most affordable destinations for all infertility treatments. PGD is allowed and sex selection is only allowed when there is a risk that the child will inherit a X-linked disease. Gametes and embryo donations are permitted. Sperm use after death is allowed under the control of the deceased legal nominee. Access: treatments include single women and lesbians. Women up to 55 years old can be treated using donated eggs. Surrogacy is available.

Iran is the only Muslim country in which gametes and embryos donation and surrogacy have been legitimized by religious authorities and passed into law, diverging from Sunni countries, where is only allowed homologous IVF. With regard to egg donation, the child of the egg donor has the right to inherit from her, as the infertile woman who received the eggs is considered to be like an adoptive mother. With regard to sperm donation, the baby born of sperm donation will follow the name of the infertile father rather than the sperm donor, parenting issues are the same as egg donation.

Israel. Contemporary Halakhic law welcomes the use of cryopreservation of gametes⁹ and also the use of a deceased husband's cryopreserved sperm with his explicit approval. Commercial surrogacy is permitted. The State subsidizes PGD in cases involving genetic diseases and it covers all expenses related to an IVF treatment that involves ova donations up to the birth of two children for all Israeli women, including for single women and lesbian couples.

South Africa. With the promulgation in 2010 of the new Children's Act 38 of 2005 **fertility law** has undergone certain changes as the access to IVF, married and cohabiting couples, including same sex couples, and single women are eligible for treatments. Commercial surrogacy is allowed.

United States. There are three different levels of ARTs regulation: state, federal and professional self-regulation. Everything is carefully monitored by the American Society for Reproductive Medicine (ASRM)¹⁰ and the Society for Assisted Reproductive Technology (SART)¹¹. The American Bar Association has recently proposed the Model Act Governing Assisted Reproductive Technology to provide some protections for participants in the use of the technology and set standards for its use.

⁹ Notice that Judaism is passed down through the maternal line (Deuteronomy 7:1-5; Leviticus 24:10). It is not uncommon, in fact, that Israeli reservists ask to freeze their sperm so that their partners or families will be able to create for themselves heirs. In addition, in 2007, an Israeli court allowed the right to use a dead soldier's sperm in order to inseminate a woman that he never knew.

¹⁰ ASRM has created guidelines for practitioners about how many embryos to implant in any in vitro fertilization cycle and about treating people whose medical conditions may complicate the typical course of IVF (such as those who are HIV-positive). However, the ASRM lacks the ability to enforce these guidelines.

¹¹ See American Society for Reproductive Medicine, 'Oversight of Assisted Reproductive Technology' [2010] ASRM Bulletin 12 (18)

IV. STATUTE NO. 40 OF 2004: RULES GOVERNING MEDICALLY ASSISTED REPRODUCTION IN ITALY

In 2004, the Italian Parliament approved statute no. 40 of 2004¹², “*norme in materia di procreazione medicalmente assistita*”, introduced after almost 20 years of delays and attempts to cover-up the regulation of ARTs. Right from the title, it’s easy to notice that is catholically-oriented regulation of MAR: the use of the word “procreation”, an imprecise and almost mystical term, instead of “reproduction”, it is symptomatic of the cultural background in which the law passed.

The first article states the recourse to ARTs is allowed only in order to assist the solution of reproductive problems arising as a result of sterility or infertility, so as to guarantee the rights of all the involved subjects, including the “conceived being”¹³. This choice mainly affects three categories of patients: first, couples that cannot bring pregnancy to a conclusion because of the risk of transmitting a genetic disease; second, couples whose infertility/sterility problems cannot be solved using their own gametes; third, they who do not prove their disease and the failure of other healing therapies. Accordingly, access to treatments is allowed only to couples composed of heterosexual adults, married or cohabiting, of reproductive age, who have been formally declared medically infertile/sterile and who are both alive.

With regard to limitations imposed on Italian reproductive specialists, the most important of those restrictions was the provision that no more than only three oocytes could be fertilized at one time during an IVF treatment, since all embryos obtained had to be transferred simultaneously. Furthermore, since that all produced embryos must be implanted in each single cycle, cryopreservation of embryos and donation of gametes/embryos were banned as well as the destruction of fertilized eggs. Thus, whether the cycle fails to obtain pregnancy, women must undergo the entire ovarian stimulation cycle again and again, until it will succeed.

Besides, couples carrying genetic anomalies with high risk of transmission¹⁴ cannot be helped through ARTs, since the law required to implant all embryos simultaneously and without PDG.

In summary, four were the most controversial implications of statute no.40:

1. the rigid prescription of the number of embryos to be transferred and the prohibition of cryopreservation of embryos;
2. the risks to the woman’s health caused by the necessity of multiple cycles of ovarian hyperstimulation¹⁵;

12 Repubblica Italiana, statute no. 40 of 2004 concerning rules governing medically assisted reproduction, G. U. no. 45. See Italian guidelines on PMA here: <http://www.iss.it/rpma/docu/cont.php?id=158&lang=1&tipo=12>

13 As Giulia Zanini pointed out in her article ‘Regulating assisted procreation: the Italian case’ [2009] European University Institute Press, the text of the law refers literally to the ‘conceived being’ (*concepito*). This term is used only in article 1, while the rest of the law speaks about either the ‘to-be-born child’ (*nascituro*) or the embryo (*embrione*).

14 Consider that PGD is available for a large number of monogenic disorders such as autosomal recessive (cystic fibrosis, Beta-thalassemia, sickle cell disease and spinal muscular atrophy type 1), autosomal dominant (myotonic dystrophy, Huntington’s disease and Charcot-Marie-Tooth disease), X-linked (fragile X syndrome, haemophilia A and Duchenne muscular dystrophy) or of chromosomal structural aberrations (such as a balanced translocation).

15 Ovarian hyperstimulation syndrome (OHSS) is a rare, iatrogenic complication of ovarian stimulation for infertility



3. the increase in the number of multiple pregnancies because of the required simultaneous implanting of three embryos;
4. the ban on using PGD.

Referendum and Judgments. In 2005, Luca Coscioni Association for the freedom of scientific research¹⁶ proposed four abrogative referendum questions in order to repeal those limits, but the legal quorum was not reached. In 2007, the Court of Cagliari authorized PDG in the public sector¹⁷. In 2010, the Court of Salerno for the first time authorized the use of PGD by a non-sterile couple who were healthy carriers of muscular atrophy.

The judgment of the Constitutional Court. In 2009, article 14 have been repealed by the Italian Constitutional Court¹⁸. In particular, paragraph 2 has been found to be unconstitutional where it provides the number of embryos to be transferred “*not exceeding three*” and where the obligation to provide “*a single and simultaneous embryo transfer*”. Paragraph 3, which expects to cryopreserve embryos “*if the transfer of the embryos into the uterus is not possible for serious and documented reasons of force majeure on the state of health of the woman is not foreseeable at the moment of fertilization*” was declared illegal insofar as it does not provide for the transfer of these embryos “*be implemented as soon as possible*” should also be carried out without prejudice to the health of the woman.

ECHR. In August 2012 the European Court of Human Rights ruled¹⁹ that Italy’s ban on PGD is a violation article 8 of the European Convention on Human Rights²⁰. In November the Italian Prime Minister Mario Monti asked for the review of the judgment. In February 2013 the government appeal was finally rejected by the court.

V. CONCLUSION

Italy, once again, has benefited from the European case-law, thereby modifying an illiberal and contradictory law and approaching the EU standards and guidelines. Statute no. 40 protected the embryo more than women, which have been forced to undergo induced abortions due the ban of PGD, and which have been subjected to severe health risks, due to the multiple ovarian hyperstimulation cycles. Meanwhile, it is interesting to notice that there is no universal model of MAR, making its regulation as a mirror of socio-economic, religious and cultural features of each country. Reason why it is a state matter.

treatments. This syndrome is characterized by ovarian enlargement due to multiple ovarian cysts and an acute fluid shift into the extravascular space. Complications of OHSS include ascites, hemoconcentration, hypovolemia and electrolyte imbalances.

16 Associazione Luca Coscioni official website: <http://www.associazionelucacoscioni.it/chi-siamo>

17 The same Court, in November 2012, required a hospital to execute PGD for a couple carries genetic diseases

18 *World Association Reproductive Medicine and others vs. Italian Parliament*, Constitutional Court judgment no. 151 of 2009. Full judgment can be found here: <http://www.giurcost.org/decisioni/2009/01518-09.html>

19 *Costa and Pavan vs. Italy*, Case 54270/10 [2012] ECHR 327-2012

20 ECHR, Article 8, Right to respect for private and family life

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THE IMPACT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION UPON NATIONAL INTERIM MEASURES: THE COST OF CONVERGENCE

Donatas Murauskas*
Vilnius University, Lithuania

Abstract. The paper is a contribution for a discussion regarding the impact of the Court of Justice of the European Union on national remedies. The focus of the analysis is the specific type of the remedies, i.e. interim measures. There is little doubt that the Court of Justice of the European Union induces the convergence of interim measures in member states. However, the impact is not clear yet. The aim of the paper is to propose insights on the cost-effectiveness of rules of the Court of Justice of the European Union regarding the application of interim measures in member states. In order to deal with the subject-matter, the cost-minimisation rationale of interim measures and theoretical insights on varying elements of interim measures are provided, the harmonising impact of the Court on national remedies is discussed and insights of cost-effectiveness of the converging remedial settings in member states are revealed.

Keywords: interim measures, cost-effectiveness, courts, remedy

INTRODUCTION

The Court of Justice of the European Union (hereinafter “CJEU” or “the Court”) has not been intended as an institution which could significantly compromise national sovereignty or national interests, but it has changed EU legal system, fundamentally undermining member state control over the Court¹. In addition, there is little doubt that the evolution of European administrative will continue². The obligation to ensure that national remedies are effective to protect individuals Community rights³ has occasionally required the modification of national law, even the provision of new remedies⁴. At the same time, the procedural autonomy of the member states is the principle which is highly disputable⁵. Although the discussion that the Court has appreciable impact on national

* LL. M. (Bologna, Hamburg, Rotterdam), PhD student of Vilnius University Faculty of Law. Assistant at the Supreme Administrative Court of Lithuania. Fields of interests: economic analysis of law; competition law; regulation of markets; legal reasoning. E-mail: donatas.asd@gmail.com

1 K. J. Alter, ‘The European Court’s Political Power: selected essays’ (New York: Oxford University Press Inc. 2009) 110

2 P. Craig, ‘EU Administrative Law’ Second ed. (New York: Oxford University Press Inc. 2012) 34

3 Article 4 of the Consolidated version of the Treaty on European Union at <http://eur-lex.europa.eu/en/treaties/new-2-48.htm>

4 J. Steiner, L. Woods, Ch. Twigg-Flesner, ‘EU Law’ 9th ed. (New York: Oxford University Press Inc. 2006) 182

5 M. Bobek, ‘Why There is no Principle of “Procedural Autonomy” of the Member States’ In ‘The European Court of Justice and Autonomy of the Member States’, B. de Witte & H. Micklitz, eds. (Intersentia 2011) 305–322 at <http://ssrn.com/abstract=1614922>

remedies is not new⁶, one could ask about the consequences of such *compulsory convergence* of national remedies. The paper is focused on the particular type of remedies, i.e. interim measures. Therefore, it analyses the impact of the Court on the way interim measures are applied in national courts and raises question regarding the cost-effectiveness of the impact.

Interim measures⁷ are the remedies which usually exist in all types of trials. This is a temporary remedy such as an interim injunction or interim payment, granted to a claimant by a court pending a trial⁸. There is a wide range of interim measures available in various types of trials. However, the focus of this paper is interim measures which are taken before a judgement is given on the merits in civil⁹ and administrative cases, including all types of precautionary measures¹⁰. The paper is not a comprehensive analysis of institutional and consequential impacts of CJEU on interim measures in member states. It serves to foster the debate on whether the impact of the Court on member states induces cost-effective outcomes as the Court sets harmonising standards in various procedural elements in remedial legal settings of member states. The paper is aimed to discuss and induce the creation of a research framework for further examinations in the field.

The aim of the paper is to propose insights on the cost-effectiveness of rules of CJEU regarding the application of interim measures in member states. In order to deal with the subject-matter, the cost-minimisation rationale of interim measures and theoretical insights on varying elements of interim measures are provided, the harmonising impact of the Court on national remedies is discussed and insights of cost-effectiveness of the converging remedial settings in member states are revealed.

THE COST-MINIMISATION RATIONALE IN APPLICATION OF INTERIM MEASURES

To begin with, every litigation create particular costs which are beared by different agents: administrative costs in the strict sense of burden on courts and institutions, the costs beared by the parties in a dispute and costs beared by the third parties. Therefore, the costs-minimisation could be identified as a reasonable target in every institutional framework including interim measures. The comparison between various institutional alternatives of arrangements of interim measures can be carried out in order to ascertain the costs of alternative arrangements with similar goals.

6 e.g. R. Caranta, 'Learning from our Neighbors: Public Law Remedies Homogenization from Bottom Up', [1997] 4 Maastricht J. Eur. & Comp. L. etc.

7 Interim measures could also be referred to interim orders, interim reliefs, protective measures or interlocutory judgments. There are particular differences between these concepts but in this paper they are used as synonyms.

8 The definition of *interim relief*, taken from 'A Dictionary of Law', Seventh edition, J. Law, E. A. Martin, eds. (New York: Oxford University Press Inc. 2009)

9 Excluding fields of matrimonial matters and maintenance obligation as these seem to be specific objects of examinations.

10 i.e. Measures designed to safeguard rights the recognition of which is applied for in other proceedings in the court hearing the case on the merits and to preserve the status quo in both fact and law. More: The European Commission. European Judicial Network in civil and commercial matters. Interim and precautionary measures - General Information [2009] at http://ec.europa.eu/civiljustice/interim_measures/interim_measures_gen_en.htm

As there could be difficulties to represent monetary values of various outcomes, cost-effectiveness analysis is one of tools which help to avoid an issue of monetary terms in cost-benefit analysis. The purpose of cost-effectiveness analysis is to evaluate which type of institutional arrangement help to achieve similar goals with the least cost¹¹.

The length of a trial is one of the recognised key indicators related to the effectiveness of the proceedings¹². Therefore, in the light of the prospective judgement on the substance, there is always a risk that even a well developed argument over the subject-matter could be meaningless if a judgement is not going to be enforced. Therefore, the litigant afraid of an aggravating delay of a judgement is usually enabled to request for interim measures, a remedy which varies in various countries in Europe¹³. Noteworthy, the particular institutional elements of interim measures which are directly related to cost-effectiveness of them.

First of all, the question is whether the interim measures in the particular type of a subject-matter are permitted by the national law at all. The issue is interrelated with the burden on applicants referring for interim relief (the threshold to overcome). In general, the question has to do with the basic rationale of interim measures: the length of the procedure on the substance and the extent of the risk that a judgement will not be enforceable. Secondly, the subjects enabled to request for interim measures may vary from only a claimant in the case to the third parties on the grounds of public interest. Thirdly, the source of initiation of a request for interim measures may also differ as there could be national laws enabling not merely parties but a national court to grant interim relief *ex officio*. Moreover, there could be a difference in at least two dimensions related to time-limits of interim measures: (i) the period the provisional measures are issued and (ii) the period to deal with a request on interim measures. Furthermore, the crucial question is the extent of the burden of proof. The criterion involves the analysis of legal and factual requirements (the threshold) which have to be satisfied in order to grant interim relief. Another crucial question is the scope of judicial review. In different jurisdictions the scope of judicial review varies. The fundamental element revealing the scope of judicial review of this type of remedy is the importance of *prima facie* evaluation of a soundness of a claim when the question of interim relief is examined. Moreover, the kind of decision is also an important facet to be examined. The scope of decisions possible under the national law shapes the extent of the usage of it and, consequently, the effectiveness of application in exceptional circumstance. If a national law allows only decisions

11 It was developed in the United States in 1950's and one of the first application of it was the contribution of analysis to the military policy planning in the nuclear age in terms of the most efficient allocation of available resources, more: C. J. Hitch, R. N. McKean, 'The Economics of Defense in the Nuclear Age' (Cambridge, Massachusetts: Harvard University Press 1960) at <http://www.rand.org/content/dam/rand/pubs/reports/2005/R346.pdf>. Nowadays, it is extensively used in various types of economic analysis of policies, programme or other types of institutional choice impact, especially, if the monetary value of an outcome is hardly achievable.

12 e.g. The European Commission. The EU Justice Scoreboard [2013] at http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf

13 The European Commission. European Judicial Network in civil and commercial matters. Interim and precautionary measures – General Information [2009] at http://ec.europa.eu/civiljustice/interim_measures/interim_measures_gen_en.htm

with restricted content, the usage of it will be limited to particular situations and will not enable requesting for interim measures in exceptional situations. The last but not the least is the question of liability caused by the interim measures if a judgement on a substance is against the party for which interim relief was granted.

INFLUENCE OF CJEU ON NATIONAL JURISDICTIONS

Basically, there are two fields of intensive impact of the rulings of CJEU on national remedies: the protective measures under the Brussels I¹⁴ and the duty to ensure fulfilment of the obligations arising out of the EU law¹⁵. Both fields of impact are roughly discussed below.

In case of Brussels I the protective measures are stipulated in Article 31¹⁶ and Article 47¹⁷. The provisions empower national with an exclusive power to issue interim measures according to the national law. However, the scope of discretion of national courts could be questioned if an existing case-law of CJEU is analysed. Firstly, the Court has provided the meaning of provisional measures as legal instruments *which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance matter*¹⁸. Thus, the Court identifies that only the provisional measures which are provided by a national court having a jurisdiction to the substance of a case are recognised. However, it excludes thinkable national rules enabling a national court to grant interim measures in cases when a national court does not have a jurisdiction on the substance. The Court has concluded in subsequent cases that *the jurisdiction on the merits of the case implicitly includes the authority to order provisional measures without being subject to any further conditions*¹⁹.

Moreover, in several cases the Court has explicitly excluded the interpretation of particular national rules as provisional measures. In the case *St. Paul Dairy Industries NV*²⁰ the Court has concluded that *the measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess*

14 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 012 (Brussels I), including successive amendments and corrections such as Regulation (EC) No 1791/2006 and Regulation (EC) No 1103/2008 (hereinafter “Brussels I”).

15 Article 4 of the Consolidated version of the Treaty on European Union at <http://eur-lex.europa.eu/en/treaties/new-2-48.htm>

16 *Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.*

17 1. *When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.*

2. *The declaration of enforceability shall carry with it the power to proceed to any protective measures.*

3. *During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.*

18 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler*, Case C-261/90 [1992] ECR I-02149

19 *Van Uden Maritime BV*, Case C-391/95 [1998] ECR I-07091

20 *St. Paul Dairy Industries NV*, Case C-104/03 [2005] ECR I-03481



the relevance of evidence which might be adduced in that regard is not covered by the notion of provisional measures. Therefore, CJEU has ruled out the restrictions regarding the unconventional meaning of interim measures under the Dutch law. In the case *Kockler*²¹ the Court has indicated that an action such as the *action Paulienne* under the French law cannot be considered as a provisional measure. Thus, CJEU has stated to keep to the concept of provisional measures by not mixing different institutions with similar elements.

The impact of CJEU on national remedies arising in the field of administrative law is mostly related to the indirect actions that raise the validity of EU actions²². The case of *Factortame*²³ is one of the most far-reaching examples²⁴, even called as a spill-over effect of the Court on national remedies²⁵. The Court has ruled out that the effectiveness of EC law would be impaired if a rule of national law could hinder a national court from granting interim relief in a matter regarding the Community law²⁶. Therefore, the Court has stated *that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule*²⁷. In the subsequent cases CJEU has been further developing the principles for granting interim relief in national courts. The idea was that the EU courts powers to issue interim measures when the legality of an EU act is challenged directly, must also reside with national courts when such a challenge arises indirectly as this was necessary to ensure the coherence of the system of interim legal protection²⁸. The Court has ruled that *the grant of interim relief to suspend the application of national provisions until the competent court has given a ruling on whether those provisions are compatible with Community law is governed by the criteria laid down by the national law applicable before that court. However, those criteria cannot be less favourable than those applying to similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the interim judicial protection of rights conferred by Community law (principle of effectiveness)*²⁹.

In addition, the Court has set out more criteria regarding the content of interim measures applicable in national law. For instance, national courts alone (not any other administrative authorities) are entitled to determine whether the conditions to grant the interim relief have been satisfied³⁰.

21 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler*, Case C-261/90 [1992] ECR I-02149

22 P. Craig, 'EU Administrative Law' Second ed. (New York: Oxford University Press Inc. 2012) 670

23 *Factortame*, Case C-213/89 [1990] ECR I-2433

24 M. Stiernstrom, 'The Relation Between Community Law and National Law' [2005] Vol. 5 No. 33 Jean Monnet/Robert Schuman Paper Series 8 at <http://aei.pitt.edu/8162/1/Stiernstromfinal.pdf>

25 R. Caranta, 'Learning from our Neighbors: Public Law Remedies Homogenization from Bottom Up', [1997] 4 *Maas-tricht J. Eur. & Comp. L.* 223.

26 M. Stiernstrom, 'The Relation Between Community Law and National Law' [2005] Vol. 5 No. 33 Jean Monnet/Robert Schuman Paper Series 9 at <http://aei.pitt.edu/8162/1/Stiernstromfinal.pdf>

27 *Factortame*, Case C-213/89 [1990] ECR I-2433

28 P. Craig, 'EU Administrative Law' Second ed. (New York: Oxford University Press Inc. 2012) 671

29 *Unibet*, Case C-432/05 [2007] ECR I-02271

30 *ABNA and Others*, Case C-453/03 [2005] ECR I-10423

Moreover, the interim measures may be ordered only where they are urgent where it is necessary for them to be adopted and take effect before the decision on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them³¹. The Court has noted in several cases that purely financial damage cannot be regarded in principle as irreparable³². However, it has also grasped the extent of discretion of national court on the subject-matter as it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure with respect to which the application for interim relief is made would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid³³. Furthermore, CJEU has concluded that interim relief, with respect to a national administrative measure adopted in implementation of a Community regulation, can be granted by a national court only if: (1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice; (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (3) the court takes due account of the Community interest; and (4) in its assessment of all those conditions, it respects any decisions of the Court of Justice ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level³⁴.

THE EFFECTS OF DIVERGENCE ON COSTS

The nature of the Court impact on national remedies is only of a case-by-case nature and depends on the capacity of the litigants to obtain access to the national courts and on the willingness of the national court to cooperate with CJEU³⁵. However, the influence of national remedies in the fields of civil law and administrative law exists and the effectiveness of it could be questioned. Some possible insights are provided below.

The Court shapes national interim measures in civil cases in the field of protective measures under Brussels I. Firstly, the Court implies to apply interim measures for a court which has a jurisdiction on the merits of a case. It may be argued as a rule which induces more effective behaviour of litigants because it directly influences legal certainty and stability as the prospective litigants are sure that there will be only one national court enabled to rule out on interim measures and there are no risks that in some member states will be different rulings on the same subject-matter. Another important facet of influence on provisional remedies in civil law matters by the Court is

31 *Zuckerfabrik*, Case C-143/88 [1991] ECR I-415

32 *Zuckerfabrik*, Case C-143/88 [1991] ECR I-415

33 *Zuckerfabrik*, Case C-143/88 [1991] ECR I-415

34 *Atlanta*, Case C-465/93 [1995] ECR I-03761

35 M. Eliantonio, "The Future of National Procedural Law in Europe: Harmonisation vs. Judge-Made Standards in the Field of Administrative Justice" [2008] 2008-8 Maastricht Faculty of Law Working Paper 12



that in few prominent cases³⁶ it has shaped the concept of provisional measures as those having the conventional content of this institution. It may be identified as a cost-minimising approach to exclude some remedies such as *action Paulienne* from the likely provisional remedies as the litigants are assured that only conventional concept of interim measures will be applied in all member states, reducing the risk investment of litigants that completely unexpected and unknown remedies will be applied. However, the influence may also be overlooked as impeding the learning effects because the diversity in laws makes it possible for states to experiment in their search for efficient and workable rules of law³⁷.

The impact of CJEU in the field of national administrative law arises from the duty to ensure fulfilment of the obligations of the EU law. In the case *Factortame*³⁸ CJEU has concluded that there needs to be interim measures even if they are not prescribed in the national law. The effect of such ruling is manifold. Although, the mandatory remedy deprives a member state an advantage to deal with information asymmetry by prescribing differentiated remedies for particular situations. For instance, if a member state has a particular knowledge on the excessive usage of remedies in one field it could put a threshold and reduce the flow. That becomes impossible after the homogenisation of remedies in member states. Moreover, the imposition of a standard (the threshold by the *principle of equivalence*³⁹) seems to imply risks of sub-optimal national threshold of remedies if a particular remedy concerned creates too much tension in national jurisdiction. On the other hand, the mandatory remedy and the threshold of application could be a cost-effective solution as provisional measures are the tools to avoid serious and irreparable damage to the party seeking them and seem to be efficient tool as it is up to the national court to scrutinise the optimal level of burden for parties.

Furthermore, the notion that purely financial damage cannot be regarded in principle as irreparable⁴⁰ seems to be cost-effective standard by creating more legal certainty and stability for persons as the concept of interim measures is clearly linked to the notion of irreparable damages and purely financial damage seems to be repairable. Moreover, the requirements to grant interim ensures for national courts provided in *Atlanta* case⁴¹ could also imply insights on cost-effectiveness dimension. For instance, the requirement to the national court to entertain serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice is an implication related to the notion of *prima facie* of a soundness of a claim. It seems to be useful tool to prevent frivolous requests from being submitted. However, the evaluation of *prima facie* soundness of a claim itself is problematic as it could be disputed whether the preliminary test on a soundness of a claim will not create a burden on a court to analyse the

36 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler, Case C-261/90 [1992] ECR I-02149*

37 R. Van den Bergh, 'Towards an Institutional Legal Framework for Regulatory Competition in Europe' [2000] 53 KYKLOS 438.

38 *Factortame, Case C-213/89 [1990] ECR I-2433*

39 *Unibet, Case C-432/05 [2007] ECR I-02271*

40 *Zuckerfabrik, Case C-143/88 [1991] ECR I-415*

41 *Atlanta, Case C-465/93 [1995] ECR I-03761*

entire case before it is solved and what the risks that the judge who will rule on the substance will not be influenced by the preliminary evaluation of a claim. Another important imposition by the Court is the requirement to take due account of the Community interest⁴². In general, the cost of such requirement is the additional burden on the national court to obtain information on Community interest and operate it. That is a costly requirement as it obliges judges to shift the operational field from the national level to the level of all member states. That may create some deficiencies on the depth of analysis in relevant cases.

CONCLUSION

The Court of Justice of the European Union seems to shape national remedies of member states including interim measures. The impact differs in various fields of law and is developing on case-by-case basis. The most intensive fields of impact are the protective measures under Brussels I in and interim measures in national administrative law in order to ensure the effective remedies in EU law. The impact of the Court of Justice of the European Union implies convergence of crucial elements of national remedies in the fields.

The interim measures are remedies having a range of elements which may be divergent in member states. Those are the facets which determine possibilities to create cost-effective national remedial setting. The Court of Justice of the European Union limits the possibilities of national law to diverge on the issue of interim measures by creating specific standards of application. The implications of the Court of Justice of the European Union are both beneficial in some cases (e.g. creating legal certainty) and costly (e.g. limiting the possibilities to differentiate the specific remedial structure).

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42 *Atlanta*, Case C-465/93 [1995] ECR I-03761



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E-JUDICIARY AS A SIGN OF CONVERGENCE IN NATIONAL LEGAL SYSTEMS

Monika Odrowska-Stasiak*

University of Lodz, Poland

Abstract. In Poland the President signed into law certain amendments to the Civil Procedure Code that now permits the adjudication of payment writs, otherwise known as enforcement of a past due debt, by electronic means (elektroniczne postępowanie upominawcze). The proposal to create electronic proceedings in the Polish Civil Procedure refers to the adopted and successfully implemented solutions for e-judiciary operating in the UK and Germany. The laws of these countries in terms of promoting electronic judiciary are widely recognized for excellence, both legally and technically. This streamlined procedure will enable a creditor to file a claim against a debtor via the Internet, thereby reducing the associated cost of litigation and court fees, the reduction of which should act as an incentive for entrepreneurs (and not only for them) to use electronic proceedings to enforce payment of a past due debt. The primary goal in enacting this amendment was and is to expedite the adjudication of small monetary claims in situations where the facts are not in dispute so as to even negate the need to conduct an evidentiary hearing. In particular, the use of electronic proceedings is intended to adjudicate claims that are supported by documentation presented by the creditor, such as invoices or bills of delivery. Both private and public entities may utilize this streamlined procedure to enforcement payment of a debt, as well as entrepreneurs and business, including domestic and foreign. The court designated to adjudicate payment writs via electronic proceedings, referred to as the “e-court”, will constitute a civil division of each District Court. Appeals will be adjudicated by a corresponding civil division within each Regional Court. The decision to seek enforcement of a debt using electronic proceedings as opposed to more traditional proceedings rests with the creditor.

Keywords: judiciary, electronic technology, writ of payment, e-court

1. INTRODUCTION

Like other branch of the government judiciary is using information and communications technology for the benefit of the citizen. If judiciary fails to go hand in hand with the latest development it cannot garner peoples confidence. Judiciary must use information and communications technology in its operation. If judiciary uses information and communications technology efficiently it can foster peoples faith and maintain rule of law. Human right protection becomes easier with efficient management that is technology friendly¹.

* Master of law (2010) and master of administration (2008), postgraduate student of University of Lodz, Chair of Civil Procedure Law (since 2010). E-mail: monika.odrowska@gmail.com

¹ R. Timalseña, E-judiciary: Right of Everyone, <http://itconference.org.np/it/docs/Ejustice.pdf> [access at 21 February 2013]

The recent development of electronic technology of communications is reflected in and has been influencing the Polish civil justice system². The possibility to use sources and techniques of electronic communications in Polish civil procedure has been in force since 1 January 2010. In this day the amendment to the Code of Civil Procedure³ was passed. Polish parliament adopted the amendment under the Act of 9 January 2009 on amendment of the Act – Code of Civil Procedure and some other Acts⁴. Electronic proceedings by writ of payment are of innovative character in Polish civil law procedure⁵. The proposal to create electronic proceedings in the Polish civil procedure refers to the adopted and successfully implemented solutions for e-judiciary operating in the Germany, England and Wales. The laws of these countries in terms of promoting electronic judiciary are widely recognized for excellence, both legally and technically.

According to T. Zembrzusi, the fact that procedural law has been opened to new technologies, as well as the fact that legal instruments have been adjusted to requirements and expectations of a growing information society will contribute to the increase of effectiveness of legal protection in civil court procedure⁶

2. ELECTRONIC PROCEEDINGS IN PARTICULAR COUNTRIES

2.1 Germany

In Germany the respective issues of the mass recovery of outstanding but often uncontested debts and of small claims litigation are addressed within the framework and structure of the procedural system. The seventh book of the German Code of Civil Procedure (ZPO)⁷ outlines the special summary proceeding (Mahnverfahren), an integral part of the procedural legislation. This order for payment procedure provides a cheap, rapid and efficient way for a creditor to enforce a pecuniary claim by an ex parte court order for payment. The underlying idea is to avoid costly and time-consuming lawsuits, and especially to avoid court hearings in cases where debtors are aware of their obligation but are either unwilling or unable to pay⁸.

Usually the procedure consists of two stages, affording the respondent two opportunities to block the issuance of an enforceable court order and instead effect a transition to an ordinary

2 R. Kulski, Some Remarks on the Course of Polish Electronic Proceedings by Writ of Payment, [in:] *Electronic Justice – Present and Future* edited by M. Kengyel, Pécs 2010, 17; Weitz K.: in *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, red. Ereciński T., wyd. 4, Warsaw 2012, s. 984.

3 Act of 17 November 1964 CODE OF CIVIL PROCEDURE, Official Journal of Laws of 1964, No. 43, item 296.

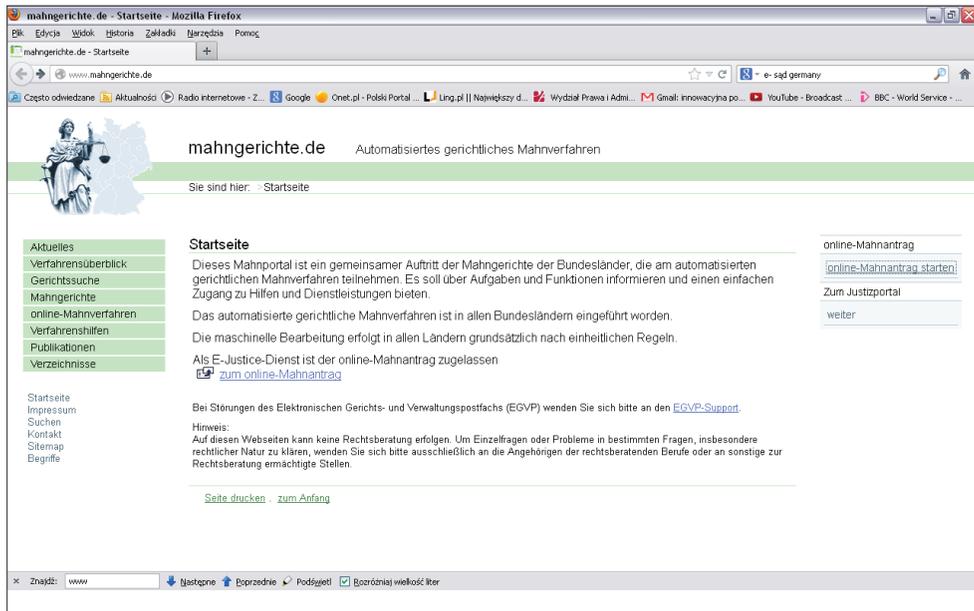
4 Act of 9 January 2009 on amendment of the Act – Code of Civil Procedure and some other Acts, Official Journal of Laws of 2009, No. 26, item 156.

5 R. Kulski, Some Remarks on ..., 17.

6 T. Zembrzusi, *Elektroniczne postępowanie upominawcze a skuteczność ochrony prawnej w postępowaniu cywilnym*, in *Materials from 10th Department Conference on „Effectiveness of Law”* organized by Law and Administration Department of Warsaw University on February 27th, 2009, Warsaw 2009, 81.

7 § 688 et seq. German Code of Civil Procedure (*Zivilprozessordnung* = ZPO).

8 G. Šijanski, J. Barber, *The German order for payment procedure (Mahnverfahren)*, <http://www.iuscomp.org/gla/literature/sijanski.htm> [access at 5 March 2013].



1 Figure Website Automatisiertes gerichtliches Mahnverfahren

civil proceeding. In the first stage, the claimant must file an application to the court containing the details of the claim (§ 690 ZPO). The presentation of documentary evidence by the claimant is not required here as the application is processed by a computerized examination program and the merits of the case are not examined; i.e., the court's computer does not consider whether the facts which the claimant might produce would substantiate and validate his claim or not. This program works on the presumption that dealing with applications in the order for payment procedure is a highly standardized legal procedure that does not (at least, not in most cases) require human supervision. Following the processing of the application, the court issues an order for payment to be sent to the respondent, who may object to the order (so-called *Widerspruch*). In the absence of an objection, the second stage is initiated, in which the claimant is permitted to apply for an enforcement order. If the respondent declines to raise an objection (so-called *Einspruch*) this second time, the order will become incontestable. Thus in most instances the procedure precludes the need for a court hearing⁹.

2.2 England and Wales

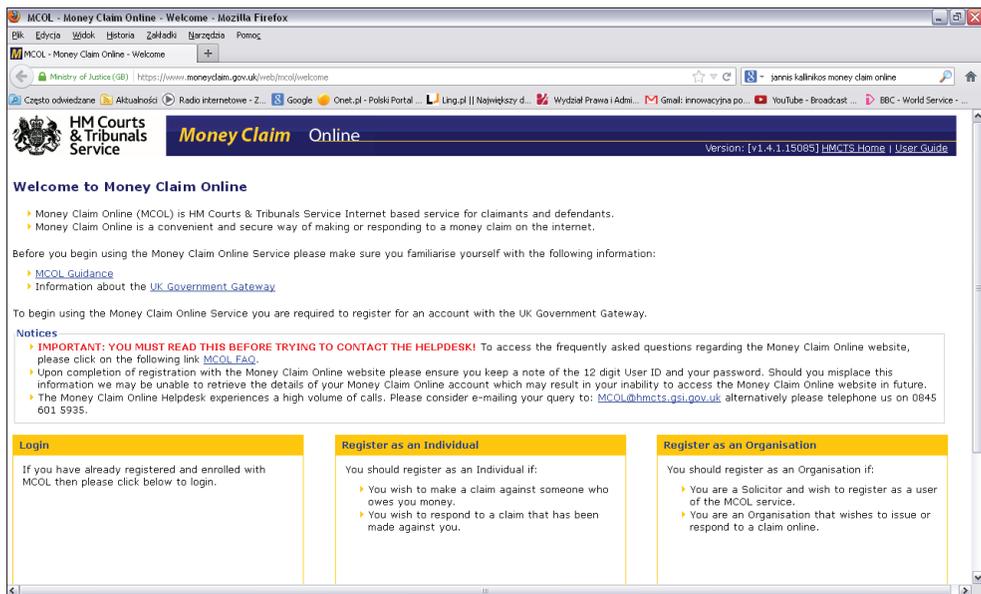
In England and Wales portal Money Claim Online (MCOL) has operated since 2002. It is a web-based service for issuing money claims and resolving fixed money disputes introduced in the

⁹ G. ŠIJANSKI, J. BARBER, The German order for payment procedure (*Mahnverfahren*), <http://www.iuscomp.org/gla/literature/sijanski.htm> [access at 5 March 2013].

judiciary of England and Wales. This online service allows county court claims to be issued for fixed sums up to £100,000 by individuals and organisations over the internet, anywhere, anytime. The service has been widely and rapidly adopted and represents a good example of how ICT-based system and artefacts can be deployed within justice to assist the management of tasks other than purely administrative once¹⁰. That is, tasks that involve transaction between the courts and citizens and organizations.

Money Claim Online was launched in the period December 2001 – February 2002 by the Court Service, the executive hand of the Lord Chancellor's Department. It is the Court Service's first online service and it allows users to issue money claims, request judgment by default or admission, apply for a warrant of execution, respond to a claim and track the progress of their case. Money claims was identified as an area that could be essentially supported by an online service for mainly two reasons. First, a large majority of money claims are issued for unpaid invoices from large organizations, like utilities, telecommunication and credit card companies and act more as a reminder in order to agree some sort of debt reduction. For this reason, money claims of this sort are settled without having to go through a court hearing. The defendant as a rule acknowledges the debt and pays it. The second reason was a technological antecedents that could support an online service.

The Money Claim Online is a fast and convenient way of making claim as the entire process is done via the Internet.



2 Figure Website Money Claim Online

10 J. Kallinikos, Institutional complexity and functional simplification: the case of money claim online in England and Wales. In: Contini, Agostino and Lanzara, G F, (eds.) ICT and innovation in the public sector: European perspectives in the making of e-government. Palgrave Macmillan, Basingstoke, UK, 174-210.

The Money Claim Online enables a claimant to request a claim online. Evidence is not attached to the statement of claims. The Money Claim Online enables also to check the status of the claim and, where appropriate, request entry of judgment and enforcement by warrant of execution. Payment of the court fee can only be made using a credit or debit card and such fees are non-refundable¹¹. Defendants can also use The Money Claim Online to reply to and check the status of their claims online. The defendant has many possible responses, which range from ignoring the claim to accepting it or defending it. In many cases, the defendant has 14 days to respond to the claim¹².

3. ELECTRONIC PROCEEDINGS BY WRIT OF PAYMENT IN POLAND

3.1 Legal basis

Drawing on legal solutions adopted in Germany, England and Wales Polish legislator introduced to the Code of Civil Procedure electronic proceedings by writ of payment. These proceedings are basically regulated by provision of the Code of Civil Procedure (especially art. 505²⁸ – 505³⁷ of the Code of Civil Procedure). Beside of the said regulation, executive orders are in force (resolutions of the Ministry of Justice) which refer to the manner of submitting statement of claims under electronic proceedings by writ of payment, manner of court fee payment, creating the account, manner of using the electronic signature and electronic deliveries in these proceedings.

3.2 E-court

Cases under electronic writ of payment proceedings considers the court, known as the electronic court (the e-court). In Poland it is VIth Civil Division of the Lublin-West Regional Court – in Lublin. It was inaugurated on the fourth of January 2010. The jurisdiction of the e-court covers the whole territory of Poland regardless of the defendant's domicile or seat¹³. It is competent to examine civil pecuniary claims (including commercial and labour claims). The cases are considered under electronic writ of payment proceedings irrespective of the total amount of the dispute, which means that some of them would otherwise fall within the competence of District Courts. The Court lacks competence over non-pecuniary claims and family law claims¹⁴.

¹¹ Ministry of Justice website: <http://www.justice.gov.uk/courts/northampton-bulk-centre/money-claim-online> [access at 12 March 2013].

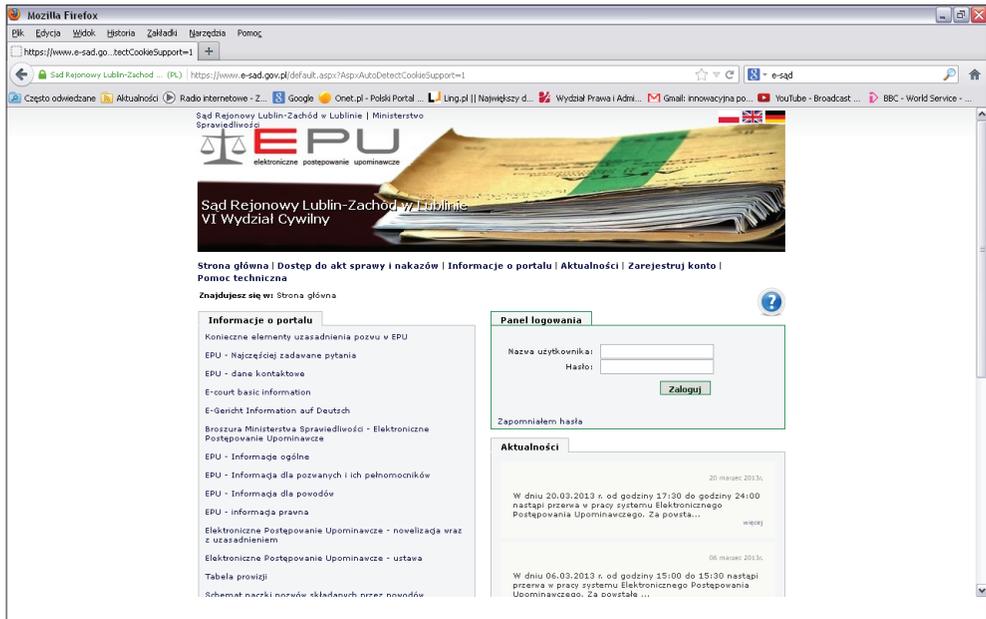
¹² J. Kallinikos, op. cit., 174-210.

¹³ J. Widło, *Elektroniczne postępowanie upominawcze*, Warsaw 2010, 9; GOŁACZYŃSKI, J.: *Elektroniczne postępowanie upominawcze. Komentarz*, Warsaw 2010, 162; GOŹDZIASZEK, Ł.: *Informatyczny przełom w postępowaniu cywilnym? Rozważania nad elektronicznym postępowaniem upominawczym*. In: *Palestra*, 2009, nr 9-10, 81-87.

¹⁴ *Electronic proceedings by writ of payment website*: https://www.e-sad.gov.pl/Subpage.aspx?page_id=35 [access at 8 March 2013].

3.3 Electronic forms

The claimant communicates with the court exclusively electronically by means of a system dedicated to the electronic writ of payment proceedings. Once registered on the platform <http://www.e-sad.gov.pl>, the claimant can edit and send the claim form and further pleadings to the e-court.



3 Figure Website Electronic proceedings by writ of payment

The new proceedings are characterised by the fact that they are entirely conducted in electronic forms. Electronic forms in this kind of proceedings make it easier to draft statement of claims, moreover danger of formal mistakes in such statement shall decrease significantly¹⁵. Electronic procedural writs are entered in the IT system – including statements of claims, and it is also in electronic form that e-courts issue orders of payment¹⁶. Writs are also served through the IT system. Actions taken by the court, court clerk and presiding judge shall only be recorded in the electronic communication system, and the electronic data generated as a result of those actions shall bear a secured electronic signature in the meaning of Article 3 (2) of the Act on Electronic Signature of 18 September 2001.

Servicing and submission of writs in electronic form is only compulsory for the plaintiff. Any pleadings filed by the plaintiff otherwise than by electronic means shall not have the legal effects

¹⁵ R. Kulski, in Kodeks postępowania cywilnego. Komentarz pod. red. K. Piaseckiego, vol. II, Warsaw 2010, 751.

¹⁶ J. Widło, op. cit., 9.

associated by the Code of Civil Procedure with the filing of a pleading with the court (art. 505³¹ § 1 of the Code of Civil Procedure)¹⁷. The defendant may choose the manner of participation in the proceedings: electronic or traditional – through the use of traditional writs and service forms. But if the defendant decides to file his pleadings by electronic means, the provisions of art. 505³¹ § 1 of the Code of Civil Procedure is applied to the defendant from the moment he files a pleading by electronic means. Its means that any pleadings filed by the defendant otherwise than by electronic means shall not have the legal effects associated by the Code of Civil Procedure with the filing of a pleading with the court.

3.4 Complaint

Electronic proceedings by writ of payment is a particular track to demand money claims connected with performed services, delivered goods, damages and other incidents causing an obligation of payment. Just like in Germany and England and Wales the electronic proceedings by writ of payment based on the plaintiff's statement. In electronic proceedings by writ of payment, evidence is not attached to the statement of claims but is merely indicated in the content of the statement¹⁸. Therefore circumstances justifying a recognition of claims and an issue of a garnishee order should be beyond any doubt and arise from invoices, contracts, acknowledgements of receiving goods etc. In the electronic writ-of-payment proceedings the proxy also does not enclose their power of attorney, but they should make a reference to it, indicating the date of authorization, scope and required in the Code of Civil Procedure.

According to art. 505³² § 1 of the Code of Civil Procedure the plaintiff should refer in his complaint to evidence in support of his allegations. Evidence shall not be enclosed to a complaint.

Moreover, a complaint should contain:

- 1) a personal identification number (PESEL) if the plaintiff is a natural person and is obliged to have a PESEL number,
- 2) a tax identification number (NIP) if the plaintiff is not a natural person and is obliged to have a NIP number, and a National Court Register (KRS) entry number, or number from another applicable register¹⁹.

3.5 Decision taken in the e-court

The most common type of decision taken in the e-court is writ of payment. The court official conducts an „in camera” examination of the well-foundedness of the claim as set forth in the lawsuit. If the official concludes that the claim is well-grounded the electronic system prepares a draft of the

¹⁷ J. Gołaczyński, op. cit., 164, 171.

¹⁸ M. Sadowski, Co oznacza zakaz dołączania dowodów oraz obowiązek ich wskazania w treści pozwu wniesionego w elektronicznym postępowaniu upominawczym (art. 505³² § 1 k.p.c.). In: *Polski Proces Cywilny*, 2011, nr 2, 122-129.

¹⁹ B. Kaczmarek-Templin, Ł. Goździaszek, Mechanizm rozpoznania sprawy w elektronicznym postępowaniu upominawczym – polemika. In: *Monitor Prawniczy*, 2010, nr 16, 896-902.

order which is subsequently signed by the official using the electronic signature (special individual code assigned to court officials considering cases)²⁰. Writ of payment shall order the defendant to satisfy the entire claim, including the related costs, within two weeks from being served with the order, or alternatively file an objection with the court. Writ of payment is automatically served on the claimant by means of the electronic system whereas the service of the lawsuit. It is delivered to a defendant in traditional, paper form²¹ with a caution that there is a possibility to complain this order within 14 days from a day of a delivery²². A defendant receives also a personal code, which allows him to log in an e-court system in order to check whether such an order exists at all²³.

In the event where the claim appears groundless, no writ of payment follows. In such a situation case is transferred to a competent court of general jurisdiction for detailed consideration²⁴. According to art. 27 of the Code of Civil Procedure an action shall be brought before the court of the first instance in whose region the defendant's place of residence is located. The place of residence shall be determined according to the provisions of the Act of 23 April 1964 – Civil Code²⁵. Provision of art. 25 of the Civil Code provides that the domicile of a natural person is the place where that person resides and where the person intends to remain permanently.

Where an order for payment cannot be served because the place of stay of the defendant is not known or the order may not be served on the defendant in Poland the court shall, *ex officio*, set aside an order for payment and refer the case to a competent court of general jurisdiction, unless the plaintiff timely removes the obstacle preventing the service of the order for payment²⁶. In addition, if, after the issuing of an order for payment, it is discovered that the defendant did not have the capacity to be a party to court proceedings or to conduct court proceedings, or did not have a representative authority upon the filing of the complaint, provided that such defaults are not corrected within a determined time limit in accordance with the provisions of the Code of Civil Procedure, the court shall, *ex officio*, set aside an order for payment and refer the case to a competent court of general jurisdiction, unless the plaintiff timely removes the obstacle preventing the service of the order for payment.

3.7 An objection to an order for payment

The defendant can submit an objection in writing to an order for payment within two – weeks' time counted from the date of the effective service of the order²⁷. An objection to an order for pay-

20 J. Gołaczyński, *op. cit.*, 180 and 181.

21 J. Widło, *op. cit.*, 9.

22 J. Gołaczyński, *op. cit.*, 164; Kaczmarek-Templin, B., Goździaszek, Ł.: *op. cit.*, 899.

23 J. Gołaczyński, *op. cit.*, 197; WRÓBEL, A.: Dostęp stron postępowania do akt sądowych w elektronicznym postępowaniu upominawczym – problemy praktyczne. In: *Monitor Prawniczy*, 2011, nr 15, 844.

24 J. Gołaczyński, *op. cit.*, 192.

25 Act of 23 April 1964 CIVIL CODE, Official Journal of Laws of 1964, No. 16, item 93.

26 K. Flaga-Gieruszyńska, *Kodeks postępowania cywilnego. Komentarz*, red. Z. Zieliński, 6th edition, Warsaw 2012, 891–892.

27 A. Arkuszewska, Charakter sprzeciwu od nakazu zapłaty – postępowanie upominawcze, europejskie postępowanie nakazowe, elektroniczne postępowanie upominawcze. In: *Monitor Prawniczy*, 2011, nr 17, 926.

ment need not be justified or supported by evidence, however the defendant's allegations should be specified therein and submitted before defending on the merits of the case, failing which they shall be forfeited²⁸. A notice of objections is filed with the court that issued an order for payment or, where the order was issued by a court clerk, with the court before which the action was brought (art. 503 of the Code of Civil Procedure). The court shall reject objections which are filed after the time limit, are not paid for or are otherwise inadmissible as well as oppositions whose defaults are not timely corrected by the defendant.

The effective submission of the statement of opposition by the defendant annuls the payment order and results in the case being transferred for consideration to the competent court of general jurisdiction.

The court to which a case is referred shall not be bound by the decision to refer the case if the defendant's objection contains an allegation concerning court jurisdiction determined in accordance with Article 46 § 1 of the Code of Civil Procedure²⁹.

As it has already been mentioned, a case may be referred to a competent court of general jurisdiction³⁰. When it comes to one of these situations the presiding judge shall order the plaintiff to correct any formal deficiencies and supplement the complaint as may be appropriate for the applicable proceedings within two weeks from the date of the order being served. If any formal deficiencies of a complaint are not corrected, the court shall terminate proceedings³¹.

A copy of the decision to terminate proceedings shall only be served on the defendant if he was served with a copy of the petition. If the plaintiff supplements his complaint, the presiding judge shall order the defendant to supplement his objection as may be appropriate for the applicable proceedings, within two weeks of being served with the order.

If the defendant refrains from submitting the statement of opposition – writ of payment becomes final and the enforcement clause is issued in the electronic system by the court official³². On this basis a creditor is entitled to direct a case to an executor in order to begin an enforcement. He is allowed to do it in one of two ways. Firstly, he may file a motion to an executor in a paper form. Secondly, he may use e-court electronic system and begin an enforcement. Irrespective of the form it is equally binding for an executor. Worth stressing is a fact that an executor publishes all of information concerning enforcement procedure in the e-court electronic system. Any time it is necessary, it is possible to log in and check a status of a case and last executor's acts.

28 R. Kulski, in Kodeks postępowania..., 767; Gołaczyński, J.: op. cit., 199.

29 K. Flaga-Gieruszyńska, op. cit., 892-893.

30 J. Widło, A. Wróbel, Postępowanie przed sądem właściwości ogólnej po przekazaniu sprawy z elektronicznego postępowania upominawczego w świetle art. 505³⁷ k.p.c. Uwagi *de lege lata* i *de lege ferenda*. In: Przegląd Sądowy, 2012, nr 4, 59-75; Sadowski, K., Piaskowska, O., Kotłowski, D.: Kilka uwag w zakresie praktycznego stosowania art. 505³⁷ § 3 KPC. In: Monitor Prawniczy, 2011, nr 23, 1293-1296.

31 J. Gołaczyński, op. cit., 163.

32 J. Widło, op. cit., 15.



3.8 A fee

In accordance with amended provisions of the Civil Case Court Fee Act³³ on a lawsuit filed through electronic proceedings by writ of payment will be charged a fourth element of a fee. A lawsuit is filed together with the fee³⁴.

4. CONCLUSION

In general, electronic proceedings by writ of payment may be defined as civil procedure which is: simple, which means accessible, cheap and fast. Electronic proceedings by writ of payment will shorten the excessively lengthy period of time necessary to obtain court protection of rights in traditional proceedings.

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33 Act of 28 July 2005 the Civil Case Court Fee, Official Journal of Laws of 2010, No. 90, item 594.

34 R. KULSKI, in *Kodeks postępowania ...*, s. 752-753.

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MIFID AS AN EXAMPLE OF CONVERGENCE OF NATIONAL LEGAL SYSTEMS IN EUROPE

Mateusz Pacak*

Jagiellonian University in Kraków, Poland

Abstract. The European Union cannot move forward without creating common legal frames for all national legal systems. The regulatory co-operation is essential, because it is the next step after the Economic and Monetary Union. The globalization of financial markets and recent crisis have made this co-operation even more important. This paper argues that concept of FSAP and axiology of MiFID may affect the overall structure and consistency of the legal framework for European integration. The author discusses convergence of national legal systems on the example of investment services and he argues that MiFID can be treated as a point of reference in the discussion about the convergence of legal systems. The structure of this article will be as follows: in section 2. the origins of MiFID will be presented. In section 3. the general aspects of convergence and its specific form – harmonisation will be discussed. Section 4. will deal with the provisions introduced by MiFID, taking as an example the German, Lithuanian and Polish regulations derived from the Directive. Finally, section 5 will conclude with an assessment of MiFID and its impact on the convergence phenomenon.

Keywords: MiFID, convergence, harmonisation, FSAP

1. INTRODUCTION

Convergence is a term which has been borrowed by the social sciences (and therefore, also by law) from mathematics and physics.¹ In general, the meaning of convergence is that different phenomena may develop independently in different places, but the stages and dynamics of development are still very similar.²

I think, however, that for the purposes of academic discussion and for the purposes of this paper in particular the definition of convergence can be broadened. Taking into consideration the Latin origin of the word (*convergere*), we can define convergence as “approaching, conforming to, uniform” – and in the aforementioned meaning this crucial term will be understood in my further argumentation. While discussing the convergence it is necessary to adopt a specific methodological approach, limiting the field of research, because it is possible to talk about the convergence of

* PhD student, Jagiellonian University. The author is the editor-in-chief of the Jagiellonian University Internet Law Review. He is interested in private law, especially in capital markets law and dogmatic aspects of civil law. His dissertation will dispute the necessity of drawing a distinction between property law and law of obligations. E-mail: mateusz.pacak@o2.pl

¹ R. Tokarczyk, Tworzenie prawa: między kultura prawa stanowionego i kultura *common law* [Establishing the law: between continental law and common law cultures, in: Konwergencja czy dywergencja kultur i systemów prawnych? [Convergence or divergence of cultures and legal systems?], Warsaw: C.H. Beck 2012, p. 5.

² M. Benaim, O. Raimond, ‘Self-interacting difusions II: Convergence in Law’, [2003] 6, Annales I.H. Poincarè-PR, p. 1043-1053.

legal systems *in genere*, the convergence of legal norms in separate systems and the convergence of interpretation of the law (treating interpretation as part of the legal culture). Owing to the complexity of the convergence phenomenon it is impossible to present or clarify all its methodological aspects. Therefore, I have decided to focus only on one part of this phenomenon: namely, that connected with investment services under the Markets in Financial Instruments Directive (MiFID).

I will consider convergence of investment services law in the European context only. However, this is not because I imply that convergence happens only in Europe. Quite the reverse! Nowadays, in the field of financial instruments (securities, derivatives) a worldwide positive regulation trend can be observed. This trend manifests itself in the standardisation of instruments, closer supervision of the market and a broadly understood protection of the market (the safety of market participants).³ I have decided to confine myself to Europe for methodological reasons – comparing and taking into consideration all distinct non-European legal systems is a task that requires extensive explanation and would have little relevance for participants of the European market.

Moreover, the focus on Europe is dictated by the particular role of European Union law, which seems to be the basis for the rapprochement of national legal systems. The choice of MiFID is motivated by the fact that the directive is a model example of harmonisation focused only on one purpose – convergence.

This paper will argue that MiFID can be treated as a point of reference in the discussion about the convergence of legal systems. The structure of this article will be as follows: in section 2. I will present the origins of MiFID. Section 3. will discuss the general aspects of convergence and its specific form – harmonisation. Section 4. will deal with provisions introduced by MiFID, taking as an example the German, Lithuanian and Polish regulations derived from the Directive. Finally, section 5 will conclude with an assessment of MiFID and its impact on the convergence phenomenon.

2. THE ORIGINS OF THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE

2.1. FSAP as a method of convergence

An interpretation of the free movement of services and the free movement of capital principles has led to the development of Europe's single license (single passport) rule. According to this rule, an entity licensed to provide services in a Member State has the right to conduct all activities within that license throughout the entire European Union.⁴ Supervision of such an entity is exercised by the authority which has issued the permit, operating in the host country (the country of residence). In general, the supervisory criteria are: capital requirements, prudential rules, rules of conduct, good standing rules, etc.⁵ As the convergence through the rule in question is quite obvious, it will not be discussed in the present paper.

3 This trend is connected with learning from (coping?) USA experiences by the EU legislators and other countries.

4 B. Bacia, in: J. Barcz (ed.), 'Prawo gospodarcze Unii Europejskiej' ['The economic law of the European Union'], Euro-prawo: Warsaw 2011, p. V-51.

5 Ibidem, p. V-52, V-53.



Mentioning the single passport rule was necessary due to its leading role in creating a single market of financial services. A need for the harmonization of the financial services market has arisen and this has led to the adoption of the Financial Services Action Plan (FSAP), announced in the Commission Communication of 17 May 1999.⁶ FSAP is a great example of convergence: numerous directives, with different levels of harmonisation, have been proposed and implemented⁷; one coherent purpose of harmonisation has been proclaimed and direct measures increasing convergence have been promoted.

Some scholars indicate that FSAP has not created a uniform, coherent market of financial services in Europe.⁸ This point of view is based on an analysis of basic FSAP directives: the Market Abuse Directive⁹, the Takeover Bids Directive¹⁰, the Transparency Directive¹¹ and the Prospectus Directive¹². However, this approach overlooks MiFID. It should be stressed that MiFID is the most carefully and accurately created regulation under FSAP, so it should have a leading role in the assessment of the FSAP.

2.2. The Markets in Financial Instruments Directive

The entry into force of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments the Market in Financial Instruments Directive – is the fourth stage of harmonisation and integration of the European financial market. MiFID replaces the Investment Services Directive (ISD). As has been mentioned above, the promulgation of MiFID Implementing Directive 2006/73/EC¹³, as well as Implementing Regulation 1287/2006¹⁴, has been part of the implementation of the Action Plan for Financial Services (Financial Services

6 Communication from European Commission – Implementing the framework for financial markets: action plan, COM (1999), 0232 final.

7 A review of directives implemented under FSAP see http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm#transposition.

8 M. Humphrey-Jenner, 'The Desirability of 'weak' harmonization: perspectives from statutory interpretation and legal coherence', [2012] July 1, GLJ, Westlaw/eL, p. 807.

9 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation.

10 Directive 2004/25/EC of 21.04.2004 on takeover bids

11 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements (...).

12 Directive 2003/71/EC European Parliament and Council on the prospectus to be published, submitted to the European Securities Committee. Now the Prospectus Directive has been replaced by Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

13 Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. OJ L 241.

14 Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, OJ L 241.

Action Plan - FSAP). The FSAP was based on the 'Lamfalussy process', a four-level decision-making process in the field of financial market regulation (named after the Chairman of the so-called Committee of Wise Men, Alexandre Lamfalussy)¹⁵. Acts on the first level are of a general, framework nature and contain regulations which are to be found in the legal systems of the Member States. The provisions of MiFID, belong to this group, unlike the provisions of the Implementing Directive and the Implementing Regulation, which are part of the second level of the Lamfalussy process. It should be noted that the level 2 Directive and the Regulation are of a rather technical nature and are used to achieve the objectives of MiFID.¹⁶

The reasons for the replacement of the ISD by the new regulations are cited by MiFID. Recitals 2 to 6 of the Directive provide that given the increasing number of investors and the growing offer of more and more sophisticated financial instruments, owing to the need for enhanced levels of consumer protection, the adoption of the new directive was necessary in order to expand the scope of regulated activities in the provision of investment services and the demand for the acquisition regulation of commodity derivatives.

3. HARMONISATION AS AN EXAMPLE OF CONVERGENCE

3.1. Harmonisation as a process

Harmonisation can be considered to be the primary manifestation of the convergence of legal systems. However, convergence is a process of a spontaneous nature which cannot be unambiguously classified. Harmonisation, on the other hand, is not spontaneous. Measures of harmonisation are subordinated to the principles and purposes of European Union, providing regulatory co-operation, which is the next step after the Economic and Monetary Union. Harmonisation is an expression of convergence and generally should be understood as a set of institutional measures taken by the EU and the Member States, leading to the creation of common legal frames for all national legal systems.¹⁷

Furthermore, the term 'implementation' should be distinguished from harmonisation. As well as convergence, the latter indicates a process which leads to the fulfilment of specific political purposes, which have been mentioned above. Implementation, on the other hand, can be described as a 'tool' of harmonisation – a specific measure which ensures the effectiveness of norms adopted by directives.

¹⁵ X. Freixas, P. Hartmann, C. Mayer, 'The assessment: European Financial Integration', [2000] 20(4) *Oxford Review of Economic Policy*, p. 479.

¹⁶ L. Enriques, M. Gatti 'Is there a uniform EU securities law after The Financial Services Action Plan?' [2008] 14(1) *Stanford Journal of Law, Business & Finance*, p. 46 and next.

¹⁷ T. Stawecki, *Konwergencja i dywergencja porządków prawnych w sferze tworzenia prawa* [Convergence and divergence of legal systems in legislation process, in: *Konwergencja czy dywergencja kultur i systemów prawnych?* [Convergence or divergence of cultures and legal systems?], Warsaw: C.H. Beck 2012, p. 34.



3.2. Full and minimum harmonisation

Two main ways of harmonisation can be distinguished: full (maximum) harmonisation and minimum (weak) harmonisation. Full harmonisation is based on a “one size fits all” approach, which assumes that a couple of decisions made in Brussels can determine the best legal solutions for all Member States.¹⁸ Full harmonisation establishes a uniform set of norms. In accordance with this attitude, a national level of protection cannot be higher or lower than this in the new implementation.¹⁹ The full harmonisation process is mainly related to consumer protection directives. According to the European Commission, full harmonisation has a leading role in providing an increase of consumer confidence in the internal market and strengthening the position of consumers in the marketplace.²⁰ Recently the full harmonisation approach has been criticised, the arguments against being mostly based on game theory evidence²¹, differences of legal cultures²² and the particular nature of harmonisation in different countries.²³ Nevertheless, this criticism of full harmonisation is not an expression of opposition against the convergence phenomenon as a whole. It is only a postulate which draws attention to the artificiality of the full harmonisation process, which at times may lead to a lack of flexibility in the regulations.

Minimum harmonisation allows each country to implement directives into domestic systems at their discretion, as long as the enacted regulations do not conflict with the minimal standards of uniformity required by the directive.²⁴ The minimum harmonisation approach has also been subjected to criticism.²⁵ This criticism is based on the assertion that a weak harmonisation may result in a “run to the bottom” effect in regulation (the so-called „Delaware effect”).²⁶

18 Compare: M. Humphrey-Jenner, [2012], p. 807.

19 M. Loos, ‘Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive’ [2010] 03, Centre for the Study of European Contract Law Working Paper Series, p. 6. Available at SSRN: <http://ssrn.com/abstract=1639436>.

20 Full harmonisation is the way of performing the priorities of the Consumer policy strategy. Consumer policy strategy 2002-2006 was introduced on 7 May 2002 by the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (2002) 208 final. This communication established full harmonisation as the basic method of consumer law harmonisation; see also M. Loos [2010], p. 6 and Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the EU Consumer Policy strategy 2007-2013, p. 7.

21 U. Bhattacharya, H. Daouk, ‘When No Law is Better Than a Good Law’, [2009] 13(4) Review of Finance, p. 577-627.

22 M. Humphrey-Jenner [2012], p. 813, 814.

23 M. Loos [2010], p. 33, the author argues, that the private law directives do not affect a general law of contract of Member States, what makes the coherence of law unreal.

24 M. Tison ‘Financial Market Integration in the Post FSAP Era. In Search of Overall Conceptual Consistency in the Regulatory Framework’ in: G. Ferrarini, E. Wymeersch, ‘Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond’, Oxford University Press 2006, p. 446.

25 Compare: M. Humphrey-Jenner, [2012], p. 807 and references.

26 “Run to the bottom” consist on implementing more and more lax regulations to attract companies to host in country with the most accommodating law; see M. Humphrey-Jenner [2012], p. 807, 808.

4. THE MiFID AS AN EXAMPLE OF CONVERGENCE

The MiFID can hardly be classified as a full harmonisation directive. The scope of the Directive, a large number of exemptions and the relative freedom of opt-outs to increase the level of protection of clients of investment firms indicate rather the minimum harmonisation approach. I will assess the power of convergence of selected provisions of MiFID.

4.1 A scope of the directive

The MiFID, in comparison with the ISD, has increased the scope of investment products, services coverage and organise dealing on new trading platforms. Furthermore, the directive has created a comprehensive regulatory regime in the field of execution of transactions and in the field of provision of investment services.²⁷ The regulatory scope is defined in article 1 MiFID: "1. This Directive shall apply to investment firms and regulated markets." It is obvious that despite the fact that MiFID is limited only to actions of investment firms, its provisions affect all market participants. Guarantees like: established ways of managing conflicts of interests, authorised obligation of honesty and fairness of investment firms, suitability and appropriateness of investment services and products, and best execution of transactions are set of rights which increase safety of clients by preventing frauds. MiFID has improved the choice of intermediaries. All of them are required to conform to high conduct of business standards, which leads to lower prices for better standard of services.²⁸ One comment has to be made on the limitation of the scope of the directive solely to regulated markets. The European Regulator is still working on new directives, which will regulate also the OTC market. What is the most important, the idea is to expand some provisions of MiFID on the OTC and to regulate electronic trading.²⁹ Although the EU laws on OTC derivatives, central counterparties and trade repositories³⁰, and short selling and credit default swaps³¹ have different objectives, they are still complementary to MiFID. The first aims to minimise counterparty credit risk and operational risk by the establishment of the mandatory Central Counterparty brokerage. The second aims to increase harmonisation as well as transparency, and to mitigate the risks associated with short selling and the use of credit default swaps.³² The revision of MiFID is the essential part of structural reforms. Reforms, which have been instigated by the financial crisis and its after-effects. Those examples show dimension of changes on financial markets, changes which may be referred to as a part of the convergence process.

27 J.-P. Casey, K. Lannoo, *The MiFID Revolution*, New York 2009, p. 34.

28 *Ibidem*.

29 See so-called MiFID II: Commission adopts proposals of 20 October 2011 for a Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, and for a Regulation on markets in financial instruments and amending EMIR, http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm.

30 The Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), which entered into force on 16 August 2012.

31 The Regulation (EU) No 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of Credit Default Swaps (OJ L 86/1), which entered into force on 1 November 2012.

32 Review of the Markets in Financial Instruments Directive (MiFID): Frequently Asked Questions, Memo/11/716 Brussels, 20 October 2011, question no. 22.



4.2. The Clients classification

The MiFID has introduced three categories of clients: eligible counterparties, professional clients and retail clients. Investment firms can make offers to eligible counterparties without fulfilling any specific obligations, concerning conduct of business, best execution etc.³³ The professional client is defined in Annex II of MiFID and in general is described as a client “who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs”³⁴. Further, generally the retail client is a non-professional (there is no connection between his professional activity and the investments). The retail clients benefit from the highest level of investor protection. Expectations are, that an application of client classification system by MiFID will provide the same level of protection of clients’ interests in all Member State, whether the clients will choose a domestic investment firm or a foreign one. In order to verify those expectations, I will examine regulations of a few Member States.

In Germany, the legislator has established three different categories of clients (however, the eligible counterparties are a sub-category of professional clients).³⁵ Nevertheless specific rules cause some doubts: according to § 31a sec. 2 sent. 2 No. 3 WpHG ‘local authorities’ are professional clients in the meaning of the WpHG. It is not clear, however, if local authorities should be treated as ‘national and regional governments’ in the meaning of Annex II point I.3 MiFID or if they rather should be treated as ‘public sector bodies’ in the meaning of Annex II point II.1 MiFID and therefore as clients whose need higher standard of protection.³⁶ I assume that the same problem arises in Lithuania on the ground of article 27 of the Law On Markets In Financial Instruments³⁷ and on the ground of Polish legislation³⁸. Those acts define ‘national and regional governments’ as professional clients and it is clear, that they are not supposed to be treated as retail client without request. New Conduct of Business Sourcebook (COBS)³⁹, however, states in its rule 3.5.2A, that a local authority or a public authority is not likely to be a regional government *per se*. Therefore, there is a discrepancy between these two approaches.

Moreover, the definition of eligible counterparty varies in different Member States. Article 29.4 of Lithuanian Law On Markets establishes a possibility for the Securities Commission to recognise

33 G. Ferrarini, ‘Contract standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture’, [2005] 02 Johann Wolfgang Goethe-Universität, Institute for Law and Finance, Working Paper Series No. 39, p. 8.

34 The Annex II of MiFID *in principio*.

35 S. Barry, H.Bracht, ‘The Implementation of MiFID into the WpHG’, [2012] 09(09) GLJ, p. 1180; in Germany MiFID was implemented mostly in the Finanzmarkttrichtlinie-Umsetzungsgesetz (FRUG), however the material provisions were implemented in the Wertpapierhandelsgesetz (Sept. 9, 1998, BGBl. 1998 I at 2708; hereinafter WpHG).

36 *Ibidem*, p. 1181.

37 The Republic Of Lithuania Law On Markets In Financial Instruments, 18 January 2007, No. X-1024 Vilnius, unofficial translation of Lithuanian Securities Commission (hereinafter Lithuanian Law On Markets).

38 The Act on Trading in Financial Instruments – which has implemented the frame rules of MiFID (and other FSAP directives related to the financial instruments) and the regulation of The Minister of Finance of 24 September 2012, on the procedures and conditions for investment firms, banks, referred to in Art. 70 sec. 2 Act on Trading in Financial Instruments, and custodian banks – which has implemented the specific part of MiFID provisions (hereinafter: Polish regulation).

39 Which has implemented MiFID in Great Britain; see <http://fshandbook.info/FS/html/handbook/COBS/3/5>.

other entities as eligible counterparties. Polish regulation does not provide such possibility, and the optional change of classification is based on the character of the act between a client and the investment firm. When this act involves interests of the investment firm, another party is treated as eligible counterparty.⁴⁰

The examples presented above demonstrate, that even though the uniform provisions of the directive are clear, problems may appear at the level of Member States' legislation.

4.3. Suitability and appropriateness

The MiFID imposes special obligations on investment firms (the fair-dealing principles). Investment firms have to obey by them while recommending or selling any product or service to the retail clients. These requirements involve a 'suitability test' and 'appropriateness test', expressed in 19.4 and 19.5 of MiFID. Article 19.4 obligates investment firms providing investment advice or portfolio management to obtain from its client (or potential client) information regarding his knowledge and experience in the investment field relevant to the type of product or service offered, as well as information about his financial situation and his investment objectives. This gathering of information is needed to recommend him products 'that are **suitable** to him'. Article 19.5 requires investment firms providing services other than investment advice or portfolio management to ask the client or potential client to provide similar information 'so as to enable the investment firm to assess whether the investment service or product envisaged is **appropriate** for the client'.⁴¹

The suitability and appropriateness tests are established in § 31 sec. 4 and 5 WpHG, respectively. In Lithuanian Law On Markets the tests are established in articles 22.6 and 22.7. What is astonishing, the Polish regulation does not make a distinction between suitability and appropriateness, providing only for the suitability test, which is to be applied to every service performed by the investment firm.⁴² Even though the aforementioned tests have the same purpose (the enhancement of investors protection), they are nevertheless applicable to two different situations.⁴³ In general, it could be said that the suitability rule apply to the advisory services (higher investor protection) and the appropriateness refer to the "execution only" services (lower investor protection).⁴⁴ The mistake in the Polish regulation does not affect market participants much, because their protection is on the same level as in the other Member States, because of the same conditions of protection. Nevertheless, that mistake in wording gives an impression that Poland did not implement the provisions of MiFID on appropriateness. In the discussion about the role of MiFID in the process of convergence of legal systems, this situation should be considered as an example of 'ostensible convergence'.

40 According to § 7.1 of the regulation, client of the investment firm defined in article 3 point 39b (triet a)-j) and l)-m) of the Polish Act on Trading in Financial Instruments (professional client with exception of big entrepreneur), is an eligible counterparty if investment firm dealing with such client for its own account.

41 G. Ferrarini, [2005], p. 20.

42 § 15.1. and § 16.1. of Polish regulation.

43 A. Chirico, 'Suitability and Appropriateness under MIFID: 'Faithful watchdogs' or 'terrible twins'?', [2007] 21 The Journal of Financial Transformation, Capco Institute, p. 3.

44 Ibidem, p. 4.



Because of the wrong wording, provisions of the Polish regulation may seem non-coherent with MiFID. However, the discussed mistake creates a situation in which EU law is coherent at the level of enforcement, but is incoherent at the legislative level.

4.4. Comparing of services – communications and best execution policy

Clients have an opportunity to compare the services provided by investment firms, because MiFID sets standards which have to be met by investment firms while providing information to their clients. Article 19.2 of MiFID states: “2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.” The key policy objective of MiFID encouraging rule is to enhance possibility to compare various investment firms offers. In Lithuania article 22.2 of the Law On Markets is repeating MiFID provision and so does § 9.1 of the Polish regulation.

Furthermore, the comparison of services is easier because of the best execution requirement. Article 21.2 MiFID requires “investment firms to establish and implement an order execution policy” to provide best execution of orders for their clients. Provisions of this policy can be a basis for selection of a better investment firm by a client. The requirements to provide best execution enhance the confidence of retail investors and lead to their increasing participation in the securities markets.⁴⁵ Paragraph 33a sec. 1 German WpHG establishes a rule, that investment firm “must take all reasonable steps to obtain, when executing orders, the best possible result for its clients”.⁴⁶ In order to do that, the investment firm must establish a policy for the best execution. Paragraph 33a sec. 2 WpHG set that this best execution policy must take into account factors such as price, costs, speed (as well as other factors mentioned in 21.2 of MiFID).⁴⁷ In Lithuania article 24.2 repeats provisions of MiFID and so does § 48.1 of the Polish Regulation.

There are two conclusions that can be derived from the comparison, which has been presented above. Firstly, the fact, that the implemented law will have the same wording does not necessarily mean that the law will be more coherent, because the process of enforcement of law may be a cause of arising differences Secondly, when the established standards have open (more of a general) character the convergence process will be slower – and the delay will take place even if the implemented provisions have the same phrasing.

5. CONCLUSION

In spite of differences in wording (or even editing mistakes, as in the case of the Polish regulation), general axiological standards of MiFID are carried out by the three presented legal systems.

⁴⁵ J.-P. Casey, K. Lannoo, *The MiFID Revolution*, New York 2009, p. 23.

⁴⁶ S. Barry, H.Bracht [2012], p. 1182.

⁴⁷ Ibidem.

In other words, the process of the convergence of legal systems in the field of “law in books” is has been put into effect. On the one hand, the process of convergence is desirable for the market, because it contributes to legal certainty across the EU. On the other hand, it raises doubts as to whether this advantage does not disappear in the field of the “law in action”. Enforcement of the law, and in particular enforcement of the law by supervisory authorities, is determined by politics and is therefore influenced by relations between the entity and the State. From the perspective of market participants, the center of legal risk is moved from the legislative level to the level of interpretation of EU law by supervisors. However, here I am not saying that the method of harmonisation proposed in MiFID has not brought any changes for market participants – it is not for nothing that MiFID has very often been referred to as a revolution⁴⁸. My goal has been to draw attention to the fact that real convergence is not only the establishment of uniform, or even identical standards – it is something more. Time is a critical element in the process of convergence and this process cannot be artificially accelerated. The purposes of MiFID have not yet been fully achieved, because the regulatory framework is only the first stage of convergence. The process of convergence will be continued by the practical application of MiFID provisions. This practice will be influenced by two factors: firstly, by the need on the part of the EU–15 States to adapt to the inevitable changes resulting from the expansion of the EU and secondly, by the process of the adaptation of the new Member States to their new obligations.

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48 J.-P. Casey, K. Lannoo, *The MiFID Revolution*, New York 2009, p. 1-3.

GERMAN AND POLISH CONSTRUCTIVE VOTE OF NO CONFIDENCE. CONVERGENCE OR DIVERGENCE?

Maciej Pach*

Jagiellonian University in Kraków, Poland

Abstract. The paper compares and analyzes German and Polish provisions pertaining to the constructive vote of no confidence (articles 67 and 158 of respective constitutions).

The convergence of legal systems is a phenomenon well mirrored in constitutions of several post-communist countries, such as Poland. However, it is not without serious drawbacks, the institution of no confidence vote being a case in point.

The main idea of the constructive vote of no confidence – originally established in article 67 of the 1949 Basic Law for the Federal Republic of Germany – is to prevent sudden government falls. In Germany, voting on the motion of no confidence against the chancellor is legally allowable only if it contains a name of his/her successor, and the support of the majority of the statutory number of MPs is required to make the motion effective. It is impossible to pass votes of no confidence against ministers. Thus, the German constitution guarantees the stability of the cabinet without giving up fundamental principles of the parliamentary system. Therefore, it is not surprising that many other, completely different countries decided to adopt a counterpart of article 67.

Nevertheless, the convergence of the general idea does not mean that the counterparts fully reflect the prototype. In Poland the constitution-giver tried – by maintaining individual parliamentary accountability of ministers – to accommodate the advantages of the institution of the constructive vote of no confidence with the native constitutional tradition of the powerful Sejm. However, such a solution can cause serious practical problems described in the article. This leads to the conclusion that it is more reasonable to decide on one legal pattern than to blend many institutions of different provenance.

Keywords: vote of no confidence, parliamentary accountability of government, chancellor, prime minister, minister

INTRODUCTION

After the WWII, when in divided Germany a creation of two fundamentally different states was becoming reality, the authors of the constitution for Western Germany knew from the very beginning that this legal document had to be an opposite of its predecessor. Probably the Weimar Republic's constitution should not be blamed on its own for Adolf Hitler's power takeover in 1933,

* Magister in law, PhD candidate (Jagiellonian University in Cracow, Faculty of Law and Administration, Chair of Constitutional Law). His research interests concentrate on Polish and German constitutional law, with a particular emphasis on the issues of the system of government, especially both parliamentary and constitutional accountability. He published several articles in scientific revues, *inter alia* in "Przegląd Sejmowy" [No. 2(109)/2012], a renowned journal of the Sejm Chancellery (available in print and online – on the official website of the Sejm: <http://www.sejm.gov.pl/Sejm7.nsf/prze-glądSejm.xsp>).

since many political and economic conditions had concurred thereto. However, this statement does not discredit another one – that the 1919 German constitution had failed, displaying all its dysfunctional features, especially in the area of division of powers, where the chancellor had to be supported both by the president and the majority of the parliament. Due to a strong fragmentation of the latter, permanent clashes of state authorities were taking place, leading to frequent chancellors' changes. In order to avoid it in future, the Parliamentary Council in Bonn – the constituent assembly which prepared the 1949 Basic Law for the Federal Republic of Germany¹ (named below as “the Basic Law” or “the BL”) – handed the executive power unequivocally to the government and limited the presidency mostly to representative tasks, thus enabling the chancellor to become a powerful political player².

CONSTRUCTIVE VOTE OF NO CONFIDENCE – THE IDEA AND ITS WORLDWIDE CAREER

A crucial element guaranteeing the chancellor's strong constitutional position is the constructive vote of no confidence. In 1950, one year after Basic Law's entry into force, Hans Schneider mentioned its art. 67 among three most significant points of the constitution (the other two were: the chancellor's election by the Bundestag and the possibility of passing statutes submitted by the government despite the parliament's refusal, when some extraordinary criteria have been fulfilled [art. 81 of the BL])³. According to this provision of the Basic Law, the only option for the Bundestag to express its disapproval for the government leader resulting for him in a loss of power is to pass the motion containing the name of his successor. More than a half of deputies have to support this initiative. If the motion is passed, the existence of the cabinet as a whole is over. At the same time, the constitution stays silent concerning motions against ministers, which is equal with the exclusion of their individual parliamentary accountability. Most scholars find acceptable resolutions criticizing the ministers which, though, do not result in their dismissal⁴.

The purpose of the above-mentioned constitutional solutions is to prevent so-called negative majorities to cause governmental crises, as at the same moment when the Bundestag forces the chancellor to end his duties, a new one is elected⁵. Already now it should be brought out that this particular expectation has been fulfilled in practice. So far only two attempts to change the chancellor in the way foreseen in art. 67 took place. In 1972 Rainer Barzel from CDU (Christian

1 Published in *Bundesgesetzblatt* 1949, No. 1, as amended.

2 More on the assumptions of the BL's authors and the examples of the constitution provisions reflecting them see: D. Willoweit, 'Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands' (München: C. H. Beck 2005) 426-428.

3 H. Schneider, 'Kabinettsfrage und Gesetzgebungsnotstand nach dem Bonner Grundgesetz' [1950] 8 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 52.

4 About their admissibility and the problem of the parliamentary accountability of ministers in Germany see e.g. L. Garlicki, 'Parlament a rząd w Republice Federalnej Niemiec' (Wrocław – Warszawa – Kraków – Gdańsk: Wydawnictwo Polskiej Akademii Nauk – Zakład Narodowy Imienia Ossolińskich 1978) 99-103.

5 P. Sarnecki, 'Ustroje konstytucyjne państw współczesnych' (Kraków: Kantor Wydawniczy Zakamycze 2005) 244-245.



Democratic Union) failed to substitute SPD's (Social Democratic Party of Germany) Willy Brandt, whereas 10 years later Helmut Kohl (CDU) managed to get the support of the Bundestag's majority against Helmut Schmidt (SPD)⁶.

Nevertheless, some scholars neglect the role of the constitution in the creation of governmental stability in Germany, emphasizing rather the positive influence of the electoral and party systems, both preventing the fragmentation of the parliament. Although these factors ought not to be overlooked, it would be seriously erroneous to omit the impact of art. 67 of the BL. In Germany, such key provisions of electoral law as the threshold clause, limiting the number of lists included in the distribution of parliamentary mandates, or the choice of proportional or majority system are the subject of an ordinary statute, not a constitutional matter. Hence, it is theoretically possible that the Bundestag passes a bill decreasing the threshold clause to a number lower than the current 5% and/or changes the partially proportional and partially majority electoral system. In the aftermath of those decisions the Bundestag could get "richer" in parties. Another issue is the crisis of German political parties, typical for many European countries and expressed by the growth of anti-party emotions within the society⁷. It is reflected in the degree approval for two German main parties – CDU and SPD – which, counted together, have got weaker and weaker electoral support, whereas some organized groups of protest (such as the Pirate Party of Germany or the National Democratic Party of Germany) have become stronger and stronger, even if still having parliamentary representation only at the *Landtag* level. Good electoral and party systems are not enough for government's long term stability. Meanwhile, the constructive vote of no confidence as a constitutional provision may neither be amended nor abrogated without a revision of the Basic Law, which is much more difficult. Thus, art. 67 could be the best barrier for any oppositional attempts of pure destabilization. On the other hand, the political accountability of the government – the most significant feature of the parliamentary system – remains a component of the constitutional system. The only prerequisite to change the criticized cabinet is to find support for the chancellor's oppositional rival. The 1982 case of Helmut Schmidt provides evidence for the real and not fictional character of the institution of parliamentary accountability.

Foreign constitution-givers also recognized the above-mentioned advantages of art. 67 of the BL what was acknowledged by the reception of this provision. Several young democracies, such as Spain after Francisco Franco's death or post-communist Hungary, Slovenia and Poland, decided on such a solution. It is remarkable that Belgium, a state with longer democratic traditions, also engrafted a counterpart of this provision to its own constitution. However, none of the above-mentioned states chose a literal reception of art. 67. The convergence, not the identity, is a fact⁸.

6 Details in: E. Zwierzchowski, 'Rząd w systemie parlamentarnym RFN' [2009] 6 Przegląd Sejmowy 87-88.

7 R. Bieniada, 'System partyjny', in: S. Sulowski, K. A. Wojtaszczyk (eds), 'System polityczny Republiki Federalnej Niemiec (wybrane problemy)' (Warszawa: Dom Wydawniczy ELIPSA 2005) 243.

8 See: art. 96 of the Constitution of the Kingdom of Belgium, art. 113 of the Constitution of Spain, art. 116 of the Constitution of the Republic of Slovenia, art. 21 para. 1, 2, 5 of the 2011 Fundamental Law for Hungary (these particular provisions are essentially the same as the 1990 Hungarian constitutional regulations). Full English texts of the constitutions are available on the official websites of the Belgian Chamber of Representatives, the Spanish Congress of Deputies and the

COMPARATIVE ANALYSIS OF GERMAN AND POLISH REGULATIONS

The limits of this paper exclude a presentation of the regulations of all the above-mentioned states. However, even just one case could serve as a good contribution to the considerations on a general issue of convergence of legal institutions.

After 1989 Polish constitution-givers also made use of the German constitutional achievements⁹, especially by strengthening the prime minister's position. As Krzysztof Wojtyczek observed, the constructive vote of no confidence is one of the expressions of this process of "germanization" of the Polish constitutional law¹⁰. However, on the ground of the 1992 "small constitution", the constructive vote of no confidence was only an alternative instrument of the exacting of the governmental parliamentary accountability. A step forward was made five years later, when art. 158 of the new Constitution of the Republic of Poland¹¹ limited the latter solely to its constructive version. Nevertheless, respective German and Polish regulations still contain not only similarities, but also differences.

According to both constitutions, the motion of no confidence has to include the name of the government chief's successor. Only one voting takes place in the Bundestag. There are no separate votings concerning the disapproval for the chancellor and the election of his/her successor, since the second decision automatically brings both legal results¹². The same idea is mirrored in the Polish regulation.

Another similarity is the size of the voting majority. The motion is passed only if it gets the support of the majority of the Bundestag/the Sejm members (and not only of the voting deputies). The function of such constitutional solutions is obvious. Only a new stable majority in the parliament enables the cabinet's change.

Art. 67 para. 1 sentence 2 of the BL and art. 158 para. 1 sentence 2 of the Polish constitution contain another important similarity. The presidents of both states are forced to accept the decision of the parliamentary majority and to appoint the new elected chancellor/prime minister¹³. In Poland the president has one more obligation – to appoint, on the motion of the new prime minister, the other members of the Council of Ministers¹⁴. The Sejm is not empowered to express

Hungarian National Assembly. The English translation of the Slovenian constitution is available on the official website of the Slovenian Constitutional Court.

9 K. Wojtyczek, 'Polska nauka prawa konstytucyjnego na przełomie wieków', in: M. Zubik (ed.), 'Dwadzieścia lat transformacji ustrojowej w Polsce. 51. Ogólnopolski Zjazd Katedr i Zakładów Prawa Konstytucyjnego, Warszawa, 19-21 czerwca 2009 r.' (Warszawa: Wydawnictwo Sejmowe 2010) 51. However, there were also other sources of inspiration, see: M. Kruk, 'Przyczynek do rozważań o inspiracjach Konstytucji RP z 1997 r.' [2002] 12 Państwo i Prawo 3-16.

10 K. Wojtyczek, 'Polska ...', 51.

11 Published in *Dziennik Ustaw* No. 78, item 483, as amended.

12 V. Epping, 'Artikel 67', in: H. von Mangoldt, F. Klein, Ch. Starck (eds), 'Kommentar zum Grundgesetz. Band 2. Artikel 20 bis 82' (München: Franz Vahlen 2005) 1661; U. Mager, 'Art. 67 (Mißtrauensvotum)', in: I. von Münch, Ph. Kunig (eds), 'Grundgesetz – Kommentar. Band 2. Art. 21 bis Art. 69' (München: C. H. Beck 1995) 1123.

13 Even if an "artificial" governmental crisis took place, not a real loss of confidence. See: V. Epping, 'Artikel 67...' 1663-1665 and U. Mager, 'Art. 67...' 1125. In terms of the Polish regulation: W. Sokolewicz, 'Artykuł 158', in: L. Garlicki (ed.), 'Konstytucja Rzeczypospolitej Polskiej. Komentarz', Vol. 1 (Warszawa: Wydawnictwo Sejmowe 1999) 50.

14 In Germany the situation is, in fact, the same. Art. 67 stays silent of this obligation because art. 64 para. 1 contains

a vote of confidence to the new government, although it has such a competence in the standard procedure of government appointment (art. 154 para. 2 and art. 155 para. 1)¹⁵. Thus, those two types of procedure differ from each other, indicating incoherence of the whole constitutional regulation¹⁶. Meanwhile, in Germany at the stage of the standard procedure of the appointment of the government as well as in the procedure of the constructive vote of no confidence the Bundestag votes only for or against the chancery candidate. As one of the Polish scholars concluded regarding the latter: “This is a logical and consistent solution coming from the fact that only the chancellor possesses the confidence of the Bundestag expressed in the process of his election and only he can lose it”¹⁷.

Quite obviously another similarity presents itself – the written form of the deputies’ motion. In both countries it is regulated by the internal parliamentary rules of procedure (§ 97 para. 1 sentence 2 of the Rules of Procedure of the German Bundestag¹⁸; art. 115 para. 1 of the Rules of Procedure of the Sejm¹⁹). The Polish act additionally forbids the withdrawal of signatures, making pointless any attempts of pressure on the deputies after the submission of the motion²⁰.

Both constitutions foresee an interval between the submission of the motion and the voting. According to the German one it is at least 48 hours, whereas in Poland – 7 days. Neither the BL, nor the RPGB introduce any deadline for the parliament to act on the motion. The Polish rules of procedure define the moment of proceeding and voting as the soonest sitting of the Sejm after 7 days from the day of submission and no later than the next sitting (art. 115 para. 4 of the RPS). Both regulations protect the government from sudden falls and enable them to look for support among deputies in case of a submission of the motion, which deserves a positive assessment from the teleological point of view²¹. At the same time, the Polish one emphasizes the necessity of a relatively quick action of the parliament, making impossible stonewalling by the Marshall of the Sejm (who usually is a member of the governmental fraction).

Among differences between German and Polish regulations the one pertaining to the authority being dismissed seems to be meaningful only *prima facie*. In Germany it is the chancellor, whe-

a general presidential obligation to appoint and dismiss ministers on the motion of the chancellor, what is a formula for all the changes in the government composition. No vote of confidence is needed anytime.

15 This explains some initial doubts among scholars, dispersed e.g. in following expert opinions: M. Zubik, ‘Konieczność uzyskania wotum zaufania przez rząd wyłoniony na skutek zgłoszenia konstruktywnego wotum nieufności’ [2001] 3 Przegląd Sejmowy 53-55; A. Szmyt, ‘Czy powołanie Rady Ministrów w trybie art. 158 ust. 2 konstytucji wymaga przeprowadzenia kolejnego głosowania, przewidzianego w art. 154 ust. 2 konstytucji, w celu uzyskania wotum zaufania?’ [2001] 3 Przegląd Sejmowy 56-59.

16 Sz. Pawłowski, ‘Upadek rządu mniejszościowego – analiza porównawcza polskich i niemieckich rozwiązań konstytucyjnych’ [2004] 4 Przegląd Sejmowy 73.

17 M. Domagała, ‘System kanclerski i możliwości jego zastosowania w nowej Konstytucji Rzeczypospolitej Polskiej’, in: M. Domagała (ed.), ‘Konstytucyjne systemy rządów. Możliwości adaptacji do warunków polskich’ (Warszawa: Wydawnictwo Sejmowe 1997) 129 (translation: M.P.).

18 Named below as RPGB.

19 Named below as RPS.

20 W. Sokolewicz, ‘Artykuł 158...’ 32.

21 U. Mager, ‘Art. 67...’ 1124; W. Sokolewicz, ‘Artykuł 158...’ 39; S. Patyra, ‘Konstruktywne wotum nieufności jako formuła tworzenia i dymisji Rady Ministrów’ [2001] 1 Przegląd Sejmowy 20.

reas in Poland – the Council of Ministers. Given that in both countries the fall of the chief of the government is linked with the fall of the government as a whole, this difference becomes rather of minor importance.

Sometimes the double, both “constructive” and “destructive”, content of Polish art. 158 is indicated (disapproval for the Council of Ministers should be expressed clearly in the motion – in Germany only the personal proposal for the chancery office is needed)²² but the role of this discrepancy is slighter than asserted. Moreover, the texts of the German motions (1972 and 1982) included also a direct expression of parliamentary lack of confidence²³.

More significantly distinct are the regulations concerning the number of the motion’s supporters. In Poland already the constitutional provision (art. 158 para. 1 sentence 1) establishes a minimum of 46 deputies (= 10% of the Sejm), whereas in Germany it is a matter of the parliamentary rules of procedure. § 97 para. 1 sentence 2 claims that at least $\frac{1}{4}$ of the deputies or a parliamentary fraction of that size have to sign the motion. That makes motions supported by slight minorities impossible. However, also the Polish regulation contains a legal barrier protecting from such unneeded actions of the MPs. According to art. 158 para. 2 sentence 2 and 3 of the Polish constitution: “A subsequent motion of a like kind may be submitted no sooner than after the end of 3 months from the day the previous motion was submitted. A subsequent motion may be submitted before the end of 3 months if such motion is submitted by at least 115 Deputies”²⁴. No such provision can be found in the German constitution and it is emphasized that no temporal limits exist²⁵. However, an already mentioned regulation of the RPGB, enabling the submission of the motion only for relatively large groups, leads to similar consequences, since initiatives of trifling minorities are thus excluded. *Notabene*, German high political culture makes it improbable that even one of the two biggest parliamentary fractions frequently submits motions from art. 67. Nevertheless, taking into account Polish parliamentary habits, quite typical for a young democracy, a temporal prohibition anchored in art. 158 should be evaluated positively, even if there are some controversies whether “subsequent motion” means a motion containing the same name of the prime minister’s successor or just another motion of no confidence, whatever its content²⁶.

INDIVIDUAL MOTIONS OF NO CONFIDENCE IN THE POLISH CONSTITUTION

Although some discrepancies between the Polish regulation pertaining to the discussed institution and its German prototype have been already analyzed, it is art. 159 of the 1997 constitution that fully justifies the conviction of one of the Polish scholars about “only a partial reception”²⁷ of

22 See e.g. S. Patyra, ‘Konstruktywne...’ 19.

23 See quotes in: E. Zwierzchowski (‘Rząd...’ 87-88).

24 All literal English translations of the Polish constitution provisions taken from the official website of the Sejm.

25 U. Mager, ‘Art. 67...’ 1123-1124; V. Epping, ‘Artikel 67...’ 1661.

26 Compare different opinions of W. Sokolewicz (‘Artykuł 158...’ 34) and S. Patyra (‘Konstruktywne...’ 16-17).

27 P. Czarny, ‘Rechtsrezeption im polnischen Verfassungsrecht’, in: W. Heun, Ch. Starck, Tzung-jen Tsai (eds), ‘Rezeption und Paradigmenwechsel im öffentlichen Recht’ (Baden-Baden: Nomos 2009) 117.



the German model. According to this provision²⁸, the Sejm is entitled to express no confidence to particular ministers with their dismissal as a result. This solution is linked to individual parliamentary accountability of the members of the Council of Ministers (art. 157 para. 2). Already during the preparatory work on the constitution professor Stanisław Gebethner had warned that this institution might enable circumventing of art. 158 by submitting many single motions against ministers instead of a constructive vote of no confidence against the government²⁹. It is remarkable that art. 159 had many strict opponents directly after the entry into force of the constitution³⁰ as well as many years later³¹. The crucial argument against it invokes the reduction of the prime minister's powers, contrary to the general tendency to strengthen his/her position³².

It is beyond the scope of this study to present the numerous facets of the institution described in art. 159. Suffice it to note that so far none of the submitted motions was passed by the Sejm, usually due to high constitutional requirements (especially the necessity of the support of an absolute majority of MPs), and counter-productive debates in the Sejm were the only result. However, art. 159 can be a real danger for the stability of minority cabinets (which are not a rare phenomenon in Poland), as the 2007 case showed. Soon after the governmental coalition had collapsed, the opposition submitted 19 separate motions of no confidence against all the members of the government, the prime minister excepted (because his/her parliamentary accountability is limited to its collective version encompassing the Council of Ministers as a whole). In order to avoid their probable deposition in the aftermath of the voting in the Sejm, the president of that time, Lech Kaczyński, effected, on the application of the prime minister, Jarosław Kaczyński, changes in the composition of the Council of Ministers (according to art. 161 of the Polish constitution). These changes had extraordinary character, as the same persons (in 15 of 19 cases) were appointed to the same offices after a break of a few days. Then the Marshall of the Sejm announced the expiration of all the motions. Scholars strongly criticized this decision³³. Nevertheless, their opinion, not being

28 "1. The Sejm may pass a vote of no confidence in an individual minister. A motion to pass such a vote of no confidence may be submitted by at least 69 Deputies. The provisions of Article 158, para. 2 shall apply as appropriate. 2. The President of the Republic shall recall a minister in whom a vote of no confidence has been passed by the Sejm by a majority of votes of the statutory number of Deputies".

29 W. Sokolewicz, 'Artykuł 159', in: L. Garlicki (ed.), 'Konstytucja Rzeczypospolitej Polskiej. Komentarz', Vol. 1 (Warszawa: Wydawnictwo Sejmowe 1999) 25.

30 P. Sarnecki, 'Funkcje i struktura parlamentu według nowej Konstytucji' [1997] 11-12 Państwo i Prawo 51, who emphasized that art. 159 "(...) may only serve pure demonstrative actions of the parliamentary opposition" (translation: M.P.).

31 R. Balicki, 'Relacje między organami władzy wykonawczej – na drodze do systemu kanclerskiego?', in: B. Banaszak, M. Jabłoński (eds), 'Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 roku' (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego 2010) 350-351. See also M. Kruk, 'Funkcja kontrolna Sejmu RP' (Warszawa: Wydawnictwo Sejmowe 2008) 62, who observes "a misuse of this institution". In fact, 72 motions have been submitted in the years 1997-2013 (till 1st of April; the last of them still waits for proceeding).

32 More arguments are recapped e.g. in: W. Sokolewicz, 'Artykuł 159...' 24.

33 See expert opinions: W. Sokolewicz, 'W sprawie niektórych problemów związanych z relacjami Prezydenta RP z rządem, odpowiedzialnością ministrów i zmianą kadencji parlamentu' [2008] 3 Przegląd Sejmowy 203-208; R. Piotrowski, 'W sprawie niektórych problemów związanych z relacjami Prezydenta RP z rządem, odpowiedzialnością ministrów i zmianą kadencji parlamentu' [2008] 3 Przegląd Sejmowy 208-214; L. Garlicki, M. Zubik, 'Idea parlamentaryzmu zrjonalizowanego w praktyce ustrojowej III RP', in: A. Łabno, E. Zwierzchowski (eds), 'Księga pamiątkowa profesora Marcina Kudeja' (Katowice: Oficyna Wydawnicza WW 2009) 182-185.

a source of law, even in the future will probably not play a decisive role from the point of view of politicians. Which is only to be regretted, especially given the quality of regulations produced without consideration even for most justified scholarly opinions.

CONCLUSIONS

Since the constructive vote of confidence has become the only possible mechanism of collective parliamentary accountability of the government, cautious remarks of one of the Polish constitutionalists pertaining to the idea of its engraftment in Poland³⁴ lost their justification. In fact, an alternative between the constructive version of this legal instrument and the “traditional” one had been permitting “negative” parliamentary majorities to choose the latter, as it happened on the ground of the 1992 “small constitution”. Nowadays the motion must be constructive.

It is well past any dispute that legal reception brings chances as well as dangers³⁵. As the analysis of the German and Polish regulations on the constructive vote of no confidence showed, some diverging elements had been implanted properly, with an account of local specificity, or, at least, the differences do not buckle the general idea. Also the practice confirms this statement. Only two motions were submitted after 1997, one of which was not even put to the vote because the oppositional candidate resigned very soon. The constructive vote of confidence strengthens the constitutional position of the Polish prime minister and in that sense art. 158 should be rated positively.

However, the parallel decision to maintain individual accountability of ministers enabled such actions as in 2007. An explanation of this particular decision could be found easily with a retrospective glance into the history of Polish parliamentarism. In fact, all Polish constitutions foresaw such a legal institution. This pertains even to the 1935 “April Constitution”, heavily diminishing the powers of the Sejm in favour of the president. In conclusion it has to be stated that since a deeper reception of art. 67 of the German BL took place in 1997, it would have been more reasonable to choose one pattern (optionally with a few discrepancies) than to blend institutions of different provenance. In its current legal shape, the aim of the reception is not guaranteed, which makes the usefulness thereof very problematic.

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34 M. Wyrzykowski, ‘Recepcja w prawie publicznym – tendencje rozwojowe konstytucjonalizmu w Europie Środkowej i Wschodniej’ [1992] 11 Państwo i Prawo 29-30.

35 *Ibid.*, s. 24-25.



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THE QUALITY OF PATENTS ON BIOTECH INVENTIONS: THE INTERNATIONAL COOPERATION ON THE NON-OBVIOUSNESS STANDARDS

Żaneta Pacud*

Jagiellonian University in Kraków, Poland

Joanna Lidia Uchańska**

Jagiellonian University in Kraków, Poland

Abstract. The patent system shall work properly to achieve an appropriate balance of interests between innovators, third parties and the public if it is to serve its purpose of promoting innovation and development. The quality of patents is a crucial aspect of how the patent system operates in order to deliver economic and social policy. However, many granted patents do not reach a sufficient quality standard because of the devaluation of the patent system which is particularly observable within the patentability of biotech inventions. As a result patents are granted for inventions which are not worth of protection.

Even though patent offices make a significant contribution to the proper functioning of the patent system to ensure that the patents they grant meet the standards, their effort is not high enough. Hence, the WIPO took up an international initiative to focus on improving the quality of the patent system, namely of patents granted worldwide.

The aim of this paper is to present the aforementioned issue based on the example of biotech inventions. Particular attention is paid to the assessment of the inventive step, which – firstly – lacks an objective method for verification and – secondly – tends to be too liberal. The subject matter is to submit the issue based on the example of non-obviousness which is, a priori, very difficult to analyze. Due to the complexity of biotech innovations there is a higher probability to grant a patent for a solution which is without merit in comparison to other fields of technology.

* Ph.D. Graduate of Law and European Studies at the Adam Mickiewicz University, currently stays in scientific cooperation with the Chair of Intellectual Property Law of the Jagiellonian University; lecturer of intellectual property law for technical courses and author of numerous articles and presentations related to patent law; member and coordinator of the Polish group in the international research project “Innovation Expert System”; laureate of the 2012 Polish Patent Office contest for the best doctoral thesis in the field of intellectual property;

** LL.M. From 2012/2013 – Ph.D. studies at the Faculty of Law and Administration, Jagiellonian University, Institute of Intellectual Property Law, Cracow, Poland 2007/2008–2011/2012 – master studies completed with the master’s degree in law at the Faculty of Law and Administration, Jagiellonian University, Cracow, Poland; master’s thesis entitled: “Protection of Biodiversity and Patent Protection. Selected Issues.” Active in IP issues, especially patent law in life science, additionally connected with civil, antitrust and international law. Currently a trainee attorney. Member of an international research project on patent law – the Innovation Expert System/FSTP. Winner of the Award of the Minister of Agriculture and Rural Development in the 10th edition of the competition for the best thesis on the protection of IP, held by the President of the Polish Patent Office. WIPO graduate – University of Dubrovnik Summer School on Intellectual Property (2012). Awarded a scholarship by the Ministry of Science and Higher Education (2011/2012). Member of several organizations on human rights. Participant in numerous conferences and trainings. Author of more than a dozen publications on IP law, civil law, as well as public international law and community law.



This paper proves that it is possible to objectify the assessment of the inventive step. This could lead to a significant improvement of the patent quality and to greater legal certainty within regional and national patent systems.

Key words: Patent quality, biotechnological inventions, non-obviousness, IES/FSTP

INTRODUCTION

The development of innovative biotechnology is of great social, health, agricultural, commercial, educational and scientific importance. The preamble to the Directive 98/44¹ indicates that “biotechnology and genetic engineering are playing an increasingly important role in a broad range of industries. The protection of biotechnological inventions will certainly be of fundamental importance for the community’s industrial development”. Patenting of biotechnological inventions remains a matter of huge controversy². Patent protection of inventions in this field, however, is necessary due to the necessity to compensate inventors or other authorized entities. Huge amounts of money and time, as well as scientific capabilities are needed to achieve a biotechnological invention³. Hence, the discussion on the protection of biotechnological inventions shall focus on the establishment of effective and binding mechanisms for granting patents while maintaining the balance of different interests. Granting high quality patents is fundamental to have a well-functioning patent system that promotes innovation, economic growth, healthcare and general welfare.

GLOBAL PROGRAMS ON THE QUALITY OF PATENTS

Article 27.1 of the TRIPS Agreement stipulates that patents shall be granted to protect inventions which are “new, involve an inventive step, and are capable of industrial application”. The TRIPS Agreement does not define these three requirements. It is up to each country to implement these requirements according to the national circumstances and level of development.

One of the problems of patent quality is the pending patent backlog. The constant increase of patent applications has led to a growing number of pending applications awaiting a final decision. Hence, on the one hand, the hectic rush of granting a patent leads in some cases to the incomplete and inaccurate testing of the non-obviousness premises. On the other hand, a long-lasting, protracted procedure hampers the proper examination of patentability (the quick procedure may lead to superficial testing. Simultaneously, the lengthy procedure of the granting of a patent might lead to a misunderstanding of the essence of the solution itself.) This situation has prompted various

1 Official Journal L 213, 30/07/1998, 0013 – 002.

2 Representatives of some members of communities/societies argue that the concept of allowing the patenting of biotechnological inventions at its base is wrongly conceived since an invention that uses biological material cannot be patented. Others argue that, although it is theoretically possible to patent a biotechnological invention, it should nevertheless be banned due to the consequences (for the economy, environment etc.). G. Dutfield, ‘Intellectual Property Rights and the Life Science Industries. Past, Present and Future’ (Hackensack/London 2009)192..

3 G. Dutfield, ‘Intellectual Property Rights and the Life Science Industries. Past, Present and Future’ (Hackensack/London 2009) 193-194.

joint international efforts of patent offices around the world like the Utilisation Implementation Project (UIP)⁴ or the so-called Patent Prosecution Highway (PPH)⁵.

However, some patents which should not have been granted may exist. In such cases, the interested party may demand a trial to invalidate a complete patent or just some claim which should not be patentable. The reasons for the invalidation of a patent are generally the same as the reasons for the rejection of a patent application.

The definition of the quality of a patent determines the boundaries of “what should deserve protection”. It is “the extent to which patent systems comply with their patentability conditions in a transparent way”⁶. Patent quality is determined by three components which mirror the life cycle of a patent and take into account the perspectives of 1) the applicant⁷, 2) the patent office, and 3) the users of the patent⁸.

Patent quality may be seen objective and mathematical, taking into account every data connected with its granting, exercising and expiry (also invalidation), observable at once from the point of view of each above-mentioned party. The Patent Quality Index⁹ was proposed by Kazuyuki Motohashi (Department of Technology Management for Innovation (TMI) University of Tokyo & Research Institute of Economy, Trade and Industry (RIETI)). It includes 1) citation 2) indicator, 3) patent family, 4) patent renewal data, 5) request for opposition, 6) patent litigation data.

However, taking into account the rising number of patents of poor quality, the WIPO (Standing Committee on the Law of Patents (SCP)¹⁰) proposed a worldwide cooperation on the Patent Quality System. The development of a European Quality System (EQS) provides the basis for continually improving the quality of patents.

Some delegations of countries all over the world proposed work plans for the SCP, inter alia, the delegations of Canada and the United Kingdom:

- a. **Technical infrastructure development** – intended to focus on information technology solutions to improve access to information relevant to patentability.
- b. **Information exchange on the quality of patents**¹¹ – intended that patent offices of interested

4 Within the European Patent Network (EPN).

5 ‘Discussion on Patent Quality – note from the German Patent and Trade Mark Office (DPMA)’; available at: http://www.wipo.int/scp/en/meetings/session_17/quality/germany.pdf.

6 B. van Pottelsberghe de la Potterie, ‘The Quality Factor in Patent Systems’ (PATSTAT Conference: Vienna 2010).

7 Does the invention, with respect to the solution of the objective problem, constitute a very small improvement for a known technical subject matter, in the sense of an incremental improvement (low degree of inventiveness), or the solution of a previously unsolved problem (high degree of inventiveness)?

8 Depending on the perspective, the term ‘patent quality’ will be perceived differently, additionally in view of the historical, cultural, geographic, technological and other points of view. Discussion on Patent Quality – note from the German Patent and Trade Mark Office (DPMA); available at: http://www.wipo.int/scp/en/meetings/session_17/quality/germany.pdf.

9 ‘A single, unified (numeric) metric representing the quality of a patent document’. R. Polk Wagner, ‘The patent Quality Index’ (Pennsylvania 2006) 2.

10 SCP/1/2, paragraph 3; see also A/32/2, Main Program 09, “Development of Industrial Property Law”.

11 However, for offices in countries such as Costa Rica, in which there are few examiners, such quality control becomes a complex issue. Secretariat, ‘Quality of Patents: Comments received from members and observers of the standing committee on the law of patent (SCP)’, SCP/18/INF/2 (Geneva 5.04.2012) Costa Rica, 2.

member states will collect views and experiences from their users relating to the quality of patent office processes and operations and share them with the committee for further consideration.

- c. **Process improvement** – intended to identify ways offices can improve their patent granting processes to ensure an appropriate degree of quality, taking into account resources and other constraints as well as flexibilities provided for international agreements.

Members of the WIPO proposed also other instruments, directed especially to the inventive step examinations. Denmark remarked that the examination standards include, as follows, the control of: a/ the search itself; b/ the prior art to be found; c/the treatment of patent claims; d/ office action¹². Spain proposed a comparative study of the various methods of the inventive step assessment, as the most controversial and difficult element in relation to the evaluation of patentability¹³. A similar approach was noticed by the National Institute of Industrial Property of France (INPI): “process improvement” should include a reference to improving the quality of searches by analysing prior art and assessing obviousness, or not, of an invention to a person skilled in the art¹⁴. The Austrian Patent Office remarked that its Quality Management Board examined the trial evaluation which resulted in a circular letter asking the examiners to observe particularly clear argumentation if the criteria of novelty and inventive step are not met¹⁵.

Apart from these general initiatives undertaken on a global scale particular patent offices work out their own mechanisms intending to guarantee the proper quality of granted patents. One of these mechanisms is a reliable method of assessing the inventive step of the claimed solutions. On the one hand, such a method should provide the verification of the non-obvious requirement in accordance with the normative regulations and technical guidelines. On the other hand, such a method must constitute the most objective possible way of this verification, so that its outcome is not dependable on the experience and knowledge of the engaged expert.

Assessment of the inventive step on the example of biotechnological inventions

At first it has to be mentioned that the definition of biotechnological inventions was regulated not in the EPC itself but in the Implementing Regulations to the EPC. According to Rule 26.2 of the Regulations “biotechnological inventions are inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used”. Pursuant to Rule 26.1 of the Regulations to the EPC, the Directive 98/44 shall be used as a supplementary means of interpretation to the EPC provisions. However, the Directive 98/44 does not regulate the premises of patentability itself. In other words, the patentability

¹² Secretariat, ‘Quality of Patents: Comments received from members and observers of the standing committee on the law of patent (SCP)’, SCP/17/INF/2 [Geneva 20.10.2012] Denmark, 5-6.

¹³ Secretariat, ‘Quality of Patents: Comments received from members and observers of the standing committee on the law of patent (SCP)’, SCP/17/INF/2 [Geneva 20.10.2012] Spain, 17.

¹⁴ Secretariat, ‘Quality of Patents: Comments received from members and observers of the standing committee on the law of patent (SCP)’, SCP/17/INF/2 [Geneva 20.10.2012] France p. 5.

¹⁵ Initial Report on Quality Management Systems prepared by Austrian Patent Office [30 November, 2012] 2; available at http://www.wipo.int/export/sites/www/pct/en/quality/2012/2012_at.pdf.

criteria of biotech solutions remain the same as for all other kinds of inventions¹⁶. According to the provisions of Art. 52.1 of the EPC European patents shall be granted for any invention, in any field of technology, provided that they are new, involve an inventive step and are susceptible of industrial application. In respect to the non-obviousness requirements the Convention states in Art. 56 that “an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art”¹⁷. The quality of patents is a key aspect of how the patent system functions. Patent protection can only be provided for inventions that are innovative and worthy of patenting.

According to the Guidelines for Examination of the EPO ‘the term “obvious” means that what does not go beyond the normal progress of technology but merely follows plainly or logically from the prior art, i.e. something which does not involve the exercise of any skill or ability beyond that to be expected of the person skilled in the art’¹⁸.

In practice, the examination of the non-obviousness of the invention in the European Patent Office - and in the majority of patent offices of European countries- is performed on the basis of the so called “problem - and - solution approach”. This method involves three steps:

1. **determining the closest worldwide prior art;**
2. **establishing the „objective technical problem” that requires a solution;**
3. **considering whether - in view of the closest state of the art and the identification of the objective technical problem - the solution could have been obvious to a person skilled in the art**¹⁹.

As far as the **first step** is concerned it has to be underlined that it may be difficult to identify the prior art of a biotechnological invention because of a really rapid development in this field. That is the reason why it can also be problematic to determine the closest prior art, which means the combination of features contained in the document which best covers the starting point for further work leading to the development of the invention²⁰. However, as the Supreme Court of Poland indicated in the judgment of March 23, 1983 for assessing the inventive step of an invention in question, it is essential to focus on the relationship or on the lack of relationship with the already well-known fields of the application of the prior art. The allegation of obviousness is premature, if 1) there is no prior art having the same or similar features, or 2) there is a prior art solution which, however, exists in another field of knowledge. And it has not been shown that the field of knowledge

16 Moreover, the WIPO states that ‘the patent offices should grant patents [of biotechnological inventions] for only such inventions that closely, raw (strictly) meet the standards of patentability - namely, novelty, inventive step and industrial applicability’ F. Gurry (ed.), ‘World Intellectual Property Report. The Changing Face of Innovation’ [Geneva 2012] WIPO Economics & Statistics Series, p. 97.

17 If the state of the art also includes documents within the meaning of Article 54, paragraph 3, (filed but still not published patent applications) these documents shall not be considered in deciding whether there has been an inventive step.

18 Guidelines for Examination in the European Patent Office (status: 20 June 2012) Part G Chapter VII-2.

19 Guidelines for Examination in the European Patent Office (status: 20 June 2012) Part G Chapter VII-3; Case VI SA/Wa 89/08 the District Administrative Court in Warsaw [30 April, 2008] CBOSA <http://orzeczenia.nsa.gov.pl/doc/43407C418F>.

20 M. du Vall, ‘Prawo patentowe’ (Warsaw 2010) 202.



is close enough to the area of the exploitation of the verified invention. Moreover, it is unjustified to identify the obviousness of a theoretical idea underlying the invention with specific technical measures constituting the solution²¹. If, however, the determination of the state of the art seems to be impossible, because the present invention is called a “pioneering invention”, it has also to be assumed that its obviousness is not affected²². The prior art, however, should not be interpreted too narrowly, as pointed out in one of the EPO decisions concerning pharmaceutical inventions intended for controlling diseases caused by retroviruses. It has been stated that the closest prior art should not be found among the medical methods of the treatment of this disease but in the biological areas dealing with viruses in general and, especially, with methods of their destruction²³.

The **second step** aims at fixing the technical problem requiring a solution²⁴. In order to complete this task it is necessary to study the application, the closest prior art, and the difference - in terms of either structural or functional features - between the claimed invention and the closest prior art. The differing parts of the compared solutions are called the “distinguishing features”. The identification of the technical effect resulting from the distinguishing feature leads eventually to the formulation of the technical problem²⁵.

Within the **third step**, it has to be answered whether an expert²⁶ might have come to the solution of the applied invention. If so, the invention does not have the attribute of non-obviousness,

21 Case IV PRN 2/83 the Polish Supreme Court [23 March, 1983] OSNC 1983/10/164.

22 H. Żakowska – Henzler, ‘Wynalazek biotechnologiczny: przedmiot patentu’ [Warsaw 2006] 177.

23 Decision T 91/98, the Enlarged Board of Appeal EPO [29 May, 2001]: Decision T 91/98, the Enlarged Board of Appeal EPO [29 May, 2001] 12: ‘As there is a practical impossibility for a pharmaceutical formulation against a given agent to be produced before this agent is identified, the fact that the claimed formulations were the first of the kind undoubtedly reflects the celerity with which the Appellants searched for a remedy against the diseases caused by the retroviruses. Yet, it is not a convincing proof of the inventive step because, in such a situation, the inventive step rather depends on the state of the art on retroviruses, which may or may not point out in an obvious manner to a way in which these viruses can be eliminated. In the Board’s view, the ordinary skilled person would have looked in the literature for any known substances reported to have an effect on retroviruses because of the new and urgent need for a medicament against them’.

24 Guidelines for Examination in the European Patent Office (status: 20 June 2012) Part G Chapter VII-4.

25 Guidelines for Examination in the European Patent Office (status: 20 June 2012) Part G Chapter VII-3.

26 At the beginning of the patenting of biotechnological inventions the requirements for qualifications were very highly placed. Only few top performers were involved in biotech and, therefore, the assessment of biotechnological inventions could often be accused of non-obviousness. The notion is right that a high-end specialist will draw conclusions that some solutions are obvious, and the average expert will be careful in using such with similar issues and solutions. Decision T 791/96 the Enlarged Board of Appeal EPO [15 November, 1999]: ‘the technical circumstances of the case should be investigated from the point of view of the skilled person, avoiding any ex-post facto analysis. In the board’s judgment, the skilled person would not have been in the position to carry out the analysis of the situation that Dr. Davison made in his declaration. This is, because differently from Dr Davison, who was undisputedly a highly skilled virologist, the skilled person for the purpose of Article 56 EPC, when dealing - like in the present case - with a relatively unexplored technical area, adopts a cautious attitude and is unable to arrive at what later turns out to be the correct conclusion unless there is solid evidence pointing to this conclusion and only filling minor gaps in existing knowledge is needed (decisions the Enlarged Board of Appeal EPO cases: T 223/92, T 886/91, T 455/91). The latter was the case, for example, in the technical circumstances of decision T 386/94 (supra), where the skilled person’s only task was to complete, by applying known techniques, the work of cloning and expressing a DNA encoding chamois, whose characterization had already reached an advanced- 13 - T 0791/96 stage in the prior art’. In foreign case law it is also observable that due to the complexity of the model of biotechnological inventions, they may be even created by a skilled multidisciplinary team; Genentech Inc’s Patent [1989] RPC 147 (Court of Appeal), Chiron v Organon Teknika (No. 3) [1994] FSR 202 (Patents Court), Harvard / Fusion proteins OJEP0 1992, 268 (T 0060/89); ‘Examination Guidelines for Patents Applications Relating to Biotechnological Invention in the Intellectual Property Office’ (Newport April 2011) 11

and, thus, is not patentable. This model is called the “could - would approach”²⁷. It is not essential whether the „skilled person could have arrived at the invention by adapting or modifying the closest prior art, but whether he would have done so because the prior art incited him to do so in hope of solving the objective technical problem or in expectation of some improvement or advantage”²⁸.

The European Patent Office did not accept the Anglo-Saxon approach called “obvious to try”. The “obvious to try method” means that it would be obvious to a skilled person that, in order to achieve a specific solution, it is essential to attempt a concrete method. However, if the invention is a variant or an alternative of this solution, it does not preclude its non-obviousness, even though the attempt to obtain the solution was obvious. Nevertheless, there is the obviousness when the solution and the attempt to obtain the solution with the use of a specific method were the most preferred ones. Hence, the solution was closely related to the expectation of success²⁹.

The decisions of the EPO clearly marked a boundary between “obvious to try” and “expectation of success”³⁰. It has been accepted in the EPO practice that even a parallel research by several groups of scientists does not exclude the non-obviousness of the invention as long as the method was not the most preferable one”. However, this interpretation is considered useful only if the invention was the result of the application of predictable methods.³¹

An assessment of the evidence of non-obviousness is particularly difficult in the examination of inventions relating to biological material isolated from the environment. Initially, the examination concerned the non-obviousness of both: the features of the invention as such and the way of its acquisition. A combination of those two aspects – biological material and its isolation method – may render the whole solution non-obvious, although the substance as such was already present in nature³². Regarding relaxin, the search of a substance occurring in nature is only a non-patentable discovery, but when a naturally occurring substance must first be isolated from the environment in the way how it is designed for, it is patentable. Furthermore, if the substance can only be properly characterized, either by its structure, or by way of receipt, or by other features, and is ‘new’ in the sense that its existence has not been known before, it may be patentable as the same substance as

27 M. du Vall, ‘Prawo patentowe’ (Warsaw 2010) 203.

28 See T 2/83

29 In re Dow Chemical, 5 USPQ2d 1529 (Fed. Cir. 198); as well K. Bozevic, ‘Patenting DNA – obviousness rejections’ [December 1992] JPTOS. Guidelines for Examination in the European Patent Office (status: 20 June 2012) Part G Chapter VII-5; See as well H. Żakowska – Henzler, ‘Wynalazek biotechnologiczny: przedmiot patentu’ (Warsaw 2006) 183. However, in the case of biotechnological inventions, most of them will not meet those requirements. Typically for the invention, the biological material is a component based on biological processes or genetic engineering, or the invention is an isolated, purely biological material that does not meet the test “obvious to try”.

30 Decision T 386/94, the Enlarged Board of Appeal EPO [11 January, 1996]: ‘the person skilled in the art would attempt any one of these undertakings with a reasonable expectation of success. (...) Furthermore, it was argued that if, at a given point in time, two groups started on the same project, it might be that both were driven by the hope to succeed. If, however, as many as four groups simultaneously started on the same project, it must be that, in view of the existing knowledge, there was a reasonable expectation of success.’

31 Decision T 737/96, the Enlarged Board of Appeal EPO [9 March, 2000]: ‘as for the expectation of success, the board is of the opinion that in the present case it is not appropriate to attempt to evaluate the expectation of success of a random technique such as mutagenesis where results depend on chance events.’

32 H. Żakowska – Henzler, ‘Wynalazek biotechnologiczny: przedmiot patentu’ (Warsaw 2006) 192.

such”³³. In support of this case the Opposition Division of the EPO indicated that the essence of the invention does not consist in the fact that the isolating DNA encoding human relaxin, the substance which was not produced by conventional methods but by the patentee, provided the public with the substance (containing hormone, gene) which was not previously known³⁴.³⁵ However, due to the development of molecular biology and recombinant DNA techniques, the substances present in the environment were obtained using well-known and common methods. Hence, the study of the non-obviousness of inventions by a method of obtaining relaxin with the above-mentioned well-known and/or common method may not be justified anymore.

As a result from the rules accepted in the EPO, the assessment of the non-obviousness of an invention has been significantly liberalized, and the inventive step of many inventions is very low. According to some significant voices of the doctrine, the assessment of the inventive step of biotechnological inventions is actually illusive³⁶.

All of the above mentioned weak points of the “problem – solution approach” contribute to the process of the trivialization of patents which was noticed already some years ago in the EPO, not only in regard to biotechnological inventions but also in other fields of technology. The EPO representatives are aware of the fact that too many weak, trivial patents have been granted which may lead to a hypertrophy of intellectual property rights³⁷.

Also in the opinion of the European Union authorities there is a concern that a spiraling demand for patents can result in an increased granting of low quality patents³⁸. In “An Industrial Property Rights Strategy for Europe” the European Commission states “it is vital that patents are awarded only where a true inventive contribution is made. The granting of poor quality patent rights has a negative effect on the economic and legal uncertainty”³⁹.

Last – but not least – also the courts expressed their opinion on the fulfillment of the non-obviousness requirements. The supreme courts of Germany and the United States have issued judgments in which they seem to seek to identify a specific „unit of measurement“ of non-obviousness, so that the method of the verification of non-obviousness can be more standardized and objective.

33 Guidelines of European Patent Office, Part C, Chapter IV.2; C. Baldock, O. Kingsbury, *The Biotechnology Directive and its relation to the EPC* [2000] Biotechnology Law Report, Nr 2.

34 In re Relaxin, Case No. EP B1 112 149, [1995] OJ EPO, 388; H. Żakowska – Henzler, ‘Wynalazek biotechnologiczny: przedmiot patentu’ (Warsaw 2006), 198.

35 In this context, as indicated by the Administrative Court in Warsaw in judgment of March 30, 2009 on a patent: ‘The preparation of biologically active collagen from the skins of salmon, invention which is a compilation of a number of measures must be assessed globally, the defense of lack obviousness brought to such invention shall be the whole solution, not just its individual components, and the combination of known resources in a new way can provide a new and non-obvious’. Case VI SA/Wa 1837/08, the Polish District Administrative Court in Warsaw [30 March, 2009].

36 H. Żakowska-Henzler, ‘Wynalazek biotechnologiczny: przedmiot patentu’ (Warsaw 2006) 198; P.G. Ducor, *Recombination products and nonobviousness; A typology* [1997] Santa Clara Computer and High Technology Law Journal, vol. 13.

37 B. Zypries, ‘Hypertrophie der Schutzrechte?’, 2004 GRUR 977-979.

38 Communication from the Commission to the Commission to the European Parliament and the Council - Enhancing the patent system in Europe, COM/2007/0165 final, 3.1

39 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - An Industrial Property Rights Strategy for Europe COM/2008/0465 final, 3.1.

The German Federal Court of Justice in its judgment of 2008 (case *Gegenstandsträger*) decided that the solution is non-obvious, if the inventor made more than one independent thought (*Gedankenschritt*), starting from the prior art to find a solution of the problem. In addition, the court also used the term “number of mental steps of thought”⁴⁰.

The US Supreme Court (USSC) indicated in its judgment of 2007 (case *KSR*⁴¹) that the assessment of non-obviousness necessarily involves a verification of the amount of creativity in the examined solution. The idea of the amount of creativity was developed in the subsequent rulings *Mayo vs. Prometheus*⁴², *Assn for Molecular Pathology vs. Myriad*⁴³ and *Wildtangent vs. Ultramercial*⁴⁴, where the USSC expressed the absolute need of at least one inventive concept underlying the invention so that it can be accepted as non-obvious.

The presented rulings confirm the necessity to objectify the evaluation of the non-obviousness of inventions and represent attempts to achieve the quality of a patent by reference to concepts and quantitative and qualitative measures. Thus, it seems to be the most reasonable way to test the non-obviousness of inventions by mathematical and rational means, rather than solely based on legal language. An example of a method which applies mathematical and logical methods to the legal evaluation is the IES/FSTP method.

THE INNOVATION EXPERT SYSTEM

The Innovative Expert System (IES) allows to effectively analyze and assess the interrelations between the patent application in question and its prior art documents. The technical teachings from both – the patent application and the prior art documents – are presented and structured in a manner which was unknown before with the help of an IES.

An IES is able to analyze basically every technical teaching which is used to denote the functional description of any procedure solving a given problem of whatsoever type, not only the problems described in patents or solely technical issues.

IES is subject to pending patent applications.

CONCLUSION

Patents of the highest quality are the key to reach the objectives of patent protection, that is to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of the producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

40 Case *Gegenstandsträger*, BGH X ZR 84/06, the German Supreme Court [22 April, 2008].

41 Case *KSR International Co. vs. Teleflex Inc.* et al., [30 April, 2007]; available at: https://www.eff.org/sites/default/files/filenode/ksr_v_teleflex/KSR_vs._Teleflex_Opinion.pdf

42 Case *Mayo Collaborative Services, DBA Mayo Medical Laboratories, et. al. vs. Prometheus Laboratories, Inc.* [20 March 2012] available at: <http://www.supremecourt.gov/opinions/11pdf/10-1150.pdf>

43 Case *Association for Molecular Pathology, et. al. vs. Myriad Genetics, Inc., et. al.* [27 April 2012].

44 Case *Wildtangent Inc. vs. Ultramercial, LLC* [22 June,].



A highly problematic issue is the subjective and discretionary examination of the requirement of “inventive step”. Moreover, this requirement is subject to an increasing liberalization of interpretation and examination of the prerequisites in question, which is particularly observable for the example of biotechnological inventions. The verification of the non-obviousness in this area, but also in other fields of technology, needs necessarily to be refined. It seems that there is a wrong and unwelcome practice of patent offices to resign from the assessment of non-obviousness in cases of patents about inventions relating to biological material isolated from its environment.

Consequently, such inventions are patented only after examining the prerequisite of novelty. The Innovation Expert System and the FSTP-Test seem to provide a reliable and highly developed means of assessment of the inventive step. Thanks to this system the above mentioned prerequisite can be verified in an objective, precise and worldwide uniform way. This can be an important tool in the management of patent quality.

Abbreviations

Directive 98/44 – Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions

EPC - the Convention on the Grant of European Patents

EPO – European Patent Office

Regulation to EPC - Implementing Regulations to the Convention on the Grant of European Patents

TRIPS Agreement - Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April, 1994

WIPO – World Intellectual Property Organization

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PROJECT OF EUROPEAN FOUNDATION: AS AN EXAMPLE OF LIMITED CONVERGENCE OF CIVIL AND COMMON LAW

Bohdan Pretkiel*

University of Warsaw, Poland

Abstract. On 8 February 2012, the European Commission presented a proposal on a European Foundation Statute. This proposal has now be shared with the Council of Ministers representing the governments of the 27 Member States for review and approval and to the European Parliament for its consent. In my paper I evaluate Project of European Foundation Statue as an example of limited convergence of Civil and Common Law and discuss which part of European Foundation have been inspired by Common Law construction and approach to non-profit organization. Because of the limited time of the conference presentation I will focus on the most important aspects of the convergence: I will re-establish a reasoning pattern used in creation of a unified European definition of Foundation (which will be used like the rest of the European Foundation Statute optionally in all Member States) especially highlighting the fact that the new definition a had to be compromise between common and continental law legal cultures and excludes charity trusts. Following this reasoning I will show (briefly) convergence of other part's of legal institution of European Foundation such as : duties of the governing board, conflict of interest and winding up. In the ending part of my paper I will write about convergence model implications.

Keywords: European Foundation , Charity, Charity Trusts, Foundation Statute

INTRODUCTION

The feasibility study undertaken in 2008 by the Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg assessed that a Statute for a European Foundation would be the most cost effective option to address the problems faced by foundations and their funders when operating across borders in Europe. The consultations undertaken on the abovementioned recommendations of the Feasibility Study, as well as the general consultation on the European Commission Communication “Towards the Single Market Act”, evidenced some scepticism¹ for the European Foundation Statute from the foundation sector but nonetheless the European Parliament gave full support to European Statutes for foundations,

* Mgr Bohdan Pretkiel – PhD candidate and lecturer of legal logic in State and Law Institute of Warsaw University’s Law and Administration Faculty.

¹ ‘However further consultations with business organisations and Member States highlighted some skepticism about the need for such a legal form. This is why it came as a surprise to many observers when the European Commission actually presented a proposal for a Council Regulation on the Statute for a European Foundation (FE). If adopted, the FE will be the fourth supranational legal form (after the EEIG, the SE and the SCE), and the first to be especially designed for the non-profit sector.’ -www.europeanlawinstitute.eu/projects 28.03.2013

associations and mutual societies with the signatures by a majority of its Members of a Written Declaration in February 2011. On 8 February 2012, the European Commission presented a proposal on a European Foundation Statute². This proposal now undergoes further legislative procedure, being shared with the Council of Ministers representing the governments of the 27 Member States for review and approval and to the European Parliament for its consent.

The Project of European Foundation Statute is aimed to establish the legal form of a European Foundation. This form of foundation would be additional and complementary to existing national forms. Similarly to European Private Company it would be legally recognized in all Member States and would operate under the same set of conditions across the EU. It should be and “as uniform as possible across the Union to best promote cross-border public benefit purpose activities”³. The idea behind making the European Foundation Statute is to remove obstacles that foundation face operating across borders within the Union. The barriers can be divided into two groups: civil law barriers and tax law barriers. In my paper I will focus on some of the civil law obstacles⁴, evaluating Project of European Foundation Statute as a chance for convergence of Civil and Common Law of Charities and discuss which parts of European Foundation Statute Commission proposal have been inspired by Common Law at the same time acknowledging that legal institution of European Foundation is based mainly on continental law.

* * *

One of the trickiest issues in drafting European Law Institution such as European Company, the European Economic Interest Grouping and the European Cooperative Society or European Foundation is finding the lowest common denominator and at the same time not treating the subject of the regulation too vaguely. Thus the most important issue is defining foundation in a way that doesn't collide with Member States national law, so existing foundations, donors and government supervisors could easily adopt to European Foundation standards without eschewing their own foundation concepts. The feasibility study⁵ outlined five basic characteristics that char-

² The European Law Institute 'Council decided in September 2012 to set up a working group to assess the Commission's proposal. The working group began its activities in January 2013. Among the questions being addressed are: Is it a good idea to restrict the European Foundation to the public benefit purposes which are enumerated in the Statute? Will the proposed governance model of the Foundation really work? Since matters which are not regulated in the Statute would be at the discretion of Member States, will the interaction between European law and national law create the risk that there will not only be one FE, but 28 different ones?' - www.europeanlawinstitute.eu/projects 28.03.2013

³ Proposal for a Council Regulation on the Statute for a European Foundation (2012/0022 APP) [2012]

⁴ Some of the experts even expressed a view that tax issues should not be undertaken by European Foundation Statute because tax exemption rules are very diverse in the Member States and 'European Foundations could find themselves enjoying tax relief but carrying out activities that would not attract relief if carried out by domestic organisations'. The answer as experts suggest could be using the case law to obtain equal treatment under the non-discrimination principles introduced by the *Stauffer* and *Hein Persche* cases at the European Court of Justice'. STEP Submission to the European Parliament's Committee on Legal Affairs (JURI) 3-4

⁵ Feasibility Study on a European Foundation Statute [2008]194-195 http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm



ity foundations have in most member states 1) Legal personality 2) Promotion of a public benefit purpose 3) No membership 4) State supervision, and 5) Establishment by registration. This clearly excludes charity trusts which are the most important and widely used type⁶ of charity in common law European Member States⁷. Charitable trust lacks legal personality and acts through a group of trustees who have obligations under the trust instrument to carry out the trust's charitable objects. Trust is legally speaking not an organization but a relationship between property and trustees and common law development of charity trust law is based on case law without rudimentary definition typical for civil law. In Proposal for Council Regulation on the Statute for a European Foundation there is no definition of foundation but "public benefit purpose entity" so that private or outright commercial/without public benefit purpose foundations are excluded: 'Art. 2 (5) 'public benefit purpose entity' means a foundation with a public benefit purpose and/or similar public benefit purpose corporate body without membership formed in accordance with the law of one of the Member States'⁸. Charitable trust in English common law are frequently named and referred to as foundations⁹, but as experts conclude lacking legal personality means that they couldn't be considered legal entities and can't even 'convert' to European Foundation or merge with one¹⁰. English charity sector is by far the biggest one in European Union¹¹ so excluding charity trusts from obtaining European Foundation status would severely harm the idea of European Foundation as a legal tool equally suited for charities from all of the Member States. Some scholars even believe that trust as a legal institution is more convenient and efficient than 'its civil law counterparts'(sic) and argue that at some point trust institution can widespread do civil law countries. On this stage of harmonisation when the significant majority of the Member States are civil law it would be incorrect to adopt charity trust before resolving the issue of recognition of trust in general.¹² The trustees can of course establish a new European Foundation to which the trust's assets can be transferred and another solution proposed by charity experts is to 'incorporate enabling legislation that would allow for the conversion of a charitable trust so that the European Foundation will gain its legal personality on registration and the assets previously held on the terms of the trust and the liabilities properly payable out of those assets in accordance with the terms of the trust would become the assets and liabilities of the European Foundation.'¹³ Solution I would prefer

6 There are other types of charities in common law such as Charitable Company, Charitable Incorporated Organisation, unincorporated charity but trust is by far the most popular-Feasibility Study http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm

7 United Kingdom(excluding Scotland), Ireland, Malta

8 Proposal for a Council Regulation on the Statute for a European Foundation (2012/0022 APP)

9 G. Moffat, 'Trust Law, Text and Materials' (Cambridge: Cambridge University Press 2005) 876-1030

10 Statute for a European Foundation (FE)STEP Submission to the European Parliament's Committee on Legal Affairs (JURI)Presented to their meeting of Monday 26 November 2012, 3-4

11 Feasibility Study on a European Foundation Statute [2008]22-27 http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm

12 R. Caterina 'Comparative Law and Economics' in Elgar Encyclopedia of Comparative Law[(Edward Elgar Publishing 2006) 162

13 Statute for a European Foundation (FE)STEP Submission to the European Parliament's Committee on Legal Affairs (JURI)Presented to their meeting of Monday 26 November 2012 ,4

because it doesn't need changing current legislation is to incorporate individually those Charity Trusts that want to become European Foundation. This incorporation is possible on the grounds of Charities (Parliament) Act 2011 section 251 procedure ending with trustees being granted a certificate of incorporation as a body corporate by Charity Commission for England and Wales¹⁴. Another option for the trustees is to establish other than trust charity forms such as Charitable Company or Charitable Incorporated Organisation.

Restrictive approach to conflict interest and Duties imposed on the governing board and its members in the Council European Foundation Statue proposal are clearly influenced of the common law of trusts:

Article 29

Duties of the governing board and its members

1. The governing board shall have the following duties:
 - (a) take responsibility for the proper administration, management and conduct of the FE's activities;
 - (b) ensure compliance with the statutes of the FE, this Regulation and the applicable national law.
2. Members of the governing board shall act in the best interest of the FE and its public benefit purpose and observe a duty of loyalty in the exercise of their responsibilities.

Article 32

Conflicts of interest

1. The founder and any other board members who may have a business, family or other relationship with the founder or with each other, that could create an actual or potential conflict of interest such as to impair his/her judgment, shall not constitute the majority of the governing board.
2. No person may at the same time be a member of both the governing board and the supervisory board.
3. No benefit, direct or indirect, may be distributed to any founder, governing or supervisory board member, managing director or auditor, nor extended to any person having a business or close family relationship with them, unless it is for the performance of their duties within the FE.¹⁵

Civil law culture Member State of course all recognise duties imposed on the governing board and its members, but Duties of Care and Loyalty imposed to such an extent as in Article 29, as well as restrictive approach to benefit distribution and potential conflict of interest presented in Article 32 are characteristic to trust law¹⁶. 'The most restrictive approach can be found in the common

¹⁴ Charities Act 2011 [2011]

¹⁵ Proposal for a Council Regulation on the Statute for a European Foundation (2012/0022 APP)

¹⁶ Ch. Chang 'Nutcases: Equity and Trusts' (London: Sweet & Maxwell 2010) 129-145; G. Moffat, 'Trust Law, Text and Materials' (Cambridge: Cambridge University Press 2005) 415-445

law of trusts, which does not allow any “unauthorised” trustee benefits, including self-dealing transactions between the trust and its trustees or persons closely connected with them. Thus, in *England and Wales* such a transaction or contract is generally voidable regardless of the fairness of the price or of other circumstances. However, the settler can allow self-dealing transactions in the trust document if the price is fair. The Charity Commission can additionally authorise certain self-dealing transactions but will do so only where strict requirements are met.¹⁷The provisions of cited articles are to ensure credibility and trustworthiness with duties and conflict of interest constraints set at an high level to avoid abuse and ensure high standards of good governance.

Another example of common law influence can be detected in Articles 43-44 concerning winding up:

Article 43

Decision to wind up

1. The governing board of the FE may decide to wind up the FE in one of the following cases:
 - (a) the purpose of the FE has been achieved or cannot be achieved;
 - (b) the time for which it was set up has expired;
 - (c) it has lost all its assets. The governing board shall submit its decision to wind up the FE to the supervisory authority for approval.
2. The supervisory authority may, after having heard the governing board of the FE, decide to wind up the FE or, where provided for in the applicable national law, to propose its winding up to a competent court in one of the following situations:
 - (a) where the governing board has not acted in the cases referred to in paragraph 1;
 - (b) where the FE continuously violates its statutes, this Regulation or the applicable national law.

Article 44

Winding up

1. Where the supervisory authority has approved the decision of the governing board pursuant to the second subparagraph of Article 43(1) or where the supervisory authority or, where applicable, a court has decided to wind up the FE, the assets of the FE shall be used in accordance with paragraph 2 of this Article.
2. Once the creditors of the FE have been paid in full, any remaining assets of the FE shall be transferred to another public benefit purpose entity with a similar public benefit purpose or otherwise used for public benefit purposes as close as possible to those for which the FE was created.
3. Final accounts until the date when the winding up takes effect shall be sent to the supervisory authority by the governing board or the liquidator responsible for the winding up

¹⁷ Feasibility Study on a European Foundation Statute [2008] 65-66 http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm

together with a report including information on the distribution of the remaining assets. These documents shall be disclosed.

In the provisions of this articles it's visible influence of the *cy-près* doctrine in English charity trust law, *cy-près comme possible* meaning as close as possible in old Norman French¹⁸- the precise words used in Article 44. The doctrine provides that when such a trust has failed because its purposes are either impossible or cannot be fulfilled, the High Court of Justice or Charity Commission can make an order redirecting the trust's funds to the nearest possible purpose¹⁹.

CONCLUSION

Unlike the European Company Statute created in 2001, European Foundation statute as a project is designed not be a lowest-common-denominator of national foundation laws in all aspects, providing only some superficial rules and referring to the 27 different national laws and complex provisions. Only few companies have adopted the SE due to its complex nature, and this is not what the foundation sector wants. Basing on the Feasibility study undertaken in 2008 and public consultation feedback, European Council in the proposal for European Foundation Statute merged some of the common law charity law institution that were seen as the most reasonable legal tools at the disposal of commission experts and seen as best suited for the aims of the EFS. Many of the provisions of Commission proposal were criticised by charity law experts and even some of the governments²⁰, but none of those that have trust law background thus confirming that limited convergence of civil and common Law in charities law is good direction and that public-service foundations sector in Europe that holds €350 billion in assets, spends €83 billion per year, and employs around 1 million people, will benefit from it²¹.

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THE INTERACTION BETWEEN RELIGIOUS AND SECULAR LAW IN ISRAEL

Anna Rataj*

Jagiellonian University in Kraków, Poland

Abstract. The paper is about interference between religious and secular law in Israel as an example of interaction of national legal systems. This example is unique, because it shows the coexistence of two legal systems in one state – the religious and the secular one. How is it possible?

No formal written Constitution

Israel does not have a formal written Constitution. There are 11 Basic Laws that can be considered as a constitution in the material sense. Why was it impossible to enact a formal written constitution within 65 years of the existence of the State? This phenomenon is strictly connected with the constant struggle between followers and opponents of enacting the traditional Jewish law as a law of the State. There are political and religious environments, which aspire to the transformation of Israel into a Halachic state, but the modern Israeli society claims for democracy and human rights.

Religious law vs. secular law

According to the Declaration of Independence and Basic Laws, Israel is a Jewish and democratic state. The coexistence of both concepts seems contradictory. Democracy means freedoms and Jewish character of the state means following Jewish religion and tradition. There are areas of life which are regulated only by religious law. For example, marriages and divorces belong to religious courts. Though Israeli law seeks to provide equal protection to all of its citizens.

State of compromises

In such legal situation it is not possible to act without compromises. The most important role in arbitrating between secular and traditional law plays the Israeli Supreme Court. It is a difficult task to preserve democratic rights and freedoms when trying not to infringe religious and traditional values. Therefore, almost every judgment of the Supreme Court is a compromise.

Keywords: Israel, Jewish law, rabbinical courts, marriage, divorce

A. INTRODUCTION

Israel is a unique example of interaction of national legal systems: it shows the coexistence of two legal systems in one state – the religious and the secular one. Israel is a parliamentary democracy, which adheres to the rule of law and the protection of human rights. However, according to the

* Anna Rataj graduated from the Jagiellonian University with Master in Law (2009) and Bachelor in Jewish Studies (2011) as well as from the University of Heidelberg with LL.M. (2010) and from the Krakow Conservatory of Music with the major in Piano (2009). Currently she is a Ph.D. student at the Jagiellonian University. For preparing her dissertation on the “Israeli Supreme Court” she was awarded with a scholarship from the Israeli Ministry of Foreign Affairs and with a Two-Year Research Grant from the Polish National Centre of Science. Her academic interests comprise constitutional law, comparative constitutional law, Israeli law and Jewish law.



Declaration of Independence of 14th May 1948¹ and to Basic Law: Human Dignity and Liberty of 17th March 1992², Israel is both a Jewish and democratic state. This implies the obligation to protect rights of non-Jewish citizens, whereas maintaining the Jewish character of the state, which is reflected in many aspects of everyday life. The concept of Jewish and democratic state has historical meaning and relates to Judaism as a religion which enabled the Jewish nation to survive two thousand years without own state, but also declares that Israel belongs to the family of democratic countries that provides tolerance to people regardless nation, religion or background.

This paper considers only selected aspects of problems that arouse from the coexistence of religious and secular norms in Israel.

B. LEGAL SYSTEM IN ISRAEL – SELECTED ASPECTS

1. Secular and religious law

The coexistence of two legal systems in Israel is a consequence of Israel being a Jewish and democratic state.³ However, those systems are not equal: the religious law applies only when secular law states that explicitly and only in limited situations.⁴ In case of conflict between both systems, the secular law is binding and religious law has to recede.

a) Secular law

In Israeli law there are remnants of different legal systems that were present at the territory of the State of Israel throughout the last century, i.e. Ottoman Empire (including the Mejlle – the civil code of the Ottoman Empire) and British Mandate. The Israeli legal system is based on common law and incorporates some elements of civil law.

Despite the assertion in the Declaration of Independence from 1948, Israel does not have a formal constitution as a one written document. Since enacting two new basic laws on human rights in 1992, its 11 Basic Laws are regarded as a material constitution. This statement has been expressed in the most significant judgment of the Israeli Supreme Court, i.e. in the Bank HaMizrachi judgment from 1995.⁵ Along with the Declaration itself, they provide a framework of political and legal system. However, many important issues remain unregulated. Therefore, Israeli positive law is enriched by the jurisprudence, in particular by the case law of the Israeli Supreme Court.

1 Declaration of Independence of the State of Israel, 14th May 1948, published in Official Gazette: Number 1; Tel Aviv, 5 Iyar 5708, (14th May 1948), p. 1. The English version can be found on the official Knesset (Israeli parliament) website: [01.04.2013] http://www.knesset.gov.il/docs/eng/megilat_eng.htm

2 Basic Law: Human Dignity and Liberty of 17th March 1992, passed by the Knesset on the 12th Adar Bet, 5752 (17th March, 1992) and published in Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752 (25th March, 1992); the Bill and an Explanatory Note were published in Hatza'ot Chok, No. 2086 of 5752, p. 60. Full text in English can be found on the website: [01.04.2013] http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

3 See above references to Declaration of Independence and Basic Law: Human Dignity and Liberty

4 M. Elon, "The Jewish Law: History, Sources, Principles, part IV" (The Jewish Publication Society, 2003)

5 United Bank HaMizrachi vs. Migdal Cooperative, Supreme Court of Israel, 1995 C.A. 1908/94, full text of the judgment in English is available on the website: [01.04.2013] elyon1.court.gov.il/files_eng/93/210/068/201/93068210.201.pdf

Sitting as the High Court of Justice, the Supreme Court plays an important role in shaping the Israeli unwritten constitution and interpreting law. This refers not only to secular, but also to religious law.⁶

b) Religious law

Israel adopted some religious normativities as part of its positive law.⁷ There are also regulations that refer to the religious norms in some aspects of life. Because Israel is declared as a Jewish state, Jewish religious law (Hebr. Halacha) is applicable as far as Jewish citizens are concerned. However, being also a democratic state obliges Israel to provide equal rights for non-Jewish citizens of Israel. Therefore, in some aspects of life (foremost in family law and law of personal status), also religious law of other communities (Muslim, Christian and Druze) is applicable.

2. Court system

The court system in Israel has a complex structure. Besides the general law courts⁸, the Israeli legal system recognizes various types of tribunals, the most important of which are the military courts, the labour courts, and the religious courts. The religious court system was established already by the Palestine Order-in-Council in 1922.⁹ After the establishment of the State of Israel, the Moslems, the Druze, the Jews, and the Christian communities were given special rights regarding judiciary and special courts were established: rabbinical courts for Jews, sharia courts for Muslims and Druze as well as ecclesiastical courts for Christians.¹⁰ The religious court system is financed by the State and its mainly scope of jurisdiction is limited to matters of marriage and divorce.¹¹

The most significant role among Israeli religious courts have Jewish religious courts.¹² Their structure, procedure and qualifications of judges is regulated in the Dayanim Act of 1955.¹³ There are 12 district rabbinical courts and the Higher Rabbinical Court with the seat in Jerusalem.¹⁴ The religious courts are managed by the Ministry of Religious Services.¹⁵ The judges of rabbinical courts are appointed by the Committee presided by the Minister of Justice.¹⁶ The courts have exclusive

6 Most significant judgments of the Israeli Supreme Court are available online in English on the website: [01.04.2013] <http://elyon1.court.gov.il/eng/home/index.html>

7 A. S. Hofri-Winogradow, 'A plurality of discontent: legal pluralism, religious adjudication and the state', (Journal of Law and Religion, Volume 26, number 1, 2010-2011), p. 57

8 Hebr. Beit mishpat (בֵּית מִשְׁפָּט)

9 Palestine Order-in-Council from 10th August 1922, issued by The King's Most Excellent Majesty George V, King of the United Kingdom (part of which was the British Mandate in Palestine). Full text in English can be found on the website: [01.04.2013] <http://unispal.un.org/UNISPAL.NSF/o/C7AAE196F41AA055052565F50054E656>

10 More information can be found on the website: [01.04.2013] <http://www.jewishvirtuallibrary.org/jsource/Politics/judiciary.html>

11 For more information visit the website: [01.04.2013] <http://www.llrx.com/features/israel3.htm>

12 Hebr. Beit din (בֵּית דִּין)

13 Dayanim are rabbinical court judges. Full text of the Dayanim Act in Hebrew is available on the website: [01.04.2013] http://www.nevo.co.il/law_html/law01/070_001.htm

14 More information available at the Rabbinical courts website in Hebrew: [01.04.2013] <http://www.rbc.gov.il/Pages/default.aspx>

15 Further information on Ministry of Religious Services can be found on the website: [01.04.2013] <http://www.dat.gov.il/>

16 See Dayanim Act of 1955 at the website: [01.04.2013] http://www.nevo.co.il/law_html/law01/070_001.htm



jurisdiction over marriage and divorce of Jews and have parallel competence with district courts in matters of personal status, alimony, child support, custody, and inheritance. Religious court verdicts are implemented and enforced in the same way as the civil court's decisions.¹⁷

3. Chief Rabbinate of Israel

The Chief Rabbinate of Israel is the supreme authority for Jewish citizens of Israel as far as religious law is concerned. Its status is regulated in the Chief Rabbinate of Israel Law of 5740-1980¹⁸. The Rabbinate has jurisdiction over many aspects of Jewish life in Israel. Its jurisdiction includes personal status issues, such as marriage and divorce, as well as Jewish burials, Conversion to Judaism, Kashrut and kosher certification, emigrants, supervision of Jewish holy sites and overseeing Israeli Rabbinical courts.¹⁹ Rabbinical courts apply Halacha – Jewish religious law – and the Chief Rabbinate of Israel sets guidelines on interpretation of Halacha. In general, it is responsible for Jewish aspect of Israel.

C. FAMILY LAW AS AN EXAMPLE OF INTERACTION OF RELIGIOUS AND SECULAR LAW

1. Marriage and divorce according to Halacha

The most important act regulating marriage and divorce in Israel is Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 5713-1953.²⁰ According to its provisions, marriage and divorce of Jews in Israel who are Israeli residents and citizens are within the exclusive jurisdiction of Rabbinical Courts. The Law further provides that marriage and divorce of Jews in Israel must be conducted under Jewish law (Halacha). In accordance with Jewish law, a marriage may end only upon divorce based on both spouses' free mutual consent, or upon death. Jewish divorce will be recognized as valid on condition that the husband grants his wife a writ of divorce (Hebr: get) and she accepts it. Rabbinical Courts do not have the authority to terminate a marriage, but they may issue orders for the parties to try to resolve their differences or to effectuate a divorce.²¹

17 Y. S. Kaplan, 'Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law' (Middle East Law and Governance 4-2012), p. 1–68.

18 Chief Rabbinate of Israel Law from 19th March 1980, passed by the Knesset on the 2nd Nisan 5740 (19th March 1980) and published in Sefer Ha-Chukkim No. 965 of the 11th Nisan, 5740 (28th March 1980), p. 90. Full text in English is available on the website: [01.04.2013] <http://www.israellawresourcecenter.org/israellaws/fulltext/chief rabbinate israel.htm>

19 Chief Rabbinate of Israel Law of 5740-1980, article 2

20 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law from 26th August 1953, passed by the Knesset on the 15th Elul 5713 (26th August 1953) and published in Sefer HaChukkim No. 134 of the 24th Elul 5713 (4th September 1953), p. 165. Full text in English is available on the website: [01.04.2013] www.knesset.gov.il/review/data/eng/law/kns2_rabbinic-courts_eng.pdf

21 The Marriage and Divorce Law of 5713-1953, see above

2. Civil marriage

In Israel, a civil marriage is non-existent. There is no possibility to get married out of religion in Israel, because marriages are in charge of religious courts. The only possibility to obtain a civil marriage is to get married abroad.²² Such a marriage is forbidden *ex ante*, but valid *ex post*, provided it is valid in the country where it has been concluded. The reason for this solution is the public interest in validity of such a marriage. It can be retroactively recognised by the Ministry of the Interior by registering it on a special list upon presenting a foreign marriage certificate. As a result of it, a marriage becomes valid. Couples married in that way are recognised as “married” by the State of Israel.

3. Family courts jurisdiction within family law

Family courts are part of an ordinary courts system which is regulated in Basic Law: The Judiciary.²³ They act according to the Family courts law of 1995.²⁴ Family courts are in charge of every legal situation that involves family members, however they cannot decide on marriage and divorce because this issues are reserved exclusively for religious courts. It is possible to file a claim regarding divorce to the family court. Although the divorce itself belongs to the jurisdiction of the rabbinical court, in the situation when the claim has been filed to the family court, it has jurisdiction concerning alimony, child custody, and division of property.²⁵ Family courts are an attempt to assure balance to rabbinical courts, which tend to favour men over women in matters of a divorce, because the act according to Halacha. Family courts in turn are not bound by religious law and can take care also for women’s rights, following the provisions of secular law of the State of Israel.

An important role in jurisdiction regarding family law has the Israeli Supreme Court. It hears petitions from final decisions of the Higher Rabbinical Court and gives guidelines for lower courts in its cases regarding family law issues.

D. CONCLUSION

Israel faces many problems arising from its specific legal system. The fact that the country is officially declared as a Jewish and democratic state causes additional complications connected with the duty to apply the religious law to some aspects of life. The interaction between religious and secular law in Israel can be perceptible especially in matters of family law. Nonetheless, Israeli legal system seeks to provide equal protection to all of its citizens, following the rule of law.

22 Today the most popular destination for Israeli citizens who wish a civil wedding is Cyprus.

23 Basic Law: The Judiciary from 28th February 1984, passed by the Knesset on the 25th Adar Alef 5744 (28th February 1984) and published in Sefer Ha-Chukkim No. II 10 of the 4th Adar Bet, 5744 (8th March 1984), p. 78. Full text in English is available on the website: [01.04.2013] http://knesset.gov.il/laws/special/eng/basic8_eng.htm

24 Family Courts Law from 31st July 1995, passed by the Knesset on the 4th Av 5755 (31st July 1995) and published in Sefer Ha-Chukking No. 11 of the 7th August 1995. Full text in Hebrew is available on the website: [01.04.2013] www.knesset.gov.il/.../law/kns13_familycourt.pdf

25 Family courts law of 5753-1995, see above



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Basic Law: The Judiciary from 28th February 1984, passed by the Knesset on the 25th Adar Alef 5744 (28th February 1984) and published in Sefer Ha-Chukkim No. II 10 of the 4th Adar Bet, 5744 (8th March 1984), p. 78.

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THE ENHANCED COOPERATION – IS IT AN INSTRUMENT EFFICIENT ENOUGH TO AVOID THE DIVERGENCE BETWEEN THE NATIONAL REGULATIONS OF PRIVATE INTERNATIONAL LAW IN THE EU?

Anna Sapota*

Jagiellonian University in Kraków, Poland

Abstract: Since the Amsterdam Treaty, the EU was vested with the competency to establish a uniformed choice of laws rules. For more than 10 years there have been implemented several regulations regarding jurisdiction, applicable law and enforcement of courts judgments. In 2010 the Rome III regulation regarding law applicable in divorce and separation matters was implemented as enhanced cooperation in 14 countries of the EU. It is interesting how such a new method of unifying private international law in the EU Member States can influence the level of convergence between their legal systems.

This article will examine the new instrument of unification that has appeared – the enhanced cooperation – and the possible consequences of using this instrument to unify the rules of private international law. It contains a critical analysis on how the adoption of the new instrument can affect the harmonization of private international law in the EU. The paper will also answer the question, if the convergence of legal systems of the EU Member States is possible in such situation. Moreover, it will indicate the attitudes of non-participating Member States towards the implanted regulation. Furthermore, it will give examples of differences between legal systems resulting from implementation of enhanced cooperation for this regulation.

The research and analysis covered by this paper will bring the conclusion that using the enhanced cooperation in the field of judicial cooperation can lead to the differentiation rather than to unification of the European law.

Key words: private international law, enhanced cooperation

A. INTRODUCTION

This article will describe the mechanism for enhanced cooperation, which has been used to adopt the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation¹ (hereinafter referred to as: ‘Rome III’ or ‘Rome III regulation’). The Rome III regulation is a part of the process of expanding the European Union legislation in the field of private international law. The enhanced cooperation is a new method of unifying this domain. Therefore, it is worth to analyse if this method serves its purpose.

This paper will examine the new instrument of unification, which has appeared – the enhanced cooperation - and the possible consequences of using this instrument to unify the rules of private

* Anna Sapota, Ph. D. candidate at Jagiellonian University in Kraków, Poland, Faculty of Law & Administration, Chair of Private International Law.

¹ OJ L 343, 29.12.2010, p. 10-16.



international law. The article will also contain a critical analysis and presentation how the adoption of the new instrument can influence the harmonization of private international law in the EU.

The regulations implemented by the EU are also a part of national legal systems of the Member States and they can either efficiently unify these legal systems or make them more differentiated. This article will indicate and present the analysis regarding the possible problems with coordination of the regulations and the divergence between the legal systems within the EU. Furthermore, it will give examples of differences of legal systems resulting from implementation of enhanced cooperation for this regulation.

This analysis will be closed by the conclusion that using the enhanced cooperation mechanism in the field of judicial cooperation can lead to differentiation rather than to unification of the European law.

B. ENHANCED COOPERATION AS A NEW INSTRUMENT IN IPL UNIFICATION

The enhanced cooperation was originally introduced by the Treaty of Amsterdam² in 1995. In 2009 the Treaty of Lisbon³ improved the mechanism for enhanced cooperation⁴ by amending questionable rules and grouping all provisions in one chapter. Only after these improvements the mechanism has been used for the first time in order to partially unify the conflict of laws rules. In 2010 the Council accepted the request for enhanced cooperation placed by 14 Member States⁵. In 2012 Lithuania declared its access to the cooperation⁶. Hence, currently there are 15 Member States where Rome III regulation is applicable.

Let's look now at the instrument itself. It is designed as an instrument that enables to overcome the paralysis when all of the EU members cannot agree on some regulation as in this case. The enhanced cooperation in judicial matters is based on the article 328 (1) of the Treaty on the Functioning of the European Union⁷. The initiative of enhanced cooperation of the Member States has to be accepted by the Council decision. The adopted regulation has to be in compliance with the requirements laid down in such decision. Further in any time, it has to be subjected to and

2 OJ C 340, 10.11.1997, p. 1-145.

3 OJ C 306, 17.12.2007, p. 1-231.

4 See: Bordignon M., Brusco S., 'On enhanced cooperation' *Journal of Public Economics* 90 (2006), p. 2063-2090, Amtenbrink F. and Kochenov D., 'Towards a More Flexible Approach to Enhanced Cooperation', (The Hague: T.M.C. Asser Press, 2009), available at SSRN: <http://ssrn.com/abstract=1310773> accessed on 25 May 2011, Marco Colino S., 'Towards Greater Flexibility or Deadlock? The Progress of European Integration Since the Introduction of Enhanced Cooperation', The Federal Trust for Education and Research, Online Paper Series 24/04. Available at SSRN: <http://ssrn.com/abstract=1701286> accessed on 25 May 2011.

5 Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia

6 2012/714/EU: Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 323, 22.11.2012, p. 18-19.

7 OJ C 115, p.1.

in compliance with other acts already adopted within the proper framework⁸. Implementing this solution for the first time⁹ created a few interesting consequences and questions related to the future means of harmonization of the law in the EU.

The mechanism is indicated as the idea inseparably linked with a discussion on the flexibility in the process of integration in the EU. Both - supporters and opponents - admit that the flexibility has been an essential element in the path towards the construction of the EU and the answer for the necessity of finding the balance between the different cultures and legislation in the Member States. The concept that is fundamental for this idea is that not all of the Member States can reach the same objectives at the same time. Therefore, there should be a place for a mechanism that allows the more advanced countries to strengthen the links between them and allows the less prepared countries to find the way of heading in the same direction in the future and joining the cooperation.

C. NEW INSTRUMENT AS A MODE OF PRIVATE INTERNATIONAL LAW UNIFICATION

1. Appropriateness of the instrument

We cannot avoid the issue regarding the appropriateness of the instrument in question in relation to conflict of law rules. Taking into account the general idea of this mechanism and its understanding while it has been drafted, it seems to be not suitable for conflict of laws¹⁰. As of now the national law was applicable in all cases of divorce or separation between couples of different nationality. At the moment applying national laws to such cases is allowed in half of the EU Member States while the second half applies unified Rome III regulation. This situation creates two dimensions in the EU, which divides the Member States. That is how the 'two speeds' in the EU could become visible. It means that in some countries the process of unification shall proceed faster and further than in others. As a consequence of such actions, there have been created 'better' and 'worse' members of the EU in respect of taking or not taking part in enhanced cooperation.

This is a reflection of a conflict between the idea of flexibility in harmonization of law and the aim of achieving the unified, stable and predictable regulation in the whole EU. Obviously, there is a provision in the Treaty on the functioning of the European Union that regards the enhanced cooperation itself directly stating that the participating countries should invite and encourage non-participants to join the cooperation. However, in this specific case, the problem lies not in the level of integration, but rather in the content of proposed regulation. The opponents¹¹ of the project of regulation have not rejected it due to the fact that they were not ready for deeper integration but

⁸ In case of Rome III, the regulation should be in compliance mainly with Brussels II.

⁹ However now there is also a patent regulation. States proposing the EU patent: Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, The Netherlands, Poland, Slovenia, Sweden and the United Kingdom. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/119732.pdf

¹⁰ J.-J. Kuipers, 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation'.

¹¹ Sweden and Finland.



simply because they felt uncomfortable with the proposed choice of law rules¹². In effect, when the regulation implemented on the basis of enhanced cooperation is so similar to the rejected Commission's project of this regulation, it is highly unlikely that the main adversaries will join the cooperating Member States.

2. Coordination problems

The logical consequence of the situation described above is a coordination problem. First dimension of this issue constitutes the coordination among European regulations, which deals with private international law, like Rome III regulation, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000¹³ (hereinafter referred to as 'Brussels II bis' or 'Brussels II bis regulation') and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes¹⁴ (hereinafter referred to as 'the Proposal'). Second dimension is the cohesion between the conflict of laws in national legal systems and the European regulations.

Therefore, the practitioners will have to deal with several problems. At the beginning they will have to determine, if a given divorce case takes places in a country that participates in the enhanced cooperation. It is very likely that the concerned country will participate and the others will not. It may result in problems with determination of applicable law, especially regarding the fact that the Rome III regulation introduces the choice of applicable law by the parties, while most of national legal systems do not allow that. In many cases it will allow questioning the validity of choice made by the spouses. The parties may be deprived of more liberal rules of Rome III regulation.

Next, the determination of applicable law will be also related to determination of the jurisdiction based on Brussels II bis regulation, which jurisdiction has not been adjusted to and coordinated with Rome III regulation¹⁵. The easy way to establish a jurisdiction of a foreign court under Brussels II bis rules will be to encourage the spouses to 'forum shopping' that would depend on their interest in obtaining the judgement based on Rome III regulation. Additionally, the initial project of Rome III regulation included the amendments to Brussels II bis regulation and it planned to introduce the agreement on jurisdiction in divorce matters. It would coordinate the rules applicable to choice of law and choice of court. Not only the parties' autonomy would have developed significantly in this field but also the harmonisation of law and jurisdiction in divorce matters would have progressed.

12 K. Boele-Woelki, 'For Better and For Worse: The Europeanization Of International Divorce Law' (2010) Yearbook of Private International Law 1-26.

13 OJ L 338, 23.12.2003, p. 1-29.

14 COM/2011/0126 final - CNS 2011/0059.

15 B. Campuzano Diaz, 'The Coordination of the EU Regulations on Divorce and Legal Separation with the Proposal on Matrimonial Property Regimes' (2011) Yearbook of Private International Law 233-255.

At last, the practitioners will have to set the judgement against the exequatur procedure in Brussels II bis regulation. Under the provisions of Brussels II bis regulation a court will not take into account the differences among conflict of laws rules while deciding on exequatur. The judgements of the participating Member States will not be granted with any benefits in the procedure¹⁶.

3. Divergence of national legal systems

As it has been assumed by the author, the major aim in unification of private international law in the EU is to provide the citizens with legal certainty resulting from the convergence of conflict of laws rules in the field of divorce. In this situation, it is quite obvious that the effect is opposite to this purpose. The chance that all non-participating countries will join the cooperation is minimal. The question is, if in such case the opposing countries would not like to create different common rules by the countries outside of this enhanced cooperation. The countries sharing similar legal culture and social background - like for example Nordic countries - can create common standards for law applicable in divorce matter (as there exist the Nordic convention on marital matters). Even though it seems difficult to adopt second different regulation on law applicable in divorce matters by the mechanism of enhanced cooperation. Particularly regarding the fact that establishing different systems of conflict-of-laws rules within the common judicial area would probably contradict the objectives of the EU. The council should not accept any new initiative in this field¹⁷. Nevertheless, there is no instrument that could prevent countries from concluding an international convention regarding this particular matter¹⁸. Especially that the loyalty obligation imposed on the EU Member States cannot be interpreted so widely in case of divided competencies. Consequently, two or even three different conflicts of laws in divorce matters regulations in the EU countries would coexist at the same time.

The introduction of the mechanism for enhanced cooperation reminds the unification of the conflict-of-law rules as it was made by international conventions (like for example the Hague conventions) when different conventions related to different matters in private international law were signed and ratified each time by the different states. The effect is the same in case of a partial unification by means of enhanced cooperation. The countries that do not wish to join the enhanced cooperation can use regular international instruments (like treaties) to establish common rules in the field of divorce matters. So instead of unifying the conflict of laws rules in divorce matters, the number of 'unified' regulations will be multiplied. The system of legal sources becomes more and more complicated and there is no room for the convergence of the conflict of law rules applicable in divorce matters.

16 S. Marinai, 'Matrimonial Matters And The Harmonization Of Conflict Of Laws: A Way To Reduce The Role Of Public Policy As A Ground For Non-Recognition Of Judgments' (2011) *Yearbook of Private International Law* 255-272.

17 There are some authors who even accept the possibility of creating new regulation based on the mechanism of enhanced cooperation. See: K. Boele-Woelki, 'To be, or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union', (2008), *Victoria University of Wellington Law Review* 779-792 (784).

18 Especially taking into account that the competence of EU to establishing conflict-of-law rules in family matters is disputable among the Member States and secondly, that some countries have not decided to participate in the judicial cooperation in full scope.



D. MALTA EXAMPLE

At the moment of approving the enhanced cooperation mechanism Malta was the sole participating Member State whose law did not provide any mechanism for pronouncing a divorce under its procedural and material law. It also influenced the content of the Rome III regulation. The specific clause was dedicated to deal with the problem of Malta's lack of such institution. Article 13 of Rome III regulation provides: '*Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation*'. In effect, Malta had no obligation to apply the rules of the Rome III regulation, which it participates in. So even among the countries that have opted in the enhanced cooperation there was no real convergence of legal systems. In practice the Malta court would not apply the conflict of law rules arising from Rome III regulation if such rules had led to pronouncing divorce. The result would be as if *lex forum* had been applied in this case.

This situation was changed recently as on July 25, 2011 when Malta's Parliament approved the divorce bill. The law came into effect on October 1, 2011. So the level of convergence between the national legal systems of participating Member States has been improved.

E. CONCLUSION

All in all, there is a matter of positive and negative consequences of using enhanced cooperation to introduce the conflict of laws rules. This mechanism that was introduced in more than a half of the EU Member States unified the conflicts of laws rules in the field of divorce matters. But the question is, if this resulted in real convergence of national legal systems in the EU? The answer is no. The accepted solution does not assure the greater stability and predictability of law for the citizens. It should be reminded that the EU citizens are more and more convinced and got used to the fact that the most of regulations in the EU are harmonized or unified. They expect the convergence of legal systems between the Member States. It leads to belief that the regulation introduced by means of enhanced cooperation is applicable in all of the EU Member States. In such a case the parties may be mistaken while they decide about the law applicable to their case, if they apply for a divorce in a country that stays out of the enhanced cooperation.

The enhanced co-operation method can be a useful and important mechanism in the development of the European integration. However, in the field of private international law it should be considered more as an additional tool for assuring flexibility in situations when there is no other possible solution but followed by more effective mechanisms like regulations. Particularly, it can be helpful when the purposes, scope of regulation and proposed rules are acceptable for all Member States, but they are also difficult for adoption in all Member States at once. Implementing such mechanism should not come as a consequence of failure in reaching the compromise among all Member States on specific topic. The enhanced cooperation cannot replace the consensus of the Member States, because instead of converging national legal systems, it multiplies the possibilities of differentiating them.

THE EUROPEAN SUPERVISORY AUTHORITIES: A TRUE EVOLUTIONARY STEP ALONG THE PROCESS OF EUROPEAN FINANCIAL INTEGRATION?

Gianni Lo Schiavo*

King's College, London, the United Kingdom; College of Europe, Bruges, Belgium

Abstract. The purpose of this article is to appraise the European Supervisory Authorities' (ESAs) structure and powers in the wider context of the debate on agencification in Europe. Agencies have acquired a major role in the European decision-making process. However, agency design has had to come to terms with the restrictive judicial interpretation on delegation of powers famously established in the *Meroni* judgment.

In the context of the well-known financial turmoil, institutional reforms have led to the creation of the European Supervisory Authorities ('ESAs'), three supervisory authorities aimed to attain further convergence in financial regulation at European level. ESAs have a wide spectrum of powers which go from preparatory rule-making to the enforcement of EU law, from an advisory role to the power of day-to-day supervision.

This reform questions whether the ESAs constitute a new step in the broader agencification process. Arguably, the extensive use of the article 114 TFEU legal basis as well as the wide-ranging ESA's powers show that this institutional reform corresponds to a new trend towards an 'authorification' of agency design.

Keywords: Financial Supervision and Regulation, European Supervisory Authorities (ESAs), Legal basis, *Meroni* doctrine, Authorification

1. INTRODUCTION

Since the outbreak of the financial turmoil in 2008, major changes have occurred in the European integration process. Instances for European fragmentation are incoming. Many contingent responses and structural reforms have been put forward. Among others these have included emergency measures - the bilateral loans to Greece in 2010¹ -, less stringent interpretations of the Treaty rules - State aid rules under article 107 TFEU² -, financial stability mechanisms - the creation of the intergovernmental European Stability Mechanism ("ESM")³ which has been recently endorsed.

* PhD candidate King's College, London; LLM College of Europe, Bruges.

1 See the Statement of the Heads of State or Government of the Euro Area, 7 May 2010, available at http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf.

2 Art.107 TFEU declares state aids incompatible with the internal market. Nevertheless, art.107 TFEU par.3 letter b) provides for the possibility to declare compatible aid to remedy to a serious disturbance in the economy of a Member State. This was the legal basis used to declare compatible aids to financial institutions. According to the Commission Staff Working Paper 'The effects of temporary State aid rules adopted in the context of the financial and economic crisis' 5.10.2011 SEC (2011)1126, 36, these aids equal to €4.5 trillion, the equivalent of 36.7% of the EU GDP, by the end of 2011.

3 For a complete appraisal of these instruments see A. de Gregorio Merino, 'Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance', [2012] 49 CML Rev., 1613-1645.



sed by the Court of Justice in the *Pringle* case⁴ –, and the strengthening of the European economic governance system – the adoption of the so-called Six Pack.⁵

Along this reform scenario, a substantial improvement to the call for *mehr Europe* and the use of the ‘Union’ method to tackle the effects of the crisis has come from institutional law reforms in European banking and financial regulation.⁶ The creation of the European system of financial supervisors (“ESFS”) is a move towards further integration and supervision in the financial sector. This is an institutional reform establishing a composite system of bodies at European level. The new structure is composed of four bodies: the European Systemic Risk Board (“ESRB”)⁷ and three European Supervisory Authorities (‘ESAs’). These are the European Banking Authority (“EBA”), the European Securities and Markets Authority (“ESMA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”),⁸ which are all responsible for micro prudential supervision. The first objective of the ESFS “shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses”.⁹ The setting up of the ESAs comes from the “shortcomings in the area of cooperation, coordination, consistent application of Union law and trust between national supervisors”.¹⁰ Yet before the adoption of their founding Regulations, it was argued that the ESAs could lead to a significant proliferation of delegated rule-making¹¹ and carry “the real potential for centralisation”.¹²

The two main questions that this contribution attempts to answer are whether the ESAs are a new form of delegated law-making and supervisory body and what implications they have on

4 *Pringle v. Ireland*, Case C-370/12, [2012] nyr.

5 Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council, of 16 November 2011, amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; all these Regulations are published in OJ 2011 L 306.

6 For a general picture on EU financial Regulation before and during the crisis see T. Tridimas, ‘EU financial Regulation: federalization, crisis management, and law reform’ in P. Craig and G. De Burca, ‘The Evolution of EU law’ (Oxford OUP 2011), 783-804.

7 The ESRB will not be taken into account in this contribution. However, for an extensive overview of the ESRB and its implications for financial Regulation see E. Ferran and K. Alexander, ‘Can Soft Law Bodies be Effective? The European Systemic Risk Board’ [2011] 35 E. L. Rev., 751-777.

8 Regulations 1092/2010 and 1096/2010 concern the European Systemic Risk Board), Regulation 1093/2010 on the EBA, Regulation 1094/2010 on the EIOPA, Regulation 1095/2010 on the ESMA, all in OJ L 331 2010. The last three will be considered as the “Regulation”. To simplify the reader, except when expressed, the articles mentioned throughout the paper will refer to the EBA Regulation.

9 The Regulation, Article 2.

10 The Regulation, Recital 1.

11 N. Moloney, ‘EU Financial Market Regulation after the Global Financial Crisis: “More Europe” or more Risks?’ [2010] 47 CMLR 1317–1383, 1345.

12 N. Moloney, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making’ [2011] 12 EBOLR 41-86, 49.

existing EU law. The paper is structured as follows. The first part will briefly retrace the origins of the ESAs in EU law. The second part will critically investigate on the ESAs' structure and powers. The third part will highlight two contentious issues: the ESAs' legal basis and the ESAs' limits inherent on the *Meroni* ruling.

2. THE RESHAPING OF EU FINANCIAL SUPERVISION AND REGULATION: FROM THE LAMFALUSSY COMMITTEES TO THE ESAS

The idea of a harmonised and comprehensive regulatory framework system for national financial law can be identified in the Segré report.¹³ In the 'White Paper on completing the internal market' the Commission stressed the idea of a harmonisation of financial services.¹⁴ However, it was not until the 1999 Financial Service Action Plan ("FSAP")¹⁵ that the Commission seriously planned to reinforce financial regulation. It set an agenda to adopt legislative instruments with a view to boost free movements of capitals and financial services.

The years following the FSAP saw the establishment of the Lamfalussy decision-making structure in 2001.¹⁶ It was a four-level structure aimed to harmonise financial supervision and regulation in Europe. Level 3 was conceived as a "pole of cooperation" between national authorities where three Committees composed of national competent authorities and Commission representatives convened to discuss the application of European legislation in financial law. These were the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS). They acted on behalf of national supervisors and did not dispose intrusive powers of supervision, monitoring or sanction to national authorities or financial entities.

Although the Lamfalussy Committee structure has been successful to a certain extent, some shortcomings have been found.¹⁷ For instance, the strongly "national imprinting" of its functions or the absence of legally binding powers have proved to be inadequate to coordinate efficiently national supervisors.¹⁸

The financial crisis has completely changed panorama. The need for institutional reforms in European financial regulation was highlighted by important European reports that showed that the established Lamfalussy structure was inadequate to tackle the risks of cross-border financial crises and to avoid spill-over effects. In particular, in 2009, the de Larosière Report¹⁹ outlined the

13 Segré report, *The development of a European Capital Market*, November 1966 available at http://ec.europa.eu/economy_finance/emu_history/documentation/chapter1/19661130en382deveurocapitm_a.pdf

14 Commission Communication *Completing the internal market*, 1985 (85)310.

15 Commission, *Financial Services Action Plan*, COM(1999)232.

16 For an extensive account of the institutional structure of EU securities regulation See N. Moloney, 'EC Securities Regulation', (Oxford OUP 2008) 1007-1101.

17 *Ibidem*, N. Moloney, *op. ult. cit.*, 1007 *et seq.*

18 See E. Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' [2011] University of Cambridge Faculty of Law Research, Paper 29/2011.

19 De Larosière Report, 25.02.2009, available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf

inefficiencies of the former system of European financial supervisory model and called for a more institutionalised system of micro-prudential supervision. It was argued that the Level 3 Committee system lacked the institutional capacity to an effective response to cross-border financial crises.²⁰ The Lamfalussy committee structure needed to be reformed in order to endure financial stability and to assure a more structured financial integration at European level.²¹ Among others, the de Larosière report showed that the absence of legally binding powers, the insufficient level of accountability and transparency and the lack of real independence from national and stakeholder interests were the main shortcomings of the Level 3 Committees structure.²²

Following the de Larosière Report the Commission promptly proposed three Regulations aimed at creating the ESFS comprising the ESAs whose functions would include, among others, preparatory law making powers in EU financial legislation and an intervention-based oversight over Member States and market participants.²³ These Regulations were adopted and entered into force at the beginning of 2011.

3. REFLECTIONS ON THE ESAS' STRUCTURE AND POWERS

3.1 ESA's structure: a new paradigm in agency design?

The first aspect to assess is the ESAs' nature. The question is whether ESAs have an innovative structure. The answer is negative. Although the ESAs have legal personality, their organisational structure still follows the logics of the Level 3 Committees. They do not act as single supervisory bodies in Europe, but follow the idea of "meta-organisations".²⁴ The institutional structure has been clearly identified as an "integrated network of national and EU supervisory authorities".²⁵ This means that the Commission has preferred improving the existing framework of decentralised financial control and supervision of the Member States rather than creating a single EU financial supervisor for financial markets. Two elements show this choice. First, each Member State continues to exercise supervisory tasks under the overarching competent ESA. Second, the heads of the national authorities' members are part of the ESAs' Board of Supervisors, the main decision body.

The ESAs' rules on governance are shaped following the traditional agency structure. It is commonly agreed that the establishment of agencies shall be guaranteed by a number of principles of good governance.²⁶ The principles of independence and accountability are the most important

20 See K. Alexander, 'Reforming European financial supervision: adapting EU institutions to market structures' [2011] 12 ERA Forum 229-252, 236.

21 De Larosière Report, *op. cit.*, 46-48.

22 *Ibidem*, 54-55.

23 See the Communication from the Commission, European Financial Supervision [2009] COM(2009)252.

24 See G. Castellano, A. Jeunemaitre and B. Lange, 'Reforming European Union financial Regulation: thinking through governance models', [2012] 23 EBLR 409-446, 437.

25 The Regulation, Recital 9.

26 See clearly Commission Communication European Governance: a White Paper [2001] COM(2001)428 final, 10-11.

ones. These principles apply also in the ESAs' context. However, the drafting of these principles in the Regulations does not guarantee that they are respected in practice.

This brief analysis has shown that, in the current debate on agencification, ESAs do not depart on structure and governance from the current agency paradigm. They are mostly in line with current agency design.

3.2 ESAs' Supervisory and Regulatory Powers: what is at stake?

As compared with the former Lamfalussy structure, ESAs have a high degree of tasks and powers in the financial sector.

The preparation of technical standards is one of the most important ESAs' powers. They can propose regulatory or implementing technical standards which, after the Commission's endorsement, will take the form of delegated or implementing acts. ESAs' influence in the creation of technical standards is immense as, in contrast with their predecessors, ESAs input will be direct and unmediated at the drafting stage.²⁷ In particular, ESAs act as the drafters of the standards and the Commission will substantially follow them. The Commission has limited power to propose amendments only in "very restricted and extraordinary circumstances".²⁸ It is true that the Commission enjoys the final wording on the content of the standard, but the Regulations restrain the possibility of rejection or amendment by stating that amendments can be made only when "[the standards] were incompatible with Union law, did not respect the principle of proportionality or run counter to the fundamental principles of the internal market for financial services (...)".²⁹ Hence, it is submitted that the Commission's possibility to review the proposed draft technical standards is limited to serious infringements of EU law.

One of the essential ESAs' powers is to ensure the consistent application of EU rules. The ESAs Regulations contain provisions that allow them to recur to a structured enforcement procedure which is parallel to the general enforcement procedure under article 258 TFEU.³⁰ Under certain conditions, the Regulations provide that the ESAs may adopt an individual decision that requires the institution to comply with Union law. A pivotal condition to adopt individual decisions is that "the relevant requirements (...) are directly applicable" to the financial institution.³¹ However, the expression "directly applicable" is controversial in this context. This means that individual decisions can be issued only if they refer to a breach of a regulation or a decision and not a directive in financial legislation. Furthermore, direct effect of directives can apply only in favour and not against individuals.³² So, this "enforcement-like" procedure would not apply to the detriment of individuals.³³

27 As to the ESMAs' powers, P. Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers', [2011] 48 CMLR 1879–1913, 1883.

28 The Regulation, Recital 23.

29 *Ibidem*.

30 *Ibidem*, article 17.

31 *Ibidem*, article 17 para. 6.

32 *Marshall v. Southampton and South-West Hampshire Area Health Authority*, Case 152/84, [1986] ECR 723.

33 For arguments in favour and contrary to this reading see T. Tridimas 'Financial Supervision and Agency Power: Reflections on ESMA', in N. Shuibhne and L. Gormley (eds.), 'From Single Market to Economic Union', (Oxford OUP 2012) 55–83, 74.



The ESFS is an integrated network of national and Union supervisory authorities.³⁴ This definition excludes that the ESAs would play an exclusive role in financial supervision in the EU. National authorities will continue to supervise market participants. Nonetheless, ESMA has been vested with the power to register and supervise Credit Rating Agencies (CRAs). This competence has potentialities that were unforeseen before the outbreak of the financial crisis. Exclusive supervision on CRAs can potentially be a truly operational model that might serve as a “launching pad” for extensive transfer of supervisory powers to European agencies in future. The supervisory powers of the ESMA on CRAs are very extensive. These have been introduced by Regulation 1060/2009³⁵ which was later amended by Regulation 513/2011.³⁶ First, the ESMA has the power to register EU-based CRAs. Second, it has true investigatory powers. It can examine and take copies of any relevant material or records, ask for oral explanations, request information, carry out investigations and summon individuals, carry out on-site inspections and dawn raids. ESMA has also sanctioning powers which comprise the revocation of the registration, the temporary prohibition of issuing ratings, the suspension of the use of ratings. Further, ESMA is also given the power to impose fines and periodic penalties in case it finds an infringement. These rules clearly resemble the competition rules for the enforcement of articles 101 and 102 TFEU. The main difference is that the main enforcer in this case is an agency and not the Commission. Hence, it is submitted that supervision over CRAs makes ESMA perhaps the most powerful and dominant agencies in the EU.

ESAs can issue also guidelines and recommendations to competent national authorities and/or to market players.³⁷ The soft law powers might act as *de facto* hard law powers as they produce legal effects which go beyond the non-binding force of these acts. This stems out from the *Grimaldi* case where the Court has stated that soft law powers in EU law might still have the effects of being considered by national courts in deciding national disputes.³⁸ However, as recently argued, the indirect legal effects soft law powers might raise concerns of accountability and legal certainty.³⁹ It remains to be seen whether, in practice, those powers will be exercised in a way that goes beyond a simple advisory nature with a view to supervise the addressees.

Overall, this analysis has shown that the ESAs’ supervisory and regulatory powers are a novelty as compared with past practice.

34 The Regulation, Preamble 9.

35 Regulation 1060/2009 of 16 September 2009 on credit rating agencies *OJ L 302*, 17.11.2009 on which see F. Amtenbrink and J. De Haan, ‘Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies’ [2009] 46 *CMLR* 1915–1949.

36 Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies *OJ L 145*, 31.5.2011.

37 The Regulation, Article 16. This is a typical form of soft law powers. On the definition of soft law in the EU legal order see the extensive study of L. Senden, ‘Soft Law in European Union law’, (Oxford OUP 2004) where the author defines in Chapter 7 soft law as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects”.

38 *Salvatore Grimaldi v. Fonds des maladies professionnelles*, Case C-322/88, [1989] *ECR* 04407.

39 T. Tridimas, *op. ult. cit.*, 72.

4. THE CONSTITUTIONAL LIMITS OF THE ESAS: AN INSURMOUNTABLE STEP?

4.1 Limits inherent to the legal basis: a new reading of article 114 TFEU in financial supervision and regulation?

Traditionally, the establishment of agencies in the EU legal order has been made through recurrence to article 352 TFEU (former 308 TCE).⁴⁰ More recently, specific legal bases have been used to create new agencies. In particular, extensive use of article 114 TFEU has been made.⁴¹ Article 114 TFEU should be used as a general legal basis for the harmonisation of the internal market or approximation of law.⁴² The boundaries on the use of the article 114 TFEU were blurred time after time.⁴³ More recent case law shows that the *Tobacco Advertising* pro-active judicial annulment power has been avoided.⁴⁴

The ESAs have been created on the basis of article 114 TFEU.⁴⁵ Some have argued that they have been established on a rather shaky legal basis (article 114 TFEU) for radical institutional reform.⁴⁶ It is submitted that this use of article 114 sits uneasily with the – yet - broad judicial interpretation in the *Smoke Flavourings*⁴⁷ and *ENISA* cases.⁴⁸ ESAs have been established with a far-reaching interpretation of article 114 TFEU. Their special nature and powers question a genuine reference to article 114 TFEU. The preparatory-law making powers, and even more the direct supervisory powers on CRAs, go beyond the assisting role on competent national authorities and the contribution to financial stability necessary for financial integration.⁴⁹ Regulation 513/2011⁵⁰ shows that article 114 TFEU has been used for purposes going beyond the “genuine” objective of the improvement of the conditions for the establishment and functioning of the internal market. Hence, it is submitted that, in the context of financial supervision and regulation, Article 114 TFEU has acquired a role that was unconceivable before the outbreak of the financial crisis. European

40 Article 352 TFEU is the so-called flexibility clause which empowers the Council to adopt appropriate measures if the Treaties have not provided for the necessary powers.

41 This provision sets out the conditions for adopting EU legislation to harmonise the internal market. Recently, article 114 TFEU has been used to establish the European Food Safety Authority (EFSA), the European Network and Information Security Network (ENISA), and the Body of European Regulators for Electronic Communications (BEREC).

42 *Germany v. European Parliament and Council (Tobacco Advertising I)*, Case C-376/98, [2000] ECR I-08419, para. 84.

43 See E. Fahey, ‘Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority’, [2011] 74 MLR 581–595

44 On harmonisation and article 114 TFEU see, *inter alia*, S. Weatherill, ‘The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s case law has become a “drafting guide”’ [2011] 12 GLJ 827–864.

45 As it appears in the Preamble of the Regulations, article 114 TFEU has been used as the essential legal basis for the creation of the ESAs because “[t]he purpose and the tasks of the [Authorities] (...) are closely linked to the objectives of the Union acquis concerning the internal market for financial services” (Recital 17).

46 See E. Ferran, *op. cit.*

47 *United Kingdom of Great Britain v. European Parliament and Council*, Case C-66/04, [2005] ECR I-10553.

48 *United Kingdom v. Council and European Parliament (ENISA case)*, Case C-217/04, [2006] ECR I-03771, paras 43–45

49 The Regulation, Recital 17.

50 Regulation 513/2011, *cit.*



institutions have trespassed the established reading of article 114 TFEU. To avoid the rise of litigation in future, article 114 TFEU should be combined with article 352 TFEU in order to provide further powers to the ESAs.

4.2 Limits inherent to the Meroni doctrine: overturning the limits of delegation?

Delegation to agencies has been limited in EU law by the *Meroni* ruling.⁵¹ This judgment stated the delegation of discretionary power to agencies cannot be allowed “since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility”.⁵² So far the so-called *Meroni* doctrine has acted as a limit to provide a *carte blanche* on delegation to agencies.

The conferral of specific powers to ESAs appears to stretch the boundaries of the *Meroni* doctrine. The ESAs’ powers go far beyond the traditional agency model. However, the Commission has been very careful in shaping the powers of the ESAs alongside the *Meroni* ruling. This can be shown by the endorsement system, the exclusion of pure policy making powers for the ESAs and the control mechanisms exercised by other European institutions in the decision-making process.

It is still doubtful whether the *Meroni* doctrine is still a real parameter to assess agencies in Europe. It is submitted that a fine reading of the *Meroni* ruling would have run counter the creation of the ESAs as they are.⁵³ The existence of legal constraints on ESAs’ activities shows that the restrictive reading in *Meroni* still exists. However, one may question whether the ESAs’ powerful prerogatives go slightly beyond the *Meroni* ‘straightjacket’. They give the impression that a more flexible interpretation has been given.⁵⁴

Overall, it is argued that further clarification on the reach of the *Meroni* doctrine should be made. ESAs’ extensive powers show that it is the right time to settle once and for all the “agency delegation issue” in the EU law.

5. THE WAY FORWARD ON THE ESAS: CONCLUSION AND OUTLOOK

The paper has shown that the ESAs are a recent and, to a certain extent, original development in the current process of European financial integration. The ESAs may have initiated a new and peculiar wave in agency design as well as a refocusing in the process of financial integration in Europe. Arguably, we are moving towards a new wave of ‘authorification’ of European agencies in

⁵¹ *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* Case 9/56, [1958] ECR 154

⁵² *Ibidem*, para. 152

⁵³ See also M. Chamon, ‘Between Meroni and Romano or the devil and the deep blue sea’ [2011] 48 CMLR 1055-1075, 1068-1070.

⁵⁴ S. Griller and A. Orator, ‘Everything under control? The “way forward” for European agencies in the footsteps of the Meroni doctrine’ [2010] 35 E. L. Rev., 33-34.

financial supervision and regulation. This process entails stronger powers to rule, enforce, control and supervise Member States and market participants through agencies. ESAs enjoy, potentially, wider margins of manoeuvre than other agencies. They constitute a true “authority network system” with extensive law-making and supervisory powers. ESAs’ potential is immense.

However, many issues are still open to debate and only future will tell whether this reform has been effective. First, it is unclear what the real structure of the European financial supervision is. The Regulations suggest that the ESFS is an “integrated network system of national and Union supervisory authorities”. However, it is still not clear what the real balance between the ESAs and the Commission is. Do ESAs have “real teeth” to contrast or to counteract the Commission or they will heavily depend on it?

Second, it is still unclear what role the Member States and their national authorities will play. The presence of members of national authorities in the Management Board is not without problems. Will the national members pursue the Union interest or will the national interest overcome “common sense”?

Third, the recent calls for a Banking Union and the adoption by the Council of a system of prevention and supervision of the banks in the Eurozone mark a new era for European integration.⁵⁵ The recent proposals appear problematic for the ESAs. What would the EBA role be in supervising European banks? The new reform arrangements show that the EBA will be partially delegitimized to the benefit of the European Central Bank. Is this a suitable solution? Are we really sure that the ECB can conduct at the same time monetary policy and banking supervision?

This article has shown that ESAs are an original form of agency which can surely perform tasks and powers that seemed unimaginable before the outbreak of the financial crisis. However, outstanding issues suggest that continued work on ESAs’ role and powers is needed and should be addressed within the larger debate of agencification in Europe.

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⁵⁵ Commissioner Barnier, “The European Banking Union, a precondition to financial stability and a historical step forward for European integration” (SPEECH/12/963), 17.12.12. See the Commission Communication A road map towards a Banking Union COM(2012) 510 final, 12.9.2012.



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CONVERGENCE OF LAW – EXAMPLES FROM EUROPEAN ADMINISTRATIVE PROCEDURE

Robert Siuciński*

University of Lodz, Poland

Abstract. The article indicates a number of areas in which the convergence in the field of administrative procedure is reached. First of them is connected with the codifications of administrative procedures at the national level, which is particularly evident in countries that have made the first codification by means of a framework act (Finland 1982 and 2003, Italy 1990). The second is associated with the regionalization of law and approximation of legal solutions in the countries belonging to the same legal culture. That is visible, for example: in procedural due process clause in common law countries and general principles of administrative procedure in states, which derives from Austro-Hungarian tradition. Nowadays, europeanization of law is undoubtedly the most unprecedented example of regionalization. In the near future the European Union's legislative activity, basing primarily on the right to good administration protected in article 41 of the Charter of Fundamental Rights, should provide an adoption of the regulation concerning the codification of the administrative procedure for all EU bodies and institutions. Overstepping previously existed boundaries is also more and more noticeable in the sphere known as global administrative law, but this area has the most questionable character. We can therefore see that certain fundamental standards in the relations between administrative bodies resolving the case and the parties involved in the proceedings appear in many unrelated spheres.

Keywords: Administrative procedure, convergence, europeanization

INTRODUCTION

Codifications of administrative procedure in the following countries allows us to understand that the phenomenon of convergence occurs at several different levels. We can see that on a very general level – on the level of basic principles of procedure, for example: in Italy (codification in 1990), Greece (1999), Finland (1982 and 2003) or in Sweden (1971 and 1986). The article indicates a more specific areas of convergence of administrative procedure.

* Master degree at the Faculty of Law and Administration at University of Lodz (Poland, 2009), postgraduate student of University of Lodz, Department of Comparative Administrative Procedure (since 2009), assistant of professor in that Department (since 2011). Received a scholarship for young researchers in the project "Training of personnel for the needs of the flexicurity market and knowledge-based economy – offer of humanities and social sciences courses of the University of Lodz" implemented in the framework of the Human Capital Programme and co-funded by the European Social Fund (2011-2013). Received a scholarship at the Università degli Studi di Brescia and graduate course „European Law, Competition and Protection of Human Rights” (Italy, 2012). Author of speeches on international conferences in Warsaw, Cracow, Lublin (Poland), Hradec Králové (Czech Republic), Častá-Papiernička (near Bratislava, Slovakia), Odessa, Lviv and Lutsk (Ukraine). Author and co-author of foreign publications and publications in leading Polish law journals. Scientific interest concerning on administrative procedure and judicial review of administration.



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For Central European countries very relevant role accounted Austro-Hungarian monarchy. Administrative Tribunal in Vienna started its activity in the 19th century. On its case law was based the first codification of administrative procedure in Central Europe (and second in the world) Austrian General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*). That codification inspired the authors of Czechoslovak, Polish and Yugoslav codifications in twenties and indirectly at the turn of the fifties and sixties: again in Czechoslovakia – in 1955, 1960 and 1967, again in Poland in 1960, again in Yugoslavia in 1965 and also in Hungary (1957). All countries from region codified administrative procedure very early – for comparison Germany in 1976, aforementioned Italy, Greece, Sweden and Finland recently and only by a frame regulation, France and United Kingdom have not done that yet. Thus, current applicable Central European laws in this materia: Hungarian and Czech from 2004, Macedonian from 2005, Bulgarian from 2006 and Croatian from 2009 (*zakon o općem upravnom postupku*) or others older like Slovakian from 1967 (*zakon o spravnom konani*) – continues the same tradition. In the context of Central Europe we can speak about Austro-Hungarian succession countries or tradition of Austrian model of administrative procedure with the same: scope of application, principles of administrative procedure, concept of party, legal hearings and individual decision.

The convergence in the field of European administrative procedure is particularly evident in the concept of good administration, which is still developed. Taking into account that we deal with an opened construction, it would be useful to remind us of its origin and numerous non-binding acts of European law which are the sources of good administration. Among the most important I should mention: Resolution 77 (31) on the protection of the individual in relation to the acts of administrative authorities¹, Recommendation no. R (80) 2 concerning the exercise of discretionary powers by administrative authorities², Recommendation no. R (81) 19 on the access to information held by public authorities³, Recommendation no. R (84) 15 relating to public liability⁴, Recommendation no. R (87) 16 on administrative procedures affecting a large number of persons⁵, Recommendation no. R (91) 10 on the communication to third parties of personal data held by public bodies⁶, Recommendation no. R (2000) 6 on the status of public officials in Europe, Recommendation no. R (2000) 10 on codes of conduct for public officials⁷, Recommendation Rec (2002) 2 on access to official documents⁸, Recommendation Rec (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law⁹ and Recommendation Rec

1 Adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers' Deputies.

2 Adopted by the Committee of Ministers on 11 March 1980, at the 316th meeting of the Ministers' Deputies.

3 Adopted by the Committee of Ministers on 25 November 1981, at the 340th meeting of the Ministers' Deputies.

4 Adopted by the Committee of Ministers on 18 September 1984, at the 375th meeting of the Ministers' Deputies.

5 Adopted by the Committee of Ministers on 17 September 1987, at the 410th meeting of the Ministers' Deputies.

6 Adopted by the Committee of Ministers on 9 September 1991, at the 461st meeting of the Ministers' Deputies.

7 Adopted by the Committee of Ministers on 11 May 2000 at its 106th session of the Ministers' Deputies.

8 Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies.

9 Adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies.

(2004) 20 on judicial review of administrative acts¹⁰. The functioning of the above-mentioned in the legal system of the Council of Europe has significantly contributed to adopting Recommendation Rec (2007) 7 on good administration with appendix – Code of Good Administration¹¹. Similarly, the European Parliament resolution from 6 September 2001 approving a Code of Good Administrative Behaviour was an effect of the case law of the Court of Justice and the Court of First Instance in the Community legal system.

The issue of good administration reached a new dynamics after entry into force of the Charter of Fundamental Rights of the European Union¹² (hereinafter: Charter) and its article 41, which states:

“Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - the obligation of the administration to give reasons for its decisions.
3. institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.”

It is highlighted in the literature that the Charter introduces a new quality which grants a right to good administration a status of the fundamental right, a human right¹³. Nevertheless, we should set out an important objection here – is the standard ensured by the Charter in regard to the principles governing the administrative procedure really high? Above all, we should take into consideration the fact that the Charter does not cover the whole continent, but is rather directed to the institutions, bodies and offices of the Union so it is binding for the administrative bodies of the EU Member States (local, regional and national) only in the framework of exercising the powers entrusted to them under the European Union law (explanations to article 51 of Charter). The Charter’s application was limited by The British and Polish protocol. We should also remember that the legal character of the norm expressed in article 41 of the Charter is a matter of controversial debate. In the doctrine the authors introduce the concepts: of a right, a principle and even

10 Adopted by the Committee of Ministers on 15 December 2004, at the 909th meeting of the Ministers’ Deputies.

11 Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers’ Deputies.

12 2000/C 364/01 and 2007/C 303/02.

13 K. Kańska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’, *European Law Journal* 2004, vol. 10, no. 3, p. 301-302.

a standard of a good administration¹⁴. It is very important because if we talk about the rights the Charter ensures their full respect. If we talk about the principles the Charter assumes that one can rely on them before the court only with the aim of interpretation of law and the control of the legality of law adopted by the EU or the law executing the EU law (article 52 and the explanations to the Charter).

In the title of article 41 it was clearly expressed that it is a right, but the interpretation of the article 52 para. 2-4 of the Charter leads to the conclusion that the rights ensured by the Charter were interpreted from the Treaties, European Convention on Human Rights or common constitutional traditions of the EU Member States. The problem is that the right to good administration was ensured by the constitutional norms only in Finland (article 21)¹⁵. It seems that this principle is evolving to the right to good administration¹⁶.

Some of the authors do not consider this distinction as a serious one. They highlight that reconstruction of the term good administration is more relevant from the perspective of private person, moreover good administration has a variable content¹⁷. Due to the limited volume of this article, I can only indicate a problem. I lean toward the concept of a conglomerate of rights arising out of the art. 41 of the Charter. It would lead to the conclusion that the general right to good administration has not been sufficiently recognized yet, and as such could not be the basis for a complaint to the court¹⁸. However, it would have an impact through the following elements: respect of the principles of impartiality and objectivity, the obligation to establish by the authority all the relevant circumstances of the case and conclusion of the procedure by final decision in a reasonable time, the administration responsibility for a damage caused by the exercise of their competencies, the party's right to be heard and the right to access to the documents concerning with a case, the authority's duty to give reasons and the judicial review of all administrative actions¹⁹. In addition, the European vision of the right to good administration is associated with

14 See more: J. Wakefield, 'The Right to Good Administration', Kluwer Law International 2007, p. 69, J. Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', EUI Working Paper Law 09/2009, p. 3-6, H.P. Nehl, 'Principles of Administrative Procedure in EC Law', Oxford 1999, s. 15-20, H.P. Nehl, 'Good administration as procedural right and/or general principle?' [in] H.C.H. Hofmann, A.H. Türk (ed.), 'Legal Challenges In EU Administrative Law. Towards an Integrated Administration', Cheltenham 2009, p. 322-327, K. Kańska, 'Towards...', *op. cit.*, p. 303-304, K.-D. Classen, 'Gute Verwaltung im Recht der Europäischen Union. Eine Untersuchung zu Herkunft, Entstehung und Bedeutung des Art. 41 Abs. 1 und 2 Europäischen Grundrechtecharta', Berlin 2008, p. 76-94, Z. Niewiadomski, 'Prawo do dobrej administracji – prawo podmiotowe czy deklaracja polityczna' [in] K. Sieniawska (ed.), 'Samorządowe kolegia odwoławcze jako gwarant prawa do dobrej administracji', Warsaw 2009, p. 173, A.I. Jackiewicz, 'Prawo do dobrej administracji jako standard europejski', Warsaw 2008, p. 124-126 and M. Koszowski, 'Prawo do dobrej administracji', *Przegląd Prawa Publicznego* 2010, no. 1, p. 48.

15 M. Niemivuo, 'The Finnish Administrative Procedure Act', *European Public Law* 2004, vol. 10, issue 3, p. 462.

16 S. Cassese, 'Il diritto alla buona amministrazione', *European Review of Public Law* 2009, vol. 21, no. 3, p. 1041, E. Lanza, 'The Right to Good Administration in the European Union: Roots, Rationes and Enforcement in Antitrust Case-Law', *Teoria del Diritto e dello Stato* 2008, nr 1-3, p. 482-483.

17 S. Cassese, 'Il diritto alla buona amministrazione', *op. cit.*, p. 1041-1042.

18 J. Wakefield, 'The Right to Good Administration', *op. cit.*, s. 126 and K. Milecka, 'Zasada dobrej administracji w orzecznictwie sądów unijnych (cz. I)', *Europejski Przegląd Sądowy* 2012, no. 2, s. 33.

19 See more: K. Milecka, 'Zasada dobrej administracji...', *op. cit.*, p. 33-38 and 'Zasada dobrej administracji w orzecznictwie sądów unijnych (cz. II)', *Europejski Przegląd Sądowy* 2012, no. 3, p. 28-32.

the procedural right of access to public information (article 42 of the Charter), as well as in many national laws on administrative procedure, for example in Italy and Portugal²⁰. Respect for these rights has not been limited to natural persons, but shall be entitled to everybody²¹.

Latest activity in that area was European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union. In its recitals the convergence was explicitly indicated. For this reason we can believe that in the near future we will have a common European code of good administration.

CONCLUSION

Nowadays convergence is raised in the context of globalization so in the questioned sphere of global administrative law as well. It is worth mentioning that none of the international legal acts with the exception of Europe indicates a good administration. However, the most universal idea in the administrative action is the rule of law concept in common law and its equivalents: German Rechtsstaat, Italian stato di diritto, French Etat de droit or Spanish and Latin American Estado de Derecho²².

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- K. Milecka, 'Zasada dobrej administracji w orzecznictwie sądów unijnych (cz. II)', Europejski Przegląd Sądowy 2012, no. 3

²⁰ For example in Italy and Portugal, see law from 7 August 1990 no. 241 – *nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*, Official Gazette from 18 August 1990 and decree from 15 November 1991, no. 442/91 – Code of administrative procedure (*Código do Procedimento Administrativo*).

²¹ K. Kańska, 'Towards Administrative Human Rights...', p. 308.

²² A.R. Brewer-Carias, 'Judicial Review in Comparative Law' [in] 'Études de droit public comparé', Bruxelles 2001, p. 529-534.



H.P. Nehl, 'Principles of Administrative Procedure in EC Law', Oxford 1999

H.P. Nehl, 'Good administration as procedural right and/or general principle?' [in] H.C.H. Hofmann, A.H. Türk (ed.), 'Legal Challenges In EU Administrative Law. Towards an Integrated Administration', Cheltenham 2009

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INTERACTION BETWEEN LITHUANIAN AND AUSTRIAN LEGAL SYSTEMS: TAX DISPUTE RESOLUTION PROCEDURE (also in due consideration of the context of European Union)

Milda Stankevičiūtė*

Salzburg University, Austria

Abstract. There is no doubt that different legal systems nowadays do interact between each other – both mandatory, unavoidable and voluntarily. Comparative analysis of couple or several legal systems may be a simple research of the existing interaction, but as well a great provocation for future interactions.

The suggested topic for the conference shall not only describe the existing tax dispute resolution procedures in Lithuania and Austria – since they could be considered similar – but also uprise and discuss both theoretical and practical issues. The point of interest does not only end with the two mentioned systems, but as well includes the overview of the influence of international provisions over this procedure.

Short excursus: the continuous discussions due to the existing procedures – how proper organized they are or how they might be changed – were common both to Lithuania and Austria already since long time. One proposal, which may also be find in lithuanian legal literature, had success in Austria and will take force with 2014: In November 2012 the Committee of the National Assembly did accept the establishment of the Federal Court of Finance since 1st of January, 2014. The new Court should replace the Independent Fiscal Senate and at the same time is the part of by the same Assembly initiated Reform of Administrative Jurisdiction. With this change the appeal stages will only be two-stage. Reasons, material changes and expected consequences of this Reform may provoke an interesting discussion.

The element of internationality shall enable to reveal disadvantages and problematics, as well as to gain the good examples of practice in this field. Presentation shall be based on analysis and interpretation of local legislation, case law, international laws and principles, jurisprudence and of course the ongoing discussions.

Keywords: tax, dispute, taxpayer, finance court

INTRODUCTION

Taxpayers' rights are guaranteed by the settlement of tax disputes between taxpayer and tax administrator or his officer.¹ Seen in general context Austria and Lithuania use a similar system of resolving tax disputes. It shall be noted that systems are not analogical, but basically can be attributed to one type of regulation (the situation will change in 2014 when Independent Finance Senate in Austria will be transformed to a specialized Finance Court²).

* PhD student of Salzburg University, Austria; Master of Law, Vilnius University, Lithuania.

¹ Marcijonas Sudavičius. `Mokesciu teise` (Vilnius: Teisinės informacijos centras, 2003) p. 103

² To Austrian point of view there is no essential difference between the present Independent Fiscal Senate and the future Financial Court. The main change shall be that the Finance Court will meet the qualities of a court as it is defined in



One size does not fit all which means that no single tax dispute resolution model exists that could be applicable to all countries. According to that, it is only possible to try to link the existing proceedings to very general internationally recognized principles and recommendations based on gathered practice.

Comparative analysis is the best way to upraise both theoretical and practical issues of tax dispute resolution procedure, to show the best practical examples and solutions. It shall also test the compatibility of procedural organization and rules with international principles, especially in the light of the proper protection of the taxpayer's rights.

PROCEDURE OF TAX DISPUTE RESOLUTION

Both Austrian and Lithuanian legislator have decided to implement the specific dispute resolution procedure for tax matters, which means, that a taxpayer has no right to apply to the administrative court before he has exhausted extra-judicial way to resolve a dispute.³

The Commission on Tax Disputes under the Government of the Republic of Lithuania is a pre-trial tax litigation institution, hearing tax disputes between a taxpayer and the tax administrator.⁴ It is a public legal entity funded from the state budget. The purpose of the Commission is to examine objectively an appeal filed by the taxpayer and make a lawful and substantiated decision.⁵ It is said that the Commission, as special institution for consideration of tax disputes, in accordance with its process activity and according to the requirements for the members of it, is similar to a specialized court.⁶ One may find different opinions in literature whether this institution should be reorganized, removed in general or a specialized court for tax issues should be established instead.

Analogically the Independent Fiscal Senate (UFS) is responsible for handling appeals in tax cases in Austria.⁷ It decides on appeals and complaints against decisions of a financial authority in tax, financial aid or criminal matters or against decisions of the customs office in customs or (minor) financial crime cases. In 2012 the Committee of the National Assembly did accept the establishment of the Federal Court of Finance since 1st of January, 2014.⁸ The new Court should replace the UFS

the Austrian Constitution. The competences of the newly established Finance Court however shall remain pretty much the same as the ones of the Independent Fiscal Senate. See further for the definition of a court.

3 In accordance with Lithuanian legal works and legislation, tax dispute resolution procedure, before it has reached a court, is called pre-trial. This means that a dispute is resolved by a specific institution which is not a court. The problem is, as it will be described further, that there are several options of how the "court" could be defined. When we talk about the pre-trial procedure in the frames of this paper, "pre-trial" shall mean procedure at the Commission on Tax Disputes or at the Independent Fiscal Senate, since they are not considered to be "courts" on the level of national constitutions.

4 Official website of the Commission on Tax Disputes, Online under <http://www.mgk.lt/>

5 Art 148 Law on Tax Administration of the Republic of Lithuania (English version)

6 Marcijonas Sudavičius. 'Mokesciu teise' (Vilnius: Teisinės informacijos centras, 2003) p. 108

7 Tax Appeal Reform Act, No. 97/2002

8 Langheinrich, 'Der langersersehnte Abschluss der Integration im abgabenbehördlichen Rechtsmittelverfahren' (Finanz Journal, Grenz Verlag 7-8/2012) p. 233-234

and at the same time is the part of by the same Assembly initiated the Reform of Administrative Jurisdiction.⁹ Arrangement of an administrative jurisdiction in tax matters should not - due to the expected relief of the Administrative Court, despite intended expansion of the system of protection of rights in the sense of a process acceleration and reinforced civil service - lead to higher costs.¹⁰

Adjustment of including specialized¹¹ institutions in tax dispute resolution process could be evaluated positively due to several aspects, i.e. reduction of the workload of the courts; it is free of charge (stamp duty may be saved); cases are heard and resolved by the specialists of the field etc. Mentioned institutions are still very often questioned due to their necessity and independence. Establishment of the Financial Court will probably terminate the topic in Austria, meanwhile the following years could show whether Lithuania should also consider following this step.

SOME ASPECTS OF THE COMPARATIVE ANALYSIS

First noticeable difference related to this topic is the definition of tax dispute. Where the legal scientists in Lithuania provides several different interpretations of what shall be the proper concept of the tax dispute, in Austrian law the concept “tax dispute” is virtually not used or very rare. In Austria such definition lays under the expressions “protection of the rights” or similar. One can find recommendations in Lithuanian scientific works to establish a unified, clear and consistent concept of the tax dispute, as when it is applied and interpreted by several different institutions, it often creates problems both in respect of the taxpayer and the tax authority.¹² The principle of legal certainty could be mentioned here which in the sense of the tax law would mean that tax legislative rules should be defined so, that it would minimize the potential amount of different interpretations and choices.¹³

Most of European states agree, that a one-time tax administrator’s review of the ruling is absolutely necessary, namely it is important to provide tax authority with an opportunity to annul the decisions, if they are unreasonable and / or illegal, in order to avoid unnecessary tax disputes.¹⁴ This provision, implemented both in Austrian and Lithuanian legislation, provides that tax dispute resolution at central tax authority is compulsory. The main difference here is the position of tax authority in a tax dispute. Proceeding at Austrian tax authority is more seen as review of own decisions¹⁵, meanwhile at Lithuanian tax authority it is seen as resolution of tax dispute. Moreover,

9 „Ausschuss macht Weg frei für neues Finanzgericht“, Online under <http://derstandard.at/1353206867076/Ausschuss-macht-Weg-frei-fuer-neues-Finanzgericht>

10 Langheinrich, ‘Der langersehnte Abschluss der Integration im abgabenbehördlichen Rechtsmittelverfahren’ (Finanz Journal, Grenz Verlag 7-8/2012) p. 234

11 As mentioned before, in Lithuanian legal literature such institutions are called pre-trial, but further analysis of the definition of the Court will show, that at some point of view they are considered to be Courts.

12 Strazdiene, ‘Kai kurie probleminiai mokesčio ginco savokos aspektai’ (Teisė. 2004. Nr. 51, 2004) p. 2

13 Lehis, ‘Means ensuring protection of taxpayers’ rights in Estonian tax law’ (Juridica International IV/1999)

14 Medeliene, ‘Mokestinio ginco nagrinėjimo teorines ir praktines problemas’ (Vilnius, Daktaro disertacija, 2005) p. 245

15 Austrian tax office is allowed to issue (Since 2014 it will be compulsory) a preliminary decision on an appeal (Berufungsvorentscheidung).

Austrian tax office may correct its own decision and issue a preliminary decision of appeal: tax office may react on the new factual and legal submissions and to amend, complement, correct or confirm its ruling in parts of judgement and motivation.¹⁶

Independency of the compared institutions, which is one of the essential features to assure the proper legal protection, may be verified by following aspects: the factual (institutional) independence and personal independence. The factual independence shall mean that the institution is not bound by instructions by any other higher authority and must not follow any other directions, except the law of the state. For instance in Austria, the members of the Independent Fiscal Senate, same as judges, are only bound to the law. Directives, decrees or individual settlements of the Federal Ministry of Finance etc. are binding neither to Senate nor to members of it.¹⁷ Similarly the Commission acts in accordance with the Constitution of the Republic of Lithuania, the Law on Tax Administration of the Republic of Lithuania, the Commission's regulations, as well as other legislation.¹⁸

Factual independency is also assured by limitations of additional activities of the members of such institutions, implemented both in Austrian and Lithuanian law. When talking about institutional independence of the Commission of Tax Disputes, opinion differs. The personal independence is assured by strict requirements and rules for the members of the analyzed authorities. Rules of appointment to members in both compared countries are public and regulated by law. Members of the Commission on Tax Dispute shall be appointed for a term of six years by the Government of Lithuania¹⁹, meanwhile the full time members of the Independent Fiscal Senate are appointed by the Federal President for an unlimited period.²⁰ Members of the Commission in Lithuania shall be appointed by the Government, acting on a joint recommendation from the Minister of Finance and the Minister of Justice²¹, which may cause some discussions over the factual independence. In both countries members shall comply with strict and clear personal and professional requirements. In Austria personal independency is guaranteed by law and in comparison to independency of judges, only the constitutional coverage is missing.²² Lithuanian Law does not provide particular provisions due to the independency of members of the Commission. A member of Commission on Tax Disputes may only be dismissed from his position under the grounds stated within the Law.²³ In Austria the change of duty station is only possible with written acceptance. Full time members are in principle irremovable and not displaceable.²⁴

Developing practice of tax disputes has an undeniably significant impact on both the concept and the process of tax disputes. Decisions of the Independent Fiscal Senate have been made free of

16 Beiser, 'Steuern', (Wien: WUV Verlag, 8. Auflage, 2010) p. 395

17 Beiser, 'Steuern', (Wien: WUV Verlag, 8. Auflage, 2010) p. 399

18 Official website of the Commission on Tax Disputes, Online under <http://www.mgk.lt/>

19 Art 148 Part 4 of the Law on Tax Administration of the Republic of Lithuania

20 Art 3 Part 4 UFSG

21 Art 148 Part 4 of the Law on Tax Administration of the Republic of Lithuania

22 Beiser, 'Steuern', (Wien: WUV Verlag, 8. Auflage, 2010) p. 401

23 Art 148 Part 5 of the Law on Tax Administration of the Republic of Lithuania

24 Beiser, 'Steuern', (Wien: WUV Verlag, 8. Auflage, 2010) p. 401

charge publicly accessible on the internet. They are published in financial documentation (Findok), which is available to every Austrian citizen. Commission on Tax Disputes also provides anonymised decisions for announcement in the database INFOLEX.Praktika²⁵ (server www.teismupraktika.lt). Promotion of decisions shall help taxpayers and other interested parties to access the litigation practice of the Commission, as well allowing the taxpayer to exercise their rights more effectively, to analyze and evaluate the activities of the Commission.²⁶

One of the common features of the proceedings in the countries of research is the right of the tax authority to challenge the decisions of the specialized institution (the Commission and the UFS). In Lithuania, in accordance with Art 159 Part 2 of the Law on Tax Administration, the right of the central tax authority is limited by permission to contest the decision of the Commission only in the cases, where the central tax administrator and the Commission have provided different interpretations of laws or other legal acts when resolving the tax dispute, but such an appeal is not possible over the different evaluation of the evidence and factual circumstances. The decision to make such an appeal shall also be made in respect with criteria of economic expediency, approved by the Minister of Finance. The tax authority in Austria is not bound to any similar limits related to content of an appeal, but shall take into consideration the internal organizational guidelines and get an approval from federal department. The complaint of the authority in such case is about the objective illegality of the decision, made by administrative authority.

DEFINITION OF A COURT

The word „court“ was mentioned many times in the recent paragraphs and it was mentioned that neither the Commission on Tax Disputes nor the Independent Fiscal Senate are courts and therefore called specialized pre-trial or quasi-judicial institutions. Unfortunately this statement is not entirely correct, because it cannot be said unambiguously. There are three main aspects by considering whether these institutions may be called courts or not:

- Definition of the Court in respect of Art 6 ECHR
- Definition of the Court in respect of Art 267 TFEU
- Definition of the Court in accordance with Austrian and Lithuanian Constitutions.

Effective judicial protection is a fundamental right of the individuals.²⁷ The right to have access to a court is a fundamental right enshrined in Art 6 of the ECHR and the ECJ held that this requirement of judicial control is also to be considered as general principle of Community law.²⁸ It is considered as obvious that the concept of human rights and their protection had a significant

²⁵ An aspect to be criticized here is that the mentioned Lithuanian database requires registration and is not free of charge, which to certain point limits the access of taxpayers and therefore may result with disturbance of implementation of their rights.

²⁶ „Mokestinių ginčų komisija praėjusiais metais išnagrinėjo 318 mokesčių mokėtojų skundų“ Online under http://www.buhalteris.lt/lt/?cid=805&new_id=217083

²⁷ Pistone, 'Legal Remedies in European Tax Law' (Amsterdam, IBFD, 2009) p. 407

²⁸ Mariolina, 'Europeanisation of Administrative Justice?' (Europa Law Publishing, 2009) p. 29

influence on the idea of taxpayers' rights.²⁹ Target of the Art 6 of ECHR is the one guaranteeing minimum standards of procedural rights.³⁰

There are different opinions whether this article is applicable to tax matters. According to the case law of the European Court of Human Rights, tax proceedings generally do not fall under the "civil heading" or "criminal heading" of the European Convention of Human Rights.³¹

The right to fair trial, arising from Art 6 Part 1 ECHR, is also implemented in the Art 47 ("Right to an effective remedy and to a fair trial") of the EU Charter of Fundamental Rights. As it results from explanation report to Art 47 Part 2 of the CFR, this provision corresponds to Art 6 Part 1 of ECHR.³² Moreover, it is said, that «In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.»³³ So to speak, Art 47 CFR also contain appropriate legal safeguards, but without the limitations exhibited if the scope of Art 6 ECHR.³⁴

All that is stated above could confirm presumption that «it may be, that Art 47 Part 2 of CFR gives the extent over the scope of protection of the Art 6 Part 1 of ECHR reaching out procedural guarantees <...>»³⁵ The critics on non-application of Art 6 Part 1 of ECHR is not a new issue and in spite of the arguments supplied by the ECtHR, it is believed that its principles, in particular those enshrined in Art 6, should be applicable to proceedings concerning tax assessments.³⁶

The voluntary harmonization with the principles of Art 6 ECHR anyway resulted through the installation of UFS, without this being legally binding.³⁷ Installation of the Federal Finance Court will even strengthen the situation. In Lithuania, compared to the amount of Austrian scientific works, this topic is virtually unexamined. Commission's compliance with Article 6 ECHR could be problematic for example due to the fact that the Commission is not established by law, questionable independence from the executive authority and due to the closed meetings of the Commission.

A significant role for evaluation of independency, organization and significance of specialized pre-trial institution plays Art 267 TFEU, which basically implements a right to make a request for a preliminary ruling from the European Court of Justice. In order to be able to make such a request an authority shall be considered as a court or a tribunal. In accordance with judicature of the European Court of Justice, a court is an organ of justice, which is having particular qualities.

29 Brezinski, 'Taxpayer's rights: Some Theoretical Issues' (In the Book: edited by Nykiel, 'PROTECTION OF TAXPAYER'S RIGHTS EUROPEAN INTERNATIONAL AND DOMESTIC', Wolters Kluwer, 2009)

30 Lagler, 'Die Grundsätze des „fair hearing“ des Art 6 EMRK und das österreichische Verwaltungsverfahren' (Dissertation, 1996) p. 12

31 Pistone, 'Legal Remedies in European Tax Law' (Amsterdam, IBFD, 2009) p. 495

32 Urtz Christoph, 'Das neue Zwangsstrafverfahren nach § 283 UGB – Übersicht über die Neuerungen sowie unions- und verfassungsrechtliche Probleme' (ZFR 2011/127), p. 228

33 Online under http://www.eucharter.org/home.php?page_id=56

34 Ehlers, 'Europäische Grundrechte und Grundfreiheiten' (Berlin: De Gruyter, 3. Auflage, 2009) p. 191

35 Urtz Christoph, 'Das neue Zwangsstrafverfahren nach § 283 UGB – Übersicht über die Neuerungen sowie unions- und verfassungsrechtliche Probleme' (ZFR 2011/127), p. 228

36 Pistone, 'Legal Remedies in European Tax Law' (Amsterdam, IBFD, 2009) p. 497

37 Laudacher, 'Die feste Geschäftverteilung im UFS' (SWK Heft-Nr 14/2004 529)

The Independent Fiscal Senate has been established, with a condition to fulfill the necessary requirements, also the ones of the Art 267 TFEU. Most important of them are: institution established on legal basis and permanent facility; the guarantee of the independence and freedom from instructions of the members; compulsory jurisdiction and an adversarial process of a judicial nature.³⁸ The European Court of Justice with verdict of 24.06.2004 did recognize the quality of the Independent Fiscal Senate as a court authorized for submission in sense of Art 234 EC (presently Art 267 TFEU).³⁹ The Commission on Tax Disputes under the Government of Lithuanian Republic has been also recognized as a court in the sense of Art 267 TFEU in 2010.⁴⁰ Since the requirements are relatively similar to the ones in Art 6 ECHR it may probably be concluded that Commission is on the proper way to reach the qualities of tribunal.

The UFS is the Court in the sense of ECHR and Art 234 EC (presently Art 267 TFEU), however not a court within the meaning of the Austrian constitution.⁴¹ That the Commission on Tax disputes in Lithuania is not considered to be a court clearly says the Art 147 of the Law on Tax Administration: "Tax disputes shall be considered by the central tax administrator, the Commission on Tax Disputes (hereinafter referred to as pre-trial tax dispute settlement institutions) and the court." To conclude, neither in accordance with Lithuanian nor Austrian Constitution or other local Laws are the mentioned pre-trial tax dispute resolving institutions considered as a court.

CONCLUSIONS

Up to 2014 existing tax dispute settlement procedure in specialized institutions of Austria and Lithuania does indeed have similarities. Admittedly, Austria paid a lot of attention to organize the procedure of tax dispute resolution to make it compatible with international law, particularly in guaranteeing the protection of taxpayers' rights. This does not mean that the Commission in Lithuania conflict with these principles – it is proved through the comparison that it actually is compatible - but the information and the amount of scientific researches on this topic is much lower. It could be wise to take an example from Austria in order to strengthen the position of the Commission on Tax Disputes, to expand their powers and scope. It would be also very "healthy" for Lithuanian system if legal academics could provide more scientific researches in this field. It could provoke constant review, necessary renewal of the system, compatibility with international acts and solution of existing problems.

The organization and legalistic implementation of a genuine two-stage administrative justice in terms of increasing the level of legal protection, in order to achieve acceleration effects and to achieve administrative simplification are considered to be as major challenges over the establishment of administrative courts in Austria, the biggest reform in the history of jurisdiction since decades.⁴²

38 Laudacher, 'Die feste Geschäftverteilung im UFS', (SWK Heft-Nr 14/2004, 529)

39 Beiser, 'Steuern', (Wien: WUV Verlag, 8. Auflage, 2010) p. 405

40 *Nidera Handelscompagnie* Case No. C-385/09 ECJ [2010]

41 Hörtnagl-Seidner, 'Formalentscheidungen im Abgabenverfahren: Der unabhängige Finanzsenat und die deutsche Finanzgerichtsbarkeit im Vergleich' (Linde Verlag, 1. Auflage, 2009)

42 Koran, 'Schaffung von Verwaltungsgerichte in Österreich', (SWK 34/2012, 1445)



The aims of the reform are comprehensible, but it is still questionable whether they could have not been reached in the borders of UFS, since it has proved to be independent, efficient, reliable, well organized and professional body, recognized not only in national, but also in international level.

Analyses of the court concept on the one hand showed that compared institutions without being court on national level, satisfy international principles and standards applied to courts and thus are an effective tool for protection of taxpayers' rights. On the other hand the precise analysis of these principles and standards shows the weaker points which could be improved.

Although neither unified opinion, nor template for tax dispute resolution exist, both comparative analysis in the form of the scientific works and the inter-institutional or international exchange of best practice and experience does undoubtedly contribute positively in order to the develop guidelines for effective tax dispute resolution.

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NATIONAL LABOUR MARKETS FOR FOREIGNERS: HARMONIZATION, RECIPROCITY RULE OR DISCRIMINATION?

Anna Stokłosa*

Jagiellonian University in Kraków, Poland

Abstract: The subject of the presentation is to analyse labour law binding in chosen European countries related to recognition of job seniority abroad, the right to receive social benefits (pensions, family and unemployment benefits), taking into account the period of work abroad, provisions on taxation of income gained outside the employee's country of nationality, recognition of professional qualifications obtained in the country other than the country of occupation. This presentation analyses the solutions adopted by the European legislation binding all European Union Member States and indicates the extent to which national laws introduce differences, including comparison of national laws in chosen countries for employment of a foreigner from outside the European Union / European Economic Area. References are made to European law as well as examples of national provisions, Polish in particular.

European law introduces common rules for Member States in case of a EU citizen employment (Article 45 of the Treaty on the Functioning of the European Union, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union) and establishes uniform solutions for the search of work, employment without having to apply for work permit, equal treatment in employment, working conditions and other social and taxation advantages. Simultaneously, examples of regulations in chosen Member States indicate different solutions when social security, health insurance and the recognition of tax liabilities are considered.

Whereas in the employment of the EU citizens uniform rules have been introduced by the European law, in case of employers intending to employ foreigners from outside the EU / EEA, legal solutions adopted in countries (visas, work permits, preferred list of professions open to foreigners) are in fact similar, although the laws result from non-harmonized activities of national legislators and economic, social and historical factors.

Key words: national labour market, foreign employees discrimination, mutual reciprocity agreements

INTRODUCTION

The situation of foreign individual who enters into employment relationship differs in accordance with the factors like: citizenship, country of citizenship, hosting country. Three situations might be distinguished:

1. common standards are created across the internal labour market what results in similar regulations, standards and practices which apply to all employees who have the citizenship

* Master of Laws, a graduate of the Faculty of Law and Administration of the Jagiellonian University, Cracow, Poland. Currently a second-year PhD student at the Jagiellonian University at the Chair of *Labour Law* and *Social Policy*. Presently during Comparative and International Law LL.M. studies at the Columbus School of Law of the Catholic University of America. Experienced teacher of overtime, discrimination and protection of personal data problems. Scientific research joins with practice in a legal firm.

of any country creating the internal labour market regardless the country of undertaking the employment (harmonization);

2. a hosting country agrees to exercise to foreign citizens the same legal rights that the foreign government exercises to its own citizens inside its country (reciprocity rule also known as mutuality)
3. foreign employee's situation is not regulated by any international laws or mutual international agreements, thus exclusively national provisions regulate the foreign employee's situation (which, in order to protect national labour market, often results in discrimination of foreign employees in the sense of access to the labour market).

As the initial thesis it might be stated that provisions for nationals of the European Union Member States who exercise their right for free movement create more favourable employment conditions compared to discriminatory lack of similar provisions for the nationals of countries outside the EU when mutual reciprocity agreements are not concluded.

Within the EU territory, national provisions are often second to the rules established on the European level. If labour market is considered, residents are guaranteed the right to freely move within the EU's internal borders by the Treaty on the Functioning of the European Union¹ (TFUE) and the European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States². Article 45 of TFUE (ex 39 and 48) states that:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this article shall not apply to employment in the public service.

Mentioned directive, in accordance with the principle of subsidiarity, does not prevent the application of national legislation or administrative arrangements providing for more favorable

¹ Treaty on the Functioning of the European Union [Consolidated version 2012] OJ 2012/C 326/01

² European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ 2004/L 158/77



treatment. The European Union does not introduce full harmonization of laws and does not aim to replace national laws as it provides for principle of subsidiarity. Article 5(3) of the Treaty on European Union³ states: *“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”* As the consequence, national provisions may differ position of employees working in different Member States.

WORKING TIME / PAID ANNUAL LEAVE

National provisions differ the rights of employees regarding their working time and annual leave. The Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time⁴ harmonises minimum safety and health requirements for the organisation of working time such as paid annual leave, periods of daily and weekly rest, breaks during work included into working time, and aspects of night work and shift work (with reservation for sectoral provisions for road transport, work at sea and civil aviation). Member States take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period and a minimum uninterrupted rest period of 24 hours for each seven-day period, which is added to the 11 hours’ daily rest. Employees shall have guaranteed a rest break if the working day is longer than six hours, paid annual leave of at least four weeks which, when calculated into working days in five-day working week means that minimum period of paid annual leave equals 20 working days. Maximum average weekly working time in accepted settlement period should not exceed 48 hours, including hours of overtime.

Abovementioned standards give the Member States the possibility to introduce provisions more favourable for employees. For instance Polish labour provisions make the lengths of annual leave conditional on job seniority. Job seniority means the length of service with an employer. It can be considered as the employment within one workplace, but also expanded to the employment in general. Under Article 156 of Polish Labor Code⁵, employees are entitled to 20 working days of leave per year during the first 10 years of employment and 26 working days thereafter (here job seniority means employment in general, not necessary limited to only given employer). Citizens of the EU and the EEA are treated in Poland in a privileged manner when calculating periods of employment in any EU/EEA country toward job seniority is considered. Such a period of employment is calculated regardless when such employment took place or if the contribution for Labour Fund has been paid. The only condition is that this period of employment must be proved

3 Treaty on European Union [Consolidated version 2012] OJ 2012/C 326/01

4 European Parliament and Council Directive 2003/88/EC concerning certain aspects of the organisation of working time [1993] OJ L307/18 (Working Time Directive)

5 Polish Labour Code, [1974] J.L. No. 24, item 141

by any document, for instance by certificate of employment, certificate of work performance, remuneration, social insurance or tax documents, references from employer. This depends on the employer if he considers the period of employment abroad documented sufficiently to count such a period toward job seniority and in case of a dispute over this issue – labour court decides on this. This could be seen as the discrimination of employees who were employed only in Poland or in any country outside EU/EEA and whose job seniority is counted only under the condition that the contributions for the Labour Fund have been made.

SOCIAL BENEFITS

If a citizen of any Member State moves to live or work in any other Member State, his entitlement to social security benefits and services has to be equal to the citizens in the hosting state. That is harmonised by the European Parliament and Council Regulation 883/2004 of 29 April 2004 on the coordination of social security systems and the European Parliament and Council Regulation 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004. Social insurance contributions from each EU state are added to qualify for one of the social welfare payments like illness or maternity benefit, invalidity pension, state pension, jobseeker's benefit, treatment benefit, widow's, widower's or surviving civil partner's pension, bereavement grant, carer's benefit. Differences in particular countries include the required period of work which entitles to receive benefit, duration of benefit, rates which apply to calculate benefit or even the fact if given benefit exists under national laws. In common understanding of citizens from poorer countries of the EU these are discriminatory provisions, especially regarding the level of unemployment benefit. Regarding regulations for foreign employees from outside the UE/EEA: Member States might enter with non-EU countries into bilateral social security agreements which are specific arrangements between participating countries that allow people to move between countries and protect their pension entitlements or other social benefits.

TAXATION OF INCOME GAINED OUTSIDE THE EMPLOYEE'S COUNTRY OF NATIONALITY

There is no one uniform or harmonised law, even within the EU, which would introduce rules on how citizens of one country living and working in another country should be taxed on their work income. The countries provide for principle of residency where all income of individuals residing on their territory are subject to taxation, regardless where this income has been in fact created or the principle of source, where all income created in their territory is subject to taxation, regardless whether the individual gaining income resides in their territory or not. In fact most countries describe this obligation largely taking advantage of these two principles what results in conflict of laws of tax jurisdictions and the phenomenon of international double taxation. National laws and agreements between countries to avoid double taxation regulate this issue. The former often introduce principle of mutuality: foreign citizens are allowed to take advantage of tax relief only



under the condition that similar solution is provided for in the country of their citizenship for the citizens of hosting country undertaking employment there.

RECOGNITION OF PROFESSIONAL QUALIFICATIONS

Within the EU, in order to fully realise the freedom of movement of employees, system for the recognition of professional qualifications has been created. Full harmonisation of the national provisions has been introduced through sectoral directives for architects, dental practitioners, general practitioners, midwives, nurses responsible for general care, pharmacists and veterinary surgeons. where automatic recognition for these professions takes place. For other professions the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications⁶ sets out the rules. It recognises “freedom to provide services” and “freedom of establishment”. In general: any EU national who is legally established in a Member State may provide services on a temporary and occasional basis in another Member State under his/her original professional title without having to apply for recognition of his/her qualifications. In case of “freedom of establishment”, when a professional intends to conduct professional activity in another Member State on a permanent basis, the principle of mutual recognition precedes. Outside the EU professional qualifications are recognised through mutual reciprocity agreements but between not the countries but the organizations which associate the professionals. As a matter of example: English The Institute of Chartered Accountants in England and Wales, Scottish The Institute of Chartered Accountants of Scotland , Irish The Institute of Chartered Accountants of Ireland, French Ordre des Experts Comptables or Belgian Institut des Reviseurs d’Enterprises de Belgique have entered into the mutual recognition agreements with Canadian The Institute of Chartered Accountants of Alberta.

CONCLUSIONS

When employment of nationals of the EU in any other Member State takes place, for most issues European law precedes over national provisions and constitutes frames for employment. Nevertheless, due to principle of subsidiarity, the Member States still regulate national labour markets and differ the situation of employees in particular states. For instance countries introduce more favourable provisions compared to the frames of the directives for the length of annual leave (from the minimum of 20 working days up to 26 working days in Poland and 28 working days in the UK), maternity leave or number of allowed working hours including overtime during the week. National regulations cannot however result in the discrimination of employees. As an example: Article 18(3a) of the Polish Labour Code provides for: *“Employees should be treated equally in relation to establishing and terminating an employment relationship, employment conditions,*

⁶ European Parliament and of the Council Directive 2005/36/EC on the recognition of professional qualification [2005] OJ L255/22

promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as well as regardless of employment for a definite or indefinite period of time or full time or part time employment” – where nationality is used as equivalent of ethnicity. As a natural consequence of protecting national labour markets, among factors which cannot result in discrimination there is no citizenship. For EU citizens such a rule is set up under Article 18 of the TFUE (“*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*” – where nationality is used as an equivalent of citizenship) and for EU employees under Article 45 as the *lex specialis* to Article 18. Foreign employees who are not EU citizens are in fact discriminated regarding the possibility of undertaking the employment. Such discrimination is exercised in two ways: firstly in lack of provisions similar to those of the European law which would simplify the employment and secondly in building up the barriers such as visas, work permits, limitation of access to labour market for all by creating preferred list of professions open to foreigners. This however cannot be criticized: countries introduce such solutions in order to protect national labour markets and save workplaces for their citizens. And one of the relatively few factors which possibly might change this attitude of the governments is the idea of international solidarity which however during the economic crisis loses with the fight with growing national unemployment rates.

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CHANGE IN THE ROLE OF NOTARIES PUBLIC? EFFECTS OF THE INTEGRATIONAL LEGISLATION ON THE EXECUTION OF A LAST WILL AND TESTAMENT¹

Noémi Suri*

Pázmány Péter Catholic University, Budapest, Hungary

As a result of almost a decade of codification, negotiations, and committee sittings, the Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession the „regulation on succession” was accepted on the 4th July 2012. By accepting the regulation, the member states of the European Union have given up another element of national sovereignty, enabling further extension of judicial cooperation in civil matters.

Accepting the regulation on succession is of great importance, not only because the renunciation of another field of private national law in favour of integration efforts, but also because the regulation clarifies concepts and answers questions that were, observing the judicial practice of the Court of Justice of the European Union and the standpoints made by the European Commission, previously unclear.

In the last five years, great care was taken in further improvement in the field of judicial cooperation. In the field of judicial cooperation in civil matters, not only the regulation on succession was accepted, but also the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

What are the common aspects of these two European norms? What are the relations and parallels that inclined me to write a treatise on these two, seemingly distant legal sources of European civil law and European civil procedure law? The notary’s office creates a connection between these two laws.

Based upon the decisions of the Court of Justice of the European Union, the following viewpoint has appeared in the legal literature: the European Commission strives to gradually reduce the national notarial institution, then rebuild it on a European level. Could this conception stand behind the decisions?²

This view is contradicted by the regulation on succession and those regulations of the Directive on Mediation that affect notaries public, extending their tasks and jurisdiction.

* PhD student, Pázmány Péter Catholic University (Budapest), Faculty of Law, Department of Civil Procedure Law.

¹ The essay was written within the framework of „A tudományos kutatás kibontakoztatása a Pázmány Péter Katolikus Egyetemen” című TÁMOP-4.2.1.B-11/2/KMR-2011-0002 research project

² Miklós Imre- Ágoston Korom: Lehetővé teszi-e az uniós jog a közjegyzői szakma specifikumainak megőrzését? In: *Közjegyzők Közlönye*, 2012. 5. p. 35.

Or the challenges and load put on their shoulders by the creation of the European Certificate of Succession is just an illusion and greater importance must be attached to the notion of judicial authority of the regulation on succession?

These are the questions I seek answers for in my treatise. I seek to reveal the motives behind the European codification by examining the regulation on succession and those regulations of the Directive on Mediation that affect notaries public.

I will scrutinize the role of the notary's office in the jurisdiction of Hungary as well as in the jurisdiction of the European Union through the notion of European judicial authority and investigate to what extent these two norms influence the Hungarian system of will execution.

In my opinion, no treatise can be complete without the demonstration of judicial practice, therefore I consider it necessary to demonstrate those decisions made by the Court of Justice of the European Union and by the Constitutional Court of Hungary that affect notaries public.

AGAINST THE TIDE?
THE EUROPEAN DEFINITION OF JUDICIAL AUTHORITY
AND THE HUNGARIAN SOLUTION

The 20th paragraph of the Preamble of the succession regulation appropriates that „the regulation must respect the different systems in use for succession proceedings in the different member states.” The definition of the court has to be interpreted freely in a way that those notaries public and record offices which are responsible for judiciary processes in the different member states are also included. A further requirement is that all the notaries public, who have authoritative power in succession proceedings in the member states, could practice their scope of activities.

From these regulations it is clear that the European legislator has definitively committed himself to the standpoint that handles the notaries public outside the definition of judicial authority at the same time accepting their function in the jurisdiction.

The second paragraph of Article 3 of the regulation entitled Definitions regulates the legal rights of the notary public proceedings even more strictly; they are subject to the laws of jurisdiction stated in the regulation if a) it is possible to appeal for remedy against their resolutions to the judicial authorities or they can be revised by judicial authorities, or b) their resolutions bear a similar effect and scope than the resolutions made by judicial authorities.³

What road had the European legislator travelled until he reached this definition? According to the definition of the so-called Law of 19 Ventôse of 1803 a notary public is a person who performs the function of serving the public. The resolution of the European Parliament on 18th January 1994 is drafted in a much more modulated way: 'the most notable characteristic of the notary public's work is the transfer of the power of the state with which they assume the public service of drafting contracts, with which they ensure their credibility and lawfulness, their directly executable and

3 Regulation on succession of Article 3 (2)

justificatory nature, their preventive role and the total impartiality towards the contracted parties, this way facilitating the work of the courts.’⁴

The C-50/08 resolution of the European Commission of 2008 expresses that notary public activities pursue such an aim which above all focuses on the legality, legal certainty of documents concerning private individuals.⁵ Since the primary activities of notaries public is to create notarial documents they do not take part directly and specifically in exercising public authority, thus they do not fall within the scope of Article 45 of the EC Treaty.

During nearly 20 years we have reached so far in the European Law that the notarial institution have become a competent authority exercising judicial tasks in succession proceeding contrary to its original role as a public service authorized with state power, yet in Hungary an opposite process took place.

The first paragraph of Article 45 of the Hungarian Constitution in effect until 1st January 2012. referred to jurisdiction as the exclusive power of the courts. This primal rule is viewed as one of the milestones of the Civil Procedures by such renowned representatives of the legal science of lawsuits as János Németh and András Grád also.

Yet, how do we define judicial activities in Hungary, and which are the powers of the courts that can be transferred in a constitutionally ensured way? During its 20 years of operation the Constitutional Court has configured a consistent practice with regard to the definition of jurisdiction and the grading of judicial power: ‘The judicial authority which is linked to the independence of the judiciary embodies itself decisively in the judicial decisions.’⁶ ‘The constitutional definition of jurisdiction cannot be interpreted so that it is only relevant in judicial decisions in particular cases, but it is necessarily more wide-ranging.’⁷ Summarizing these decisions we can state that the core of judicial cases is formed by the substantive settlement of legal disputes trustee of which is the organisation of the courts. This view seems to be underlined by the fact that the principal aim of non-contentious proceedings mainly under notary jurisdiction is generally not the settlement of some dispute but the recognition or enforcement of some rights. In the Hungarian legal system the notaries public belong to the territory of the judicial authority of the state. The rules driving their practices are normatively determined and relate to the public law. This viewpoint stood on firm grounds in Hungary until 2012 however, the implementation of the new Fundamental Law has widened the definition of jurisdiction to a great deal. According to the norm in effect since 1st January 2012 ‘The courts exercise judicial tasks.’⁸ It can be clearly stated the courts’ monopoly over jurisdiction seems to be being broken through which was further enhanced by the transfer of the warrant of payment to the notary public’s scope of authority.

4 E. Deckers: *La profession notariale, sa déontologie et ses structures*, Ádám Tóth- Judit Bókai- Mária Balász: *A közjegyzői hivatás deontológiája és szerkezete*. MOKK, Budapest, 2000. pp. 13-14.

5 C-50/08, 87. Judgment of the Court (Grand Chamber) of 24 May 2011. *European Commission v French Republic*. Failure of a Member State to fulfil obligations - Article 43 EC - Freedom of establishment - Notaries - Nationality requirement - Article 45 EC - Connection with the exercise of official authority.

6 53/1991. (X.31.) AB határozat, ABH 1991, 266, 267.

7 1481/B/1992. AB határozat, ABH 1993, 755, 756.

8 Az Alaptörvény 25. cikk (1)

I believe we can rightly ask the question: are we swimming against the tide? While in Europe legislatures have by now systematically declared the banning of notaries public from the judicial authorities, in Hungary the pillars of this institution are standing firmly and the notaries public contribute with an ever greater scope to the reasonable distribution of the judicial case workload.

REALLY JUST AUTHENTICATION? NOTARIES PUBLIC IN MEDIATOR ROLES

Based on the statement of the European Court the limitation of the freedom of settlement can pertain to the training of notaries public as part of the process of employment, to the restraints on their numbers and their areas of jurisdiction, their remuneration, incompatibility, and the rules of displacement.⁹

The Court has justified the application of the regulation of Article 43 of the EC Treaty against notaries public with the fact that the major responsibility of a notary public is the creation of notarial documents, they do not take part directly or in any specific ways in exercising public authority, thus they do not fall under the effect of Article 43 of the EC Treaty.

Can it be stated then, based on the above, that on a European level the notarial institution is a mere 'formality', and their activities only cover the authentication of documents?

In my firm viewpoint this hypothesis is not valid in any states that follow the Latin model of the institution of notaries public, thus it is not compelling in the case of Hungary either. In our country notaries public, besides having authority in the majority of non-contentious proceedings, also pursue case substitutions, changes of legal position (destruction of documents and securities), proceedings enforcing the exercise of rights (probate trials) and case prevention non-contentious proceedings (legal counselling). Their tasks can be classified into two classes: firstly notary public activities executed for clients (creation of documents, issuing of certificates, authenticated copies, guarding documentation fees), secondly specifically regulated non-contentious notary public activities (probate proceedings, the destruction of securities and other documents)¹⁰. 'Probate proceedings constitute the major part of their activities, however, this proportion can vary regionally.'¹¹

Besides authentication as a mere technicality the notary public proceedings focus mainly on creating peace through legal thinking, information sharing and with just coordination of interests either when compiling a notarial document, or during a probate proceeding. In Hungary the three definitions of mediation, reconciliation and counselling are often treated as synonyms, however, there are essential differences between these three institutions. According to regulations in effect notaries public can and do pursue all three activities. I find the definitions of the German legal academic writing the most appropriate that categorizes the distinct notarial activities based on

⁹ Imre Miklós-Korom Ágoston i.m. p. 32.

¹⁰ Tamás Farkas: A közjegyzői tevékenység szerepe a viták megelőzésében: a jogi tanácsadás és a közjegyzői közvetítés (mediáció), mint ennek eszköze. In: *Közjegyzők Közlönye* 2000. 2. pp. 9-10.

¹¹ Orsolya Nemcsik: A közjegyző, mint mediátor- közokiratszerkesztés és a hagyatéki eljárás a közvetítés tükrében. In: *Doktoranduszok fóruma* 220.p.

the factor whether the notary public pursues counselling (Beratungspflicht, obligation to counsel) or informing (Belehrungspflicht, obligation to inform).¹²

The notaries public take active part in the peaceful settlement of legal disputes both in proceedings directed towards the future (the creation of wills) and in the collision of legal interests in present cases (probate trials). The law of Probate Proceedings prescribes for notaries public as a distinctly legal obligation to make an attempt at reaching an agreement at all phases of the proceedings.

The LV Law of 2002 on the mediation proceedings (later referred to as the 'Mediation Law') took effect on 17th March 2003. It called into being the regulatory framework of mediation proceedings in civil and commercial legal disputes. The Mediation Law has lifted the ban on mediation proceedings with regard to two legal professions: lawyers and notaries public are entitled to pursue mediation¹³ provided their behaviour during mediation does not deviate from that stated in the Act XI of 1998 and Act XLI of 1991.¹⁴

On 21st May 2008 the 2008/52/EC Directive of the European Parliament and Council was passed concerning some aspects of the mediation activities in civil and commercial cases. The member states were given time to inform the Committee about the assignment of competent courts and authorities until 21st November 2010, and until 21st May 2011 to meet their obligations stated in the directive.

The Mediation Directive has brought about changes to several legal institutions (to the enforceability, limitation and the confidential nature of proceedings) that will greatly ease the extra-judicial settlement of cross-border cases while it did not bring anything new in terms of the definition of the mediator. According to the b) point of Article 3 of the law 'a mediator can be any third person, who was asked to mediate in an effective, impartial and professional way independent of the third party's name or profession in the given member states or the way in which this third party was appointed for the mediation activity. Although the directive does not define in detail to which judicial organisations its effect is relevant to, compared to the Hungarian regulations its rules have to be considered as authoritative for the mediation activities of notaries public, as well. The obligation of the directive towards the quality assurance in each member state raises intriguing questions. The member states translating the directive must establish an effective way of quality assurance regarding the mediation services.¹⁵ The question remains: in Hungary which organisation is (will be) entitled to monitor proceeding of the notaries public in non-notary mediator roles?

While the Mediation Directive does not even mention any regulations concerning the possibility of notary mediation, it seems the European legislative wants to compensate for this shortcoming in the Preamble of the Law of Succession: '... this regulation cannot obstruct the parties in the

12 H.-J. Pützer: Das Notariat im Zivilrechtssystem. In. Das Moderne Notariat-Strukturen und Aufgaben, Bundesnoterkammer, Köln, 1993. pp. 7-8.

13 35. § (3) Ha a közvetítői eljárásban jogtanácsos, közjegyző vagy ügyvéd vett részt közvetítőként, az eljárás során létrejött, írásba foglalt megállapodás alapján joghatás kiváltására alkalmas okiratot nem készíthet és a közvetítő jogtanácsosként vagy ügyvédként annak ellenjegyzésére sem jogosult.

14 Mária Kutacs: Törvény a mediációról. In. Cég és Jog, 2003, március 7.p.

15 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters of 4 Article 1th paragraph

peaceful, non-contentious settlement of succession cases, for instance, in front of a notary public in any member states chosen by the parties until the law of the state provides this possibility.’¹⁶

Based on these thoughts it can be declared that the statement which says that the principal activities of a notary public are limited to authentication is false. All the guarantees provided for the Latin notarial institutions (independence, inability to be displaced, encumbered suggestibility) all prove that the public notary authorities are indeed viewed as parts of jurisdiction.

FACING NEW CHALLENGES

One of the most significant innovations of the succession regulation is the creation of the European inheritance certificate. The contradictory aspects of the succession systems of some member states are apparent in the differences between the closing acts of the proceedings. ‘In some EU states the acting authority ‘assigns the probate’ to the successor with a formal resolution, in other countries a succession certificate is issued, while in still other member states the successors’ written agreement is sufficient.’¹⁷

Despite the different types of legal acts the cause and the aim of issuing a certificate is common: to justify the successor’s entitlement, to ensure the rightful transfer and occupation of the objects of the probate. This new document enables the free cross-border transmission of notarial documents within the European Union during probate / succession proceedings. The European succession certificate is a document which legally validates the registration of valuables belonging to the probate in the registers of any member states.¹⁸

Creating the new European notarial document is a more efficient and cost-effective proceeding¹⁹ not only for the successors, legatees, and the executors of the will, but it facilitates the work of notaries public, too, and at the same time faces them with new challenges. The regulation declares with an obligatory force: the member states must ensure that the potential creditors living in other states be notified of the location of the probate objects. In Hungary the notary public summons the probate creditors to the probate trial once no will has been recovered based on point b) of the first paragraph of the Law of Probate Proceedings²⁰. I believe this regulation creates more obligations mainly for the notaries public, which I hold applicable through the establishment of a new electronic system (network).

The certificate must be issued in the member state the authorities of which bear legal authority according to the regulation. The list of authoritative institutions has to be defined by the member sta-

16 Regulation on succession of 29th paragraph of the Preamble

17 Gyöngyi Horváth: Az európai öröklési rendelet tervezete In. Közjegyzők Közlönye 2011. 8.p.

18 Regulation on succession of 18th paragraph of the Preamble

19 European certificate of succession will be sufficient with regard to the estate or probate proceeding conducted in a single Member State

20 Hetv 53. § (1) A közjegyző a hagyaték tárgyalására az örökhagyó végintézkedésének hiányában megidézi a) a törvényes örökösöket, b) a hagyatéki hitelezőt, c) a hagyatéki eljárásban fellépett igénylőt és d) azt, aki mint az örökhagyó hagyatékához tartozó dolog birtokosa, vagy az örökhagyó hagyatékához tartozó, és a halállal az örökösre (hagyományosra) átszálló jog vagy követelés kötelezettje az idézést kérte.



tes. Since in Hungary the proceeding of a probate trial and the issuing of a certificate authenticating the inheritance (grant of probate) can be issued by notaries public it would be only reasonable for the legislatures to entrust notaries public with the legal authority of issuing inheritance certificates.

In the 4th paragraph of Article 66 of the regulation it is stated that 'The issuing authority will do all necessary acts to ensure that the beneficiaries are notified about the solicitation of the certificate', while it does not prescribe the establishment of an electronic database for registration of the inheritance certificates. It only declares that the original copy of the certificate must be held by the issuing authority and the person with proven interest of right can receive an authenticated copy. Furthermore, the Preamble of the regulation adds that this does not exclude the possibility that the member states enable the issuing of not authenticated copies to the public in adherence with their own regulations of generating legal documents.²¹

SUMMARY

I firmly believe that in line with the above thoughts we can fairly raise the question: are we standing on the grounds of a conceptual change? Having overviewed the European legal practices of the last five years we have reached the conclusion that the institution of notaries public, which comprises providing information for the clients on the one hand and ensuring legal consistency and security on the other, has been replaced by a notarial institution that exercises judicial tasks although cannot be classified as a judicial institution. Contrary to this in Hungary there was and still is a contradictory process going on, which has further reinforced the position of notaries public as an element of the civil authorities.

While all the decisions of the European Court regarding notaries public and the European legislation has tried more and more to belittle the ethos of the notarial profession, their newly assigned tasks in reality justify the need for them in our country and in states that follow the Latin model of the notarial institution.

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²¹ Regulation on succession of 72th paragraph of the Preamble

CONVERGENTIAL IMPACT OF INFORMATION TECHNOLOGIES ON REGULATION OF EMPLOYMENT RELATIONSHIPS

Gintarė Tamašauskaitė*

Vilnius University, Lithuania

Abstract. The present article focuses on the analysis of an impact of the use of information and communication technologies at workplaces on regulation of employment relationships. It examines whether this phenomenon affects the national legal systems as a convergent. This research is grounded on the analysis of the cases of an employee's right to respect for private life and of a practice of telework. It refers to national and foreign states' views, the opinion of the European Court of Human Rights.

Keywords: Information and communication technologies, employment, telework, employee's right to privacy

INTRODUCTION

During the last decades a lot of areas of the social life have been under the influence of the global technological revolution. On the one hand the information and communication technologies became the assisting measure and the factor of the labour productivity in the work process. On the other hand that promotes the discussions among legal scientists as well it brings up the purpose to explore whether contemporary labour law effectively regulates the employment relationships.

Every smart technological tool creates new challenges to define a clear boundary between professional and private life, employee's autonomy and the control of his employer as well to adopt the legal regulation of new forms of work organization as a telework.

Lithuanian labour law aspects on the use of the information technologies at the workplaces are not examined much on scientific level. Sometimes it could be seen a lack of clear legal rules and rear fragmentary judgement cases. The topic of research is important because of its theoretical and practical point of view. It will be analysed whether the use of the information technologies determines the changes of the traditional employment relationships regulation.

The main objective of this article is to analyze the impact of the use of information technologies to legal regulation of standard employment relationships, evaluate the problems according to the labour law and other branches of law and offer possible solutions.

* Gintarė Tamašauskaitė is seeking Doctoral Degree in Vilnius University Law Faculty. She specializes in the fields of labour and social security law, is interested in legal problems of discrimination, human rights in employment relationships and researches the aspects of the use of information technologies at workplaces. She is a member of the National UNESCO's MOST Programme Committee as well of the Institute of Labour Law at Law Faculty of Vilnius University. She actively takes part in national and international scientific events, attends the French – speaking projects.

In order to reach this goal, the following tasks have been set:

1. To carry out a comparative analysis of selected underwritten fields of research:
 - a. The use of information technologies and the protection of employee's right to privacy in informational space;
 - b. The implementation of the telework as a flexible form of work organization.
2. To explore the interaction of national and foreign labour law solving the legal problems of the use of information technologies at workplaces.

Various research methods (comparative, logical, logical and systematic analysis, synthesis, analytical and historical) were applied in this research.

1. THE USE OF THE INFORMATION TECHNOLOGIES AT WORKPLACES

Historically, the Lithuanian labour law had to respond apace to the social changes. After the reestablishment of independence in 1990, Lithuania had to transform its legal regulation of the employment relationships from centralist public model to a new form and to adopt this regulation to open economic market and democracy development. During the period when the Republic of Lithuania sought to become a member of the European Union, national labour law was reformed according to *acquis communautaire*.

Equally, we might emphasize that the transition period from an industrial to information society is obvious. Lithuania and other states have to evaluate an influence of information technologies on the legal regulation of employment relationships.

The facts of the Lithuanian Department of Statistics suggest that in 2012 the computers and the Internet were used by almost all manufacturing and service companies (99.7 %) which have ten and more employees; in the fields of everyday work the computers were used at least once a week by 43.1 % and the Internet – 38.7 % employees of these companies¹. It could be maintained that the use of information technologies at work is a notably common case.

The decade of the validity of Lithuanian Labour Code² coincides with a period of strong technological progress. Nonetheless, a contract of a distance work (teleworking) was legalised just in 2010. There is the only visible modification of national labour law immediately concerned with information and communication technologies.

Analytically, it could be raised a hypothesis that the use of information technologies determines the changes of collective and individual employment relationship as well as new requirements appearance for contracting parties. For example, in France where tradition of employees' representation is active, the scientists are currently discussing the adaptability of the information technologies in collective relationships to implement representatives' rights to vote on electronical form or solve the labour disputes. Meanwhile, Lithuanian representatives of employees are not as

¹ Statistics Lithuania, 'Information Technologies in Lithuania' (Vilnius: Statistics Lithuania 2012) 56-57

² The Labour Code of the Republic of Lithuania came into force on 1 January 2003.

active as in France; therefore there are a lot of scientific discussions on fundamental questions of collective labour law reform, but not the problems of the use of information and communication technologies in collective relationships.

Depending on the law traditions and the national legal systems in each country, the use of information technologies at workplaces could affect several labour law systems differently. However, we could envisage the common and transboundary problems conditioned by technological factors. The cases of a telework and an implementation of employee's right to privacy are demonstrative examples in the European Union.

2. INFLUENCE OF THE USE OF INFORMATION TECHNOLOGIES AT WORKPLACES TO DIFFERENT LAW INSTITUTES

2.1. Protection of employee's right to respect for private life

The specific legal regulation of an implementation of employee's right to privacy is not provided by Lithuanian labour law. The common legal norms of civil law are applicable. It could be added that the legal personal data protection institute³ defines the mechanism of person's right to privacy realization and the responsibility in information areas⁴. Thus all information composes meaning of personal data is considered as a part of an employee's privacy like a personal data subject. An employer, who is processing employee's personal data during an employment, a performance or an expiry of an employment contract, is a controller of employee personal data.

The employer has a lot of practical opportunities to follow and control the employee's electronic workplace, a work by computer and access to the Internet. Employer's monitoring and control is not unlimited. The European Court of Human Rights explained that the legal protection of private life includes the professional activities⁵. The use of information technologies at workplace could not violate an inviolability of employee's communication. An absence of neither national legal regulation nor local legal regulation was acknowledged by the European Court of Human Rights as a violation of employee's right to privacy⁶. The employer in collecting the information about employee's telephonic conversations, the story of looked Internet pages or the use of digital programs, should follow all requirements that are applicable to every personal data controller.

According to the Convention⁷ each Member State of the European Union does not ignore the fundamental human rights and freedoms and it appreciates the importance of employee's right to privacy. This notwithstanding, the mechanisms of its implementation and protection are different. For example, in Lithuania there is no specific national employee's communication and the use of information technologies at workplaces legal regulation, whereas French social law

3 Law of the Republic of Lithuania on Legal Protection of Personal Data [1996] Official Gazette no. 63-1479

4 I. Petraitytė, 'Asmens duomenų apsauga ir teisė į privatų gyvenimą' [2011] 80 Teisė 167

5 *Niemietz v. Germany*, no. 13710/88 [1992] ECHR

6 *Copland v. the United Kingdom*, no. 62617/00 [2007] ECHR

7 Convention for the Protection of Human Rights and Fundamental Freedoms [1995] Official Gazette no. 40-987

prohibits⁸ employer by local regulation to intervene in employee's personal rights and individual and collective freedoms, and limit them if it is not legitimated or proportional for attainment of his purpose. Furthermore, France uses the legal category of employee's personal life (in French is '*vie personnelle*'). This definition expanded the conception of employee's private life (in French is '*vie privée*') at work⁹. Thus France in solving disputes tries to separate two situations: a) an employee's life not at work and not at work time, and b) an employee's life at work and at work time. In the USA, we can find other attitude: if an employer provides the equipment for professional reasons and if for business interests need it, and an employee agrees, then it suffices to justify the monitoring and control of the workplaces¹⁰.

The legal protection of employees' personal data is concurrent element of work organization on national and international level. The free movement of goods, persons, services and capital promotes to make a fresh start discussing on the harmonization of legal protection of personal data among the all Members States of the European Union. It should be noted the implementation of the Directive 95/46/EC¹¹. The Member States of the European Union fragmentary implemented the common principles of Directive 95/46/EC. Thus the European Commission, reacting to social force of information technologies, prepares the reform of legal protection on personal data in the European Union. According to this change (if that will be approved) the Members States will adopt legal acts to create special legal regulation of management of personal data in the employment sphere¹².

The free workforce movement and the technological factors determine new challenges to find effective ways how to ensure equal and adequate legal protection of an employee personal data in each European country. It could provide more employees' guaranties on an inviolability of employee's communication. After the reform of the European Union legal protection of personal data, the common principles of legal protection, the concrete specific norms on employment as well a common responsibility system could be created. This model would harmonize convergenationally Member States' national legal systems in the informational field of the implementation of an employee's right to privacy.

2.2. The teleworking relationships regulated by labour law

The teleworking phenomenon also illustrates the use of information and communication technologies impact to the employment regulation. The latest American Community Survey data confirm that the growth of teleworkers (not including self-employed) increased 73 % from 2005

8 Code du travail de France (French Labour Code) [interactive] Article L 122-35¹

9 R. J. Tour, 'Étude sur la jurisprudence récente de la Chambre sociale de la Cour de cassation' [interactive]

10 T. Bagdanskis, P. Sartatavičius, 'Workplace Privacy: Different Views and Arising Issues' [2012] 19 Jurisprudencija 708–709

11 Parliament and Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281

12 Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) [interactive]

to 2011 though the rate of growth slowed during the recession in the USA¹³. The percentage of teleworking (in employment working from home) among workers aged 25 – 49 was 8.4 % of men and 7.1 % of women of total employment in the European Member States in 2006¹⁴. Surprisingly, the global forecast for 2009 - 2013 noticed that the worldwide mobile worker population was set to increase from 919.4 million in 2008 (29 % of the worldwide workforce), and to 1.19 billion in 2013 (34.9 % of the workforce)¹⁵. During last decades in this area the countries search a harmonization. The European social partners adopted the Framework Agreement on Telework in 2002¹⁶. The voluntary framework agreement should be implemented during three years after the date of signature by the members of European social partners in accordance with the procedures and practices to management and labour in the Member States. European social partners prepared a joint report on the implementation of this agreement in 2006. The report demonstrated the diversity of its implementation across the European Union.

In Finland, Latvia, Spain and Sweden the framework agreement was implemented through general social partner agreements which formulate guidelines for negotiators at sectoral or company level. In other countries the social partners chose to implement national or sectoral collective agreements (Belgium, Denmark, France, Greece, Iceland, Italy, Luxembourg and Sweden). In the United Kingdom and Ireland, the social partners adopted the codes of practice. In some countries the social partners decided to call on public authorities to implement the framework agreement through legislation. The provisions of the framework agreement were introduced into the labour codes (the Czech Republic, Hungary and Portugal)¹⁷.

The Lithuanian data and report were not presentend in 2006 because the Lithuanian social partners and public authorities thought that then legal regulation of homework was sufficient; there were not a lot of teleworkers, thus there was not a strong action to regulate telework. The teleworking contract came to Lithuanian Labour Code just in 2010. It replaced a homework contract.

When we are analysing the convergence of the legal systems in telework case, we should pay attention to the following aspects:

- Concerned with a telework definition. The European Framework Agreement on Telework defined the telework as ‘a form of organising and / or performing work, using information technology, in the context of an employment contract / relationship, where work, which could also be performed at the employers’ premises, is carried out away from those premises on a regular basis’¹⁸. Regarding the 115th article of Lithuanian Labour Code¹⁹, a teleworking contract may establish that an employee will perform the job function or part

13 Statistics by the Global Workplace Analytics and the Telework Research Network [2012: interactive]

14 EUROSTAT ‘Reconciliation between work, private and family life in the European Union’ [2009: interactive] 128

15 International Data Corporation ‘Worldwide Mobile Worker Population 2009 – 2013 Forecast’ [2010: interactive]

16 Framework Agreement of the European Social Partners of 16 July 2002 on Telework [interactive]

17 Report by the European social partners on implementation of the European Framework agreement on Telework [2006: interactive]

18 Framework Agreement of the European Social Partners of 16 July 2002 on Telework [interactive]

19 Code of the Republic of Lithuania [2002] Official Gazette no. 64–2569

- of the job functions agreed therein in places other than the workplace, as appropriate for the employee. The characteristics of teleworking contracts established by Government also it could be agreed by collective agreements. Lithuanian telework definition involves the homework as a one of alternating kinds of telework. It means that national definition of telework is larger and accordingly expresses the meaning of a distance work. Original term in Lithuanian is 'a distance work' but authentic translation in English is 'teleworking'.
- Conceptual differences and difficulties of different work conditions. In Lithuania, the teleworking is acknowledged as a separate contract. The Framework Agreement on Telework says that it's a form of organising and / or performing work. According to the interpretation of this Agreement it could be maintained that the telework is not another form of work contract²⁰. In case of teleworking, the information and communication technologies efface the boundaries. All this means that a telelocalization replaces a geolocalization because an employee can perform its function from whatever state or place. The distance work raises the discussions on the regime of work time and rest periods, the management of overtime work, the work at night and fair remuneration for work, the relation between professional and private life, the balance between work and family (especially in case of teleworking at home), the conditions of employees' health and safety ensuring labour discipline and control as well as the contracting parties' responsibility. Teleworking and other applications of information technologies open up opportunities for more flexibility that could be used to facilitate work – private life balance. Nonetheless, in applying flexible and atypic forms of work organization it is important to safeguard the employees' rights evenly in all the European Union.
 - Different implementation of voluntary agreements. The Framework Agreement on Telework is a voluntary contract by European social partners that is implemented differently. As it was noticed that telework phenomenon has a convergential influence to each national legal system, however the states chose the various ways to govern and regulate the modern and flexible employment relationships.

CONCLUSION

The use of the information and communication technologies at workplaces became powerful and convergential instrument to realize the economic globalization. This technological impact is pronounced on national and international level. According to the influence of the information technologies and the flexible forms of employment, the employment relationships change conceptually. The employees are becoming more self-confident, active and mobile. Nonetheless these changes, the main task of labour law remains the same scilicet to provide minimal necessary standards of an employee's legal protection.

The mass use of information technologies increases the flexibility of employment, promotes the free workforce movement and creates a lot of opportunities for modern employee to choose

²⁰ Commentary of the European Social Partners' Agreement on Telework [interactive] 9

various atypic forms to self-realise. Sometimes that unifies the professional and private social spaces.

It could be added that all traditional functions of labour law persist but the new challenges increase in regulating employment relationships to acclimatize that to global and convergentially moving labour market. The technologies factor effectes the common modernization and harmonization of the employment conditions. Also it promotes the contracting parties more actively to participate in the information and communication processes, to regulate the relationships by local acts and the collective agreements and to regularize their different interests more by the soft-law in basis of responsible partnership.

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CONVERGENCE OF NATIONAL LEGAL SYSTEMS-BURDEN OF PROOF IN EMPLOYMENT LAW

Aneta Tyc*

University of Lodz, Poland

Abstract. I would like to draw my attention to the convergence of national legal systems (especially Polish, Italian, Spanish, Dutch, Belgian, French, German) which results from the European and international law. I will focus on the reversal of the burden of proof by rebuttable presumptions of law: formal – such as the presumption of innocence stated in article 6 paragraph 2 of The European Convention on Human Rights and article 14. 2 of the 1966 International Covenant on Civil and Political Rights, which also applies to employment law; material – the presumption of employment relationship in Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Moreover, article no. 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex and other European Union directives provide the “shared” burden of proof – between employee and employer. The latter proves that there has been no breach of the principle of non-discrimination. The obligation to provide information to the other party can facilitate the burden of proof. The harmonisation is reached by the Council Directive of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC). I will give some other examples of the directives referring to the burden of proof. I would not omit the ILO Convention no. 158 concerning termination of employment at the initiative of the employer (article 9. 2a concerning the burden of proof). 36 countries have ratified the convention. We can observe its impact on the national regulations even in the countries which have not ratified the convention.

Keywords: Burden of proof, convergence

INTRODUCTION

Merriam-Webster dictionary defines convergence as the act of converging and especially moving toward union or uniformity¹. Alfred Russel Wallace was the first who paid attention to convergence. He called it parallel evolution. But in fact it was Charles Darwin who first used the term convergence². Nowadays lawyers use the term in several senses. It can denote “the coming

* Master of law (2010) and master of administration (2009); postgraduate student of University of Lodz, Chair of Labour Law (since 2009); research grant (2012) funded by The National Science Centre to promote her doctoral thesis entitled: “Burden of Proof in Employment Law”; a scholarship at the Faculty of Law, University of Brescia in Italy (2012); an author of over 20 articles (published in Poland and abroad); almost 20 speeches at the conferences in Poland and abroad; seven letters of congratulations from the Rector of the University of Lodz and two Awards of the Rector of the University of Lodz.

¹ ‘Merriam-Webster’s Collegiate Dictionary’ (Merriam-Webster. Incorporated 2004) 273.

² N. Annandale, ‘Evolution – Convergent and Divergent’ [in:] ‘The Shaping of Indian Science. Indian Science Congress Association Presidential Addresses. Vol I: 1914-1947’ (Hyderabad: Universities Press 2003) 156.



together of legal systems through mutual interest and common development, often perceived as an inevitable part of the process of globalisation (...). In the context of EU, convergence may also denote the process of harmonisation of national legal principles and procedures (...)”³. I have compared different approaches to the burden of proof in employment law existing in selected European countries and have paid attention to general and specific provisions concerning *oneris probandi*. The convergence of national legal systems mainly results from the European Union directives, the judgments of the Court of Justice of the European Union and international law. In the main body of this article I will focus on the convergence, but it is important to note that the opposite process exists as well. It could be useful to indicate here some examples of the divergence. “In Anglo-Saxon systems, the burden of proof for a specific issue remains with one party throughout the trial”⁴. The comparative perspective shows the greater flexibility of the Spanish burden of proof resulting from the rule according to which the court should have regard to the availability of evidence and the relaxation of the burden of proof concerning one of the parties to the dispute⁵. Even more flexible is Dutch regulation, according to which the burden of proof may shift between the claimant and the defendant during the proceedings, as a result of evidence submitted⁶. Another example is connected with the contracts on the burden of proof. For instance in Italy and Portugal such contracts bear absolute nullity. The lack of regulation in Poland raises disputes in the literature⁷.

* * *

Focusing on the reversal of the burden of proof I will mention the rebuttable presumptions of law. Firstly, formal presumption such as the presumption of innocence stated in article 6 paragraph 2 of The European Convention on Human Rights (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”) and article 14. 2 of the 1966 International Covenant on Civil and Political Rights, which also applies to employment law. It is worth mentioning in this context the wording of article 52 § 1 of Polish Labour Code, which states that: “An employer may terminate a contract of employment without notice through the fault of the employee in the following cases: (...), 2) a criminal offence committed by the employee during the term of his contract of employment that prevents his further employment in the current position, if the offence is obvious or declared by court in a final and non-appealable judgement”. The situation when “the offence is obvious” may be treated as an exception from the presumption of innocence⁸.

3 C. Harlow, ‘Voices of Difference in a Plural Community’ [in] P. Beaumont, C. Lyons, N. Walker (ed.), ‘Convergence and Divergence in European Public Law’ (Portland: Hart Publishing 2002) 202.

4 M. Van Hooijdonk, P. Eijssvoogel, ‘Litigation in the Netherlands. Civil procedure, Arbitration and Administrative Litigation’ (Haga: Wolters Kluwer 2009) 191.

5 Article 217.7 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, Boletín Oficial del Estado, no. 7, 8 January 2000, 575-728.

6 M. Van Hooijdonk, P. Eijssvoogel, ‘Litigation in the Netherlands. Civil procedure, Arbitration and Administrative Litigation’ (Haga: Wolters Kluwer 2009) 191.

7 More: A. Tyc, ‘Ciężar dowodu we włoskim prawie pracy – wybrane zagadnienia’ [2012] Przegląd Sądowy, 120.

8 P. Hofmański, ‘Domniemanie niewinności w prawie pracy’ [in:] W. Sanetra (ed.), ‘Europeizacja polskiego prawa pracy’ (Warszawa: Wydawnictwo Naukowe 2004) 96.

Secondly, we can distinguish material presumptions – for instance the presumption of employment relationship introduced in Directive [EC] 2009/52 of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals⁹. Article 6. 1 of this directive states that: In respect of each infringement of the prohibition referred to in Article 3, Member States shall ensure that the employer shall be liable to pay:

- a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages;
- b) an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines; (...).

3. In order to apply paragraph 1 (a) and (b), Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise.

The process of directive implementation has an impact on the domestic legal systems.

Article no. 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex states that: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”. We can meet similar regulations in the following documents: article no. 10 of Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation¹⁰; article no. 8 of Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹¹; article no. 9 of Council Directive [EC] 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹²; article no. 19 of Directive [EC] 2006/54 of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)¹³.

We can infer from the above-mentioned directives that there is a kind of a “shared” burden of proof – between employee and employer. Where employees plead that the principle of equal treat-

9 [2009] OJ L 168, 30.6.2009, p. 24–32.

10 [2000] OJ L 303, 2.12.2000, p. 16–22.

11 [2000] OJ L 180, 19.7.2000, p. 22–26.

12 [2004] OJ L 373, 21.12.2004, p. 37–43.

13 [2006] OJ L 204, 26.7.2006, p. 23–36.



ment has been infringed to their detriment and establish facts from which it may be presumed that there has been direct or indirect discrimination, Directive 97/80 on the burden of proof in cases of discrimination based on sex is to be interpreted as meaning that it shall be for the respondent to prove that there has been no breach of that principle¹⁴. We can observe the influence of above-mentioned regulations on the national legal systems.

The obligation to provide information to the other party can facilitate the burden of proof. The harmonisation is reached by the Council Directive (EEC) 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship¹⁵.

Legal fictions do not require a proof. There is only a need to declare the existence of the conditions specified in law for the realization of this legal structure. I will give some examples of legal fictions below.

Article 4. 2 of Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹⁶ states that: If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship. The above-mentioned provision has not been implemented in Germany („There is no provision explicitly transporting Directive Article 4 Para. 2 into national law, partly because of the employee's right to object to the transfer. Nevertheless this reflects an inadequate implementation of this part of the Directive") and in France („There are no legal provisions corresponding to Directive Article 4.2. The employer is regarded as responsible for the dismissal if the cause of the termination is a substantial change in the working conditions"). Belgian regulation uses the same wording as French and Dutch versions of Article 4.2 of the Directive. Article 7:665 of *Burgerlijk Wetboek* in the Netherlands provides for the implementation of Directive Article 4.2¹⁷. According to this regulation: If the transition of the enterprise leads to a change of circumstances to the disadvantage of the employee and, as a result of this change, the employment agreement has been rescinded on the ground of Article 7:685, then for the purpose of that Article the employment agreement is regarded to be rescinded due to a reason which is for account of the employer.

According to clause 5 of Council Directive (EC) 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP¹⁸: 1. To prevent abuse arising from the use

14 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE, Case C-196/02 [2005] ECR I-01789. See also: Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, Case 109/88 [1989] ECR 3199; Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG, Case 171/88 [1989] ECR 2743; Jämställsdhetsombudsmannen v Örebro läns landsting, Case C-236/98 [2000] ECR I-02189.

15 [1991] OJ L 288, 18.10.1991 p. 32–35. More: C. Bosse, 'Bewijslastverdeling in het Nederlandse en Belgische arbeidsrecht' (Tilburg 2003) 312–313.

16 [2001] OJ L 82, 22.3.2001, p. 16–20.

17 M. Sargeant, 'Implementation Report – Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. In partnership with Middlesex University Business School', June 2007.

18 [1999] OJ L 175, 10.7.1999, p. 43–48.

of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) the maximum total duration of successive fixed-term employment contracts or relationships;
- (c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

- (a) shall be regarded as „successive”
- (b) shall be deemed to be contracts or relationships of indefinite duration.

The legal fiction we can find in article 25¹ § 1 of Polish Labour Code: Conclusion of another fixed-term contract of employment shall have the same legal effect as the conclusion of an indefinite-term contract if the parties have already concluded two fixed-term contracts of employment for two consecutive terms, unless there was a break between the date of termination of a previous contract of employment and the date of conclusion of another contract of employment of more than one month.

Article 7:668a of Dutch Civil Code (*Burgerlijk Wetboek*) states:

1. As from the day that between the same parties:
 - a. two or more employment agreements for a fixed term have succeeded one another at intervals of not more than three months and these employment agreements jointly have covered a total period of 36 months, these intervals included, the last employment agreement for a fixed term is deemed to be an employment agreement that has been entered into for an indefinite term;
 - b. more than three employment agreements for a fixed term have succeeded one another at intervals of not more than three months, the last employment agreement for a fixed term is deemed to be an employment agreement that has been entered into for an indefinite term.
2. Paragraph 1 applies accordingly to employment agreements for a fixed term succeeding one another between an employee and different employers who reasonably must be considered as each other's successor with regard to the work that has been performed by this employee.
3. Paragraph 1, under point (a), does not apply to an employment agreement that has been entered into for not more than three months and that has been concluded immediately after the ending of an employment agreement for a period of 36 months or more between the same parties.
4. The duration of the term of notice of termination is calculated as from the day that the first employment agreement referred to in paragraph 1, under point (a) or (b), was entered into.
5. It is only possible to derogate to the disadvantage of the employee from the previous para-

graphs by Collective Labour Agreement or by a Regulation by or on behalf of a public governing body competent to this end.

„Under Belgian labour legislation the main rule is that successive fixed-term contracts are presumed to have been concluded for an indefinite period. In case of disagreement the employer must show that the successive contracts are justified by objective reasons, such as the nature of the work. However, reforms during the 1990's have made recourse to successive fixed-term contracts (for a fixed-period or for a specific task) possible also under the following conditions:

Four successive fixed-term contracts, each of which must be of at least three months duration, can be concluded during a maximum period of two years. Six successive fixed-term contracts, each of at least six months duration, can be concluded during a maximum period of three years, provided that the employer has obtained prior authorization from the Labour Inspectorate. Non-observance by the employer leads to the transformation of the contract into an open-ended contract. The fixed-term contract comes to an end automatically by the arrival of the term envisaged; no warning or notice is necessary. If the parties, after the deadline of the term, continue the contract, it will be subject to the same rules as for open-ended contracts. A contract of replacement of a permanent worker is under Belgian legislation in theory an open-ended contract; the parties can envisage that this contract will be broken by means of a period of notice or not. The term of a replacement contract is subject to a two-year maximum duration (without exception) applicable also in the event of succession of successive replacements contracts”¹⁹.

In Italy the directive was implemented by Decreto legislativo from 6 September 2001, no. 368 – *“Attuazione della direttiva 1999/70/CE relativa all' accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES”*²⁰.

I would not omit the ILO Convention no. 158 concerning termination of employment at the initiative of the employer. Its article 9. 2a provides that: In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities: (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer. 36 countries have ratified the convention for instance France (16 March 1989), Spain (26 April 1985)²¹. For example Poland, Italy, Netherlands, Belgium, Germany have not ratified the convention²² but its impact on the national regulations (even in the countries which have not ratified the convention) should be highlighted²³.

19 Report by the Commission services on the implementation of COUNCIL Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on the Fixed-term Work concluded by ETUC, UNICE and CEEP (EU-15), Brussels 2006.

20 Gazzetta Ufficiale, 9 October 2001, no. 235 with amendments.

21 http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303.

22 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312303:NO.

23 L. Krysińska-Wnuk, 'Regulacja zwolnień grupowych pracowników' (Wolters Kluwer 2009) 32-33.

CONCLUSION

European law is affecting national legal systems. The same conclusion refers to the international law. The burden of proof in employment law is just an example within this great process. I have mentioned just selected problems of the burden of proof in order to show how national legal systems can be influenced. All the directives and other acts mentioned reflect the present efforts in Europe to achieve more uniformity.

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THE CONCEPT OF STATE IMMUNITY AND THE MAIN CHALLENGES

Neringa Toleikytė*

Vilnius University, Lithuania

Abstract. The purpose of this article is to analyse the doctrine of state immunity. Customary international law inflicts a general requirement that foreign states should not be subject to suit in foreign state. State immunity is an institution that is originated from public international law and concern the protection which a state is given from being sued in the foreign state. It is widely known that it derives from the principle of equality of states (*par in parem non habet imperium*) and is an expression of non-interference and respect for the sovereignty of other States. The international community has tried for many years to agree a treaty on the subject, but they all failed.

Keywords: state immunity, absolute immunity, restricted immunity.

INTRODUCTION

Foreign states are generally entitled to be granted immunity from the jurisdiction of other states. This is known as foreign state immunity. In the last decades States have generally accepted the restrictive doctrine of State immunity. The article presents a short overview of the development of the restrictive state immunity doctrine and deals with the main problems applying the doctrine.

Immunity from jurisdiction is distinct from immunity from execution. Immunity from execution, which means measures of constraint directed against property of the foreign state, will not be analysed in this article. This article analyses only the immunity from jurisdiction, its evolution and operation. Immunity of jurisdiction can be defined as limitation on the Forum State to exercise jurisdiction over a foreign state.

I. THE CONCEPT OF STATE IMMUNITY

State immunity is an institution that at its basis belongs to public international law¹. Under the doctrine of foreign state immunity, one State is not subject to the full force of rules applicable in another State; the doctrine bars a national court from adjudicating or enforcing certain claims against foreign States². Immunity is gained to legal proceedings against the foreign state itself, its organs and companies, and its agents.

* Vilnius University Faculty of Law, Department of Private Law, Saulėtekio al. 9, LT-00117 Vilnius, Tel. +370 614 24694; e-mail: neringa.toleikyte@gmail.com

¹ R. Nowosielski, 'State Immunity and the Right of Access to Court. The Natoniewski Case Before the Polish Courts'. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173035>

² D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/2, OECD Publishing. doi: 10.1787/5km91poksqs7-en

State immunity derived from state sovereignty and the equality of states. Customary international law inflicts a general requirement that foreign states should not be subject to suit in foreign state. Customary international law is a widely accepted source of international law, but it is poorly analysed. The doctrine of state immunity originated from customary international law and also entails many disadvantages to domestic courts, because there are no uniformed rules that should be used in all countries and regulated the same state activities.

The law of state immunity has been subject to numerous proceedings before domestic courts. When the courts of one state assume jurisdiction over another state or its representatives, the authority of the forum state to adjudicate the dispute conflicts with the principle of state equality, often expressed by the maxim “*par in parem non habet imperium*”³. State sovereignty implies two principles: the principle of territorial jurisdiction of the forum state (this principle demands unlimited exercise of jurisdiction) and the principle of sovereign equality of states (two equals cannot rule over each other and means respect for the sovereignty of other States).

The principles of international law regarding jurisdictional immunities of states have derived mainly from the judicial practice of individual nation⁴. This first articulation of the principle of state immunity was recognized by the United States Supreme Court in its famous 1812 judgment of *The Schooner Exchange v. McFaddon*⁵. Chief Justice Marshall clearly enunciated the principle: “[The] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him”. Since then the recognition of State immunity became firmly established in the general practice of the United States and the majority of modern European States.

II. THE DOCTRINAL APPROACH

The doctrine of foreign state immunity has changed over the last centuries and has been subject to constant evolution, progressing through several distinct periods. From the doctrinal approach, there are two opposite doctrines regarding state immunity: the absolute doctrine and the restricted doctrine⁶. The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity

3 S. Knuchel, ‘State Immunity and the Promise of Jus Cogens’ Northwestern University School of Law Volume 9, Number 2 (Spring 2011) Northwestern Journal of International Human Rights

4 F.J. Nicholson, ‘Sucharitkul: State Immunities and Trading Activities’, 2 B.C.L. Rev. 459 (1961), <http://lawdigitalcommons.bc.edu/bclr/vol2/iss2/42>

5 *The Schooner Exchange v. McFaddon and Others*, 11 U.S. 116 (1812).

6 M. Maw, ‘Recent Trends In The Principle of State Immunity’ <http://dspace.lib.niigata-u.ac.jp:8080/dspace/bitstream/10191/1055/1/18..>

from domestic legal proceedings. The idea of absolute state immunity was generally accepted by domestic courts in the 19th century. But absolute immunity caused unjust and unfair circumstances on private enterprises trading with governmental entities.

The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade.⁷ So-called “restrictive” doctrine of state immunity is more suitable: a foreign state will be able to use immunity only for claims arising out of sovereign acts (*acta jure imperii*), but there will not be a possibility to use immunity to the claims arising out of “private law” acts (*acta jure gestionis*). As States became involved in commercial activities, national courts began to apply a restrictive law of immunity. One purpose of the commercial exception is to protect the legitimate expectations of business partners that engage in commercial transactions with foreign States. The restrictive approach is now widely reflected in case law, national statutes and international conventions, although it cannot yet be said to be universally recognized⁸. Under this theory, states are immune from suit in respect of acts of government, but not in respect of commercial activities. But the biggest problem is that there is no clear boundary between commercial acts and acts of government.

The aim of state immunity law is to enhance relations between states and to bring collectively benefits to the community of nations. Thus, where state conduct is clearly detrimental to interstate relations but still protected by domestic state immunity laws, the restrictive approach is inconsistent with the strictures of international law and should be amended⁹. But under the normative hierarchy theory, a state’s jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*¹⁰.

III. THE LEGAL FRAMEWORK OF STATE IMMUNITY

As it was said before, the immunity of states is no longer absolute and it derives mainly from judicial practice of individual nations. The practice of states on state immunity is not uniform. International consensus on the matter “exists only at a rather high level of abstraction,” and the details of the international law of state immunity are not always certain¹¹.

The international community has tried for many years to agree a treaty on the subject. In 2004 the United Nations enacted Convention on Jurisdictional Immunities of States and Their Property, but was not signed by proper number of states. The convention includes customary international

7 L. M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’, AJIL 97 (2003), 741 et seq. (745)

8 D. Gaukrodger, ‘Foreign State Immunity and Foreign Government Controlled Investors’, OECD Working Papers on International Investment, 2010/2, OECD Publishing. doi: 10.1787/5km91poksqs7-en

9 L. M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’. AJIL 97 (2003), 741 et seq. (745)

10 L. M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’. AJIL 97 (2003), 741 et seq. (745)

11 J. W. Dellapenna, ‘Foreign State Immunity in Europe’, 5 N.Y. INT’L L. REV. 51, 61 (1992)

rules of state immunity and consolidates the restrictive approach to state immunity, but the degree to which the restrictive approach is recognized by States today remains a subject of debate. But this convention is modern multilateral instrument that provides a comprehensive approach dealing with complicated issues of state immunity.

Also there were several attempts to codify the state immunity doctrine, but they all failed. It is needed to mention the European Convention on State Immunity, which came into force in 1976. However, only eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) are parties.

Some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, and enforced national immunity legislation. The State Immunity Act 1978 (U.K) and Foreign Sovereign Immunity Act 1976 are analysed as examples of codification of state immunity. Both acts include “commercial activities” as major criterion providing the doctrine of restricted state immunity.

It can be seen that some countries lack of their own legislation in this field. Civil Procedure Code of The Republic of Lithuania, passed in 1964, entrenched the rule of absolute immunity, that the potential litigants were allowed to pursue claims in the courts against foreign states only in case of a written consent of the foreign state, the execution of the judgment in respect of foreign state’s property was possible only with the same condition. This rule was the inheritance of the USSR times not matching changed social relations and political and economic state system of Lithuania. In 1998 The Supreme Court of Lithuania made the decision in civil case *V. Stukonis v. USA embassy*¹², in which stated the restrictive theory of state immunity. The decision indicated the main landmarks of the restrictive theory such as the distinction between *acta jure imperii* or sovereign acts and *acta jure gestionis* or private, non-sovereign acts.¹³ Civil Procedure Code of The Republic of Lithuania, passed in 2002, does not include the rule of absolute immunity, but there is no other regulation related to the state immunity, therefore courts decisions are the main source of legislation of state immunity in Lithuania.

CONCLUSION

The article analysed overview of the law of state immunity in which describes principle and development of state immunity. The topic of sovereign immunity is one of the profound subjects in international law. It stands as a customary international law which is justified on general principles of international law: the principle of territorial jurisdiction of the forum state (this principle demands unlimited exercise of jurisdiction) and the principle of sovereign equality of states (two equals cannot rule over each other and means respect for the sovereignty of other States).

As it was said in this article, in the 19th century the absolute rule of sovereign immunity prevailed. Due to the amount of State trading in the 19th century, a number of countries developed

¹² *V. Stukonis v. US embassy*, 1998-01-05 LAT nutartis c.b. Nr. 3K-1/98

¹³ K. Balevičienė, ‘Riboto valstybės imuniteto doktrina ir jos taikymas Lietuvos Respublikoje’. *Jurisprudencija*, 2004, t. 58(50); p. 138–145.



the restrictive theory of immunity, which divides states acts into governmental (*acta jure imperii*) and commercial acts (*acta jure gestionis*). There is no common ground to formulate a criterion that would be acceptable to all countries and this in turn has led to persistent divergence in the practice of states.

The State Immunity Act 1978 (U.K) and Foreign Sovereign Immunity Act 1976 are analysed as examples of codification of state immunity that determines the restrictive theory of immunity. In 2004 the United Nations enacted Convention on Jurisdictional Immunities of States and Their Property which includes customary international rules of state immunity and consolidates the restrictive approach to state immunity, but was not signed by proper number of states. Thus the practice of states on state immunity is not uniform and causes many troubles to local courts to use this doctrine suitable.

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PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW AS A TOOL FOR CONVERGING NATIONAL LAWS

Maarja Torga*

University of Tartu, Estonia

Abstract. On the face of it, the harmonization of private international law seems to freeze, if not even promote, differences in legal systems. This happens when harmonized conflicts rules oblige the courts of different states to apply the same substantive law, regardless of where the claimant brings his action. In this way the claimant always 'takes' his law with him and there is no need for the states to unify their substantive laws. One of the most fundamental concepts of modern European private international law - the concept of party autonomy - seems to accentuate this view even further as it allows parties to voluntarily take their law with them when moving abroad. On the other hand, the concept of party autonomy could also trigger the convergence of substantive laws if the courts are faced with the need to apply their national rules to unfamiliar family unions and other foreign relationships. In such cases it might be easier to introduce foreign concepts into national law than to make up new conflicts of laws categories by analogy. This solution may, however, be barred by the applications of protective mechanisms of private international law. Such protective mechanisms include the doctrines of public policy and mandatory norms, which both limit the application of party autonomy. By using Estonian private international law and the case-law of the Estonian Supreme Court as an example, the paper demonstrates how both, the exercise of party autonomy and the exercise of the safeguards against party autonomy could trigger changes in national law. The hypothesis of the paper is that, the role, which party autonomy has been allowed to play in private international law depends on the social realities of a particular state, including, among other things, the rate of emigration that this state is faced with.

Keywords: Private international law, conflict of laws, choice of law, party autonomy, public policy

INTRODUCTION

Party autonomy has become an underlying concept in the modern European private international law. Such autonomy is widely accepted in commercial relationships where the parties are generally free to choose the law applicable to their contract¹ or to the non-contractual obligations² arising from the relationships between them. The concept of party autonomy has recently also

* Lecturer of Civil law, University of Tartu, Estonia.

¹ See Art 3 of the Rome I Regulation: Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ 2008 L 177/6 (Rome I Regulation).

² See Art 14 of the Rome II Regulation: Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ 2007 L 199/40 (Rome II Regulation).



moved into the area of international maintenance³ and divorce⁴ law and it is to be expected that the triumph of party autonomy will continue when the proposed European regulations on the marital property⁵ and property consequences of the registered partnerships⁶ will enter into force. However, the exercise of party autonomy can be blocked by certain safeguards such as the concepts of public policy and mandatory norms. The purpose of the present paper is to demonstrate how both, the exercise of party autonomy and the exercise of the safeguards against party autonomy could trigger changes in national law and that the willingness to make such changes could, among other things, depend on the rate of emigration that a certain state is faced with.

1. RECOGNITION OF PARTY AUTONOMY AND THE CONSEQUENT CONVERGENCE OF NATIONAL LAWS

On the face of it, the acceptance of party autonomy in private international law seems to freeze, if not even promote, differences in national laws. Since the claimant is always allowed to 'take' his law with him, it might seem that there is no need for the states to unify their substantive laws. In this way the reasonable expectations of the parties as to the applicable law are always protected and the states do not need to make their legal systems more convergent in order to correspond better with the expectations of the parties. On the other hand, the acceptance of party autonomy in private international law can also lead to the convergence of laws. This can happen in two types of situations. Firstly, if national courts could potentially be faced with the need to deal with unfamiliar family unions and other foreign relationships in the future, it might be easier for the legislator to preventively introduce foreign concepts into national law instead of expecting the courts to make up new conflicts of laws categories or locate unfamiliar unions under the already existing categories by analogy. Secondly, if foreign law provides for a different solution than domestic law, the courts might be inclined, on a case-by-case basis, to introduce foreign concepts into domestic law in order to protect the reasonable expectations of the parties and their choice as to the applicable law.

An example of the situation where the national law might be changed in order to avoid possible characterisation problems in the future can be given by explaining the treatment of same-sex unions in the current Estonian private international law. Estonian substantive law does not currently have any provisions on the same-sex marriages or registered partnerships for the same-sex couples.

3 See Art 8 of the Hague 2007 Protocol: Protocol of 23 November 2007 on the law applicable to maintenance obligations [2007]. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (Hague 2007 Protocol). The Hague 2007 Protocol has officially not yet entered into force, but the Member States of the European Union are already bound by the protocol by virtue of its conclusion by the European Community.

4 See Art 5 of the Rome III Regulation: Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ 2010 L 34/10 (Rome III Regulation).

5 See European Commission, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final.

6 See European Commission, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final.

Accordingly, Estonian private international law does not deal with such unions and the Estonian rules on choice-of-law for divorce and the validity of marriage do not allow parties to choose the law, which would give legal protection to such unions.⁷ However, Estonia is currently preparing to join the Rome III Regulation,⁸ which Art 5 gives limited autonomy for the spouses in divorce matters. Applying Art 5 of the Rome III may require Estonian courts to recognize parties' choice of law even if it provides for the divorce of the same-sex marriages. Although Estonian courts would have a possibility to refuse to pronounce a divorce of a same-sex couple on the basis of Art 13 of the Rome III Regulation, such refusal may lead to a situation where the courts would have to start inventing new legal categories in order to do justice for the same-sex couples who have married abroad. In these cases the courts could, for example, define such unions as contractual and determine the applicable law to the consequences of such unions under the corresponding choice-of-law rules for contracts,⁹ but to do so would be technically difficult and might potentially bring along a situation where the partners to such unions are not equally protected due to the differences in their knowledge or access to legal aid. For example, if the property consequences of the same-sex couples would be dealt under the general rules applicable to contracts, such contracts would not need to correspond with special formalities, which are generally applied to matrimonial property agreements.¹⁰ Thus, it might be more beneficial to introduce same-sex marriages or similar institutions such as registered partnerships in Estonian national law, which seems to be the course that the Estonian legislator has taken - the Ministry of Justice has recently started to work on a bill to introduce gender-neutral registered partnerships into Estonian substantive law.¹¹ Introducing such partnerships into Estonian national law would allow Estonian courts to determine applicable law in international cases involving same-sex couples under the private international law rules applicable to marriages. This in turn means that the application of foreign law which provides for similar unions could not be refused based on the public policy clause.¹² Considering that the main

7 See Arts 55, 56 and 60 of the Estonian Private International Law Act: Riigikogu, *Rahvusvahelise eraõiguse seadus*. [The Parliament, *Private International Law Act*] 2002. RT I 2002, 35, 217.

8 Government of the Republic of Estonia, 'Eesti Euroopa Liidu poliitika 2011-2015 tegevuseesmärgid (eelnõu 25.11.2011)' [*Action plan for the Estonian European Union politics 2011-2015*], 2011. Available: http://valitsus.ee/UserFiles/valitsus/et/riigikantselei/euroopa/eesti-eesmärgid-euroopa-liidus/ELPOL_2011-2015_tegevuseesm%C3%A4rgid.pdf.

9 See further: M. Torga, 'Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?' [2012] NJPR 30/4, 547, 551-553.

10 For example, according to Art 60 of the current version of Estonian Family Law Act matrimonial property agreements have to be notarized. See: Riigikogu, *Perekonnaseadus* [*Family Law Act*] 2009. RT I, 27.06.2012, 12.

11 Ministry of Justice, Press Release, 'Justiitsministeerium hakkab järgmisel aastal looma kooseluseaduse eelnõu' [*Next year Ministry of Justice will start working on the draft legislation on cohabitation*], 24 October 2011. Available: www.just.ee/55682.

12 In comparison, the explanatory text of the current Estonian Private International Law Act suggests that the application of foreign law which provides for same-sex marriage, should be refused, based on public policy. See: Riigikogu, 'Rahvusvahelise eraõiguse seaduse eelnõu seletuskiri' [*Explanatory text to the draft bill on Private International Law Act*], 1999. Available: www.riigikogu.ee/?op=emsplain&content_type=text/html&page=mgetdoc&itemid=991600039. It could be argued, however, that since the society has changed after the Private International Law Act entered into force in 2002, such interpretation would not be applicable today. For example, Estonian courts have already given legal protection for same-sex couples in domestic cases, which illustrates a shift away from the values that the legislator held when the Private

destinations of young Estonians nowadays include Finland and the United Kingdom,¹³ which both allow same-sex couples to enter into civil partnerships, this development in Estonian national law is very welcomed from the point of view of private international law. The previous example illustrates how allowing party autonomy in private international law may lead to the convergence of national laws as the states might be more inclined to take over legal concepts, which are recognised in foreign legal systems in order to avoid devising technically difficult choice-of-law solutions for such unfamiliar concepts.

Party autonomy can also give rise to the convergence of national laws on a case-by-case basis if the courts are faced with the need to uphold the reasonable expectations of the parties who have chosen to apply foreign law. This can be illustrated by judgments of the Estonian Supreme Court dealing with matrimonial agreements. In the case *Jacobsen vs Mets*¹⁴ the spouses had concluded a matrimonial property contract and chosen German law as the law applicable to the property consequences of their marriage, but the marital property contract was not entered into Estonian registry of marital property contracts. Although under Estonian national law, as it stood at the time, the reliance on the marital property contract by third parties depended on the fact whether the marital agreement was entered into the relevant Estonian registry,¹⁵ the Supreme Court found that this requirement of Estonian law did not apply in this case, since the spouses had chosen to apply foreign law and thus the property consequences of the marriage depended on the foreign law. In addition, in the case *C.A.C vs K.C(L)*¹⁶ the spouses had concluded a marital property agreement in Canada in accordance with the formal requirements applicable in Canada and chosen Estonian law as the applicable law to their matrimonial property. Such choice, however, did not meet the formal requirements prescribed by Estonian private international law, which required that the choice had to be notarized by a notary public. However, the courts upheld the agreement between the spouses, which was justified by the fact that both spouses relied on the relevant choice in the court proceedings. It is to be noted, however, that the solutions adopted by the courts in these cases corresponded to special circumstances of these cases. It is to be expected that such case-by-case solutions do not bring with them general changes in substantive laws, but they illustrate how the courts can sometimes disregard national law in order to uphold reasonable expectations of the parties.

International Law Act was prepared. See: *S. O vs Viimsi Vallavalitsus*. Tallinn Circuit Court decision of 15 June 2010 [2010] No. 3-09-1489. Available: https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/menetlus.html?kohtuasj_aNumber=3-09-1489/33

The possibility to uphold such foreign unions in conflicts-of-laws process has also found support in Estonian legal literature: I. Nurmela, 'Arenegud rahvusvahelises eraõiguses' ['Developments in private international law'], *Juridica* 2002, 4, 249, 253.

13 Statistical Office of Estonia Press Release 28 May 2012. Available: www.stat.ee/57429/.

14 *Jacobsen vs Mets*. Estonian Supreme Court decision of 10 December 2003. No. 3-2-1-125-03. Available: <http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-125-03>.

15 See Art 10(6) of the Family Law Act and Art 146(3)¹ of the General Part of the Civil Code Act: Riigikogu, Perekonnaseadus [*Family Law Act*] 1994. RT I 1994, 75, 1326. Riigikogu, Tsiivilseadustiku üldosa seadus [*The Parliament, General Part of the Civil Code Act*] 1994. RT I 1994, 53, 889.

16 *C.A.C vs K.C(L)*. Estonian Supreme Court decision of 4 April 2006. No 3-2-1-18-06. Available: <http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-18-06>.

2. LIMITATIONS ON PARTY AUTONOMY AND THE POSSIBLE CONVERGENCE OF NATIONAL LAWS

There are two safeguards that the courts can use against the application of foreign law. Firstly, the courts can refuse to apply foreign law based on the public policy of the forum.¹⁷ Secondly, the courts can generally refuse to apply foreign law and apply domestic (or some other) law if they consider it to have mandatory character. While the concept of public policy is generally applicable in all spheres of private international law, the reliance on mandatory rules is usually used in relation to contracts¹⁸ and non-contractual obligations.¹⁹

As was explained in the previous chapter, limiting the application of foreign law by public policy defence might be difficult if the courts want to do justice for the parties and protect the reasonable expectations of the parties who have acquired a certain status abroad. Instead of relying on the public policy clause, it might be more preferable to introduce foreign unions and institutions into national laws. If the courts, on the other hand, are forced to rely on the public policy clause in a circumstances where the national laws differ so greatly that such reliance is needed in order to protect the essential principles of domestic law and, similarly, if the courts are forced to apply domestic mandatory provisions instead of the foreign law chosen by the parties, the party autonomy of the spouses becomes futile. The courts should be careful when limiting the autonomy of the parties as such limitations might have various social implications. For example, limiting the application of foreign law, which recognises same-sex might cause same-sex partners to leave Estonia in order to be able to receive legal protection abroad.

Similarly, the courts should be careful when limiting the choice of law of the parties by Estonian or foreign mandatory rules, as such limitations may have unexpected social implications. This can be illustrated by a recent judgment of the Estonian Supreme Court of 16 January 2013 in *Kivi and Pajo vs WKSМ Grupp OÜ*,²⁰ which concerned Estonian workers who had been sent to work in Finland by their Estonian employer. The parties had agreed that the employees would be paid wages under Estonian law, which meant that the employees were entitled to receive considerably lower wages than the wages prescribed by the collective agreement applicable in Finland at the time when the work was carried out. The employees consequently sued the employer in Estonia for higher wages. The Estonian Supreme Court ruled that the employer had to pay the employees the wages, which corresponded with the minimum requirements found in the Finnish collective agreement. Although, the Supreme Court did not establish any choice-of-law agreement between

17 All European private international law regulations dealing with the applicable law include such clause. In addition, general public clause is provided by Art 7 of the Estonian Private International Law Act. On the nature of Art 7 of the Private International Law Act, see further: I. Nurmela et al. (eds), *Rahvusvaheline eraõigus* ['Private International Law'], Tallinn: Juura 2008, 68; R. Jankelevičs, 'Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses' ['Public policy and imperative norms in private international law'], *Juridica* VII 2002, 479, 486.

18 See for example: Rome I Regulation Arts 3(3), 3(4) and 9.

19 See for example: Rome II Regulation Art 16.

20 *Kivi and Pajo vs WKSМ Grupp OÜ*. Estonian Supreme Court decision of 16 January 2013. No. 3-2-1-179-12. Available: <http://www.nc.ee/?id=11&tekst=RK/3-2-1-179-12>.



the parties, the Supreme Court felt it necessary to explain that, even if the parties would have chosen Estonian law as the applicable law to their employment relationship, such law could not have deprived the employees of the protection, which was afforded to them by the Finnish collective agreement.²¹ This solution was based on the Rome I Regulation Art 8(1) according to which parties to an individual employment contract can choose the law applicable to their contract, but such choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.²² Although it is still too early to say how this judgment could affect Estonian domestic employment law, it definitely has some implications which should not be overlooked by the legislator. According to statistics, a considerable number of Estonians work regularly abroad with the main destination of such workers being Finland.²³ The problem of losing work-force to neighbouring states has been widely recognised in Estonian society. For example, the Estonian President has even launched an official campaign called 'Talents back home' (*Talendid koju*) to attract those who have emigrated from Estonia to return to their previous homeland. If the employees are afforded considerably better protection by neighbouring states, it might bring along even quicker outflow of workforce, which the legislator should not overlook when amending rules on employment contracts in the future. Although for economic reasons, it is not possible to guarantee the employees exactly the same level of wages as has been guaranteed by the laws of the neighbouring countries, the Estonian legislator might want to consider raising the protection its legislation affords to the employees in other aspects in order to stop the work-force from leaving the country.

CONCLUSION

The recognition of party autonomy in private international law could bring along the convergence of national laws if the courts and the legislator are motivated to protect the reasonable expectations of the parties who have exercised their right to choose the applicable law to their legal relationship. In contrast, the same could potentially also be true if the courts are obliged to limit party autonomy by applying national mandatory rules instead of the law chosen by the parties. In the latter case, the willingness of the legislator to harmonize its substantive law with the laws of the other states depends on the attention that the legislator is able to give to the level of emigration and the loss of work-force that its state is faced with. Although the convergence of national laws is often not possible for economic and cultural reasons, it is something that the Estonian legislator should carefully consider. This consideration should be carried out by taking into account the level

²¹ See para 13 of the judgment.

²² On the application of Art 8 of the Rome I Regulation, see further: P. Mankowski, 'Employment Contracts under Article 8 of the Rome I Regulation' in: F. Ferrari and S. Leible eds, 'Rome I Regulation The Law Applicable to Contractual Obligations in Europe' (Munich: Sellier 2009) 171-216; R. Plender and M. Wilderspin, 'The European Private International Law of Obligations Third Edition' (London: Sweet & Maxwell 2009), 301-332.

²³ According to the Statistical Office of Estonia 4.4% of the total work force works abroad of which 60% works in Finland. See: Statistical Office of Estonia Press Release 19 December 2012. Available: <http://www.stat.ee/67265?highlight=soome>.

of party autonomy, which is recognized in Estonian private international law, in order to better respond to the social problem, which the loss of work-force and high level of emigration presents for the Republic of Estonia.

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CONVERGENCE OF NATIONAL LEGAL SYSTEMS AT THE EXAMPLE OF THE PRINCIPLE OF PROPORTIONALITY USAGE

Bronislav Tottskyi*

National Academy of Sciences, Ukraine

Abstract. This article pays attention to the principle of proportionality and its implication in legal systems. Author does argue about the importance of the legal principles at the example of the principle of proportionality usage in national and international legal systems. Principle of proportionality is a basic principle which aim is to find “fair balance” between private and public interests, mechanism of keeping “just war”, principle of EU law. Major features of the principle of proportionality in all its implications are described in the article.

Keywords. Principle of proportionality, ECtHR, fair balance, human rights.

The European Court of Human Rights (hereinafter – ECtHR) is one of those bodies that can create rules for many states. Thus, the ECHR decision is not only well-grounded judgment but also the theoretical basis for the development of different legal systems.

ECtHR decisions are very practical, theorised and good motivated in such level that only U.S. Supreme Court decisions can compete in these aspects with ECtHR decisions. A characteristic feature of these courts is that they perceive the basic documents (for ECtHR - Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - ECHR) for the U.S. Supreme Court - the U.S. Constitution) as «living instruments that must be interpreted in light of modern conditions»¹. Factually, interpretation of the basic international documents does create a real converge of national legal systems.

One of the methods of interpretation of the ECHR is an interpretation using the generally accepted principles of law, such as the rule of law, the principles of equality, justice, fairness, proportionality, legal certainty and others.

However, these principles have not been withdrawn in ECHR but have become an effective mechanism of convergence of different legal systems especially in Europe. I would like to focus on the development history and theoretical aspects of one of the fundamental principle that do bring together human rights limitations standards – the principle of proportionality.

Principle of proportionality is the fundamental principle of law, aims to provide a legal regulation of the balance of interests². The principle of proportionality is part of the rule of law. It could be realised in International Public Law, EU Law and Human Rights Protection Law.

* PhD student, Koretsky Institute of state and law of National Academy of Sciences of Ukraine.

1 *Tyrer v. The United Kingdom* (Series A No 026) European Court of Human Rights (197 7-78) 2 EHRR 245 , 25 APRIL 1978, para.30

2 С. Погребняк ‘Основоположні принципи права (змістовна характеристика)’ (Харків: Право 2008) 192, 204



The first area where principle of proportionality was used is an International Public Law. Principle of proportionality does unify standards of the just war for all countries. Right to war (*ius ad bellum*) in the doctrine of just war includes the requirement of *fair legitimate reasons* for initiating the use of force, *fair intentions* of the party who use such force due to the fact that the application force should be proportionate to the need for it (i.e. it should not cause more harm than benefit), it must be *the last argument*, and it can go, only aiming at peace and having real hope of success³. The principle of proportionality was first recorded in the Hague Convention 1907, which was later codified in Art. 49 of the draft Convention on the responsibilities of developed international law commission in 1980. Also this principle implicitly specified in the Additional Protocols to the Geneva Convention 1977. Factually principle of proportionality is the part of customary international law. According to this principle, the state has the right to defend itself unilaterally and/or carry out reprisals if they are proportionate to their losses and casualties. The answer must also be direct and necessary, not to be aimed at civilians, and aim to establish a *status quo ante*.

The principle of proportionality in international public law focused on the concept of just war. But this concept is changing permanently. The last conceptual change was made in the United States after the 2001 tragedy. The concept of “anticipatory action” began to develop. The U.S. president expressed an idea of U.S. military concept “identification and destruction of the threat before it reaches the border”⁴. However, it is unclear whether the creator of the theory of just war Hugo Grotius would have taken such a modern concept of the United States. Grotius position is that any decision to join the war has to be clearly necessary and proportionate to the possible threat. The use of force in the absence of clear reasons and threats does not correspond to the principle of proportionality⁵. If there is any doubt on the need to use force, this case should be resolved in favour of peace. Modern concept of war by the United States most clearly expressed in the so-called doctrine Powell (Powell Doctrine). According to this doctrine, before entering any war, the state must take decisions on a number of basic questions: “Is there an important policy objective, clearly defined and understood? Are all peaceful means have failed to solve the problem? Will the use of military force goal? In what cost? Was analysed all the benefits and risks and how the situation can be altered, modified by the use of force, developed further and that can be the results?”⁶. If the decision to go to war was made, the Powell doctrine involves massive use of force to reduce loss of life and achieve the fastest results. However, the fact that the mass use of force raises doubts about the proportionality of such actions in the context of the concept of just war in the modern public international law. However, Powell puts the highest goal of state action - the protection of national security.

The principle of proportionality has an important role in the international system of the law of war. The principle of proportionality is used to search the balance harm and benefits of using

3 Hugo Grotius ‘The Rights of War and Peace including the Law of Nature and of Nation’ (1625) (M. Walter Dunne 1901) 110

4 The National Security Strategy of the United States of America 6 (September 2002)

5 Th. Sullivan, R. Frase ‘Proportionality Principles in American Law . Controlling Excessive Government Actions’ (Oxford 2009) 24

6 R. Diprizio ‘Armed Humanitarians:US Interventions from Nothern Iraq to Kosovo’ (John Hopkins Univ. Press 2002) 3

military force in the context of the use of military force as a last way to resolve conflicts in international public law. The principle of proportionality not only limits the number of military conflicts but the number of casualties during the war.

Also, the principle of proportionality is the basic principle of *operation of the European Union* which has an important role in the stability and uniformity of the EU policy. Non-interference in the internal politics of member countries if there is no direct need for the purposes of the Treaty establishing the European Union is the main idea of principle of proportionality. Every action of the EU body should not exceed the limits of its real need in a particular situation. The principle of proportionality prevents excessive detail European legal norms also determine the most appropriate ways to implement the provisions of European law to national legal systems. The main components of this principle in the correlation of the EU are:

1. Case should not be the exclusive jurisdiction of the Member States;
2. Significant impact on communitarian interests must be important for EU;
3. Communitarian authority powers usage will lead to more positive results than the use of domestic jurisdiction.

Especially important is the principle at activities of the European Commission. It tries to harmonize the economic life of the EU and even the countries covered by the ENP⁷.

“Landmark judgment” doctrine also plays great role in principle of proportionality usage in EU. This doctrine is considered from two perspectives. The first one is that states that limit the discretion is “the other side of the principle of proportionality”⁸, the second is that it provides the possibility of supranational structures “balance between the independence of the participating countries and their obligations” to the supranational structure, including the EU⁹.

The first one called substantive concept of limits assessment closest related to the restriction of human rights. “Limit assessment is only the final stage which only serves to hide the real judgment reason in the case when restrictions are justified or not ...”¹⁰.

The second one the structural limits of the concept of appreciation is that a supranational structure such as EU can intervene only in those cases in which the possible human rights violations.

Most often this principle is used to determine the proportionality in *limitation of human rights*. The essence of this principle in reasonable relations between purpose of state influence of their achievement in limiting rights¹¹. Some researchers believe that the principle originated in antiquity and the middle Ages¹². Modern form principle of proportionality was made in Germany

7 О.Андрійчук ‘Кореляція стосунків між державами-членами єу та комунітарними органами> [2007] 7 Юридичний журнал

8 Y. Arai-Takahashi ‘The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR; (London 2002) 14

9 R. Macdonald ‘The margin of appreciation’ [1993] The European system for the protection of human rights 85

10 R. Singh ‘Is there a role for the “Margin of Appreciation” in national law after the Human Rights Act?’ [1999] 1 European Human Rights Law Review 4

11 С. Погребняк ‘Основоположні принципи права (змістовна характеристика)’ (Харків: Право 2008) 193

12 Б.Шлоер ‘Принцип адекватності в європейському та українському публічному праві> [2003] 3 Укр. прав. часопис 3



in XIX-XX centuries by High (later Constitutional) Court of Germany that “brought” the principle of proportionality (*Verhaeltnismaessigkeit*) from the codification of Prussian law XVIII. The Code of public law authorized the police to use only the necessary means to ensure public order, peace and security. And for the first time this principle in the field of police law was developed in the Supreme Court of Prussia in the Decision № 9 dated 14 June 1882¹³. Supreme Court of Prussia described the restriction of possible police action only by the required means that “*the police cannot kill gluttony with guns*”¹⁴. The Constitutional Court of Germany in 1965 noted that “*the principle of proportionality is an unwritten constitutional principle in the Federal Republic of Germany. It is derived from the concept of the rule of law, and, in fact, the nature of fundamental rights because they reflect a general right to freedom of the citizen from the state which may be limited by the state only if absolutely necessary pursuit of public interest*”¹⁵. The Court stated that the principle of proportionality can be expressed as: individual burden may be imposed on a person by the state only to the extent necessary to achieve a legitimate and necessary public purpose¹⁶.

Also principle of proportionality exists in the French legal system, but it is not known in the English legal system. Lord Steyn points out, when the principle of proportionality is actively used by domestic and international courts, that “*outlines the principle of proportionality similar to English law*”¹⁷, referring to the English concept of *validity (reasonableness)*¹⁸.

Compliance with the principle of proportionality is required in determining the content restrictions set out in Articles 29, 30, 31, 32, 33, 34, 35, 36, 39, 41, 42, 43, 44, 47, 54 of the Constitution of Ukraine, in accordance with the interests of national security and public order, health and morals, etc. Also, the principle of proportionality uses the Constitutional Court of Ukraine in a number of links to this general legal principle¹⁹.

The principle of proportionality is a component of the rule of law. The very same principle of proportionality has also three sub-principles: *adequacy* (a measure must be adequate to achieve the objectives set in advance if the desired result can be achieved only with reference to this extent) *need* (a legitimate measure of the least possible limitations must be provided to achieve legitimate objectives) and *proportionality stricto sensu* (seriousness and gravity of the interference of reasons justifying the interference must be proportionate to each other)²⁰. The same sub-principle sets the “father” of the principle of proportionality the Constitutional Court of Germany:

13 PROVG 353

14 PROVG 353

15 BverfGE 19, 342, 348

16 С. Шевчук ‘Судова правотворчість: світовий досвід і перспективи в Україні> (Київ:Реферат 2007) 319

17 Regina v. Secretary of State for the Home Department, 23.5.2001(2001) UKHL 26

18 Т. Хартли ‘Основы права Европейского сообщества> (Москва: Закон и право: Юнити, 1998) 161-162

19 Рішення Конституційного Суду України у справі про призначення судом більш м’якого покарання від 2 листопада 2004 р. № 15- рп/ 2004; Рішення Конституційного Суду України у справі про податкову заставу від 24 березня 2005 р. № 2- рп /2005; Рішення Конституційного Суду України у справі про утворення політичних партій в Україні від 12 червня 2007 р. № 2- рп/ 2007.

20 N.Emiliou ‘The principle of proportionality in European Law . A comparative study’ (London : Kluwer Law International 1996)

1. Means that are selected by legislator in regulation must be the best for achieving a legitimate objective;
2. Means must limit *de minimum* constitutional rights and values;
3. Means must be adequate to the goals²¹.

The Constitutional Court of the Russian Federation determines three components of the principle of proportionality:

1. Any restrictions are possible only on the basis of the law and to the extent that is necessary for the normal functioning of a democratic society;
2. Legislator must use only those means that prevent unreasonable restrictions on rights and freedoms;
3. Means must be used only by the necessary and strictly conditioned goals²².

The Constitutional Court of Germany focuses on regulations. The Constitutional Court of the Russian Federation weighs key position to the legislator. The court may determine the proportionality of certain specific restrictions. In our opinion, the requirements of the principle of proportionality should be applied to any of the state and local governments and be abstract for their possible use in any given situation first.

ECtHR developed the principle of proportionality the best. It noted that «... each «special procedure», «condition», «restriction» or «penalty» that imposed must be proportionate to the legitimate aim pursued»²³.

The main criteria of proportionality can be determined as follows:

1. Restrictions must be provided by certain legal act (including an individual);
2. Restriction must pursue a legitimate aim;
3. Proportionality *stricto sensu* (restrictions should be dimension to the legitimate purpose that achieved)²⁴.

The principle of proportionality is a fundamental principle of law which aims to ensure a balance of interests. The concept of the principle of proportionality developed in many areas. The principle of proportionality has its manifestations in international public law, EU law and so on. Most of it appears in the context of the limitations of human rights authorities and could be a converge effect. Principle of proportionality is a manifestation of the European tradition of law but the main application must be used as a mechanism to unify European legal systems.

Principle of proportionality should apply in all cases where the possible restriction of human rights by state authorities and the conflict of interest of public and private may occur. The main

21 48 BVerfGE 127, 160 (1978); 4 BVerfGE 157, 168 (1955); 2 BVerfGE 266, 280-81 (1953)

22 Постановление Конституционного Суда от 17 сентября 1993 года по делу о проверке конституционности постановлений Верховного Совета Северо-Осетинской ССР, касающихся проблем беженцев; Постановление Конституционного Суда от 27 марта 1996 года по делу о проверке конституционности статей 1 и 21 Закона Российской Федерации „О государственной тайне“; Постановление Конституционного Суда от 13 июня 1996 года по делу о проверке конституционности части пятой статьи 97 Уголовно-процессуального кодекса РСФСР.

23 Handyside v. the United Kingdom, 5493/72, (1976) 1 EHRR 737 para. 49

24 Н. Варламова «Верховенство права – базовый принцип европейской системы защиты прав человека» [2002] 3 Конституц. право: Восточноевроп. Обозрение 161



requirement of the principle of proportionality is: restrictions must be provided certain legal act; restriction must pursue a legitimate aim; restrictions should be dimension to the legitimate purpose, which was achieved. A characteristic feature of the principle of proportionality is that the analysis of certain restrictions on the above mentioned criteria should be carried out in each case and all the important facts are fully examined since the principle of proportionality determines only the general rules and forms that are imposed on industry, institutional and other features specific legal.

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SOME ASPECTS OF ENVIRONMENTAL REGULATION OF SHALE GAS ACTIVITIES

Jonas Urbanavičius*
Vilnius University, Lithuania

Abstract. Two aspects of the environmental regulation of the shale gas activities are analysed in the research: does the current EU legislation on the environmental impact assessment require obligatory EIA for shale gas activities? Are exploration activities regulated in a similar way?

Legislation of Lithuania, Latvia, France, Germany, Sweden and the Netherlands is analysed with respect to transposition of the EIA Directive. Author makes a conclusion that none of the analysed Member States currently provides for obligatory EIA neither for shale gas activities nor for exploration activities. However, various Member States have taken individual steps towards amending national legislation. Such changes at the national level might result in the amendments of the respective EU legislation, and through it – in subsequent changes of the national legislation.

Keywords: environmental law, energy law, shale gas, environmental impact assessment

INTRODUCTION

The issue of the convergence or divergence of national legal systems is not easy to analyse having in mind the fact that national legal systems interact with each other in many different (and sometimes opposite) ways. In Lithuania, this interaction became more inclusive after the country in 2004 became the Member State of the European Union (EU). New pieces of legislation that are implementing EU directives were being adopted in all the countries acceding the EU legal system, therefore the national legislation in the areas falling under the Article 4 of the Treaty on Functioning of the European Union¹ (on the shared competence between the EU and its Member States) is more or less similar in the most of Member States. Therefore it is not always easy to analyse such legislation in the search of the convergence or divergence.

In science, best research results are achieved in the isolated environment, where the impact of external factors is minimized. Contemporary legal science has rarely such a privilege – to analyse regulation of isolated social relations. However, from time to time the need to regulate suddenly and unpredictably arising situations emerges (as opposed to the usual and often predictable evolution of social and legal relations). Environmental law is among areas of law where the number of such situations is the biggest. Deteriorating environmental situation, new scientific data on the environmental impact of the existing activities or newly emerging technologies are among triggers for changes in the legal environment.

* Jonas Urbanavičius is a doctoral student candidate in the Faculty of Law of Vilnius University. Main area of his scientific research is the environmental legislation applicable for the shale gas activities in Europe. E-mail: Jonas@Urbanavicius.eu

¹ Treaty on the Functioning of the European Union (Consolidated version), OJ C 326, 26.10.2012

When one of such events occurs, it might be not covered by the EU legislation because of its particularities and novelties. Before the action is taken at the EU level (it might take several years until the new legislation comes into force), Member States might face the need to take appropriate measures at the national level. This is the moment where different practices that illustrate instances of divergence or convergence usually occur.

One of the situations that triggered the discussion on the changes in environmental legislation is the turn of the EU energy policy towards the exploitation of shale gas. Shale gas is a kind of unconventional hydrocarbons (together with coal-bed methane, shale oil, tight sands, gas hydrates)². From the chemical point of view, these hydrocarbons do not differ from 'conventional' oil and gas. Difference lies only in the way they are extracted. Two technologies are used together: horizontal drilling and hydraulic fracking. Taken separately, these technologies are used more than 50 years, however, taken together – only for the last decade. This type of energy sources is widely used in the United States of America and forced prices of natural gas to fall down. The estimations of shale gas deposits in some of the Member States raised debates not only on lower prices of hydrocarbons but also on the environmental aspects of the shale gas exploitation.

Shale gas activities are related to various kinds of (possible) environmental impact – excessive water consumption and contamination; air, noise and soil pollution; excessive land use; unusual seismic activities. Environmental impact assessment (EIA) is the evaluation process during which all of these aspects should be taken into account before taking the decision on the permissibility of certain activity.

In this paper, the application of the EIA in various EU Member States for shale gas activities is analysed. Two main issues are under consideration: firstly, is the EIA mandatory for shale gas activities? Secondly, do rules differ for research/exploration and exploitation activities? More specifically, the answers to the following questions on the relationship between the EU and national legislation are sought: how does EU legislation on EIA influence national laws? Is the transposition different across the EU? On what do these national particularities depend?

According to the U.S. Energy Information Administration³, shale gas deposits may be found in many of the EU Member States. Out of the countries where shale gas theoretically may be found, several were chosen for the analysis: Lithuania – because it is the country with the legal system of which author is most familiar; Latvia because of the same shale gas basin as in Lithuania, in addition, the practice of the neighbouring countries might be useful for a comparative analysis; Germany, France, and the Netherlands – because of their old and rich legislative traditions, especially in the mining and gas sectors; Sweden – because of its rather unique legal system.

² European Parliament, *Impacts of Shale Gas and Shale Oil Extraction on the Environment and on Human Health*, IP/A/ENVI/ST/2011-07, PE 464.425, <http://www.europarl.europa.eu/committees/en/envi/studiesdownload.html?languageDocument=EN&file=44388> (retrieved 30.03.2013), p.12-13

³ U.S. Energy Information Administration, 'World Shale Gas Resources: An Initial Assessment of 14 Regions Outside the United States', (<http://www.eia.gov/analysis/studies/worldshalegas/> retrieved 30.03.2013), 05.04.2011.



EU LEGISLATION

Legislation on the Environmental impact assessment

Main piece of the EU legislation governing the environmental impact assessment is the Directive on the assessment of the effects of certain public and private projects on the environment⁴.

According to this directive, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects (Article 2(1)).

Under the directive, definition of the term „project’ includes, among other, interventions in the natural surroundings and landscape during the course of extraction of mineral resources (Article 1(2)(a)).

As regards activities related to the production of the shale gas (prospection, exploration, exploitation), they are not directly listed in the EIA Directive neither as ‘Annex I projects’ (projects, for which environmental impact assessment is obligatory under the Article 4(1) of the Directive), nor as ‘Annex II projects’ (projects, for which, under Article 4(2) of the Directive, the screening procedure must be implemented in order to judge whether environmental impact assessment is necessary). Shale gas activities would fall under the ‘Annex I’, in case the daily production of gas constitute 500000m³ per day (this threshold is practically never reached in shale gas activities). According to the EIA Directive, such activities would still need EIA if the national authorities after the examination make such a decision. European Commission in its guidance note on the application of the EIA Directive⁵ states that its services are of the opinion that both the exploration and exploitation of unconventional hydrocarbons fall within the scope of the EIA Directive – mainly as an ‘Annex II’ activities. According to the Commission, the screening is necessary for projects that do not reach the thresholds, set in Annex I and involve deep drilling. Part 2 (of the Annex II), referring to ‘deep drilling’, includes some indicative examples of deep drilling (i.e. geothermal drilling, drilling for the storage of nuclear waste material, drilling for water supplies). The text of the EIA Directive uses the term ‘in particular’, which implies that the enumeration of examples is indicative. Hence, concludes the Commission, unconventional hydrocarbon projects, even exploratory ones, which use deep drillings, are covered by Part 2.d (of the Annex), and thus, should be screened for the necessity of the EIA. Moreover, the screening process should not only be based on the size of projects (e.g. the depth of drillings and/or the size of the surface installations), but it should take into consideration all the criteria listed in Annex III because even a small-scale project (e.g. exploration one) can have significant effects on the environment.

Thus, it is for Member States to make detail arrangements in their national legislation on the application of the EIA legislation for various stages of the shale gas activities.

4 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1 (EIA Directive).

5 European Commission, Guidance note on the application of Directive 85/337/EEC to projects related to the exploration and exploitation of unconventional hydrocarbon, *Ares* (2011)1339393, 12.12.2011, <http://ec.europa.eu/environment/eia/pdf/Annexe%202.pdf> (Retrieved 30.03.2013)

EIA for prospection and exploration activities

Prospection and exploration (together with production) are stages of the production of hydrocarbons. Legal aspects of the authorizations for these activities are set down in the Directive on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons⁶. In the context of the current research, the importance of this directive may be described by several elements. Firstly, it emphasizes Member States' sovereign right over the natural hydrocarbons in their jurisdiction, thus entitling them to grant authorizations (particularly via exclusive rights) to prospect or explore for or produce hydrocarbons in a geographical area (Article 1(3)). Secondly, the directive distinguishes prospection, exploration and production of hydrocarbons as separate activities by setting the principle that authorization may be granted for each activity separately or for several activities at a time (Article 1(2)). Finally, the directive entitles Member States to impose conditions and requirements on the exercise of the activities of prospecting, exploring for and producing hydrocarbons (Article 6(2)).

One of such conditions and requirements might be the requirement to implement environmental impact assessment before granting the licences to begin activities or approving working plan.

National legislation

As stated above, national legislation on the EIA of the analysed member States transposes the EIA Directive. However, some Member States have adopted national laws on EIA before the EU legislation came into force, therefore, although uniform with regard to the result to be achieved, they differ in details.

Lithuania

Law of the Environmental Impact Assessment of the planned economic activity of the Republic of Lithuania was adopted in 1996⁷. At the time it did not correlate with the EIA Directive at all. It was only in 2000 when the law was adapted to the EIA Directive⁸. Since, it follows the structure and main provisions of the Directive. It is of no surprise that the law does not expressly list any activities related to the shale gas production (e.g., deep drilling, hydraulic fracking) as Annex I projects. Thus, as Annex II projects, they are left to the discretion of the competent national authorities. In addition, the Lithuanian legislation does not make any distinction between the research, exploration and exploitation activities in the context of the EIA.

6 Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, [1994] OJ L 164/3 (Hydrocarbons Directive).

7 Law of the Environmental Impact Assessment of the planned economic activity of the Republic of Lithuania (Lietuvos Respublikos planuojamos ūkinės veiklos poveikio aplinkai vertinimo įstatymas, Žin., 1996, Nr.82-1965).

8 Law of the Environmental Impact Assessment of the planned economic activity of the Republic of Lithuania (new edition Žin., 2000, Nr.39-1092).

Latvia

Historic circumstances that lead Latvia to the European Union in 2004 are quite similar to those in Lithuania. However, as regards the EIA legislation, it followed the EIA Directive since its adoption in 1998. Moreover, in certain aspects it sets even stricter rules than required by the EIA Directive. For example, in Latvia, the installation and utilisation of the deep drillings, inter alia, for the research and extraction of hydrocarbons are included to the Annex II of the Latvian Law On Environmental Impact Assessment⁹. This addition to the law was done long before the discussions on the shale gas began (through the amending law in 2003¹⁰). Unfortunately, it was not possible to find out the reasons for expressly including the research activities to the scope of the application of the Law.

Lithuania and Latvia are not countries with the long history of mining activities, thus it is worth examining the legislation of Member States with such a history. In those countries (e.g., France, Germany, the Netherlands), general rules for the environmental impact assessment are set in the general environmental legislation, while the mining legislation sets particular rules applicable for the exploitation of hydrocarbons.

The Netherlands

In the Netherlands, under the 2003 Mining Act¹¹ (which replaced the identical 1810 Act), exploration and exploitation (production) of hydrocarbons are regarded as different activities with different licencing procedures¹². As regards environmental impact assessment, most of the EIA of hydrocarbons-related activities are governed by the Environmental Management Act¹³. In this regard, the Netherlands are no different than most other EU Member States – thresholds set by the EIA Directive on the obligatory nature of the EIA exist in the law. Otherwise, projects are screened on a case-by-case basis. Research or exploration activities are not listed in any of the lists.

In the Netherlands, two exploration licences for shale gas were granted so far, however, one of them was successfully challenged in the court by the local community¹⁴. Following this Court decision, the Government decided to postpone all the shale gas related activities until the report on the environmental impact is released later in 2013¹⁵.

9 Latvian Law On Environmental Impact Assessment, with amendments (likums 'Par ietekmes uz vidi novērtējumu', 'LV', 322/325 (1383/1386), 30.10.1998.).

10 Amendment to Latvian Law On Environmental Impact Assessment (19.06.2003., 'LV', 103(2868), 10.07.2003.).

11 Mining Act of the Netherlands, with amendments (Mijnbouwet, 31.10.2002, Stb 542)

12 Martha M. Roggenkamp, Catherine Redgewell, et al (eds.), 'Energy Law in Europe. National, EU and International Legislation', 2nd edition (Oxford University Press, 2007), 793, 796-7.

13 Environmental Management Act of the Netherlands, with amendments (Besluit m.e.r., 01.04.2011., Stb 102).

14 Natural Gas Europe, 'Dutch Court Hands Cuadrilla a Setback' [2011], (<http://www.naturalgaseurope.com/dutch-court-hands-cuadrilla-a-setback-3191> retrieved 30.03.2013).

15 Information from Dutch Ministry of Environment, 'Schaliegas' [2013], (<http://www.rijksoverheid.nl/onderwerpen/gas/gasexploratie-en-productie/onconventioneel-gas> retrieved 30.03.2013).

France

According to the annex of the Article R122-2 of the French Mining Code¹⁶, drilling for exploration is among activities for which a screening on a case-by-case basis is necessary depending on certain criteria. As regards environmental aspects of the public consultations, the regime of notification is applicable for exploration activities while the regime of permission is applied for exploitation activities¹⁷. However, prior to 1984, the Mining Code did foresee a public consultation requirement at the exploration authorisation phase. This requirement was removed from the law due to the fact that most exploration authorisations in France did not lead to positive results so, back then, it was felt as unnecessary to consult the public¹⁸. Despite this, just recently France made a 'U-turn'. In this country, the debate on the shale gas activities ended with the adoption of the Act on the prohibition of exploration and exploitation of liquid hydrocarbons mines by means of hydraulic fracturing and on the cancellation of exploration permits granted for projects using this technique¹⁹ was adopted. According to this act, all exploration and exploitation of hydrocarbons for which hydraulic fracturing of rocks is required is forbidden.

Germany

German mining law dates back to the 12th century or even earlier²⁰. Although not related to the extraction of hydrocarbons in the beginning, the mining legislation evolved and crystalized through time so as to be able to cope with the newly emerging needs. EIA for mining activities in Germany is governed by the Act of Environmental Impact Assessment of Mining projects²¹. As it stands now, the law requires EIA only for gas exploitation activities with output for more than 500000m³/day. All the elements that have to be addressed in the usual procedure of the environmental impact assessment are the obligatory part of the general planning approval procedure by the competent authorities before issuing the licence (German Federal Mining Act²², Articles 52-57c). As regards exploration (in particular – of the shale gas), as the law currently stands, there is no specific EIA requirement during the exploration authorisation procedure. Recently the amendment to the Act on EIA of Mining was proposed stating that for any activities involving hydraulic fracking, the EIA is obligatory²³.

16 French Mining Code (Code Minier, LOI n°0020, 25.01.2011, consolidated version of 01.01.2013., JORF p. 1467).

17 European Commission, 'Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe', 10.08.2010, <http://ec.europa.eu/environment/integration/energy/pdf/fracking%20study.pdf> (retrieved 30.03.2013), 13.

18 Ibid, 49.

19 Act on the prohibition of exploration and exploitation of liquid hydrocarbons mines by means of hydraulic fracturing and on the cancellation of exploration permits granted for projects using this technique (LOI n° 2011-0162 du 14 juillet, 2011, JOFR, p. 12217)

20 Gerd Weisgerber, 'The First German Mining Laws and the Archaeological Evidence' [1988] Bulletin of the Peak District Mines Historical Society. Vol 10, No 4., 224-230.

21 Act of Environmental Impact Assessment of Mining projects (Verordnung über die Umweltverträglichkeitsprüfung bergbaulicher Vorhaben) [1990] BGBl. I S. 1420

22 German Federal Mining Act (Bundesberggesetz), with amendments [1980] BGBl. I S. 1310

23 Proposal to amend the Act of Environmental Impact Assessment of Mining projects (in German) [2013], http://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Wasser_Abfall_Boden/vorschlag_bmu_bmwi_fracking_bf.pdf (retrieved 30.03.2013).

Sweden

From the Member States analysed, legal tradition of Sweden is somewhat distant from the rest, Swedish Environmental code²⁴ being the most liberal of the analysed legislation. The activities for which environmental impact assessment is necessary are decided not based on express lists, but rather on the possible/prospective impact on the environment. Thus, environmental impact assessment for unconventional hydrocarbons activities is necessary not because of the technologies used (e.g., deep drilling, horizontal drilling, hydraulic fracking), but rather because they might be regarded as ‘Environmentally hazardous activities’ due to their possible environmental impacts (for example, wastewater discharge, other detriment to the surroundings due to noise, vibration or similar impact, Chapter 9, section 1). As regards distinction between exploration and exploitation activities, the situation is similar to that in France with notification applicable for exploration, and permission – for exploitation activities²⁵.

CONCLUSIONS

As regards obligatory application of the EIA for shale gas activities, none of the analysed Member States currently expressly require it, leaving for the competent authorities to take the final decision. For exploration activities, EIA is also not necessary. Exploration is either mentioned among activities that have to be examined on a case by case basis or not mentioned in the legislation at all.

Several groups of criteria may have influenced national legislation of the analysed countries. First of all, these countries follow their legal traditions: Germany’s legislation is rather detailed, France and the Netherlands follow the path of codification codification, while legislation of Sweden is oriented towards principles rather than detailed provisions. Secondly, some of those countries have long history of mining and hydrocarbons exploitation activities. This might have influenced detailed provisions in national legislation in some cases allowing filling in legal gaps without amending legislation. Finally, the last group of countries have their environmental legislation formed in the light of the EU accession, thus merely copying it. Nevertheless, even in those countries various political ramifications lead to stricter provisions on some aspects.

It is not possible to unambiguously conclude what are exact reasons for the countries to formulate their legislation in the way they have done (maybe with the exception of the regulation of exploration activities – they tend to be regulated more precisely in countries with long history of mining activities).

On the other hand, it seems that countries that have taken decisions to freeze shale gas activities have done so purely because of political (and not environmental) concerns, because their legislation is not anyhow different from those allowing such activities.

Finally, the analysis of the EIA legislation applicable for the shale gas activities shows the life cycle of the general EU legislation: after adoption, it is rather uniformly transposed to national

²⁴ The Swedish Environmental Code, DS 2000:61.

²⁵ Supra fn 17, 48.

legal systems. However, when the trigger influencing emergence of new legislation appears, Member States diverge from each other and react individually, depending both on the legal and other traditions. Finally, the critical mass of diverging reactions might result in changes in the EU legislation. This, in turn, becomes a new instance in convergence during implementation of the new piece of EU legislation.

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THE INTERACTION OF NATIONAL LEGAL SYSTEMS IN THE STATE OF EXCEPTION

Aušra Vainorienė*

Vilnius University, Lithuania

Abstract. The conversion of national legal systems in the state of exception has taken place. However, the migration of legal ideas as in security law after 9/11 does not always result in improvement of national law. The resemblance between legal systems does not necessarily appear because ideas have migrated directly from one national legal system to other. International rules affect national legal systems by forcing national regulation and by restraining national exceptionalism. International law forces national legal systems to converge as it determines certain counter terrorism measures. The contribution of so-called anti-exceptional forms of international law is also significant. International and domestic law cannot easily derogate from or suspend universal human rights. This strong influence from international law in some sense is a response to the so-called international emergencies, but still it does not seem entirely desirable. Having in mind all the effort to restrain extensive state power in national legal systems, now we face this powerful international phenomenon. Through universal exceptionalism sovereign states aim at regulating emergencies inside. Nonetheless, the framework, which supposed that certain questions were handled only by sovereign states within mutually exclusive territories, populations, and governing arrangements, is not dominant anymore. National legal systems are losing their autonomy because of the insufficiency of a national state's authority and that only complicates state's ability to shape its own national legal system or to interact directly with other national legal systems.

Keywords: Emergency, legislation, exceptionalism, conversion

INTRODUCTION

Globalisation emerged a while ago and it brought some disorder in law as well as in many other areas. National legal systems do not operate in an empty void, they influence each other as well as they are influenced by a great number of other legal systems. Such patterns as a migration of constitutional ideas and others indicate that conversion between legal systems eventuates.

Since September 11th, 2001 attacks legal scholars have identified new trends in public law theory, namely the second wave of public law globalisation and copied emergency legislation. Legal and political developments of the state of exception in domestic public law were widely analysed and criticised. This question contains a myriad of complex issues, but the aim of this paper is to analyse the interaction of different legal systems in the regulation of the state of exception.

The emergency legislation particularly illustrates that national legal systems are losing their exceptional role and autonomy in the world of legal systems. International law makes a great impact

* LL. M. (Edinburgh). PhD student and lecturer in Constitutional Law at Vilnius University Faculty of Law, Department of Public Law



to the conversion of legal systems since it initiates new binding legal rules in such areas that are immanent parts of domestic legal systems. Though, international law is not the only factor that shapes the regulation of domestic emergency powers.

Traditional national state is losing its role as a holistic central figure as the decline of the state's authority emerges. Thus not only international but also global implications have a great impact on the interaction of legal systems in context of the state of exception. Many quasi-legal systems enter into the global legal world. Therefore in many ways it would be unsound to confine the paper solely to the analysis of the interaction between national legal systems without giving any credit to a number of international and transnational implications. The main question is how these national, international and transnational legal systems work together in the state of exception? Do they frame or force national exceptionalism?

1. MIGRATION OF EMERGENCY LEGISLATION

The term of "legal borrowing" was dominant in legal theory in the context of the interaction of national legal systems. However, in the theory of public law this concept was recently retired and replaced by an advanced notion of the "migration" of legal ideas.¹ Legal scholars claim that the concept of "borrowing" is misleading as *inter alia* it implies that something positive is moving without modification and it is voluntarily borrowed from owner by a non-owner. However, legal ideas usually do not belong to a certain country and they are not voluntarily given away. In addition, "borrowing" does not consider instances when a country deduces negative implications from another country's experience or cases where ideas are irredeemably modified as they shift. Therefore in this paper the concept of "migration" will be used further.

Certain kind of legislation migration can be observed in many countries after the September 11th. Legal scholars have identified this trend, which was called the second wave of public law globalisation that began in the end of 2001.² It also applies to the national regulations of emergency powers. A universal move might be observed from direct executive powers to the use of statutes in crisis law making. Many states have adopted this approach of instituting emergencies under the constraint of law by defining limits of acceptable emergency powers within their constitutions (e.g. South Africa, Germany), whereas other states have opt for special statutes to manage emergencies within the framework of law (e.g. Canada, Spain).³ This widespread pattern of copied legislation emerged after 9/11. In this sense, the United States were first and demonstrated the example with the PATRIOT Act⁴ and other laws, the United Kingdom followed with the Anti-Terrorism, Crime and Security Act (ATCSA).⁵

1 Choudhry S. (ed) 'The Migration of Constitutional Ideas' (New York: Cambridge University Press 2006) 6-9

2 *Ibid.*

3 Scheppele K. L. 'International State of Emergency: Challenges to Constitutionalism after September 11' (Version prepared for the Yale Legal Theory Workshop, 2006) 49

4 The official title of the USA PATRIOT Act is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001."

5 UK Anti-Terrorism, Crime and Security Act (ATCSA) [2001]

The conversion between national legal systems in the regulation of state of exception has taken place. However, the migration of legal ideas as in security law after 9/11 does not always result in improvement of national law. The main concern is that this kind of legislation is passed in urgent, censored procedures of emergency. This was the case with ATCSA in UK and PATRIOT Act in US, which were passed soon after the attacks. The US government was harshly criticised for their chosen methods of handling the state of exception. In the UK, the House of Lords decided the case of *A and others v. Secretary of State for the Home Department*⁶ where it was declared that the 23rd section of the ATCSA that authorised the Home Secretary to detain suspected international terrorists who (for legal or practical reasons) could not be deported from the UK was incompatible with the 5th article of the European Convention on Human Rights (ECHR)⁷.

But the question here is why this particular migration of legal ideas occurred? It seems that exceptional laws come from exceptional situations – exception initiates the convergence of national legal systems through the migration of constitutional ideas. The first impression is that this process is quite organic. In fact, this complex transformation is often associated with globalisation. However, globalisation in law is not new and it does not answer the question why this significant shift has taken place.

Clearly, a large number of national legal systems proceeded to the same direction, but it does not necessitate that they have reached that same result. As mentioned above many countries have passed similar anti-terrorist laws and these laws mainly have constitutional dimensions. However, the resemblance does not necessarily appear owing to the fact that ideas have migrated directly from one national legal system to other. Here we can refer to the theory of legal scholar K. L. Scheppele that countries may have constitutional or anti-constitutional ideas in common not because they are learning directly from each other but instead because they are independently influenced by legal principles coming from above and beyond of them as legal globalisation increases.⁸ Thus the international law adjusts the interaction of national legal systems and this process is subjected to the hierarchy between international and national law.

2. INTERNATIONAL IMPLICATIONS

The influence of international rules to exceptional regulations in national law is undeniable. But the question is to what extent has the move towards a more nuanced law-centred approach to the state of exception been encouraged, framed or frustrated by international instruments? International rules affect national legal systems in two ways. Firstly, by forcing national regulations, for example Security Council prescriptively rules against terrorist finance. Secondly, by restraining national exceptionalism, for instance ECHR limitations on the suspension of human rights.

6 *A and others v. Secretary of State for the Home Department* [2004] UKHL 56

7 The Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 213 UNTS 221

8 Scheppele K. L. 'International State of Emergency: Challenges to Constitutionalism after September 11' Version prepared for the Yale Legal Theory Workshop [2006] 36



Universal exceptionalism

The U.N. has developed to a real and powerful actor from what had been thought to be merely symbolic institutions. Scheppele critically observes: “Out from under the constant threat of nuclear catastrophe and the sense that only sovereigns with ‘realist’ views could manage the bipolar world, the international institutions that had developed with the luxury of having the sources of real power ignore them suddenly became sources of real power themselves.”⁹ International law, underrated by realists has become more lawful since more countries willingly take its principles as binding on domestic decisions.

The Security Council departed from its previous limited and cautious practice by adopting Resolution 1373, whereby it decided “that all States shall” take certain actions against the financing of terrorist acts, also a number of other actions designed to prevent any support for terrorists.¹⁰ This resolution established the Counter-Terrorism Committee to monitor implementation of the resolution and asked for all states to report on their compliance with it. In the past, the Security Council has often required states to take certain actions, such as to implement sanctions against particular states or to cooperate with an *ad hoc* tribunal, but these requirements were always related to a particular situation and would naturally expire when the issue in question and all its consequences were resolved. By contrast, Resolution 1373, while inspired by the attacks of 9/11, is not specifically related to them and lacks any explicit or implicit time limitation. Significant part of the resolution can be said to establish new binding rules of international law rather than mere commands relating to a particular compliance with them.

By this example Security Council encourages anti-terrorist legislation in domestic countries. It demonstrates that certain type of emergency, namely, terrorism is subjected to international law and that responsible parties should be condemned. The ways in which international community fights terrorists are legal and it sets guidelines to every country. Accordingly, international law forces national legal systems to converge as it determines certain counter terrorism measures.

Furthermore, new national constitutions (written after Soviet Union and similar regimes collapsed) often include provisions of international principles.¹¹ International law is even more viewed as a kind of domestic law on account of binding legal rules that are inherent parts of national legal systems and that provide constitutive norms together with their meaning.

However, a number of countries reject such laws and try to avoid responsibility in front of the international community. For example, legal theory identifies so called “universal international exceptionalism”, which refers to cases when states sign international treaties with certain exceptional clauses that makes particular provisions not binding for them.¹² In fact, it is difficult to find

9 Scheppele K. L. ‘Law in a Time of Emergency: States of Exception and the Temptations of 9/11’ [2003-2004] 5-6 Journal of Constitutional Law 1076

10 UN SC Resolution 1373 [2001]

11 For example, the Constitution of the Republic of Lithuania [1992] is one of them.

12 Scheppele K. L. ‘Law in a Time of Emergency: States of Exception and the Temptations of 9/11’ [2003-2004] 5-6 Journal of Constitutional Law 1077

other country that, with the exception of truly brutal dictatorships, denies the binding applicability of international law in the way that the United States does.

Through this kind of exceptionalism states somehow aims at regulating emergencies within the sovereign states. Though, using reservations, derogation or just selective signing up, everyone to a greater or lesser extent displays a kind of false monism. This new type of false monism arguably follows from the post-war extended authority of (now potentially monistic) international law. Having in mind all the effort to restrain extensive state power in national legal systems, now we face this even stronger international phenomenon. In some sense it is a response to the so-called international emergencies, but still it does not seem entirely desirable. Some authors name this increasing power as the “hegemonic” international law.¹³ The direction of this pattern is unclear so far and probably it will be shaped by the future emergencies, which unfortunately are unpredictable.

Universal or relational human rights?

In the human rights theory on legitimate derogations international law is considered to be providing universal principles that operate like strong guidelines. The major human rights conventions work as international instruments and have a great importance. The case that was mentioned earlier *A. v. Secretary of State for the Home Department* illustrates the way in which British constitutional discourse has become more nuanced and more complicated following the enactment of the ECHR. This case has been widely regarded as being one of the most constitutionally significant cases ever decided by the House of Lords.

The ECHR not only embodies the spirit and substance of legal principles and values but also represents strong rules about legality, due process, etc. (articles 5-7). This is the contribution of so-called anti-exceptional forms of international law. International and domestic law cannot easily derogate from or suspend those rights. Of course, the system of protection and its abilities raise a number of questions but at this point it is important to acknowledge the general role of anti-exceptional instruments.

One of the puzzles of international and constitutional law is whether there are any rights, which are absolute and must never be interfered. Some of the candidates are the right to life and the protection from torture. Professor J. Waldron has considered the rule against torture as an archetype of the substantive law of human rights and also as an archetype of international law. To treat a person inhumanly is to treat him in the way that no human should ever be treated. Thus he argues that the prohibitions on inhuman treatment in the Universal Declaration of Human Rights, the Covenant, and the ECHR are “as much a paradigm of the international human rights movement as the absolute prohibition on torture.”¹⁴

In this sense international human rights documents frame national emergency legislation. As professor of law J. Raz notes, there are important pragmatic reasons for singling out universal

13 Vagts D. F. ‘Hegemonic International Law’ [2001] 95 American Journal of Int. Law 843

14 Waldron J. ‘Torture and Positive Law: Jurisprudence for the White House’ [2005] 105 Columbia Law Review 1746-47.



rights, and letting them inherit the title of human rights, derived from the traditional theory.¹⁵ Not only respect to human rights can be demanded by anyone, but also citizens of one country can address such demands to the governments of other countries. And those governments cannot ignore these demands. The ability of states to restrict interference in their internal affairs, to deny their responsibility to outside actors, is what traditionally considered the state's sovereignty. But human rights, set limits to sovereignty, and states have to account for their national legal systems' compliance with human rights to international tribunals (where the jurisdictional conditions are in place) and to responsibly acting people and organisations outside the state.

Nonetheless, many of the limitation clauses found in the documents that protect human rights include national security as a permissible ground for suspending certain rights and freedoms otherwise guaranteed under the relevant instruments.¹⁶ Cases coming before the European Court and European Commission of Human Rights have verified the wide discretion left to governments in determining the legitimacy and sufficiency of national security considerations as justification for restricting protected rights.¹⁷

There is a notion of so-called universal human rights regime, but actually there is no institutional framework of universal protection. Some regions, for example, the Europe with both the Council of Europe and the EU, have developed adequate institutions and procedures for the recognition and enforcement of human rights, whereas they are absent in other parts of the world. Thus international weight that was given to human rights does not always operate effectively.

3. DECLINE OF THE STATE'S AUTHORITY

The recent increasing number of different forms of legal regulation and its recognition has shifted the way of our understanding about the legal authority in general. The "order of orders" in Western world always was the international and constitutional law, but the positivist frame of the principle of authority, has been threatened in its predominant position and is no longer understood under previous terms.¹⁸

The framework, which supposed that questions of the just social order, matters of representation, fair distribution, recognition and treatment, were properly dealt with only by sovereign states within mutually exclusive territories, populations, and governing arrangements, is not dominant

15 Raz J. 'Human Rights in the Emerging World Order' [2010] 1 *Transnational Legal Theory* 42

16 Limitation clauses permit (even in ordinary times) a breach of an obligation, imposed upon a state with respect to human rights by an international human rights convention, for specified reasons such as public order, public safety, morals, or national security. Examples are Articles 6(1), 8(2), 9(2), 10(2), and 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 213 U.N.T.S. 221.

17 See, e.g., *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Common H.R. Dec. & Rep. 5 [1978] (restrictions on distribution of propaganda to soldiers); *Case of Klass and Others* [1978] Y.B. Eur. Conv. on H.R. 622 (Eur. Ct.) (legislation allowing secret surveillance of mail, post, and telecommunications); *X v. The Federal Republic of Germany* [1970] Y.B. Eur. Conv. on H.R. 888 (Eur. Common on H.R.) (disclosure of official secrets)

18 Walker N. 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' [2008] 6 *International Jnl. Of Constitutional Law* 373

anymore. The premise that the dominant Western tradition is under challenge from the current wave of globalisation shapes the way of approaching problems. Much of the new transnational developments, for instance, the hybrid structures as the EU or WTO, are in some level a response to “the growing inadequacy of the holistic state model” in the face of the emergence of collective action and coordination problems that just cannot coincide with the political boundaries of the state.¹⁹

In a state of exception, while a particular country struggles with a crisis, not only the international community is watching, but also many various institutions are trying to influence its methods. On that account, using every available legal channel a multitude of groups pursue their controversial agendas such as religions, racial or ethnic groups, environmental movements, trade associations, etc. Many of these groups are conflicting in various legal areas, such as legislative or administrative lobbying, but simultaneously they claim to be acting in the name of public welfare.

States are joined by a plethora of other institutions that are in some level autonomous and each of these institutions must negotiate their boundary relationships between themselves and within other states. Regarding the decrease in traditional authority of government and its political and economical capability that held the state-centred frame, these other institutions are likely to imitate or even to outstrip the state in terms of democratic representativeness, scope of jurisdiction, protection of human rights, or the ability to guarantee compliance of affected parties.²⁰

This binary change, moving away from the central role of the state in both legal and social directions, constructs a complex situation in boundary negotiations and relations within systems. Despite the outstripping and borderline correspondence of legal orders, there is no distinct principle of authority, such as sovereignty, with structured power relations, to produce a central grid for the control of these relations. In contrast, there are different contesting systems of legal authority. The convergence of these independent systems can lead to unprecedented conflicts, uncertainties, and complications. After all, the global legal configuration, differently from particular legal orders within that configuration, has no institutional hierarchy of a political, administrative, or even judicial form.

CONCLUSION

The interaction of national legal systems is a complicated process with a myriad of international and transnational implications. This global process cannot be easily controlled by national states within their legal systems. On the one hand, it is a natural state of affairs, national legal systems converge as a result of globalisation, growth of the global economy, social networks, etc. On the other hand, this approach seems artificial since national legal system should regulate as well as resemble those social and cultural relations that are present in a particular society.

The convergence of national legal systems, in the context of the emergency regulation, appears to be enforced without asking if it is really necessary or indeed if it is suited for that particular

¹⁹ Walker N. 'Beyond the Holistic Constitution?' in 'The Twilight of Constitutionalism?' ed. by Dobner P., Loughlin M. (Oxford: Oxford University Press 2010) 304

²⁰ *Ibid.*



country. Moreover, national legal systems are losing their autonomy because of the insufficiency of a national state's authority and that only complicates state's ability to shape its own national legal system or to interact directly with other national legal systems. States must face many transnational institutions and compromise not only between themselves. Implications of international and transnational legal systems indicate that sovereign states do not have that much power and space to seek their own intentions even within their own territory and that space may become surprisingly small in the future. It is an issue not only in theory but also in practice and the question remains how much room should be left solely to the state's discretion?

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THE PARADIGM OF NEW SCIENCE – COMPLEX DYNAMIC SYSTEMS – AND ITS IMPORTANCE FOR RESEARCH IN LEGAL SCIENCE

Dovilė Valančienė*

Vilnius University, Lithuania

Abstract. Currently, the global paradigm of science is undergoing changes: the old, deterministic and mechanistic thinking based on absolute clarity, certainty, and search for objectivity is “struggling” with new (postmodern) science which is understood as science of complex dynamic systems. We believe that the time is ripe for a change in the approach towards science, focus more attention to indeterminism, humanization of science, social context and spontaneous development of thought. It is of great importance to evaluate the potential of this new science for the science of law. Methods: scientific analytical, systemic, logical. The main finding. It is high time to change the approach to science itself. Contemporary (new, postmodern) science encourages us to combine science, common sense and social context in order to understand the reality more clearly, though not absolutely clearly. Scientists of law need to understand the importance of connecting science and life, and most importantly, to use not a single one, but a number of methodologies (and their integration) in science. Only by changing our approach to science in general we will be able to perceive law as a complex dynamic system. But we have to be critical. We should not stray into a state where “anything is allowed” or “nothing is clear”. It must be understood that postmodernism is not necessarily the best way, only time will tell which is better. The whole world faces that.

Keywords: science; postmodernism; law; complex dynamic systems.

1. INTRODUCTION

Today the world lives in a time of changes: values, attitudes, the thinking paradigm are changing, and postmodern ideas are becoming more popular. Inevitably, they influence the science of law as well (e.g., D. A. Patterson¹, D. A. Carson², G. T. Jones³). The old (classical), deterministic and mechanistic thinking based on absolute clarity, certainty, and search for objectivity is “struggling” with new (postmodern) science which is understood as science of complex dynamic

* Dovilė Valančienė is a PhD student at the Faculty of Law in Vilnius University. The main research area is legal science and the paradigm of complex dynamic systems.

1 D. A. Patterson, Postmodernism. In D. A. Patterson, ed. ‘Companion to Philosophy of Law and Legal Theory’ (Oxford: Blackwell Publishing 2008).

2 D. A. Carson, ‘The Dangers and Delights of Postmodernism’ [2003] 12(4) Reformation. Internet link: <http://www.modernreformation.org/default.php?page=articledisplay&var1=ArtRead&var2=281&var3=authorbio&var4=AutRes&var5=238>, [2010-11-19].

3 G. T. Jones, ‘Dynamical Jurisprudence: Law as a Complex System’ [2008] 24(4) Georgia State University Law Review.



systems by many researchers (e.g., I. Prigogine⁴, S. A. Kauffman⁵, S. Strogatz⁶, J. Gleick⁷, J. Elster⁸ and others). We believe that the time is ripe for a change in the approach towards science, focus more attention to indeterminism, humanization of science, social context and spontaneous development of thought.

The aim of this paper is: to evaluate the potential of this new (postmodern) science for the science of law. In the 20th century we were satisfied with the man-made and wholly-owned mechanism of law where every detail had a clear purpose and vision; however, at the beginning of the 21st century, we understand that law has never been and is not a system entirely managed by humans – it is governed by internal laws which cannot be changed by legislators or practitioners. How the new science paradigm can help the law? Which direction is law science developing? Will it be the best way or maybe the downfall?

Methods: scientific analytical, systemic, logical.

2. CHANGING ATTITUDE TO SCIENCE ITSELF

One of the greatest mistakes of the old (classical) science is that it distinguished strict limits between sciences and separated the object from its context, whereas the new science – postmodern, complex dynamic systems – do not absolutize the possibilities of cognition and endorse that every cognition depends not only on the limitation of the cognition of the subject, but also on the complexity, dynamics and the context of the object.

The old (classical) science influenced the conception and the development of the positive law, but it absolutized facts and logic application and alienated law from the social context and human culture, values and common sense. The new (postmodern, complex dynamic systems) science corrects the mistakes of the old (classical) science, i.e., it approaches science to common sense, the interpretation of social, historical and cultural context.

Although, law science has still much difficulty in “separating” from old (classical) science thinking, which conditions the deterministic, static and narrow attitude towards science, postmodern ideas and new (postmodern) science of complex dynamic systems more and more affect the science of law. In the opinion of I. Prigogine⁹, a Nobel Prize winner, science has now reached a stage at which uncertainty exceeds the obvious. The metaphors commonly used in the new science of complex dynamic systems are as follows: complexity, dynamics, uncertainty, indetermination, non-linearity, and modesty estimating one’s knowledge (e.g., J. Gleick¹⁰, M. Gell-Mann¹¹, I. Prigogine¹², M. J. Wheatley¹³, M. Alvesson¹⁴, E. Laszlo¹⁵).

4 I. Prigogine, ‘The End of Certainty. Time, Chaos and New Laws of Nature’ (Oxford: The Free Press 1997).

5 S. A. Kauffman, ‘Investigations’ (Oxford: Oxford University Press, 2000).

6 S. Strogatz, ‘Sync: The Emerging Science of Spontaneous Order’ (New York: Hyperion 2003).

7 J. Gleick, ‘Chaos: Making a New Science’ (New York: Viking 1987).

8 J. Elster, ‘Explaining Social Behavior: More Nuts and Bolts for the Social Sciences’ (Cambridge: Cambridge University Press 2007).

9 I. Prigogine, ‘The End of Certainty. Time, Chaos and New Laws of Nature’ (Oxford: The Free Press 1997).

10 J. Gleick, ‘Chaos: Making a New Science’ (New York: Viking 1987).

Science itself is no longer mechanical, valueless or non-humanistic. So, if we do not understand the general developments and trends of science, we may not be able to value properly the science of law. If the attitude to science changes in general, the science of law must also change. Law is increasingly understood as a complex system, which is neither automatic nor valueless. J. B. Ruhl¹⁶ is one of the first scholars of law who introduced complex dynamic systems in his works. He said that it is very interesting and important to apply complex dynamic system to understand, for example, judges decisions. It's very important to apply it to understand legal phenomena.

What is complex dynamic system? A complex dynamic system is: a) a system made up of more than two elements linked by dynamic ties; and b) a system that is difficult to comprehend, control, or predict. Among complex dynamic systems belong, for example, social systems (e.g., M. Hollis¹⁷, N. Luhman¹⁸, K. Popper¹⁹, J. Elster²⁰), biological systems (e.g., D. Noble²¹; B. Goodwin²²), and natural systems (e.g., J. Gleick²³, M. Gell-Mann²⁴), the law has also been attributed to complex dynamic systems (e.g., R. A. Posner²⁵, D. Patterson²⁶, G. T. Jones²⁷, J. B. Ruhl²⁸). Complexity is all around us. One of the most important complex dynamic systems features is that a slight error in the initial state of the system can result in great Changes in the final state of the system ("butterfly effect"); overspecialization of the system can be detrimental to changes; variability of system changes, if optimal, ensures system stability; if the environment is chaotic, then the system behavior must also

11 M. Gell-Mann, 'The Quark and the Jaguar: Adventures in the Simple and the Complex' (San Francisco: W. H. Freeman 1994).

12 *Cit. op.* 9.

13 M. J. Wheatley, 'Leadership and the New Science. Discovering Order in a Chaotic World' (San Francisco: Berrett-Koehler Publishers 1999).

14 M. Alvesson, Postmodernism. In M. S. Lewis-Beck, A. Brym, T. Futtin Liao (Eds.), 'The SAGE Encyclopedia of social science research methods' (London: SAGE Publications 2004).

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16 J. B. Ruhl, 'Complexity Theory as a Paradigm, for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State' [1996] 45 Duke. L. J. 849.

17 M. Hollis, 'The Philosophy of Social Science' (Cambridge: Cambridge University Press 1994).

18 N. Luhman, 'Social Systems' (Stanford: Stanford University Press 1995).

19 K. R. Popper, 'The Open Universe. An Argument for Indeterminism' (London, New York: Routledge 2000).

20 J. Elster, 'Explaining Social Behavior: More Nuts and Bolts for the Social Sciences' (Cambridge: Cambridge University Press 2007).

21 D. Noble, 'The Music of Life. Biology Beyond the Genome' (Oxford: Oxford University Press 2006).

22 B. Goodwin, 'How the Leopard Changed its Spots, The Evolution of Complexity' (Princeton: Princeton University Press 2001).

23 J. Gleick, 'Chaos: Making a New Science' (New York: Viking 1987).

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be chaotic, or the system will not survive; the “principle of positive feedback” is the mechanism that ensures the fast growth of the system; the variety in the properties of the whole is much greater than the variety in its parts taken together; the higher the level of the system, the more complex its properties; the system can evolve both to the depth and on the whole.²⁹

3. WHAT IS THE SPECIFIC INFLUENCE OF NEW (POSTMODERN, COMPLEX DYNAMIC SYSTEMS) SCIENCE TO LAW SCIENCE? WHICH DIRECTION IS LAW SCIENCE DEVELOPING?

The new paradigm of science encourages studying reality using not a single methodology, but many of them. In the context of the science of law it would mean the pluralism not only of legal doctrines and schools, but also the possibility to view legal phenomena using, for example, the achievements of natural sciences. At present, there is more discussion about experimentalism (and empirical research) in the science of law.³⁰ Research in legal theory (as all other research in the science of law) could be carried out referring to different methodologies of other sciences, but for this reason it is necessary to know them, as well as to overcome certain stereotypes of legal thinking, for example, to recognize that law is not a unanimous “body” and a closed system. The new science does not “fragment” sciences into parts; science becomes integral, and in this perspective the science of law should become integral internally and in its relations with other sciences.

One of the examples of scientific integrity, when different scientists try to communicate, is the dialogue between neuroscience and law science. This integration has various names - *neurolaw*, *neurojurisprudence*, sometimes it is simply called *law and neuroscience*. This is a great and very new result of integrating law and other sciences. S. K. Erickson³¹ said, that the impact of neuroscience on law will be inevitable and dramatic. More and more western scientists talk about the dialogue between neuroscience and law (e.g., J. D. Aronson³², J. D. Greene, J. D. Cohen³³, O.W. Jones, F. X. Shen³⁴). *Neurolaw* is gaining great momentum in the US, but the integrity of the law and neuroscience is increasingly grabbing attention of scientists in other countries, such as Australia, South America, Canada, Finland, Germany, Austria, Japan, Greece, Italy and others.³⁵ When did the dialogue between neuroscience and law start? The beginning of the dialogue between law and neuroscience can be considered the 1990s.³⁶ Since 2000 the number of law research papers on

29 A. Skurvydas, V. Kundrotas, I. Valantiniene, D. Valanciene, ‘Complex dynamic systems – new management paradigm: fashion or necessity?’ [2013] 8(1) *Baltic Journal of Management* 66 – 78.

30 M. C. Suchman, E. Mertz, ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ [2010] 6 *Annual Review of Law and Social Science* 555-579.

31 S. K. Erickson, ‘The limits of neurolaw’ [2011] 9 *Houston Journal of Health Law & Policy* 303-320.

32 J. D. Aronson, ‘The law’s use of brain evidence’ [2010] 6 *Annual Review of Law and Social Science* 93-108.

33 J. D. Greene, J. D. Cohen, ‘For the law, neuroscience changes nothing and everything’ [2004] 359 *Philosophical Transactions of the Royal Society B* 1775-1785.

34 O. W. Jones, F. X. Shen, *Law and Neuroscience in the United States*. In T. M. Spranger (Ed.), ‘*International Neurolaw*’ (Heidelberg: Springer 2012) 349-380.

35 T. M. Spranger (Ed.), ‘*International Neurolaw*’ (Heidelberg: Springer 2012).

36 O. R. Goodenough, M. Tucker, ‘Law and cognitive neuroscience’ [2010] 6 *Annual Review of Law and Social Science* 61-92.

the theme of “neuroscience” has increased four times, and in 2008 and 2009 more than 200 research papers published in US mentioned keywords “neuroscience”. So it is becoming increasingly interesting to law scientists. More and more neurolaw lectures appear at universities, for example in Vanderbilt University, the University of Colorado, Georgetown University, Mercer University, the University of San Diego, Temple University, Tulane University, Yale University.³⁷

Thus, only after changing the approach to science itself, we can differently view the law science and its relation to changes in science. The future will show whether different sciences will find common talk among themselves. The current situation shows that more and more persons are willing to start a conversation.

Here are some other possible examples of new science specific influence to law science (first of all for its branch forming its methodology – legal theory): law science is encouraged to uncloset; law scholars should seek common dialogue among themselves and with law practitioners; law is increasingly seen as a complex dynamic system (which is hard to manage and is an unpredictable system); law science today can no longer be perceived as a defined system, where you can always find a clear answer; freedom of creativity, bold ideas and criticism are greatly encouraged; law science cannot be separated from values, moral, social and cultural context, law science must be integral and cannot be separated from life. In other words, new science encourages reviewing the values of law science, it is the time of new values, the time of the revaluation, new methods of investigation, it is a time when it is necessary to combine sciences, common sense and social context so that we could understand reality more clearly, though not absolutely clearly. However, we should keep in mind that new science or the science of complex dynamic systems) has both advantages and disadvantages. Time will best tell whether this was a better way, or it was a complete downfall. This is the beginning of the road, or maybe just the very beginning. The future of law science will depend not only on the culture of research, but also on the open dialogue between researchers and practitioners for one common goal - that there would be more truth and justice in the highly complex and dynamic world.

4. CONCLUSION

It is high time to change the approach to science itself. Contemporary (new) science encourages us to combine science, common sense and social context in order to understand the reality more clearly, though not absolutely clearly. Scientists of law need to understand the importance of connecting science and life, and most importantly, to use not a single one, but a number of methodologies (and their integration) in science. Only by changing our approach to science in general we will be able to perceive law as a complex dynamic system. But we have to be critical. We should not stray into a state where “anything is allowed” or “nothing is clear”. It must be understood that postmodernism is not necessarily the best way, only time will tell which is better. The whole world faces that.

37 *Cit. op. 34.*



The importance of the new science for the science of law:

- we understand that law has never been and is not a system entirely managed by humans – it is governed by internal laws which cannot be changed by legislators or practitioners;
- the new paradigm of science encourages studying law using not a single methodology, but many of them. The science of law should become integral internally and in its relations with other sciences (a good example is neurolaw).
- it is very interesting and important to apply complex dynamic system to understand legal theory phenomena;
- only by changing our approach to science in general we will be able to perceive law in a different way – as a complex dynamic system where it is impossible to find common answers which are true to everybody, and most importantly – to predict behavior;
- the new paradigm of science should not only ensure precision and reliability to scientific cognition, but also approaches the science of law to the solution of realistic problems, i.e., provides the science of law not only with theoretical profoundness and pragmatics, but also with dynamic interpretation of human values.

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EU UNITARY PATENT AS AN EXAMPLE OF CONVERGENCE IN THE INTELLECTUAL PROPERTY LAW

Joanna Wiszniewska*

Jagiellonian University in Kraków, Poland

Abstract: The aim of that paper is to examine the methods of convergence at regional level based on the example of the European Union. The first two parts show the summary of the history of patent protection and some essential information about the EU law system. The next part of the paper concerns the European Patent which may be obtained on the basis of the Munich Convention signed in 1973. In the fourth part I will discuss the newly adopted EU unitary patent.

Keywords: convergence, unitary patent, patent protection, European patent

I. INTRODUCTION

Inventions have been made since the dawn of time and so did the concept of their protection. It was not until the 19th century when the need for the protection more extensive than ensured by the territorial exclusive right was noticed. The contemporary national patent systems provide protection that is limited to the jurisdiction of the country that conferred such rights. The increasing globalization of the economy and the internationalization of trade in the late 20th and 21st century required to seek for a new coherent solution.

The aim of that paper is to examine the methods of convergence at regional level based on the example of the European Union. The first two parts show the summary of the history of patent protection and some essential information about the EU law system. The next part of the paper concerns the European Patent which may be obtained on the basis of the Munich Convention signed in 1973. In the fourth part I will discuss the newly adopted EU unitary patent.

II. BRIEF SUMMARY OF THE HISTORY OF PATENT PROTECTION

Looking back on the history of the protection of the Intellectual Property one can recognise the first signs of the concept of exclusive rights in ancient Greece¹. Nevertheless, the origins of the concept of the protection can be with greater probability traced back to the system of royal privilege-giving which operated in most of medieval Europe². These patents were much simpler than today's complex regulations as they were merely recognizing the rights of the inventor. The

* Joanna Wiszniewska - PhD candidate in the Chair of the Intellectual Property Law, Jagiellonian University in Krakow; graduated from Faculty of Pharmacy, Jagiellonian University in Krakow (MPharm), 2011, and Faculty of Law and Administration, Jagiellonian University in Krakow (MA), 2012.

1 H. Bluhm, 'Die Entstehung des ersten gesamtdeutschen Patentgesetzes' [1952] 8-9 GRUR 341.

2 M. du Vall 'Prawo patentowe' (Warszawa: Oficyna a Wolters Kluwer business 2008) 48.

so-called privilege period was ruled by the principle of territoriality as the right did not extend beyond the territory of the sovereign who has granted the rights in the first place³.

As a consequence of international trade contacts such a right was insufficient. Hence, since the 19th century a great interest in the possibility of international co-operation on intellectual property and particularly in the copyright can be observed. It was the origin of the internationalization period when the protection of Intellectual Property for foreigners was based on the bilateral agreements. Until 1883 over 70 agreements were signed, but only two of them concerned patent protection⁴. The first comprehensive international regulation on the issues of intellectual property protection was the Paris Convention for the Protection of Industrial Property of March 20, 1883. The agreement, amended several times, is still in force. It is based on the assumption that the Convention shall not interfere with national patent systems, so there were different regimes of protection in every country signatory of the document⁵.

The increasing globalization and internalization of trade resulted in the need for harmonization and unification of the intellectual property law. The response to this need was a number of sources of international law concerning the issue at the regional and global level, i.a. The Convention on the Grant of European Patents of 5 October 1973 (so-called Munich Convention, EPC) or The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) that was negotiated in 1994.

For this reason, in the field of the patent law the three levels of regulations – national, regional and international are currently coexisting.

III. EU LAW

Since the European Union is an economic and political union of twenty seven member states it is an exceedingly complex structure formed by countries with diverse historical background, law systems as well as the different levels of economic development. The basic and most crucial principle of the common market in the EU is the free circulation of goods, capital, people and services across the borders of countries within the Union. In the consequence, such a situation causes the constant contact between varied cultures, values and legal systems.

The European Union law consists of three sources that are primary, secondary and supplementary law. The aim of secondary law is to pursue the objectives set out in the Treaties establishing the EU (primary law). They include regulations and directives that have direct effect on the laws of EU member states.

According to the supremacy doctrine in case where the law of member state provide with lesser right than EU law, the latter should be enforced by courts of member states. Thus, it is exceedingly important to develop on the European level such legal rules that will be acceptable to all member states.

3 P. Drahos, 'The Universality of Intellectual Property Rights: Origins And Development', at www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf

4 M. du Vall 'Prawo patentowe' (Warszawa: Oficyna a Wolters Kluwer business 2008) 48.

5 M. du Vall 'Prawo patentowe' (Warszawa: Oficyna a Wolters Kluwer business 2008) 50.



IV. THE WAY TO DEVELOP PATENT PROTECTION WITHIN THE EU

As I have already mentioned, national patent is a right strictly territorial in nature. For this reason, there is a primary conflict between the main freedoms of the common market in the EU and the exclusive right of patent owners. Undoubtedly it is in the interest of the proprietor of the patent that the invention is protected throughout the EU, especially in the view of the free movements of goods. For this reason, the need to uniform the system of granting patents arose shortly after formation of the common market within the European Economic Community (EEC), as a consequence of the great diversity in this area. However, it took over 20 years to develop consensus on the issue that were accepted by all the parties.

European Patent Convention and the European Patent

The first international agreement on the so-called European patent was The Convention on the Grant of European Patents of 5 October 1973 signed in Munich (European Patent Convention, EPC). It shall be underlined that EU patent is not a legal institution set by the EU and the EPC is not part of the EU law.

The patent obtained on the basis of Munich Convention is not a unitary right, but a group of independent nationally-enforceable and nationally-revocable patents, that depends largely on the interpretation and application of standards by national authorities. So, the European patent can be recognized as an administrative rationalization rather than a newly created right, as almost all attributes of an EU patent are determined independently under respective of national law.

A patent granted on the basis of EPC can be obtained in the countries – signatories of the Convention after conducting only one granting procedure before the European Patent Office (EPO). Such a patent is considered to be an equivalent to one granted on the basis of the national regulations in each country. The lot of the patents in every country differ and are subject to the rules in force in particular state. Such a patent should undergo a procedure of validation in every country that was appointed as a country of protection. Due to the cost of such an undertaking it is extremely rare to validate a patent in more than a few contracting states – an average EU patent is nowadays being validated in 5 countries⁶.

Therefore, the right does not assure the real and available protection and is still excessively dependent on national regulations.

EU unitary patent

In the 90's beside the above regulations the integration processes in the EEG resulted in developing rules on Community designs and Community trademark. The next step would be the adoption of common rules in the field of a Unitary Patent, as the most far-reaching form of convergence.

⁶ 'Wewnętrzny dokument roboczy Komisji. Streszczenie oceny skutków' [2011] 3, at http://ec.europa.eu/internal_market/indprop/docs/patent/sec2011-483-final_pl.pdf, (30.03.2013)

Until recently EU companies had two main competitors – the USA and Japan. Currently there are at least two more of them – India and China. In order to provide real and effective patent protection in condition of so fierce competition convergence of national regulations seemed to be crucial.

Even though the debate on the issue was pending on the European forum for over 30 years, it was only in December 2012, when the member states eventually achieved their aim through the use of enhanced cooperation procedure⁷.

For the implementation of the Unified Patent three instruments of EU secondary law were intended

- Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection
- Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements
- Agreement on a Unified Patent Court (UPC Agreement).

The first two documents were adopted on 17th December 2012⁸ and entered into force in January 2013. They will apply once the UPC Agreement enters into force. According to the opinion of the Court of Justice of the European Union the creation of the UPC would be inconsistent with EU law. For this reason, the court will be established by an intergovernmental treaty signed on 19th February 2013 and 5th March 2013.

Poland is the only member state which joined the enhanced cooperation measures but has not yet signed the UPC Agreement. Meanwhile, probably under the influence of the above-mentioned debate, Poland decided to postpone joining the Unified Patent System in order to analyse its effect on the economy of the country.

The Unified Patent shall come into force after ratification of the UPC Agreement by 13 states (including Germany, France and the United Kingdom), but not earlier than on 1st January 2014.

Among the most important reasons justifying the need for a Unitary Patent the Commission listed:

- high costs related to the translation and publication of patents granted by the EPO on the basis of EPC,
- differences between member states in terms of the maintenance of patents,
- administrative complexity of registration, transfers, licenses and other rights.

In the opinion of the Commission the patent protection is currently too expensive and complicated. Therefore it does not fulfill its role, because it is not sufficiently accessible to a significant number of inventors and small and medium-sized companies. Such a situation has an undesirable influence on the common market as it supports breaking up the market and slows down the innovativeness, development and competitiveness of European enterprises⁹.

7 Spain and Italy refused to take part in the legislation as a result of the proposed language scheme, which uses English, German and French at the exclusion of other languages.

8 Regulation (EU) No 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] Official Journal of the European Union L 361/1, Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [2012] Official Journal of the European Union L 361/89.

9 'Wewnętrzny dokument roboczy Komisji. Streszczenie oceny skutków' [2011] 2-3, at http://ec.europa.eu/internal_market/indprop/docs/patent/sec2011-483-final_pl.pdf, (30.03.2013)

The influence of industrial property and patent protection in particular on economic growth is nowadays significant and unquestionable and it was a subject of some widespread research. In one of the latest studies Anghel and Iancu conducted an analysis of the statistical data on patenting in EU member states, the USA, Japan, China and the Republic of Korea and they found significant differences between the USA and developed EU countries. On the other hand, they stated that the convergence regarding the patenting and the global competitiveness is quite obvious¹⁰.

The proposed legislation of Unitary Patent is closely related to the European Patent but there are several differences to be emphasized. Similarities include the procedure of patent granting that will be still conducted by EPO on the basis of EPC. In opposition to the EU patent regulations new rules create an autonomous right that, once established, would be designated within one procedure with validity on all participating countries. Other distinctiveness is: reduction of the translation requirements and maintenance fees as well as the founding of a common court for patent litigations.

The concept of creating a Unitary Patent as well as the establishment of the Unified Patent Court raises huge controversy in Poland.

Small and medium-sized companies as well as patent attorneys point out mainly the language issue¹¹ as the patent proceedings are to be held in one of the three EPO languages and no patent translations into national languages will be provided. So will be conducted the proceedings before a Unified Patent Court. Partial solution to the language problem should be a free of charge online automatic translation system for the patent documentation. In case of the litigation a regular translation will have to be delivered to the accused of infringement at the expense of the patentee. In my opinion, it is jeopardizing situation when the translation would be prepared only at the time of litigation. It could have a profound effect on the determination of the correct extent of protection and threaten the legal certainty. Moreover, due to the specific nature of the patent claims and its peculiar legal-technical jargon they are difficult to be translated correctly even by an experienced interpreter, not to mention a machine.

An increase in the number of patent infringement cases against national patent owners may turn out to be another undesirable effect. In my opinion it is not acceptable to force national entrepreneurs to defend themselves in a proceedings conducted in a foreign language.

I agree with the Commission's argument up to the point that the patent proceedings based on the new regulation will be less expensive than the European Patent. But it is true only when comparing the cost of the Unified Patent against the cost of European Patent validated in at least several countries. If an inventor or company would like to have a patent in one or two countries, the new regulation could generate even greater costs.

10 I.E. Anghel, V. Iancu, 'The convergence of industrial property rights' [2010] Working Papers of National Institute of Economic Research from National Institute of Economic Research 21, at <http://EconPapers.repec.org/RePEc:ror:wpince:100202> (30.03.2013)

11 See i.a. 'Jednolita ochrona patentowa» w UE zagraża rozwojowi polskiej gospodarki opartej na wiedzy, [2012] 43 Pi-gulka 1-4, at http://www.rzecznikpatentowy.org.pl/nie_dla_pat_jed/Pigulka_43.pdf, 'List otwarty w sprawie odstąpienia Polski od systemu jednolitej ochrony patentowej', at http://www.rzecznikpatentowy.org.pl/aktualnosci/120525/List_otwarty_przedsiębiorcow.pdf, (30.03.2013)

At least initially, the new regulation on Unified Patent will not replace the national patent systems of the signatories, so there will not be a complete harmonization of the issue. Moreover, instead of simplification and harmonization, an additional patent regime was created. It is very probable that most innovative companies will prefer to obtain a Unified Patent than a national patent. As the language issue does not exist for them, they will opt for wider and more automatic protection. This may lead to collapse of the national patent system. If so, it is not excluded that small companies or single inventors will be deprived of the patent protection because they will not be able to bear the costs of obtaining it.

Undoubtedly all concepts of the supranational patents are the examples of the tendency to converge the national law systems in the field of patent protection. But as to the Unitary Patent in my opinion it is rather an attempt to create a new institution with an unclear legal nature than the actual convergence. Instead of consolidating patent law in Europe, the Unitary Patent Package adds to its fragmentation on both the territorial and substantive level.

V. CONCLUSION

It is to be noticed that on the European level institutional and legislative systems undoubtedly tend towards convergence in accordance with international treaties and agreements and as I have stated the convergence of legal systems in the EU in the field of patent law is highly desirable to secure legal certainty and market confidence. On the other hand its implementation as an EU law in the proposed way faces many barriers and prejudices.

The refusal of Spain, Italy and eventually also Poland to take part in the Unified Patent system shows the fundamental problems that EU faces attempting to introduce common rules for all member states. In order to create a coherent and competitive free trade market EU member states have to develop a compromise that would harmonize different patent regimes. Due to divergences between national law systems and the needs and expectations of each member state the process of unification is ambitious. Nevertheless, it does not excuse us from searching for an accurate and acceptable way to convergence in the very field.

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CORRUPTION IN THE PRIVATE SECTOR: THE CONVERGENCE OF LEGAL SYSTEMS

Salomeja Zaksaitė*

Vilnius University, Lithuania

Abstract. Corruption in the private sector is an interdisciplinary issue covering international law, criminal law, civil law and disciplinary law. One of the key difficulties is the broadness of the concept of corruption in the private sector. The broad definition actually fits all branches of the aforesaid laws. Therefore, one must draw some guiding (yet, simplified and relative) criteria according to which the convergence of legal systems could be possible. One of the criteria is harm, damage or dangerousness. Another criteria come from ECHR case-law: the nature of offence and the nature of sanction entrenched in a certain legal system. Considering such criteria, it can be decided what legal system(s) should be applied to tackle corruption in the private sector.

Key words: Corruption, private sector, damage, *ultima ratio*

INTRODUCTION

As it is stated in the explanatory report on the Criminal Law Convention on Corruption, countries of Western, Central and Eastern Europe have been literally shaken by huge corruption scandals and some consider that corruption now represents one of the most serious threats to the stability of democratic institutions and the functioning of the market economy.¹ The aforementioned words emphasize the threat of corruption and (further) need to criminalize it. However, such need should be grounded on some clear principles. In other way the principles of legal certainty and *ultima ratio* might be violated. In order to cover the topic, the following **aim** has been set up: to identify the possible guidelines for convergence between legal systems in the context of corruption in the private sector. To implement the aim, the **structure** of the paper is divided into three parts: 1) the concept of corruption in the private sector; 2) the problems of criminalization of corruption in the private sector; 3) convergence of legal systems in case of corruption in private sector.

* Salomeja Zaksaitė earned a master's degree and a PhD in law (thesis "Cheating in Sports: Prevalence and Prevention Problems", defended in 2012) from the Vilnius University. From 2006, she has been working at the Law Institute of Lithuania as a research fellow at the Criminal Justice Department. From 2013, she works at Mykolas Romeris University on the project "Postdoctoral Fellowship Implementation in Lithuania" (The manager of the postdoctoral project is the Research Council of Lithuania). Salomeja Zaksaitė has written a large number of scientific and practical publications, and carried out both qualitative and quantitative interdisciplinary researches. Scientific interests: criminology, sports law, criminal law, crime prevention.

¹ Council of Europe Explanatory Report on the Criminal Law Convention on Corruption [1999] Access through the internet: <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>

1. THE CONCEPT OF CORRUPTION IN THE PRIVATE SECTOR

Certain international documents devoted to criminal and civil law provide definitions of corruption in the private sector.² For example, The Criminal Law Convention on Corruption provides quite a broad definition of active and passive bribery. Article 7 stipulates that each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed **intentionally in the course of business activity**, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, **in breach of their duties**.³

A very similar definition is presented in the Council Framework decision combating corruption in the private sector: the Member States are to take all the necessary measures (*inter alia* criminal measures) to ensure the punishment of the following intentional conduct when it is committed in the **course of business activities**: promising, offering or giving an undue advantage to any person directing or who directs or works for a private sector entity in order that the person should perform or refrain from performing any act in breach of that person's duties (active corruption).⁴

Article 2 of Civil Law Convention on Corruption stipulates that corruption means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts **the proper performance of any duty** or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof. Article 3 stipulates that each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.⁵

Last, but not the least, corruption in the private sector is also regulated by **disciplinary** law. For instance, Article 62 of the FIFA disciplinary code stipulates that anyone who offers, promises or grants an unjustified advantage to a body of FIFA, a match official, a player or an official on behalf of himself or a third **party in an attempt to incite it or him to violate the regulations of FIFA** will be sanctioned: a) with a fine of at least CHF 10,000, b) with a ban on taking part in any football-related activity, and c) with a ban on entering any stadium.⁶ The same definition is entrenched in the disciplinary code of the Lithuanian football federation.

The problems of the aforementioned definition are quite explicit: the **definitions of corruption in the private sector in different law systems are rather similar, but the consequences of almost identical acts are very different**: from a ban on taking part in a specific activity up to relatively long imprisonment. The current policy of the EU is urging to criminalize corruption in both the

² In this paper, critical (yet realistic) insights about the lack of unified definition of corruption are not analyzed.

³ Council of Europe Criminal Law Convention on Corruption [1999] (ETS No. 173).

⁴ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2003] OJ L 192/54.

⁵ Council of Europe Civil Law Convention on Corruption [1999] (ETS No. 174).

⁶ FIFA disciplinary code [2011]. Access through the internet: <http://www.fifa.com/mm/document/affederation/administration/50/02/75/discoinhalte.pdf>

private and public sector.⁷ Such policy calls for systematic analysis what are the main problems of criminalizing corruption.

2. THE PROBLEMS OF CRIMINALIZATION OF CORRUPTION IN THE PRIVATE SECTOR IN THE REPUBLIC OF LITHUANIA

In the Republic of Lithuania, corrupt practices in the private sector theoretically are to be covered by the existing criminal regulation⁸ in the chapter “Crimes and Misdemeanours to the Public Service and Public Interests” (namely, Articles 225-228 and 230 of the Lithuanian Criminal Code). These articles stand for: Taking bribes (Art. 225); Trading of Influence (Art. 226); Giving Bribes (Art. 227); Abuse of Authority (Art 228); Definitions (Art. 230). The third paragraph of Article 230 stipulates that **persons employed at any state or private office, enterprise or organisation**, a political or public institution, or engaged in professional activities, discharging public functions **and having appropriate authority and a position in public administration shall be held to have the status equivalent to that of a public official**.

It is important to note that corruption in the private sector in Lithuania **is not narrowed** to profit-seeking activities as it is recommended in the Criminal Law Convention on Corruption: “First of all, Article 7 restricts the scope of private bribery to the domain of “business activity”, thus deliberately **excluding any non-profit oriented activities** carried out by persons or organisations, e.g. by associations or other NGO’s. This choice was made to focus on the most vulnerable sector, i.e. the business sector.”⁹ Lithuania chose to broaden the private sector by **not indicating** that the necessary feature of the private sector’s bribery should be profit-seeking. Such an alternative is possible also according to the aforementioned Explanatory Report: “nothing would prevent a signatory State from implementing this provision without the restriction to “in the course of business activities.” However, theoretical covering has not much in common with the practical incrimination of bribery. For instance, there was not a single case in which anyone would have been sentenced for sports bribery in Lithuania.

In my view, there are two main problems in criminalizing these phenomena: 1) the lack of clarity concerning the concepts of “status equaled to a public official”, “public administration authorities” and “public functions”; 2) the lack of clarity concerning the concept of “great damage”. These problems raise serious doubts whether the Lithuanian criminal regulation is in conformity with the principle of legal certainty.

1. The attributes of “person equaled to public official”, “public administration authorities” and “public functions” are necessary in order to incriminate *corpus delicti* of corruption-related

7 According to point 48 of the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, corruption is an area of particular relevance in establishing minimum rules on what constitutes a criminal offence in Member States and the penalties applicable. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. Preamble, point 7.

8 Criminal Code of the Republic of Lithuania, Official Gazette No. 89-2741 [2000].

9 Council of Europe Explanatory Report on the Criminal Law Convention on Corruption [1999] Access through the internet: <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>



crimes that are in Chapter “Crimes and Misdemeanours to the Public Service and Public Interests”. Although it is correct to recognize that people in the private sector do have public administration authorities, it does not necessarily mean that Lithuania has properly criminalized corruption in the private sector. *Corpus delicti* of bribery and other corruption-related crimes requires a specific subject. The subject shall be a public official or a person who is equaled to the public official. The subject could also be a private person (also, working in non-profit sector), however, this person must have the power of public administration or the right to provide public services. Not all people working in the private sector have such rights and powers; therefore, *stricto sensu*, a large part of private employees cannot be the subject of criminal liability for the aforementioned offences.

2. Another serious problem is related to the concept of “great damage”. This attribute is necessary to incriminate *corpus delicti* of the Abuse of Authority which is, in principle, the most general corruption-related crime.¹⁰ However, there is no explicit interpretation what is to be regarded as “great damage”. It is complicated to imply this quality mostly because damage might occur after relatively long period of time and sometimes it might not be clearly seen at all. It should be also pointed out that “great damage” is a requisite quality in order to separate these crimes from disciplinary or administrative offences. Also the issues of assessing immaterial damage arise, and so the ultimate difficulty is that if “damage” is understood too broadly and applied too vaguely, then the criminalization of corruption in the private sector can become a selective measure for overly discretionary punishment. In turn, the principle of *ultima ratio* is potentially violated, and if so, we must raise a question under what circumstances only disciplinary responsibility should be applied.

3. CONVERGENCE OF LEGAL SYSTEMS

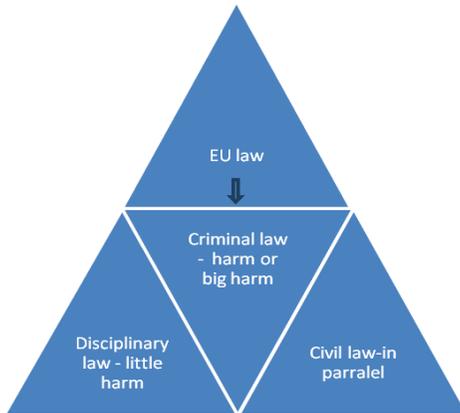
The aforementioned insights on the ambiguity of the definition of corruption as well as problems of criminalization of corruption imply that the criminalization of corruption might not be in conformity with the principle of *ultima ratio*.

In my view, a thorough estimation of harm (or damage) might help avoid to broad extension of criminal liability. As it is noted in the European Criminal Policy Initiative, extended criminal liability abandons the requirement of even an abstract danger for a legally protected interest and hence is not compatible with the principle of proportionality (and derived from that the principle of *ultima ratio*) which is an essential guideline for criminal policy.¹¹

Harm (or related concepts – dangerousness and damage) is one of the main criterion, according to which it should be decided what type of liability should be applied. Assessing this criterion, it is possible to show one of the possible convergent schemes in the light of corruption in the private sector. Without any criterion, one can speak about divergence and vagueness when national sys-

¹⁰ The first paragraph of Article 228 stipulates that “a public official or a person of equivalent status who exceeds his authority or who wilfully fails to perform his duties or performs them improperly, where this causes great damage to the State, a legal or natural person, shall be punished by a fine, or detention, or imprisonment for a term of up to 5 years.”

¹¹ European Criminal Policy Initiative: A Manifesto on European Criminal Policy [2011], 86-103. Access through the internet: <http://www.europarl.europa.eu/document/activities/cont/201112/20111207AIT33475/20111207AIT33475EN.pdf>



Scheme No 1. The (Inter)relation of Legal Systems in Case of Corruption in the Private Sector

tems do not cooperate, but rather interfere with and confuse one another.

On the top of the scheme there lies EU law which draws the guidelines for the national regulation. Criminal law lies in the centre, as currently corruption in the private sector is primarily associated (and is recommended to be associated) with criminal law. Actually, the scheme (pyramid) can be seen also from a civil law perspective, for example, in the light of competition law; and also from the perspective of disciplinary law (for example, sports law). Thus, the pyramid might be “turned over”. The type of liability depends on the degree of harm. If there is no harm, there is no liability. If the harm is little (for instance, abuse of position in the private sector in order to get

small immaterial advantage), then disciplinary liability is to be applied. If the harm is relatively big, then criminal liability should apply. Civil liability goes in parallel with criminal or disciplinary liability with the aim (consequences) to compensate the concrete damages and to void the corrupt contracts. For the sake of objectivity, it must be noted that the criterion of harm is not necessary very clear. It is related to weighing principles that sometimes can be competing. For instance, in case of corruption in sports, sometimes certain acts (as sport betting itself¹²) might cause harm to fair play, but such damage might be compensated by the aim to attract certain funding to sports and to ensure the sustainability of sporting activity (which often receives sponsorship from the betting business). It should also be noted that, theoretically, all kinds of liability can be applied in one single case: disciplinary (eg. ban to engage in certain activity), criminal (eg. fine) and civil (eg. annulment of contract). Then a complicate question of double jeopardy arises. As it was noted by the ECHR, each case must be treated separately and three main criteria must be taken into account: the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty.¹³ Thus, the national systems cannot duplicate one another: if civil or disciplinary sanction is huge, then it should be considered that one legal system is deterrent enough and the other system (criminal law) is not to be applied. In such case the principle of *ultima ratio* is also properly taken into account.

¹² In reality, such acts lie on the margin between no liability (lawfulness) and disciplinary liability.

¹³ *Malige v. France*, application no. 27812/95 [1998] ECHR 1998-VII, no. 93, 35§.



CONCLUSIONS

1. International documents provide quite a broad definition of corruption in the private sector. Moreover, corruption in the private sector is regulated at least by the four systems: international law, criminal law, disciplinary law and civil law. Such pluralism calls for identification of circumstances under which each system is to be applied.
2. The current policy of EU recommends criminalizing corruption in the private sector. Lithuania has partly implemented this recommendation by entrenching that persons working in the private sector are to some extent equalled to persons working in the public sector. However, some vagueness incriminating corruption in the private sector is still present, and the aforementioned regulation is applied relatively rarely in practice.
3. The convergence of the four legal systems is possible when the functions of each system and the nature of offence as well as the sanction for the offence are taken into account. Criminal law as *ultima ratio* can be applied only when the harm of the offence is relatively big, while disciplinary law is applied when the harm is little. Civil law should have another (compensatory) function, and it can be applied in conjunction to disciplinary and criminal law.

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THE STATE IMMUNITY DOCTRINE AS THE RESULT OF THE CONSTANT CONVERGENCE BETWEEN THE NATIONAL LEGAL SYSTEMS

Julius Zaleskis*

Vilnius University, Lithuania

Abstract. Convergence between national legal systems can lead to creation and evolution of new legal fields. This is particularly relevant in the context of international law where subjects to a legal system, i.e., states with their own legal systems, are main legislators themselves. The international legal doctrine of state immunity is a perfect example to study with respect to an interaction between national legal systems in the context of international law. The paper aims to present the doctrine of state immunity as a result of constant convergence between national legal systems. The dual – national and international legal – nature and international customary status of the doctrine of state immunity determines the effect that the convergence between different legal systems has on the doctrine. The development of the doctrine has always been based on the convergence between the statutes and judicial decisions issued in a number of different legal systems, satisfying the constancy and uniformity requirements for international customs. Moreover, in the absence of universal conventions on the matter in force, the convergence between the national legal systems is still the driving force for the development of the doctrine of state immunity.

Keywords: international law, international customs, state immunity, convergence between national legal systems

1. INTRODUCTION

Convergence between legal systems may result not only in changes to the existent fields of law. The convergence can also lead to creation and evolution of new legal fields. The latter trend is particularly relevant in the context of international law. As opposed to the national law, the international law does not have superior legislative, executive or judicial body, and subjects to a legal system, i.e., states with their own legal systems, are main legislators. In international legal order, constant and uniform practise of states alone, which often is a result of the convergence between the legal systems of those states, may actually create the law.

A doctrine of state immunity is a perfect example to study with respect to the interaction between the national legal systems in the context of international law. The doctrine was born in

* Julius Zaleskis is a PhD fellow at Law Faculty of Vilnius University (Lithuania) conducting research on an international legal doctrine of state (sovereign) immunity. His doctoral research focuses on legal quality of the state immunity doctrine and the changes thereof that have been caused by the developments in international law in the beginning of 21st century. The main academic interests of Julius Zaleskis are international law, law of state immunity, legal protection of privacy and personal data, consumer protection law, law of information technologies and sports law. He is also an associate at LAWIN Vilnius Office. E-mail: julius.zaleskis@gmail.com



different national legal systems. Through a few centuries it has significantly converged and has become a universally followed doctrine of the international law. Moreover, it had changed greatly through the years and faced some landmark developments in the 21st century¹.

The paper aims to present the doctrine of state immunity as a result of constant convergence between the national legal systems. To this end, the content and the limits of the doctrine of state immunity shall be determined (Section 2), the legal sources the doctrine is based on shall be in turn overviewed (Section 3), the specific impact of the convergence between national legal systems on the doctrine shall be subsequently analysed (Section 4) and the concluding remarks shall be settled (Section 5).

2. COMPLEX CONCEPT OF STATE IMMUNITY

The doctrine of state immunity is a complex one. The mere definition of the state immunity raises doubts and ambiguities regarding its content and scope. The state immunity is analysed in a number of different legal contexts. Moreover, the content of the doctrine has radically changed through the years. Therefore, researching on the given subject matter may prove uncertain without crystalizing the definition and limits thereof.

The state immunity is understood as legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction of another state². Some linguistic variations are used in the context of state immunity: the doctrine of state immunity³, the principle of state immunity⁴, the law of state immunity⁵. These variations are often used as synonyms and do not have significant impact on the content and, in particular, the issues of state immunity being analysed herein. For the purposes of the present paper the notion of the doctrine of state immunity shall be used as a general and less complex one from the perspective of legal theory to describe the legal rules and principles of state immunity.

It is immunity of states, not heads of states, diplomatic and consular agents or state armed forces which is relevant in the given context. State immunity protects, on a procedural basis, foreign states against adjudicatory jurisdiction of other states rather than from legal liability, as it was clearly articulated by the International Court of Justice in the *Jurisdictional Immunities case* in 2012⁶.

1 Namely, from 2000 until 2013 the European Court of Human Rights in more than ten judgements established a comprehensive case law on balancing the doctrine of state immunity against a right to access a court enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see Section 4 to this end); in 2010 the United Nations General Assembly adopted the Convention on the Jurisdictional Immunities of States and their Property to be the first universal written law on the matter (see Section 3 to this end); in 2012 the International Court of Justice issued its first decision on the matter in the *Jurisdictional Immunities case* (see Section 4 to this end).

2 P. Malanczuk. 'Akehurst's Modern Introduction to International Law (Seventh Revised Edition)' (New York: Routledge 1997) 118.

3 E. K. Bankas. 'The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts' (Berlin: Springer 2005).

4 J. Finke. 'Sovereign Immunity: Rule, Comity or Something Else?' [2010] European Journal of International Law 21(4) 853–881.

5 H. Fox. 'The Law of State Immunity (2 ed)' (New York: Oxford University Press 2008).

6 Judgement of the International Court of Justice of 3 February 2012 in Case of Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), para. 93.

States can be immune from jurisdiction of both, courts and arbitration institutions. However, the immunity of state in arbitral proceedings is considered to be a separate and less complex topic, as the mere nature of the arbitration proposes that a state can be involved therein only subject to its consent and, thus, waiver of immunity. The doctrine of state immunity is discussed in relation to civil proceedings, as the immunity of state from criminal proceedings remains generally absolute⁷.

The doctrine of state immunity has never been static⁸. From 1812 when the Supreme Court of the US issued the landmark decision in *the Schooner Exchange v. McFaddon* case till roughly mid of the 20th century national courts had been refraining from exercising jurisdiction against foreign states on an absolute basis. Starting from the mid of the 19th certain countries, initially, civil law jurisdictions, started restricting the immunities of foreign countries where they acted in a private capacity (*acta iure gestionis*), as opposed to governmental activities (*acta iure imperii*). Nowadays it is the restrictive state immunity that dominates converged practice of states as evidenced by the adoption of the United Nations Convention on the Jurisdictional Immunities of States and Their Property in 2004 ('the United Nations Convention')⁹.

The doctrine of state immunity is a part of international public law, as it concerns relations between different countries. Nevertheless, national legal systems are unavoidably involved in the matters concerning the state immunity. At the end of the day it will be national courts that will make the crucial decisions regarding application of the doctrine of state immunity and it will be national laws pursuant to which such decisions will be made. Therefore, the issues of state immunity are often addressed from the perspective of private international law ('conflicts of law') which is a part of national law dealing with the applicable law and jurisdiction in situations involving the so called foreign element. The state immunity is also a procedural obstacle to civil proceedings before national courts and is, therefore, analysed from the national civil procedural law perspective.

Thus, the doctrine of state immunity is at the point of intersection of international law and national law¹⁰. Such complex – international legal and municipal legal – nature of the doctrine of state immunity shapes the specifics of legal sources thereof, as well as the role the convergence between national legal systems plays in the development of the doctrine.

3. LEGAL SOURCES OF STATE IMMUNITY

To understand the impact the convergence between the national legal systems has on the doctrine of state immunity, one should refer not only to the nature of doctrine, but also to the international legal sources the said doctrine is based on. A classic list of main international legal

7 H. Fox. 'The Law of State Immunity (2 ed)' (New York: Oxford University Press 2008) 33-34.

8 For a detailed historical account on the doctrine of state immunity see I. Sinclair. 'The Law of Sovereign Immunity. Recent Developments' [1980] *Collected Courses* 121-196.

9 Adopted by the United Nations General Assembly's Resolution A/59/38 of 2 December 2004. See Part III 'Proceedings in Which State Immunity Cannot Be Invoked' of the United Nations Convention which provides a number of cases where states are considered to be acting in their private capacity and, thus, exempt from the immunity.

10 B. Heß. 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property' [1993] 4 *EJIL* 271.



sources established by Article 38 of the Statute of the International Court of Justice¹¹ shall be employed as a point of reference here.

International conventions constitute the major and developed part of international legal order. Differently from other important fields of international law (such as international treaty law, international diplomatic and consular law, international humanitarian law) codification efforts have not been that fruitful in relation to the doctrine of state immunity. Currently, there is no universal international treaty that would be in force and regulate the matters of state immunity on a comprehensive basis.

The fore-going shall not lead to underestimating significance of the United Nations Convention which, as of 1 April 2013, had been signed by 28 states and obtained thirteen instruments of ratification, acceptance, approval or accession (out of thirty necessary for it to come into force)¹². Worth mentioning is the European Convention on State Immunity adopted by the Council of Europe in 1972 which had obtained eight ratifications and has not achieved wider recognition¹³.

The doctrine of state immunity is largely based on international customs understood as evidences of the general practice accepted as law. The International Law Commission concluded already in 1980 that the doctrine of state immunity had been adopted as a general rule of customary international law solidly rooted in the current practice of states¹⁴. Accordingly, the preamble of the United Nations Convention which concluded the great work done by the International Law Commission in the given field, noted that *'the jurisdictional immunities of states and their property are generally accepted as a principle of customary international law'*.

As the International Court of Justice noted in the North Sea Continental Shelf cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*¹⁵. The settled practice of the states must be constant and uniform¹⁶. State practice can be evidenced by way of administrative acts, legislation, decisions of courts and activities on the international stage, for example treaty-making, etc.¹⁷.

As to the international customary law, it is a challenge to determine what the law actually is, especially where the customs are not codified by universal widely accepted written instruments that are in force. In the context of the doctrine of state immunity, the United Nations Convention provides for valuable help to this end. Even it has not come into force yet, the very recent case

11 The Statute of the International Court of Justice annexed to the Charter of the United Nations [1945].

12 It shall be noted that 28 countries have signed the convention. However, the latest signatures were added only in the beginning of 2007. For list of signatures and ratifications see < http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en [accessed on 1 April 2013].

13 For list of signatures and ratifications see <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG>> [accessed on 1 April 2013].

14 Judgement of the International Court of Justice of 3 February 2012 in Case of Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), para. 56.

15 Judgement of the International Court of Justice in the North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports, 1969, p. 44, para. 77.

16 Judgement of the International Court of Justice in the Asylum case, I.C.J. Reports, 1950, pp. 266, 277; 17 ILR, p. 276.

17 M. Shaw, 'International Law (Sixth Edition)' (New York: Cambridge University Press 2008) 82.

law of international courts treats the United Nations Convention, as a whole, as an authoritative codification of international customs.

For instance, in *the Jurisdictional Immunities case* the International Court of Justice based its conclusion on the international customary status of the doctrine of state immunity on *'the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention'*¹⁸. The same approach has been followed by the European Court of Human Rights ('the ECtHR') in a number of recent cases balancing the doctrine of state immunity against a right to access a court enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECtHR holds that *'the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, apply under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either'*¹⁹.

Other sources listed by Article 38 of the Statute of the International Court of Justice, namely, general principles of law, judicial decisions and legal teachings may be relevant in the context of the state immunity. General legal principles, such as the concept of reparation or equity, shall be respected in applying the rules of state immunity, even they may not shed much light upon the content of the rules which are rather detailed themselves, as reflected by the United Nations Convention. International courts, in particular the International Court of Justice and the ECtHR, as cited above, have generated some valuable case law confirming the international customary status of state immunity rules. Legal scholars, Lady Hazel Fox, Sompong Sucharitkul and Ian Sinclair, just a few notable ones to mention, have conducted a great work in researching on evolution, crystallizing and comparing trends and systemizing of the rules of state immunity. The International Law Commission also deserves a credit for its invaluable work on codifying the practice of countries regarding the state immunity.

Thus, the international customary law, based on the constant and uniform practice of states, still is the crucial legal source of the doctrine of state immunity. The United Nations Convention that is not yet in force provides for guidance on the specific customary rules of state immunity.

4. THE IMPACT OF CONVERGENCE BETWEEN NATIONAL LEGAL SYSTEMS UPON STATE IMMUNITY

The impact that convergence between national legal systems has on the doctrine of state immunity is essentially shaped by two factors discussed previously: the dual – international and national – nature of the doctrine, and the foundations thereof in the international customary law.

It shall be firstly noted that national legal systems do not provide for sources of international law. However, as affording foreign countries with immunity is a decision made within limits of a national legal system merely by national legislators and / or courts and governed by national laws,

¹⁸ Judgement of the International Court of Justice of 3 February 2012 in Case of Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), para. 56.

¹⁹ Oleynikov v. Russia, no. 36703/04 [2013] § 55, ECHR; Cudak v. Lithuania [GC], no. 15869/02, § 55 [2010] ECHR.



it will be national legal systems where one shall seek for an evidence of state practice as a material element of an international custom.

Subsequently, it will be commonalities between a number of different national legal systems, meeting the requirements of the constancy and uniformity, that will result in the creation and evolution of the international customs in the context of state immunity. In the absence of other substantial legal sources the said commonalities, as a basis for international customs, become the driving force for the development of the doctrine of state immunity.

The dependence of the doctrine of state immunity on the convergence between national legal systems can be traced back to the early origins the doctrine, namely, the first known decision of its kind adopted by the Supreme Court of the US in *the Schooner Exchange v. McFaddon* case in 1812. Therein it was held that '*<...> all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may in some instances be tested by common usage and by common opinion, growing out of that usage*'²⁰. Thus, the landmark state immunity precedent has been already based on certain common understanding of the state immunity.

The role of the convergence between the national legal systems in the context of state immunity is specifically evident from the great research conducted in the field by the International Law Commission and reflected in the Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries²¹. One may notice that rules proposed therein have been essentially based on thorough identification of common views expressed on particular matters of the state immunity in different national legal systems.

In nowadays context, the issue was addressed by the International Court of Justice in *the Jurisdictional Immunities* case. Therein it was held that '*State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States*'²².

The doctrine of state immunity is dependent on the convergence between the national legal systems. In other words, the particular content of the doctrine of state immunity can be distinguished only where it can be concluded that different national legal systems had converged to a degree satisfying the requirements for international customs. To this end as precisely noted by Lady Hazel Fox the identification of precise rules of the state immunity '*often requires an exercise more in comparative law than in international law*'²³.

20 *The Exchange v. McFaddon*, 11 U.S. 7 Cranch 116 116 (1812). <http://supreme.justia.com/cases/federal/us/11/116/case.html> [accessed on 1 April 2013].

21 Text adopted by the International Law Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf [accessed on 1 April 2013].

22 Judgement of the International Court of Justice of 3 February 2012 in Case of Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), para. 55.

23 H. Fox. 'The Law of State Immunity (2 ed)' (New York: Oxford University Press 2008) 20.

The above is confirmed by the methods of reasoning employed by international courts in the recent case law. For instance, in *the Jurisdictional Immunities case*, after thoroughly surveying developments in the national legal systems of Italy, Canada, France, Slovenia, New Zealand, Poland, Greece, the United Kingdom, the US, as well as some international legal sources, the International Court of Justice has noted that under customary international law as it presently stands, a state is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict²⁴.

Similarly, in the case *McElhinney v. Ireland* the comparative analysis of developments in national legal systems of Austria, Germany, France, Italy, Spain, Switzerland, Canada, Australia, the United Kingdom, the US, as well as some international legal sources, has led the ECtHR to conclude that '*<...> it appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. <...> Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by acta jure imperii or that, in affording this immunity, Ireland falls outside any currently accepted international standards*'²⁵.

The above enables the conclusion that the doctrine of state immunity is a result of commonalities between the different national legal systems meeting the constancy and uniformity requirements for the international customs. The doctrine has been developed and is likely to be developed by the constant convergence between the different national legal systems, particularly in terms of statutes and judicial decisions issue therein.

5. CONCLUSION

The doctrine of state immunity is a part of the international law, as it governs the relations between the sovereign countries. On the other hand, the doctrine is also subject to the national legal systems, as it will be national courts that will make the crucial decisions regarding the application of the doctrine and it will be the national laws pursuant to which such decisions will be made. The doctrine of state immunity is based on the international customary law as a general practice accepted as law and to a certain extent codified by the United Nations conventions which has not yet come into force.

Such dual – national and international legal – nature and the international customary status of the doctrine of state immunity determines the effect that the convergence between the different legal systems has on the doctrine. The development of the doctrine has always been based on the convergence between the statutes and judicial decisions issued in the different legal systems, satisfying the requirements for the international customs. Moreover, in the absence of universal conventions on the matter in force, the constant convergence between the national legal systems is still the driving force for the development of the state immunity.

²⁴ Judgement of the International Court of Justice of 3 February 2012 in Case of Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), para. 83-91.

²⁵ *McElhinney v. Ireland*, no. 31253/96 [2001] § 27, 30, 38, ECHR.



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18. The Exchange v. McFaddon, 11 U.S. 7 Cranch 116 116 [1812].

HEALTH CARE SYSTEM FINANCING IN UKRAINE AND ABROAD

Olha Zhmurko*

Lviv Ivan Franko National University, Ukraine

Abstract. The bases of health care financing system in Ukraine are grounded on the model of health care financing system of former Soviet Union. Having achieved its independence, Ukraine accepted a number of legal acts in the sphere of health care. But the aim and tasks which stood before health care system of the former Soviet Union do not differ from the ones which our government follows, while providing a proper level of health protection. A comparative analysis of the constitutional norms of health protection in foreign countries which can be the examples of health care financing world models shows us an expediency to make changes to the article of the Constitution of Ukraine which guaranty the right of the person to health protection,

The main authorities of state bodies in health care sphere and the main functions of state bodies in relationships in health care sphere gives an opportunity to show the perspectives of the role of state in health care sphere and what should be done in this aspect of research.

The system of health care financing should be improved in Ukraine also. The system of health care financing from the cash fund will look like the following: the financing will be held for granted medical aid. We do not support the point of view that the financing should go to health care entities. The insured should pay a part of money. The other part one will be paid from the insurance fund after getting aid and the part of money paid by the insured will be returned to him/her by the insurance fund. The acceptance of legal act, which will establish a legal status of health care entities in the system of state obligatory medical insurance is necessary. Also a special attention should be devoted to the determination of legal bases of health care entities. All conclusions are based on the analyzed of health care financing world models.

Keywords: health care financing system, constitutional norms of health care, the main functions of state bodies, health care entities, cash fund.

The bases of health care financing system are grounded on the model of health care financing system of former Soviet Union. Having achieved its independence, Ukraine accepted a number of legal acts in the sphere of health care. But the aim and tasks which stood before health care system of the former Soviet Union do not differ from the ones which our government follows, while providing a proper level of health protection. Since the principles of our current system must correspond to international standards not only in this sphere, the order of health care financing and giving medical aid should improve. The scientists researched the general issues of health care financing, the ways of introducing the state obligatory social medical insurance, and proposed the ways of its development in Ukraine. They are: J. M. Busduhan, Z. S. Hladun, S. J. Kondratiuk,

* Ass. prof., department of administrative and financial law, Law faculty, Lviv Ivan Franko National University

R. A. Maydannik, M. V. Mnykh, O. V. Soldatenko, and others. But the main tasks which we have the following: to define the basis of health care financing in foreign countries and decide which model of health care financing could be introduced in Ukraine.

The matter of law of a person on a health care are differently reflected in the norms of constitutions of foreign countries. These norms do not make a detalization the question of functioning of health care entities, the general order of giving a medicare, and also the limits of its giving; the norms of constitutions of foreign countries do not set and do not determine the politics of the state on the already established model of the financial providing of health protection

Canada comes forward as a prime example of budgetary model of financing of health care. According to the chapter I «Rights and Freedoms» article 6 fixes: «Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to move to and take up residence in any province; and to pursue the gaining of livelihood in any province. The above mentioned rights are subject to any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services»¹.

The insurance model of health care financing exists in such developed countries, as France, Germany, Netherlands. The norms of Constitution of Germany fixes:

Article 74: «(1) Concurrent legislative power shall extend to the following matters:12) labour law, including the organisation of enterprises, occupational health and safety, and employment agencies, as well as social security, including unemployment insurance;19-a) the economic viability of hospitals and the regulation of hospital charges». Article 87: «(2) Social insurance institutions whose jurisdiction extends beyond the territory of a single Land shall be administered as federal corporations under public law. Social insurance institutions whose jurisdiction extends beyond the territory of a single Land but not beyond that of three Länder shall, notwithstanding the first sentence of this paragraph, be administered as Land corporations under public law, if the Länder concerned have specified which Land shall exercise supervisory authority»².

The private system of health care financing is used in such countries, as the USA and Japan. Constitution of the United States of America and its amendments fix no guarantees from the side of the state in relation to a human right on a health care, and the anymore on medical insurance. This right is set by the bylaws of civil legislation and has exceptionally private character.

The legislator of Ukraine went another way. In Constitution of Ukraine a human right on a health care is regulated in detail,. The Constitution of Ukraine fixes the sources of the system of health care financing and its cost for a population, a cost of medical service for a concrete person. A necessary step for the input of insurance model of financing of health care is making alteration to the article 49 of Constitution of Ukraine. Namely, it is necessary to expound her in such release: «everybody has a right on a health protection. The state creates terms for effective and acces-

1 The Constitution Act of Canada of 1982. [Electronic resource]. – Available from : http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

2 The Constitution of the Federal Republic of Germany of May 23rd, 1949. [Electronic resource]. – Available from : <http://www.lexadin.nl/wlg/legis/nofr/legis.php>

sible medical service for all citizens. The state assists development of curative establishments of all patterns of ownership. The state cares of development of physical culture and sport, provides sanitary-epidemic prosperity». We consider that it is enough to establish of the new system of health care financing and is the guarantee of a person on health care.

As as an aim of defence of citizens defence of citizens comes forward in the field of a health protection, then the corresponding should be a duty on realization of such rights. And a just the same duty is fixed, in obedience to a current legislation, on the state.

Basic lines of participation of the state in the field of state medical insurance are:

- the definiteness of the state as an obligatory subject, taking into account the role it plays and as whom it is in the system of health care, and also taking into account the aim of the system of health care (forming of budget of Ukraine, realization of financing from the budgets of all levels and control function after the usage of money);
- the publicity of character, that appears in an accumulation, distribution and usage of money of budgets of all levels;
- the satisfaction of interests of patients.

The state executes next functions - legislative through the acceptance of normatively-legal acts (Supreme Council of Ukraine), administrative - exactly through public bodies and bodies of local self-government, control - the state through the authorized bodies carries out control after the participants of legal relationships in the field of a health care and execution - the state through its bodies is the performer of the rules of realization of the system of health care. So, the state sets the rules of realization of health care and executes those rules. We consider that it is wrong, when one participant of legal relationships executes all functions. It results in unefficiency and ineffectiveness of mechanisms of functioning this system.

The state comes forward as a public subject in these relations and her role is qualificatory. However, consider that the institute of social insurance can not functioning effectively, when each other from participants sets, regulates. controls this sphere and comes forward as a performer. If relations in the sphere of health care arise up between different participants on satisfaction of public interest, the right and duties must be equivalent.

For strengthening of position of the state at the insurance market and improvement of social defence of population it is necessary to reform the system of health care. Namely:

- the State must be provided with the prescribed legislative authorities. However, at legislative level it should be prescribed that the function of management and control must come true by local bodies;
- in relation to the administrative function of the state consider that possible and expedient will be to limit plenary powers of Government treasury service of Ukraine in relation to accounting after movement of money and direct movement of money in the cash fund of social health insurance;
- the State as a performer is practically only and basic participant in relations and it is wrong. As, citizens (insured) come forward as a main subject, that is why it is needed to revise position that the state is as a performer.

The system of health care financing is fully financed from all the budget levels and is directed to realize the state programs. The enumeration of medical aid and health care entities which provide medical aid is comprehensive and it is foreseen in existing acts. The financing of state health care entities is provided by the state budget of Ukraine, health care entities of local self-government – by the bodies of local self-government³.

The budgetary model of health care financing exists in Great Britain, Sweden and Canada. The main principles of this model existence are: accessible and free of charge medical aid to all the sections of state population; reliability of one-channel mechanism of financing (state budget) with the state controlling of all financial expenditures in this sphere; guaranteed level of paying for medical aid and services; the possibility to introduce quickly amendments in the health care system on all the levels; a deficiency of a competition in the sphere of granting medical services (with the hidden competition for the distribution of state financial resources which are given by the budget for paying medical aid and medical services); state control of medical aid quality⁴. Sweden is a striking instance of this model. 26 regional bureaus of social insurance are administrating the system. National Council of social insurance supervises them. 18 % costs for health care are given by the government, 51 % - by local self-government, 31 % - by employers⁵.

Health care in Sweden is being operated by the following principles: decentralization, public-opened model, providing the insurance to all citizens. Approximately 90 % of income of local self-government is used for health care, 70 % of which are taxes. Local self-government owns and administrates almost all hospitals and hires most of doctors and other medical workers. A number of private hospitals and medical services is insignificant but they make a contract with local self-government as well. This system is universal and everybody is free to choose the provider of health services. The providing of health services is based on the quality principle and needs of each person⁶.

Insurance model of health care financing exists in France, Austria, Germany and Netherlands. The main characteristics of this system is obligatory medical insurance in national scope; the joint participation of employers in medical aid payment is foreseen by law; the nonprofitness of insurance institutions with the obligation to pass all their money for medical aid and services. The subjects of this sphere are: the doctors and medicoprofilactic institutions, which offer their services, insurance institutions which are responsible for medical services payments, and patients. Germany is a striking instance of this model. The subjects are the following: patients who are the members of state or private insurance; insurance funds and their state and local associations; the association

3 Бюджетний кодекс України від 24.12.2010 р. N 2456-VI з наступними змінами та доповненнями // Відомості Верховної Ради України. – 2010. – № 50-51. – Ст. 572 Закон України від 5.10.2000 р. № 2017-III «Про державні соціальні стандарти та державні соціальні гарантії» з наступними змінами та доповненнями // Відомості Верховної Ради України. – 2000. – № 48. – Ст. 409.

4 Надюк З. О. Механізми державного регулювання ринку медичних послуг в Україні : дис. ... доктора наук з державного управління : 25.00.02 / Надюк Зіновій Олександрович – З., 2009. – с. 35-36

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6 Вјдрп Albin, Katarina Hjelm and Wen Chang Zhang Health care systems in Sweden and China: Legal and formal organisational aspects / Albin et al. Health Research Policy and Systems. – 2010. – p. 1-2.

of private insurers; medical staff that gives out-hospital aid from the resources which they gain due to the collective agreement between medical associations and funds; the hospitals which are being financed from insurance funds; producers of medicine; ministry of labour and social politics in lands and federal ministry of health care.

The process of paying for medical treatment due to this system can be realized in two ways:

- a) the insurance funds fully pay the expenditures to the doctors associations instead of paying directly to a doctor. The sum of compensation is committed according to the number of the insured covering all kinds of services granted by doctors. Then the associations pay directly to the doctors.
- b) the general sum of money is divided among the associations due to additional instructions and universal scale of reimbursement under which the associations figure up the sums of money which should be reimbursed⁷.

The private model of health care financing exists in USA and the main principles of its financing are the correlations between doctors and patients as free sides of the market. Under such conditions and existence of competition between suppliers of medical services real market prices are established; the absence of unique state medical insurance system; the commitment of state regulation of medical services market only by accepted laws and establishment of social medical programs⁸.

The definition of health care financing system. The system of health care financing from the cash fund will look like the following: the financing will be held for granted medical aid. We do not support the point of view that the financing should go to health care institutions. The insured should pay a part of money. The other part one will be paid from the insurance fund after getting aid and the part of money paid by the insured will be returned to him/her by the insurance fund. As financing being done not properly, when the individuals and legal entities can not pay and the state money is scarce, also a great number of social aid was established after adoption the State budget and thus it could not be financed and foreseen, then they were addressed to local budgets. And we consider that the best for Ukraine will be the establishment of the insurance model of health care financing.

Considering the above mentioned drawbacks of our health care financing system, it is reasonable to consider about establishing the insurance model of health care financing system in Ukraine. The main principles of this system will be: the government will not be responsible for the health care system financing except some segments of this market; the main role of the government will be to establish conditions for proper functioning of medical insurance funds; the administration of this system will be laid on the workers and employers; the solidary principle – the level of services will be equal not depending on income, family status, risk to become ill; the existence of real paying for the services without contract between an insured person and a supplier of health care (health care institution); the right to choose a supplier of health care (health care institution)

7 Reinhard Busse, Annette Riesberg Health care systems in transition Germany. Copenhagen, WHO Regional Office for Europe on behalf of the European Observatory on Health Systems and Policies, 2004. – Vol. 6. – No. 9. – P. 177.

8 Солдатенко О. В. Європейський досвід фінансування видатків на охорону здоров'я / Оксана Солдатенко // Юридична Україна. – 2010. – № 4. – С. 56.

and insurer by the insured; medical insurance funds should have the authority to define a proper sum of payments and allocation of this payment; health care institution expenditures for granted medical services will be reimbursed due to the number of insured and they will cover all kinds of medical aid given by them.

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International conference of PhD students and young researchers

THE INTERACTION OF NATIONAL LEGAL SYSTEMS: CONVERGENCE OR DIVERGENCE?

25–26 of April 2013

VILNIUS UNIVERSITY FACULTY OF LAW

DAY ONE 25 of April 2013	
8.30 – 9.00 <i>Registration of participants</i>	
9.00 – 9.15 <i>Welcome speech</i>	
PLENARY SESSION Room JR 4	
9.15 – 9.30 The synthesis of comparative and socio-legal research as the essential prerequisite to reveal the interaction of national legal systems Vitalij Levičev	
9.30 – 9.45 The paradigm of new science – complex dynamic systems – and its importance for research in legal science Dovilė Valančienė	
9.45 – 10.00 What Makes A Legal System Legitimate? Analyzing Three Models of Public Justification Wojciech Ciszewski, Ewa Matejkowska	
10.00 – 10.15 E-judiciary as a Sign of Convergence in National Legal Systems Monika Odrowska-Stasiak	
10.15 – 10.45 <i>Discussion</i>	
10.45 – 11.00 <i>Coffee break</i>	
SECTION I Room JR 4	SECTION II Room 609
Session 1	
11.00 – 11.15 The comparative analysis of the institutes of penal effect measures in the Lithuanian and Polish criminal law Justyna Levon	11.00 – 11.15 National labour markets for foreigners: harmonization, reciprocity rule or discrimination? Anna Stokłosa



<p>11.15 – 11.30 The impact of EU law on harmonisation of national criminal law Teresa Bedulska</p>	<p>11.15 – 11.30 Convergence of National Legal Systems-Burden of Proof in Employment Law Aneta Tyc</p>
<p>11.30 – 11.45 Corruption in the Private Sector: the Convergence of Legal Systems Salomėja Zaksaitė</p>	<p>11.30 – 11.45 Convergent impact of information regulation of employment relationships technologies on regulation of employment relationships Gintarė Tamašauskaitė</p>
<p>11.45 – 12.00 Interaction of domestic law of United States of America with domestic laws of other countries dealing with reparation for Nazi crimes Nika Bruskina</p>	<p>11.45 – 12.00 Convergence in Polish Labour Law. The impact of European Union Law Żaneta Jakubiec</p>
<p>12.00 – 12.30 <i>Discussion</i></p>	<p>12.00 – 12.30 <i>Discussion</i></p>
<p>12.30 – 13.30 <i>Lunch break</i></p>	<p>12.30 – 13.30 <i>Lunch break</i></p>
<p>Session 2</p>	
<p>13.30 – 13.45 German and Polish Constructive Vote of No Confidence. Convergence or Divergence? Maciej Pach</p>	<p>13.30 – 13.45 The Interaction of National Legal Systems in Regulation of Mediation Egor Evtukhovich</p>
<p>13.45 – 14.00 Convergence of Law – Examples from European Administrative Procedure Robert Siuciński</p>	<p>13.45 – 14.00 Integration of Mediation in to Latvian Legal Culture Ivars Kronis</p>
<p>14.00 – 14.15 Whose Fault Is It? Chiara Feliziani</p>	<p>14.00 – 14.15 Party autonomy in private international law as a tool for converging national laws Maarja Torga</p>
<p>14.15 – 14.45 <i>Discussion</i></p>	<p>14.15 – 14.45 <i>Discussion</i></p>
<p>14.45 – 15.00 <i>Coffee break</i></p>	<p>14.45 – 15.00 <i>Coffee break</i></p>
<p>Session 3</p>	
<p>15.00 – 15.15 The Interaction of National Legal Systems in the State of Exception Aušra Vainorienė</p>	<p>15.00 – 15.15 Convergence on shareholder primacy model of corporation – endlessly contested issue? Eglė Lauraitytė</p>
<p>15.15 – 15.30 Change in the role of notaries public? Effects of the integrational legislation on the execution of a last will and testament Noémi Suri</p>	<p>15.15 – 15.30 Jurisdiction in civil and commercial matters under the Regulation No 1215/2012 – between common grounds of jurisdiction and divergent national rules Łukasz Dyrda</p>

15.30 – 15.45 The interaction between religious and secular law in Israel Anna Rataj	15.30 – 15.45 The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: 'The End of History' for directors' fiduciary duties? Katarzyna Chałacziewicz-Ladna
15.45 – 16.15 <i>Discussion</i>	15.45 – 16.15 <i>Discussion</i>

DAY TWO
26 of April 2013

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SECTION I Room JR 4	SECTION II Room 302
Session 1	
9.00 – 9.15 The State Immunity Doctrine as the Result of the Constant Convergence between the National Legal Systems Julius Zaleskis	9.00 – 9.15 The enhanced cooperation - is it an instrument efficient enough to avoid the divergence between the national regulations of private international law in the EU? Anna Sapota
9.15 – 9.30 The concept of state immunity and the main challenges Neringa Toleikytė	9.15 – 9.30 Judicial cooperation in civil matters in the European Union Iwona Miedzińska
9.30 – 9.45 Historical meaning of convergence of Polish and Austrian administrative procedure Łukasz Sobolewski, Marcin Banasik	9.30 – 9.45 Collective redress v. class actions – convergence or divergence between the European and American solutions on group litigation? Maciej Gac
9.45 – 10.15 <i>Discussion</i>	9.45 – 10.15 <i>Discussion</i>
10.15 – 10.30 <i>Coffee break</i>	
Session 2	
10.30 – 10.45 EU Competition Law – No Place For National Rules? Dariusz Miniotas	10.30 – 10.45 Software agents as international issue – can we afford divergence? Rafał Michalczak



10.45 – 11.00 The main changes and dynamics of competition law rules in Poland and Lithuania in the period of 1990 – 2004 Magdalena Kozak	10.45 – 11.00 EU unitary patent as an example of convergence in the Intellectual Property Law Joanna Wiszniewska
11.00 – 11.15 Energy policy of the European Union and its influence on EU economic competitiveness Karol Magoń	11.00 – 11.15 The quality of patents on biotech inventions: the international cooperation on the non-obviousness standards Joanna Uchańska
11.15 – 11.30 Some Aspects of Environmental Regulation of Shale Gas Activities Jonas Urbanavičius	11.15 – 11.30 The Historical Development of Regulation of Non-marital Cohabitation of Heterosexual Couples and its Effect on the Creation of Modern Family Law in Europe Olga Beinaroviča
11.30 – 12.00 <i>Discussion</i>	11.30 – 12.00 <i>Discussion</i>
12.00 – 13.00 <i>Lunch break</i>	
Session 3	
13.00 – 13.15 Project of European Foundation: as an example of limited convergence of Civil and Common Law Bohdan Pretkiel	13.00 – 13.15 Education funding in the light of the principles of good governance Dominique de Meyst, Mariëtte D.C. van der Tol
13.15 – 13.30 MiFID as an example of convergence of national legal systems in Europe Mateusz Pacak	13.15 – 13.30 Interaction between Lithuanian and Austrian legal systems: tax dispute resolution procedure (also in due consideration of the context of European Union) Milda Stankevičiūtė
13.30 – 13.45 The European Supervisory Authorities: a true evolutionary step along the process of European financial integration? Gianni Lo Schiavo	13.30 – 13.45 Assisted reproductive technologies: a state matter Alessia Minieri
13.45 – 14.15 <i>Discussion</i>	13.45 – 14.15 <i>Discussion</i>
14.15 – 14.30 <i>Coffee break</i>	

PLENARY SESSION

Room JR 4

14.30 – 14.45

Human rights universalism and particularism in the jurisprudence of Lithuanian courts

Karolina Bubnytė

14.45 – 15.00

Convergence of national legal systems as the example of the principle of proportionality usage

Bronislav Totskyi

15.00 – 15.15

Administration of justice: comparative aspect of different national legal systems

Miglė Dereškevičiūtė

15.15 – 15.30

The Impact of the Court of Justice of the European Union upon National Interim Measures: The Cost of Convergence

Donatas Murauskas

15.30 – 16.00 *Discussion*

16.00 *Conclusion of the conference*



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