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Tomáš Gábriš – Matej Horvat – Ondrej Hamuľák

LIST OF CONTRIBUTORS

Norbert Adamov is an assistant professor at Comenius University in Bratislava, Slovakia

Jozef Andraško is an assistant professor at Comenius University in Bratislava, Slovakia

Daniel Bednár is an assistant professor at Comenius University in Bratislava, Slovakia

Andrej Beleš is a PhD student at Comenius University in Bratislava, Slovakia

Martin Dufala is an assistant professor at Comenius University in Bratislava, Slovakia

Lenka Dufalová is an assistant professor at Comenius University in Bratislava, Slovakia

Tomáš Gábriš is an associate professor at Comenius University in Bratislava, Slovakia

Barbora Grambličková is a PhD student at Comenius University in Bratislava, Slovakia

Abdul Ghafur Hamid is a professor at International Islamic University, Malaysia

Ondrej Hamuľák is an assistant professor at Palacký University Olomouc, Czech Republic

Simona Heseková is an assistant professor at Comenius University in Bratislava, Slovakia

Jarmila Chovancová is an associate professor at Comenius University in Bratislava, Slovakia

Tanel Kerikmäe is a professor at Tallinn Law School, Estonia

Anna Kociołek-Pęksa is an assistant professor at The Main School of Fire Service, Poland

David Kopal is a doctoral student at Palacký University Olomouc, Czech Republic

Jakub Ľorko is an assistant professor at Comenius University in Bratislava, Slovakia

Zuzana Macková is an assistant professor at Comenius University in Bratislava, Slovakia

Murtala Ganiyu A Murgan is an assistant professor at University of Ilorin, Nigeria

Maizatun Mustapha is an associate professor at International Islamic University, Malaysia

Ľudovít Máčaj is an assistant professor at Comenius University in Bratislava, Slovakia

Jerzy Menkes is a professor at Warsaw School of Economics, Poland

Matúš Mesarčík is a PhD student at Comenius University in Bratislava, Slovakia

Rastislav Munk is an assistant professor at Comenius University in Bratislava, Slovakia

Mária Patakyová is a professor at Comenius University in Bratislava, Slovakia

Mária T. Patakyová is an assistant professor at Comenius University in Bratislava, Slovakia

Jana Šmelková is an assistant professor at Comenius University in Bratislava, Slovakia

Lívia Trellová is an assistant professor at Comenius University in Bratislava, Slovakia

Peter Vršanský is an associate professor at Comenius University in Bratislava, Slovakia

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IDENTITE NATIONALE ET CONSTITUTIONNELLE DANS LA JUDISPRUDENCE DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE[1]

NATIONAL AND CONSTITUTIONAL IDENTITY IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Ondrej Hamuľák, David Kopal, Tanel Kerikmäe
Palacký University Olomouc, Faculté de droit, La Chaire Jean Monnet
Université de Technologie de Tallinn, École de commerce et de gouvernance, département de droit Tallinn Law School

Résumé: Le but de cet article est de déterminer la position de la CJUE à l'égard de l'identité nationale en ce qui concerne sa jurisprudence et si la Cour privilégie l'identité nationale ou la primauté du droit de l'UE lors de l'équilibre entre les principes constitutionnels et Les intérêts des États membres avec le droit de l'UE. La partie introductive d'article traite de l'insertion et du développement de la clause d'identité nationale dans le droit primaire de l'UE. Sa partie principale consiste à analyser la jurisprudence de la CJUE, ainsi que les avis des Avocats Généraux dans la période antérieure et postérieure à l'adoption du Traité de Lisbonne.

Mots-clés: identité nationale, identité constitutionnelle, Cour de justice de l'Union européenne, relation entre le droit national et le droit de l'UE

Abstract: The aim of this paper is to determine the position of the CJEU towards the national identity with regard to its case law and whether the Court gives preference to the national identity or to the primacy of EU law during the balancing between the constitutional principles and the interests of member states with EU law. The introductory part of the paper addresses the insertion and the development of the national identity clause in the primary law. Its main part consists of analysis of the case law of the CJEU, as well as of the opinions of Advocates General, in the period before and after the adoption of the Treaty of Lisbon.

Keywords: national identity, constitutional identity, Court of Justice of the European Union, relationship between national law and EU law

1 INTRODUCTION

En général on peut dire que l'identité nationale, ou bien l'identité constitutionnelle des États membres de l'UE est liée aux élements essentielles de leur constitution en relation avec la commu-

[1] Cet article a été écrit au nom des projets GAČR no. 17-22322S (Vliv Listiny základních práv EU na ústavní právo zemí Visegrádské čtyřky) and IGA no. PF_2015_017 (Evropská unie a finanční krize: Jak se změnil vztah mezi právním řádem EU a právními řády členských států?).

nauté politique de tel ou tel état.[2] Le trait caractéristique de ces élements constitutifs est le fait qu'ils sont donnés et ainsi protégés contre un éventuel changement. Dans le cas de la présente étude il s'agit d'une modification ayant son origine dans le droit européen qui s'accroit sans cesse et qui impiète de plus en plus dans les spécificités constitutionnelles des pays membres.

Bien que le respect de l'identité nationale des États membres fait partie du droit de l'UE depuis son commencement,[3] ce n'est que le Traité de Maastricht de 1992 qui en a fait la partie explicite. Conformément à l'article F :

1. *L'Union respecte l'identité nationale de ses États membres, dont le système politique est fondé sur les principes démocratiques.*
2. *L'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, en tant que principes généraux du droit communautaire.*

Ce sont de probables changements importés dans le cadre juridique de l'UE par le Traité de Maastricht qui en ce moment représentent la raison de l'implémentation de la dite stipulation. Quoi qu'il s'agissait de la citoyenneté européenne, l'union économique et monétaire ou bien la monnaie unique, tous les changements avaient un impact incontestable sur la suveraineté des États membres. Ces derniers se sont mis d'accord pour inclure une stipulation de sécurité dans les Traités mêmes pour régler dans une certaine mesure la gamme des compétences européenne à l'aide des stipulations garantissants le respect de l'UE aux identités nationnales des États membres.[4] La judisprudence, au fur et à mesure croissante des instances intérieures suprêmes, y va de pair, et ces dernières ont essayé de définir les limites du droit de l'UE dans les ordres juridiques intérieurs. La conception de l'identité nationale dans les Traités avait un caractère plûtot politique, ce qui n'était pas le cas par exemple de la Cour constitutionnelle fédérale[5] et l'impact de ces désions sur le rapport du droit de l'UE et du droit national. C'était causé aussi par le fait qu'à l'époque l'article F du Traité sur l'Union européenne (TUE) ne relevait pas de la jurisprudence de la Cour de justice de l'Union européenne (CJUE).

Il résulte de la présente stipulation que la conception de la protection de l'identité était dans sa version d'origine liée surtout aux principes de démocratie. Cependant, il faut prendre en considération le fait que le paragraphe suivant parle expressément aussi de la protection des droits fondamentaux émanant des traditions constitutionnelles des États membres.

Malgré le fait que le droit primaire exprimait expressément le respect à l'identité nationale des États membres, le contenu réel de cette locution verbale n'était pas clair. En plus, la situation a été rendue compliquée par le fait que la Cour de justice à l'époque n'avait pas la compétence d'interpréter le contenu de la présente stipulation, il n'y avait donc pas d'instance pouvant mettre des contours fondamentaux à cette nouvelle conception.

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2 MARTÍ, José Luis. Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed*). National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 20.

3 Conclusion de l'avocat général Miguel Poiares Madura du 8 octobre 2008 dans l'affaire *Michaniki*, C – 213/07, ECLI: EU:C:2008:544.

4 ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro. Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed*). National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 6

5 Par exemple la décision de la Cour constitutionnelle fédérale du 12 octobre 1993, BverfGE 89, 155 *Maastricht-Urteil.*

La disposition mentionée a été modifiée et renumérotée par l'adoption du Traité d'Amsterdam en 1997 qui a déplacé la protection de l'identité nationale dans le troisième paragraphe et a abrégé son texte de façon à ce que d'après l'ancien article 6 du TUE:

1. *L' Union reconnaît les droits, les libertés et les principes énoncés dans la Charte des droits fondamentaux de l'Union européenne, les principes communes aux États membres.*
2. *L' Union respecte les droits fondamentaux garantis par la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales signée à Rome le 4 novembre 1950 tels qu'ils résultent des traditions constitutionnelles communes aux États membres en tant que principes généraux du droit communautaire.*
3. *L'Union reconnait l'identité nationale de ses États membres.*

Vu que le respect à l'identité nationale et les textes du deuxième paragraphe restaient maintenus, cela semblait montrer qu'il s'agissait d'une modification formelle du présent article. En même temps le nouveau paragraphe premier a été inclu, définissant les valeurs principales et les principes communs aux États membres, les fondements de l'UE. L'identité nationale dans le paragraphe 3 peut être regardée comme l'élément faisant un contrepoind aux principes communs définis dans le paragraphe1.[6]

L'art. 6 gardait sa forme jusqu'à l'adoption du Traité de Lisbonne qui a non seulement assemblé *de facto* le deuxième et troisième paragraphe, mais a aussi élargi son contenu.[7] Conformément à l'actuel article 4, paragraphe 2 TUE:

L'Union respecte l'égalité des États membres devant les traités ainsi que leur identité nationale, inhérente à leurs structures fondamentales politiques et constitutionnelles, y compris en ce qui concerne l'autonomie locale et régionale. Elle respecte les fonctions essentielles de l'État, notamment celles qui ont pour objet d'assurer son intégrité territoriale, de maintenir l'ordre public et de sauvegarder la sécurité nationale. En particulier, la sécurité nationale reste de la seule responsabilité de chaque État membre.

A première vue, il est évident que dans l'article mentionné il ne s'agisse pas de la définition exhaustive de l'identité nationale mais plûtot d'une simple liste des signes qui y sont liés. L'article allégué n'apporte pas de réponse à la question de savoir quel contenu et quels impacts réels peuvent avoir une telle conception sur les relations de l'ordre juridique de l'UE et les ordres juridiques nationaux des États membres.[2]

De l'art. 4 paragraphe 2 du TUE résulte que la notion de l'identité nationale entre autre peut comprendre le repect de l'Union européenne aux fondements constitutionnels des États membres, c'est-à-dire à leur identité constitutionnelle. Il en est clair aussi de la jurisprudence de la CJUE analysée ci-dessous parce que quand la Cour de justice, respectivement l'avocat général renvoie à l'art. 4 paragraphe 2 du TUE ou précèdents, il mentionne souvent des principes résultant du droit constitutionnel des États membres. Donc, l'Union européenne a l'obligation de respecter non seulement l'identité de ses États membres mais en même temps leur identité constitutionnelle représentant un certain sous-ensemble de l'identité nationale.

De l'autre côté il faut regarder aussi la systèmatique de la disposition mentionnée où l'art. 4 du TUE mentionne dans les autres paragraphe en plus de la protection de l'identité nationale aussi le principe

6 CLAES, Monica. National Identity: Trump Card or Up for Negotiation?. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 118.

7 L' obligation de respecter l'identité nationale des états membres a été introduit même dans le Préambule au Convention des droits fondamentaux de l'UE qui après la ratification du Traité de Lisbonne a le même statut que le droit primaire.

de la transmission des compétences et surtout le principe de la coopération loyale. En vertu du principe mentionné en dernier « Les États membres facilitent l'accomplissement par l'Union de sa mission et s'abstiennent de toute mesure susceptible de mettre en péril la réalisation des objectifs de l'Union. »

Il en résulte qu'il faut toujours équilibrer le respect à l'identité nationale des États membres avec d'autres principes découlant du droit primaire, surtout avec les principes de la primauté et de l'effet direct du droit de l'UE.[8]

Dans ce sens il faut souligner le fait que l'art. 4 paragraphe 2 du TUE dépend nouvellement de la compétence de révision de la Cour de justice puisque conformément à l'art. 19 paragraphe 1 du TUE la Cour de justice « assure le respect du droit dans l'interprétation et l'application des traités. » C'est pourquoi il est à la CJUE d'interpréter dans sa jurisprudence la conception de l'identité nationale ou bien constitutionnelle, et de définir la mesure dans la quelle la spécificité constitutionnelle d'un des États membres peut motiver une exception du droit de l'UE.

La question se pose si une nouvelle définition de l'identité nationale dans l'art. 4 paragraphe 2 du TUE présente une modification essentielle du droit primaire ou bien s'il s'agit d'un simple remaniement de ce qui contenait le droit primaire déjà depuis le Traité de Maastricht.

D'après certains auteurs la formulation dans l'art. 4 paragraphe 2 du TUE pourrait apporter un équilibre dans les relations entre la CJUE préférant le principe de la primauté absolue du droit de l'UE et les cours constitutionnelles nationales estimant les constitutions intérieures comme une barrière contre les effets expansifs du droit de l'UE.[9] D'après certains parmi eux la conception de l'identité nationale pourrait fonctionner comme une exception du principe de la primauté du droit de l'UE pouvant être utilisée par des cours constitutionnelles intérieures.[10] D'après une autre opinion le texte de l'art. 4 paragraphe 2 du TUE ne présente aucune modification matérielle car ils subsument l'actuelle protection des traditions constitutionnelles des États membres, auparavant contenue dans l'art. 6 paragraphe 2 du TUE sous la conception de l'identité nationale.[11]

Nous nous penchons du côté de l'avis mentionné en dernier car en comparant l'ancien art. 6 paragraphe 2 et 3 du TUE et l'actuel art. 4 paragraphe 2 du TUE il en résulte que le contenu du point de vue matériel reste sans modification. Pour cette raison, nous ne supposont pas que l'art. 4 paragraphe 2 du TUE dans le contexte du Traité de Lisbonne devrait être opéré comme une disposition permettant aux États membres de servir d'exception du principe de primauté du droit européen.

Pour répondre à la question si l'art. 4 paragraphe 2 du TUE pourrait présenter une obligation positive pour l'UE et ses institutions, il faut mettre au clair ce qui est le contenu réel de la conception de l'identité nationale. La présente étude essaie de répondre à la question de savoir quelle est la position de la CJUE dans sa pratique décisionnelle concernant la question de l'identité nationale, et si, dans la compensation des principes constitutionnels et des intérêts des États membres avec le droit de l'UE, elle donne la priorité à l'identité nationale ou bien si elle impose plûtot la primauté du droit de l'UE même au détriment des intérêts légitimes des États membres.

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8 GREWE, Constance. Methods of Identification of National Constitutional Identity. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 39.

9 BOGDANDY, Armin von, SCHILL, Stephan. Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Tready. *Common Law Market Review*, 2011, an. 48, p. 1418.

10 KUMM, Matthias, FERRERES COMELLA, Victor. The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union. *International Journal of Constitutional Law*, an. 3, n. 2–3, p. 473–492.

11 MARTINICO, Giuseppe. What Lies behind Article 4(2) TEU. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 94.

Le présent chapître est divisé en trois parties. La première partie est consacrée à la jurisprudence de la Cour de justice concernant l'identité nationale de la période avant le Traité de Lisbonne. La partie suivant traite l'évolution de la jurisprudence après l'adoption du Traité de Lisbonne. Et la dernière partie résume l'approche de la Cour de justice à la conception de l'identité nationale en vertu de sa jurisprudence des deux périodes analysées.

2 LA JURISPRUDENCE DE LA PÉRIODE D'AVANT LE TRAITÉ DE LISBONNE

2.1 La Cour de justice

La Cour de justice a mentionné pour la première fois la notion d'identité nationale avant son établissement dans le droit primaire. La décision Groener[12] concernait le règlement national irlandais conditionnant la nomination à un poste permanent à plein temps de professeur dans les institutions publiques d'enseignement professionnel à la preuve d'une connaissance suffisante de la langue irlandaise. D'après la Cour de justice le métier d'un enseignant revêt un rôle important dans la mise en place et le maintien de la politique interne, de plus, dans le cadre d'un enseignement, l'utilisation de l'irlandais est un moyen d'expression de son identité nationale et sa culture. C'est pourquoi le droit européen primaire d'après CJUE n'interdit pas d'adopter la politique dont l'objectif est la protection et le sauvegarde de la langue officielle d'un état membre.[13]

L'implémentation d'une telle politique ne peut pas empiéter d'après la CJUE dans la liberté fondamentale telle que la libre circulation des travailleurs. C'est pourquoi les mesures applicables ne doivent en aucun cas être disproportionnées par rapport au but poursuivi et les modalités de leur application ne doivent pas comporter de discriminations au détriment des ressortissants d'autres États membres.[14] La CJUE est parvenue à ce que la législation irlandaise soit conforme aux exigeances de la disposition sur la libre circulation des travailleurs à l'intérieur de la Communauté.

Vu que ladite décision est la seule dans laquelle la CJUE a mentionné la conception de l'identité nationale avant sont implémentation dans les Traités, il est à conclure que la Cour de justice jusqu'à là n'y prêtait pas attention.

Il est possible de trouver preuves à l'appui plus de mentions sur l'identité nationale, surtout dans les conclusions des avocats généraux après l'adoption du Traité de Maastricht, grâce auquel la protection de l'identité nationale fait inéluctablement partie des Traités. La Cour de justice même dans ce temps là (avant l'adoption du Traité de Lisbonne) n'a mentionné la protection de l'identité nationale que dans deux de ses décisions. Les deux, comme l'arrêt *Groener,* concernaient une soi-disante identité culturele.

La première décision concernait la *Commission des Communautés européennes contre Grand-Duché de Luxembourg* [15] sur légalité des conditions internes de la nationalité luxembourgoise pour l'emploi d'un enseignant dans le système de l'enseignement public que prévoit la constitution

[12] L'arrêt de la Cour de justice du 28 novembre 1989, *Groener*, C-379/87, ECLI:EU:C:1989:599.
[13] Ibid., points 18, 19.
[14] Ibid., point 19.
[15] Arrêt de la Cour de justice du 2 juillet 1996, *Commission des Communautés européennes contre Grand-Duché de Luxembourg*, C-473/93, ECLI:EU:C:1996:263.

luxembourgoise. La question est posée sur le fait de savoir si cette stipulation est conforme à la libre circulation des travailleurs. D'après le gouvernement luxembourgois la condition de la nationalité est liée à la transmission des valeurs traditionnelles et constitue donc, eu égard à la situation particulière démographique du pays, une condition motivée de la sauvegarde de l'identité nationale du Grand-Duché de Luxembourg. Celle-ci ne pourrait en effet être préservée si la majeure partie du corps enseignant était constitué de ressortissants d'autres États membres.[16]

D'après l'avocat général Léger toutes les matières enseignées ne reflètent pas forcément les valeurs traditionnelles du pays même si certaines peuvent sans doute refléter l'identité nationale. Permettre aux ressortissants des autres États membres d'enseigner dans les écoles ne représente pas selon l'avocat général une menace pour l'identité nationale parce que ces ressortissants doivent remplir d'autres conditions strictes prescrites par le droit interne pour l'exercice de cet emploi.[17]

La Cour de justice est arrivée à la conclusion que les dispositions mentionnées ne relèvent d'aucunes exceptions à la libre circulation des travailleurs fixées par le droit interne.[18] D'après la CJUE, cette conclusion ne peut pas être influencée même pas par le fait, que conformément à l'ancien art. F paragraphe 1 du TUE l, le mantien des identités nationales des États membres est un objectif légitime du droit de l'UE autorisant la restriction des libertés fondamentales. Dans ce cas là d'après la CJUE, l'intérêt du Luxembourg peut être assuré effectivement par des moyens moins limitants. La restriction en question était trouvée disproporticionnelle car la sauvegarde de l'identité nationale ne peut pas justifier l'exclusion des ressortissants des autres États membres de l'ensemble des emplois du secteur de l'enseignement.[19]

La Cour de justice a fait les mêmes démarches aussi dans la deuxième décision qui concernait le *Grand-Duché de Luxembourg*[20] et dont l'objet était la condition légale de la nationalité luxembourgoise dans l'exercice des activités de notaire. La question soulevée était si cette condition n'est pas en contradiction avec le principe de la liberté d'établissement. Le gouvernement luxembourgois invoquait que l'objectif de la condition en cause vise à assurer le respect de l'histoire, de la culture, des traditions et de l'identité nationale luxembourgoise au sens de l'ancien art. 6 paragraphe 3 du TUE.[21]

L'avocat général Pedro Cruz Villalón, dans ses conslusions, répétait seulement l'argumentation du gouvernement, en reliant la condition de la nationalité dans l'exercice des activités du notaire avec la protection de l'identité constitutionnelle du Luxembourg.[22]

La CJUE se préoccupait surtout du fait s'il est possible d'inclure la disposition interne en cause dans l'exception des libertés fondamentales d'établissement découlant des Traités. Ce n'était que par la suite qu'il mentionnait que même si la sauvegarde de l'identité nationnale des États membres représente un but légitime respecté par l'ordre juridique de l'Union, « l'intérêt invoqué par le Grand-Duché peut toutefois être utilement préservé par d'autres moyens que l'exclusion, à titre général, des

16 Ibid., point 32.

17 Conclusion de l'avocat général Léger du 5 mars 1996 dans l'affaire *Commission contre Grand-Duché de Luxembourg*, C-473/93, ECLI:EU:C:1996:80, points 134, 137, 139.

18 *Commission contre Grand-Duché de Luxembourg*, C-473/93, point 33.

19 Ibid., points 24, 35.

20 Arrêt de la Cour de justice du 24 mai 2011, *Commission européenne contre le Grand-duché de Luxembourg*, C-51/08, ECLI:EU:C:2011:336. Même si la décision a été prise après l'adoption du Traité de Lisbonne, la procédure avait démarré avant cette date.

21 Ibid., point 72.

22 Conclusion de l'avocat général Pedro Cruz Villalóna du 14 septembre 2010 dans l'affaire Commission européenne contre le Grand-Duché de Luxembourg, C-51/08, ECLI:EU:C:2010:525, point 141.

ressortissants des autres États membres ».[23] Ansi, d'après la Cour de justice la condition de nationalité pour la profession de notaire ne relève pas de l'exception de la libre circulation découlant du droit primaire.

Comme dans l'arrêt Groener, aussi dans ces deux décisions mentionnées, la CJUE n'a fait références sur la protection de l'identité nationale que subsidiairement. Elle procède d'abord en vertu de sa jurisprudence établie concernant des exceptions des libertés du marché intérieur dont le centre est l'application du principe de proportionalité. Non seulement ces décisions n'ont pas expliqué ce que la Cour de justice entend sous la notion de l'identité nationale, mais cette notion n'a même pas été utilisée comme argument principale influençant considérablement le résultat de la procédure.

Une autre décision mentionnée ne concerne pas directement l'identité nationale mais du point de vue matériel il s'agit d'une affaire similaire. Dans la décision *Omega*[24] la CJUE a pris en considération la spécificité constitutionnelle de l'État membre pour justifier l'exception du droit de l'UE, ce qui autrement ne serait pas possible.

La ville allemande Bonn a interdit par un arrêté les jeux laser dont l'objectif étaient la simulation d'actes d'homicides sur d'autres personnes pour divertir avec justification qu'une telle forme de divertissement est contraire à la dignité humaine protégée par la constitution allemande. La question de la juridiction introduisante l'affaire était si cette interdiction ne porte pas l'atteinte à la libre circulation des services dans le champ du droit de l'UE pour les prestateurs de ces jeux.

D'après la CJUE les droits fondamentaux font « partie intégrante des principes généraux du droit dont la Cour assure le respect et que, à cet effet, cette dernière s'inspire des traditions constitutionnelles communes aux États membres. »[25] La Cour de justice n'a explicitement pas fait référence à l'identité nationale mais sur les traditions constitutionnelles des États membres stipulées dans l'ancien art. 6, paragraphe 2 du TUE.

D'après la Cour de justice « il n'est pas indispensable, à cet égard, que la mesure restrictive édictée par les autorités d'un État membre corresponde à une conception partagée par l'ensemble des États membres en ce qui concerne les modalités de protection du droit fondamental ou de l'intérêt légitime en cause. »[26] Quoique d'après la Cour de justice la dignité humaine est protégée dans le champ du droit de l'UE, l'État membre a une large liberté pour délimiter le contenu et la portée dudit principe en prenant en considération les spécificités nationales. La CJUE a aussi souligné que l'ordre public ne peut être invoqué qu'en cas de menace réelle et suffisamment grave, affectant un intérêt fondamental de la société.[27]

La CJUE est parvenue à constater que la restriction était dans ce cas là proportionnelle parce qu'elle limitait seulement l'interdiction des jeux laser qui ont pour objet de tirer sur des cibles humaines et l'arrêté litigieux n'est pas allé au-delà de ce qui est nécessaire pour atteindre l'objectif poursuivi par les autorités nationales compétentes. D'après la CJUE l'interdiction adoptée pour des motifs de protection de l'ordre public est conforme au droit de l'UE.[28]

Ainsi, la Cour de justice, dans ce cas là, a laissé à l'autorité interne le soin de déterminer qu'il était important d'appliquer une certaine spécificité constitutionnelle dans un contexte concret. C'est

23 *Commission européenne contre le Grand-Duché de Luxembourg*, C-51/08, point 124.
24 Arrêt de la Cour de justice du 14 octobre 2004, *Omega*, C-36/02, ECLI:EU:C:2004:614.
25 Ibid., point 33
26 Ibid., point 37
27 Ibid., point 30
28 Ibid., points 40, 41.

seulement ensuite que la CJUE seule fixerait la portée de ladite spécificité sur le droit de l'UE.[29] La CJUE dans une certaine mesure respectait le dialogue entre elle-même et les autorités internes au lieu de disposer de façon autoritaire.

Même si dans cette décision la CJUE ne partait pas de la sauvegarde de l'identité nationale explicitement et qu'elle a renvoyé aux traditions constitutionnelles des États membres, son approche était similaire aux décisions mentionnée ci-dessus. De nouveau, la Cour de justice est partie de sa jurisprudence constante concernant les dérogations du droit de l'UE qui trouvent leur origine dans le droit européen même. Par cette attitude elle garde également le contrôle absolu sur le résultat de la procédure.[30] Ce qui est intéressant c'est que l'avocat général Poiares Maduro considère l'approche dans la décision Omega comme exemple du respect à l'identité nationale.[31]

2.2 Conclusions des avocats généraux

Les autres acteurs contribuant aux débats sur le sujet de l'identité nationale durant la période avant Lisbonne furent les avocats généraux avec leurs conclusions devant la CJUE. La Cour de justice n'a pas ramassé l'éponge jetée par les avocats généraux et n'a pas basculé du côté de l'argumentation avec l'identité nationale.

Dans la décision la *Royaume d'Espagne contre Eurojust*, l'Espagne a attaqué le régime linguistique utilisé dans le recrutement dans Eurojust et demandait l'annulation de la disposition demandant de remplir certains documents en anglais. L'avocat général Miguel Poiares Maduro, dans sa conclusion, a signalé le fait qu'en vertu de l'ancien art. 6 paragraphe 3 du TUE l'Union respecte l'identité nationale des États membres et le respect de la diversité linguistique est l'un de ses aspects principaux. Le principe du respect de la diversité linguistique est en plus explicitement énoncé même dans la Charte des droits fondamentaux de l'UE.[32] La Cour de justice dans sa décision ne se préocupait pas du tout de l'argument sur l'identité nationale parce qu'elle trouvait le recours irrecévable.

La décision Marrosu Vassallo concernait la législation italienne, dont la conséquence était la différence de traitement dans le cadre du secteur privé et public, dans le cas de transformation des contrats de travail à durée déterminée en contrats à durée indéterminée. Le gouvernement italien a justifié qu'il était nécessaire de percevoir ce traitement distinct en considération des exigences constitutionnelles, à savoir les conditions assurant l'impartialité et l'efficacité de l'administration.[33]

En réaction à cette argumentation l'avocat général Poiares Maduro a estimé qu'il était nécessaire de reconnaître « aux autorités nationales, et notamment aux juridictions constitutionnelles, la responsabilité de définir la nature des spécificités nationales pouvant justifier une telle différence de traitement. Celles-ci sont, en effet, les mieux placées pour définir l'identité constitutionnelle des États membres que l'Union européenne s'est donnée pour mission de respecter. Il reste, toutefois,

29 BESSELINK, Leonard F. M., National and Constitutional Identity before and after Lisbon, *Utrecht Law Review*, 2010, an. 6, n. 3, p. 46.

30 ZBÍRAL, Robert. Concept de l'identité nationale en tant qu'un nouvel élément dans la relation du droit interne et de l'Union : Acquis théoriques et professionnels. *Právník (Juriste)*, 2014, an. 153, n. 2, p. 123.

31 Conclusion de l'avocat général Miguel Poiares Maduro du 8 octobre 2008 dans l'affaire *Michaniki*, C – 213/07, ECLI:EU:C:2008:544, point 32.

32 Conclusion de l'avocat général Miguel Poiares Maduro du 16 décembre 2004 dans l'affaire *Royaume d'Espagne contre Eurojust*, C-160/03, ECLI:EU:C:2004:817, points 24, 35.

33 Conclusion de l'avocat général Miguel Poiares Maduro du 20 septembre 2005 dans l'affaire *Marrosu Vassallo,* C – 53/04, ECLI:EU:C:2005:569, point 39

que la Cour a pour devoir de vérifier que cette appréciation est conforme aux droits et aux objectifs fondamentaux dont elle assure le respect dans le cadre communautaire. »[34] En l'espèce, d'après l'avocat général la nécesssité de préserver la voie du concours comme voie particulière d'accès à l'emploi dans les administrations publiques peut être tenue pour un objectif légitime justifiant, dans ce secteur, l'exclusion de la transformation des contrats de travail à durée déterminée en contrats à durée indéterminée. Cette mesure doit être proportionnelle, c'est-à-dire que les moyens employés sont nécessaires et appropriés pour atteindre l'objectif légitime recherché.[35]

L'avocat général Poiares Maduro s'exprimait sur la notion de l'identité nationale aussi dans la conclusion sur l'affaire Michaniki,[36] qui concernait la compatibilité de la législation nationale permettant l'exclusion d'un entrepreneur de la procédure d'attribution d'un marché public de travaux figurant dans le droit de l'UE. Cette régulation est le résultat de la disposition de la constitution nationale qui a pour but la défense de pluralisme des médias. La question était de savoir si la disposition de la constitution greque n'était pas en contradiction avec la directive n. 93/37/CEE sur la coordination des marchés publics des travaux.

D'après l'avocat général l'identité constitutionnelle fait partie de l'identité nationale prévue dans l'ancien art. 6 paragraphe 3 du TUE et le respect de l'identité constitutionnelle constitue pour l'Union européenne un devoir qui s'impose à elle depuis l'origine.[37] La jurisprudence de la CJUE a déjà tiré les conséquences que l'État membre « peut, dans certains cas et sous le contrôle bien évidemment de la Cour, revendiquer la préservation de son identité nationale pour justifier une dérogation à l'application des libertés fondamentales de circulation. »[38]

L'État membre peut d'abord l'invoquer explicitement lui même comme motif légitime et autonome de dérogation à la règles de la libre circulation ou seul l'État membre peut développer sa propre acception d'un intérêt légitime de nature à justifier une entrave à une libre circulation. Comme l'exemple dudit motif, l'avocat général a évoqué l'affaire mentionnée *Omega* dans laquelle l'État membre invoquait la protection de la dignité humaine prévue dans sa constitution de nature à motiver la restriction de la libre circulation des services.

Ensuite, l'avocat général est parvenu à constater qu'un État membre peut invoquer le respect de l'identité nationale pour justifier l'évaluation des mesures constitutionnelles. Le respect de l'identité constitutionnelle des États membres ne peut pas être compris comme une défense absolue à l'égard de toutes les règles constitutionnelles nationales. De même que le droit communautaire prend en compte l'identité constitutionnelle des États membres, de même le droit constitutionnel national doit s'adapter aux exigences de l'ordre juridique de l'UE.[39] Il faut toujours, d'après l'avocat général, confronter l'intérêt résultant de l'identité nationale de l'État membre aux exigences de l'ordre juridique de l'UE, c'est-à-dire appliquer le test de proportionnalité. La disposition de la constitution greque d'après l'avocat général dans le cas en espèce méconnait le principe de proportionnalité.

La Cour de justice est arrivée au même résultat quand elle a mentionné qu'il convennait « de reconnaître aux États membres une certaine marge d'appréciation aux fins de l'adoption de mesures

34 Ibid., point 40.
35 Ibid., points 43, 44.
36 Conclusion de l'avocat général Miguel Poiares Maduro du 8 octobre 2008 dans l'affaire *Michaniki*, C – 213/07, ECLI: EU:C:2008:544.
37 Ibid., point 31.
38 Ibid., point 32.
39 Ibid. point 33.

destinées à garantir les principes d'égalité de traitement des soumissionnaires et de transparence. »[40] D'après la CJUE c'est justement l'État membre qui peut le mieux, en prenant compte des facteurs internes, identifier les situations propices à l'apparition de comportements susceptibles d'entraîner l'inobservation de ces principes. La volonté de l'État membre de garantir la transparence de la procédure des marchés publics réjoint l'objectif d'intérêt général que constitue le maintien du pluralisme et de l'indépendance des médias d'information.[41] La Cour de justice a trouvé la mesure greque concrète disproportionnelle. La Cour de justice a ainsi de nouveau escamoté l'argumentation par l'identité nationale, cette fois-ci avec la référence à l'intérêt général de l'État membre.

Dans l'affaire *Umweltanwalt von Kärnten*[42] l'avocat général a aussi essayé d'argumenter par la conception de l'identité nationale en mentionnant que les États membres de l'UE ont une compétence de souveraineté quant à la définition de la composition et de la répartition des pouvoirs voulue par leur Constitution. Si un pays membre attribue des fonctions juridictionnelles à des organes parajudiciaires, il s'agit d'une volonté liée à l'identité constitutionnelle et à la souveraineté.[43] D'après l'avocat général, le droit d'un État membre de décider la composition du pouvoir judiciaire national fait partie de l'identité constitutionnelle. La conclusion de l'avocat général n'a pas encore convaincu la Cour de justice de s'occuper de l'identité nationale.

La notion de l'identité nationale a été mentionnée dans d'autres conclusions des avocats généraux, par ex. en l'espèce de la protection d'une collectivité territoriale[44] ou bien liée à la détermination des conditions de l'acquisition de la nationalité.[45]

L'effort de préciser l'interprétation de l'actuel art. 4 paragraphe 2 du TUE et de proposer à la Cour de justice dans ce sens des arguments pertinents est mis en lumière par toutes les conclusions mentionnées par des avocats généraux. C'est Poiares Maduro, sans doute, qui a le plus de mérite et d'après lui ce sont justement les autorités nationales des États membres qui définissent la structure de l'identité nationale. D'après lui, ce n'est qu'après que la Cour de justice doit estimer la proportionnalité de cette structure avec le droit de l'UE par l'intermédiaire du principe de proportionnalité. D'après l'avocat général l'argument de l'identité nationale peut directement justifier la dérogation au droit de l'UE. Cependant, sa référence à l'affaire Omega se montre un peu problématique, parce que comme il l'a été dit ci-dessus, dans cette décision le trait principal de l'argumentation de la Cour de justice reflétait sa jurisprudence constante, l'argumentaion des spécificités constitutionnnelles des États membres n'était utilisée que subsidiairement.

En résumé, dans sa période avant Lisbonne, en prenant en considération le nombre des décisions pertinentes, la CJUE dans la conception de l'identité nationale ne considére pas un argument qui pourrait être décisif lui même dans le cas où il s'agit d'une éventuelle atteinte aux spécificités constitutionnelles des États membres. Cette notion reste ainsi pour le moment « séquestrée » particulièrement dans les conclusions des avocats généraux.

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40 Arrêt de la Cour de justice du 16 décembre 2008, *Michaniki*, C – 213/07, ECLI:EU:C:2008:731, point 55.

41 Ibid. points 55, 59.

42 Conclusion de l'avocat général Dámas Ruiz-Jarabo Colomer du 25 juin 2009 dans l'affaire U*mweltanwalt von Kärnten*, C-205/08, ECLI:EU:C:2009:397.

43 Ibid. point 47

44 Conclustion de l'avocat général Verici Trstenjak du 4 juin 2008 dans l'affaire *Coditel Brabant*, C-324/07, ECLI:EU:C:2008:317.

45 Conclusion de l'avocat général Miguel Poiares Maduro du 30 septembre 2009 dans l'affiare *Rottmann*, C-135/08, ECLI:EU:C:2009:588.

3 JURISPRUDENCE APRES LISBONNE

3.1 Le droit primaire

Après l'adoption du Traité de Lisbonne, c'est-à-dire quand l'art. 4 paragraphe 2 du TUE est devenu l'objet de la révision par la Cour de justice, la CJUE s'est exprimée concernant la notion de l'identité nationale pour la première fois dans l'affaire *Sayn-Wittgenstein*.[46] Cette décision concernait la compatibilité de l'art. 21 TFUE régissant la liberté de circulation en application des règles autrichiennes prohibant les titres de noblesse. Ces dernières émanant du principe autrichien constitutionnel de l'égalité de traitemement. La requérante dans la procédure devant la cour nationale a affirmé que l'impossibilité de porter le titre de noblesse est une atteinte au droit de tout citoyen de l'Union de circuler librement.[47] De l'autre côté, d'après le gouvernement autrichien, l'interdiction mentionnée constitue la sauvegarde de l'identité constitutionnelle de la République d'Autriche.[48]

D'après la CJUE le fait que les autorités de l'État membre aient refusé de reconnaître tous ses éléments du nom patronymique d'un ressortissant d'un État membre tel qu'il a été déterminé dans un second État membre constitue une restriction aux libertés reconnues dans l'art. 21 du TFUE à tout citoyen de l'UE.[49] Ensuite, la Cour de justice a rappelé que « conformément à l'article 4, paragraphe 2, TUE, l'Union respecte l'identité nationale de ses États membres, dont fait aussi partie la forme républicaine de l'État. »[50] La loi autrichienne sur l'abolition de la noblesse, d'après la CJUE fait partie de l'histoire constitutionnelle autrichienne et constitue un élement de l'identité nationale qui peut être pris en compte lors de la mise en balance d'intérêts légitimes avec le droit de la libre circulation. Quoique l'identité nationale puisse être prise en compte, la justification du gouvernement autrichien invocant l'atteinte à l'identité constitutionnelle peut être malgré cela, d'après la CJUE, interprété comme quoi le gouvernement autrichien invoque l'ordre publique.[51]

D'après la CJUE cette notion doit être comprise de la façon restrictive et donc sa structure ne peut pas être déterminé unilatéralement par chaque État membre sans contrôle des autorités européennes. L'ordre public ne peut être invoqué « qu'en cas de menace réelle et suffisamment grave, affectant un intérêt fondamental de la société. »[52] Vu que les circonstances pouvant justifier à avoir recours à la notion de l'ordre public peuvent être différentes dans chaque État membre, il faut reconnaître aux autorités nationales une marge d'appréciation. Avec la référence sur l'arrêt Omega, la CJUE a rappelé que la nécessité et la proportionnalité des mesures nationales ne sont pas exclues pour la seule raison que l'État membre a choisi le système de la sauvegarde qui est différent de celui offert par un autre état.[53]

Enfin, la CJUE est ensuite parvenue à l'opinion que l'art. 21 TFUE doit être interprété en ce sens qu'il ne s'opposait pas à ce que les autorités nationales, dans des conditions déterminées, refusaient

[46] Arrêt de la Cour de justice du 22 décembre 2010, *Ilonka Sayn-Wittgenstein*, C-208/09, ECLI:EU:C:2010:806.
[47] Ibid., point 43.
[48] Ibid., point 74.
[49] Ibid., point 71.
[50] Ibid., point 92.
[51] Ibid., points 83, 84.
[52] Ibid., point 86
[53] Ibid., points 87, 91

de reconnaître, dans tous ses élements, le nom patronymique d'un citoyen de son pays. La restriction autrichienne de la liberté de circulation est dans ce cas là proportionnelle.

Même si la Cour de justice dans cet arrêt s'occupait de la sauvegarde de l'identité constitutionnelle, fondamentallement, elle a interprété la revendication du droit constitutionnel autrichien comme faisant partie de l'ordre public autrichien permettant une restriction nécessaire et proportionnelle des libertés fondamentales. [54] L'art. 4 paragraphe 2 du TUE ne jouait pas un rôle important dans cette décision et il a été utlisé comme un argument subsidiaire, qui probablement n'influencait pas de point de vu considérable sur le résultat même.

Malgré ces faits, la CJUE a au moins tiré au clair la conception obscure d'interpréation de l'identité nationale parce qu'elle a attiré l'attention sur la relation solide entre l'identité nationale et les principes nationales constitutionnelles. Elle l'a fait non seulement par le fait qu'elle a relié l'identité nationale à l'intérêt résultant de la constitution autrichienne mais, en outre par le fait que d'après la CJUE la notion de l'État en tant que république fait partie de l'identité nationale.[55] Le respect à la Constitution d'un État membre résulte aussi du fait qu'un éventuel conflit entre le droit constitutionnel et le droit de l'UE doit être régulé par le principe de proportionnalité.

La Cour de justice traite la conception de l'identité nationale aussi dans l'arrêt *Runevič-Vardyn*,[56] qui concernait la situation où les autorités lituaniennes ont refusé de modifier les noms et prénoms des requérants tels qu'ils figurent sur leurs actes d'état civil. Ces données, conformément aux lois lituaniennes, doivent être rédigées uniquement en caractères de l'aphabet latin, aucun autre caractère n'est autorisé. La question était la conformité de ladite législation avec la libre circulation des personnes en vertu de l'art. 21 du TFUE.

L'avocat générale Jääskinen a relevé dans sa conclusion que l'UE, conformément à l'art. 4 paragraphe 2 du TUE, honore l'identité nationale des États membres et donc, leur offre la possibilité de créer des règles de graphie des prénoms et des noms de famille tendant à faire respecter la langue nationale.[57]

La Cour de justice a fait d'abord référence à l'argumentation utilisée dans l'arrêt *Groener*, d'après laquelle le droit primaire européen n'interdit pas d'accepter la politique ayant pour but la sauvegarde et la promotion de la langue officielle d'un État membre. Ensuite, elle a poursuivi que tant aux termes de l'art. 3 paragraphe 3 du TUE ainsi que conformément à la Charte des droits fondamentaux de l'UE, l'Union respecte la diversité culturelle, religieuse et linguistique. Et ce n'était que subsidiairement qu'elle ajoutait que l'UE « respecte également l'identité nationale de ses États membres, dont fait aussi partie la protection de la langue officielle nationale de l'État. »[58]

Ensuite, elle relate que c'est à la juridiction nationale de faire valoir le principe de proportionnalité et de déterminer ainsi la conformité de la législation nationale avec la libre circulation des personnes en vertu de l'art. 21 du TFUE.[59] D'après la CJUE la législation nationale qui vise à protéger la langue officielle nationale constitue un objectif légitime susceptible de justifier des restrictions aux droits de la libre circulation prévus dans l'article 21 du TFUE.[60]

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54 En accord BOGDANDY: *Overcoming Absolute Primacy Bogdandy*…, p. 1424

55 Ibid., p. 1425.

56 Arrêt de la Cour de justice du 12 mai 2011, *Runevič-Vardyn,* C-391/09, ECLI:EU:C:2011:291.

57 Conclusion de l'avocat général Niila Jääskinena du 16 décembre 2010 dans l'affaire *Runevič-Vardyn*, C-391/09, ECLI:EU:C:2010:784, point 80.

58 *Runevič-Vardyn,* C-391/09, points 85, 86.

59 Ibid., point 83.

60 Ibid., point 87.

La CJUE a ensuite relevé que dans le cas où il a été démontré que le refus de modification du nom de famille commun pour un couple de citoyens de l'UE provoquait de sérieux inconvénients, il appartient de nouveau à la juridiction nationale « de déterminer si un tel refus respecte un juste équilibre entre les intérêts en présence, à savoir, d'une part, le droit des requérants au principal au respect de leur vie privée et familiale ainsi que, d'autre part, la protection légitime par l'État membre concerné de sa langue officielle nationale et de ses traditions. »[61] Aussi, dans ce cas là, la Cour de justice a laissé à la juridiction nationale le soin de faire valoir le principe de proportionnalité.

Comme dans l'arrêt *Sayn-Wittgenstein,* l'art. 4 paragraphe 2 du TUE n'était pas appliqué individuellement comme un objetif légitime justifiant la dérogation au droit de l'UE mais comme un argument supplémentaire à côté de l'allégation principale, expliquant que la diversité linguistique résultait de l'art. 3 paragraphe 3 du TUE ainsi que de l'art. 22 de la Charte des droits fondamentaux de l'UE. De l'autre côté il faut mentionner que dans sa conclusion à la décision postérieure, l'avocat général Kokott a fait référence à l'interconnetion desdites stipulations en estimant que le fondement de l'art. 22 de la Charte des droits fondamentaux de l'UE reposait, d'après les explications officielles, sur le respect à l'identité nationale des États membres.[62]

Dans les deux cas suivants la CJUE n'a pas accepté l'argumentation par l'identité nationale pouvant justifier la dérogation au droit de l'UE. La première décision *Anton Las*[63] concernait la question de la sauvegarde de la langue officielle. L'objet de la présente affaire était un décret belge adopté sur le fondement constitutionnelle qui exige que tout employé installé dans la région de langue néerlandaise ait des contrats de travail tranfrontaliers rédigés en néerlandais sous peine de nullité. La question était si cette législation, ayant une portée restreignante sur les employés ne parlant pas néerlandais et sur les employeurs des autres États membres, est en contradiction avec l'art. 45 du TFUE réglant la libre circulation des travailleurs.

D'après l'avocat général Jääskinen l'identité nationale comprend les aspects linguistiques de l'ordre constitutionnel d'un État membre qui définissent notamment la langue officielle, le cas échéant, les subdivisions territoriales dans lesquelles ces langues sont en usage.[64] D'après Jääskinen l'identité nationale belge comprend la division de source constitutionnelle en communautés linguistiques et c'est pourqoui la politique de défense d'une langue est un motif pour autoriser un État membre à recourir à des mesures restreignant les libertés de circulations.[65] Néanmoins, l'usage obligatoire de la langue résultant de la réglémentation en cause d'après l'avocat général, ne répond pas à cet objectif, puisque la rédaction des contrats transfrontaliers de travail dans une langue autre que le néerlandais n'est pas susceptible à menacer son usage.[66]

La Cour de justice, d'abord avec référence sur l'arrêt *Runevič-Vardyn* a invoqué qu'en vertu de l'art. 4 paragraphe 2 du TUE la défense de la langue officielle d'un État membre fait partie de l'identité nationale. [67] L'objectif reposant sur le soutien de l'emploi de langue néerlandaise, qui est une des langues officielles du Royaume de Belgique, constitue d'après la CJUE un intérêt légitime de nature à

61 Ibid., point 91.

62 Conclusion de l'avocat général Juliane Kokott du 21 juin 2011 dans l'affaire *République italienne contre Commission européenne*, C 566/10 P, ECLI:EU:C:2012:368, point 86.

63 Arrêt de la Cour de justice du 16 avril 2013, *Anton Las*, C-202/11, ECLI:EU:C:2013:239.

64 Conclution de l'avocat général Niilo Jääskinen du 12 juillet 2012 dans l'affaire *Anton Las*, C-202/11, ECLI:EU:C:2012:456, point 59.

65 Ibid., point 60.

66 Ibid., point 61.

67 *Anton Las*, C-202/11, point 25.

justifier la restriction aux obligations prévues dans l'art. 45 du TFUE. Ensuite, la Cour de justice est parvenue à ce que la législation belge dans cette affaire là aille au-delà de ce qui est strictement nécessaire pour atteindre l'objectif mentionné et ne saurait donc être considérée comme proportionnée.[68]

La Cour de justice s'est prononcée sur de l'identité nationale aussi dans l'affaire *Digibet Albers*[69], concernant la réglementation des jeux de hasard. Plus exactement, la question était de savoir si l'existence de la réglementation juridique plus libérale des jeux de hasard, au moyen d'Internet, dans un des Länder, par rapport à la réglementation plus stricte dans d'autres Länders, représente une restriction illicite à la libre prestation des services en vertu de l'art. 56 du TFUE.

La CJUE jugait si une telle restriction peut être admise au titre des mesures dérogatoires aux l'art. 21 et 52 du TFUE pour des raisons d'ordre public, de sécurité publique et de santé publique ou bien conformément à sa jurisprudence motivée par des raisons impérieuses d'intérêt général.[70]

La Cour de justice, faisant référence à sa jurisprudence constante, alléguait que les autorités nationales bénéficiaient, dans le domaine des jeux de hasard, d'un large pouvoir d'appréciation pour déterminer les exigences pour la protection du consommateur et de l'ordre social. Si les conditions établies par la jurisprudence de la CJUE sont respectées, il appartient à chaque État membre d'apprécier si dans le contexte des buts légitimes qu'il poursuit, il est nécessaire d'interdire ou de restreindre des activités de hasard.[71] La CJUE s'est référée à l'identité nationale et a estimé que la répartition des compétences entre les Länder ne saurait être remise en cause puisqu'elle est protégée par l'art. 4 paragraphe 2 du TUE.[72]

D'après la Cour de justice l'art. 56 du TFUE doit être ainsi interprété dans le sens qu'il n'oppose pas la législation mentionnée des jeux de hasard plus libérale dans un Länder que dans les auters Länder. Mais cela n'est valable que si une telle législation est proportionnelle.

Dans cet arrêt la CJUE a pris l'argumentation par l'identité nationale de nouveau et seulement de façon indirecte parce qu'elle traitait surtout l'existence de la dérogation du droit primaire et non la problématique de l'organisation fédérale de l'Allemangne et dans le contexte de laquelle elle a mentionné l'identité nationale.

Comme dans l'arrêt *Anton Las*, aussi dans *Digibet Albers* la Cour de justice n'utilise de nouveau l'art. 4 paragraphe 2 TUE que subsidiairement pour soutenir le résultat auquel elle est parvenue par les démarches résultant de sa jurisprudence constante. Cette dernière lui donne une certaine liberté pour la réflexion de l'État membre.

En ce qui concerne le contenu de l'art. 4 paragraphe 2 du TUE, des quatre arrêts analysés résulte que cet article inclu les interêts qui concernent la prohibition des titres de noblesse, le respect au multilinguisme et l'organisation fédérale des États membres. L'arrêt *Sayn-Wittgenstein, Runevič-Vardyn* a *Anton Las* montrent d'un côté que les États membres peuvent recourir à l'art. 4 paragraphe 2 du TUE comme à la dérogation au droit primaire. Cependant, la CJUE n'a utilisé, dans aucun des cas, cette stipulation séparement, mais toujours liée à sa jurisprudence constante prévoyant les dérogations au droit de l'UE ou en commun au droit fondamental résultant de la Charte des droits fondamentaux de l'UE.

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68 Ibid., points 27, 33.
69 Arrêt de la Cour de justice du 12 juin 2014, *Digibet Albers*, C-156/13, ECLI:EU:C:2014:1756.
70 Ibid., point 22.
71 Ibid., point 32
72 Ibid., point 34.

3.2 Le droit secondaire

La CJUE dans la période d'après le Traité de Lisbonne s'occupait de la question de l'identité nationale même dans les cas où les obligations des États membres résultaient du droit secondaire de l'UE. L'un des premiers arrêts en était l'affaitre *O'Bien*,[73] ayant pour objet la question si les juges peuvent être compris dans l'accord-cadre sur le travail à temps partiel qui figure dans l'annexe de la directive 97/81/CE. D'après le gouvernement letton l'application du droit européen sur la juridiction d'un État membre impliquerait le non-respect de l'identité nationale des États membres en vertu de l'art. 4 paragraphe 2 du TUE.[74]

Mais la Cour de justice a refusé cet argument parce que d'après elle il appartient aux États membres de définir la notion de « travailleurs » en vertu de la directive et de l'accord-cadre pour déterminer si les juges relèvent de cette notion, à condition que cela n'aboutisse pas à exclure arbitrairement cette catégorie des personnes au bénéfice de la protection offerte par la directive et l'accord-cadre. L'exclusion d'un bénéfice de cette protection, d'après la CJUE, ne peut être admise que dans le cas où la relation entre les juges et le Ministère de la Justice est, de par sa nature, substantiellement différente de celle qui lie les employeurs et les employés.[75]

La CJUE a mentionné ensuite qu'appliquer la directive et l'accord-cadre sur les juges à temps partiel ne peut pas avoir d'effet sur l'identité nationale parce que l'objectif des deux documents n'était qu'à l'égard des juges, « à leur faire bénéficier du principe général d'égalité de traitement, qui constitue l'un des objectifs de ces textes, et ainsi à les protéger contre les discrimininations à l'égard des travailleurs à temps partiel. »[76]Ainsi, d'après la Cour de justice, en l'espèce, l'argumentation par l'identité nationale n'était pas pertinente.

Un autre cas concernant le droit secondaire était l'arrêt *Commission européenne contre Royaume d'Espagne*.[77] Dans cette affaire on a opposé que l'Espagne a incorrectement transposé la directive n. 200/60/CE, déteminant le cadre pour l'activité de la Communauté dans le domaine de la politique de l'eau, dans le droit national. Le gouvernement espagnol a invoqué que s'il s'agissait d'un bassin hydrographique intracommunautaire, la mise en oeuvre des obligations résultant de la directive était assurée par l'art. 149 paragraphe 3 de la Constitution espagnole stipulant que si la communauté autonome dispose dans un certain domaine du pouvoir législatif, et si cette dernière ne profite pas de ce pouvoir, pour les matières qui ne sont pas attribuées aux communautés autonomes, les normes d'état seront appliquées.

Mais d'après l'avocat général la non acceptation par l'UE de la conception de l'art. 149 paragraphe 3 de la Constitution espagnole ne contestait pas l'identité nationale de l'Espagne. « Il n'est pas exclu d'assurer la transposition du droit de l'Union, dans des États fédéraux ou décentralisés, par l'application subsidiaire des instruments de l'État central. Il faut simplement que cette application subsidiaire ne fasse aucun doute. Le droit espagnol ne satisfait pas à ces exigences. »[78]

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73 Arrêt de la Cour de justice du 1 mars 2012, *O'Brien*, C-393/10, ECLI:EU:C:2012:110.

74 Ibid., point 49.

75 Ibid., point 51.

76 Ibid., point 49.

77 Arrêt de la Cour de justice du 24 octobre 2013, *Commission européenne contre Royaume d'Espagne*, C-151/12, ECLI:EU:C:2013:690.

78 Conclusion de l'avocat général Juliane Kokott du 30 mai 2013 dans l'affiare *Commission européenne contre Royaume d'Espagne*, C-151/12, ECLI:EU:C:2013:354, point 34.

La Cour de justice approuvait la conclusion de l'avocat général et a mentionné que l'Espagne n'a pas rempli les conditions résultant de la directive. D'après la CJUE l'existence des principes généraux du droit constitutionnel et administratif peut rendre superflue la transposition par des mesures spécifiques à condition que ces principes garantissent la pleine application de la directive par l'administration nationale.[79] Ensuite, la Cour de justice, concernant l'argument du Royaume d'Espagne selon lequel la Commission européenne aurait tenté en violation de l'art. 4 paragraphe 2 du du TUE déterminer la manière de la transposition des dispositions en cause, a constaté que la Commission européenne n'avait pas mentionné dans la requête la manière de la transposition des dispositions en cause de la directive.[80] Ainsi, d'après la CJUE les spécificités constitutionnelles de l'Espagne ne sont pas pertinentes puisque cet argument repose sur l'accusation mal comprise que la Commission européenne a déposé contre l'Espagne.

La Cour de justice a adopté une approche similaire aussi dans l'arrêt *Torresi*.[81] Dans cette affaire la Cour de justice nationale s'est adressée à la CJUE avec la demande que, si l'art. 3 de la directive n. 98/5/CE permettant aux ressortissant italiens qui ont obtenu le titre professionnel d'avocat dans un État membre autre que la République italienne, le fait d'exercer leur activité dans cet état, fait contourner la constitution italienne qui subordonne l'accès à la profession d'avocat à l'obtention d'un examen d'État réussis. Donc, la question était si la disposition de la directive était en contradiction avec l'art. 4 du paragraphe 2 du TUE et du fait si elle devrait être considérée comme nulle.

D'après l'avocat général, l'adhésion au barreau des ressortissants de l'UE qui ont obtenu un titre professionnel dans un autre État membre, ne présenterai pas une menace pour l'identité nationale.[82] Quoique la jurisprudence de la CJUE admet la possiblité que les États membres dérogent à leurs obligations résultant du droit européen pour des motifs de la protection de l'identité nationale, cela ne signifie pas « que toute règle consacrée dans une Constitution nationale puisse limiter l'application uniforme des dispositions de l'Union ».[83]

La CJUE a renoué avec cette argumentation quand elle a estimé que l'art. 3 de la directive ne concerne que le droit de s'établir dans un État membre pour y exercer la profession d'avocat sous le titre professionnel délivré dans l'État membre d'origine. Cette disposition ne réglemente pas ainsi, d'après la CJUE, l'accès à la profession d'avocat ni l'exercice de cette profession sous le titre professionnel obtenu dans l'État membre d'accueil.[84] « Il en résulte nécessairement qu'une demande d'inscription au tableau des avocats établis, présentée au titre de l'article 3 de la directive 98/5, n'est pas de nature à permettre d'éluder l'application de la législation de l'État membre d'accueil relative à l'accès à la profession d'avocat. »[85] L'art. 3 de la directive « n'est pas, en tout état de cause, susceptible d'affecter les structures fondamentales politiques et constitutionnelles ni les fonctions essentielles de l'État membre d'accueil au sens de l'article 4, paragraphe 2, TUE. »[86]

Bien que la Cour de justice dans les trois arrêts mentionnés se soit exprimée à l'art. 4 du paragraphe 2 du TUE par lequels les États membres se sont protégés, dans aucun d'eux la conception de l'identité nationale n'était un argument suffisant pour la dérogation au droit de l'UE.

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79 *Commission européenne contre Royaume d'Espagne*, C-151/12, point 28.

80 Ibid., point 37.

81 Arrêt de la Cour de justice du 17 juillet 2013, *Torresi*, C-58/13 et C-59/13, ECLI:EU:C:2014:2088.

82 Conclusion de l'avocat général Nils Wahl du 10 avril 2014 dans l'affaire *Torresi*, C-58/13 et C-59/13, ECLI:EU:C:2014:265, point 99.

83 Ibid., point 100.

84 *Torresi*, C-58/13 et C-59/13, point 56.

85 Ibid., point 57.

86 Ibid., point 58.

L'arrêt *Melloni*[87] portait aussi sur le droit secondaire. Dans cette affaire la Cour constitutionnelle espagnole a déposé une demande de décision préjudicielle dans l'affaire où l'exécution du mandat d'arrêt européen (ci après « MAE »), concrètement l'art. 4a, paragraphe 1, de la décision-cadre relative au MAE, s'oppose au droit au procès équitable interprété par la cour constitutionnelle espagnole. D'après sa jurisprudence l'exercice de MAE délivré en vue d'exécuter un jugement rendu par défaut doit être subordonnée à la condition que la personne condamnée a le droit dans l'État membre d'émission à une nouvelle procédure. Il s'applique, en vertu de l'art. 4a, paragraphe 1 de la décision-cadre que si une telle personne a connaissance du procès prévu donne mandat à son avocat pour la défendre au procès, la remise ne pourrait pas obéir à une telle condition.

D'après l'avocat général, un État membre devrait avoir la possibilité attaquer la disposition du droit secondaire en vertu de l'art. 4, paragraphe 2 TUE au cas où une telle disposition menace son identité nationale. Ensuite, il a ajouté que dans l'affaire pendante il ne s'agit pas d'une telle situation. D'après l'avocat général la détermination de l'étendu du droit au proces équiptable et au droit à la défense dans les jugements par défaut ne peut pas toucher l'identité nationale du Royaume d'Espagne. Il en résulte surtout du fait que le contenu du droit à la défense n'est toujours pas fixé dans la jurisprudence de la Cour constitutionnelle espagnole et en plus le gouvernement espagnol lui même a mentionné que la participation de l'accusé à son procès ne relève pas de l'identité constitutionnelle du Royaume d'Espagne. Aussi, il faut faire la distinction entre le contenu de la protection des droits fondamentaux et la menace de l'identité nationale, resp. de l'identité constitutionnelle d'un État membre. Dans ce cas là, d'après l'avocat général il s'agit d'un droit fondamental protégé par la Constitution espagnole, c'est pourqoui cela signifie que l'application de l'art. 4, paragraphe 2, TUE ne doit pas être envisagée.[88]

La Cour de justice, sans référeces aux principe de la protection de l'identité nationale, est arrivée à ce que l'Espagne ne peut se prévaloir du droit au procès équitable au termes de la constitutions espagnole ayant pour but de dévier la décision-cadre du MAE. C'est que l'exécution du MAE n'est pas subordonné à la condition que la condamnation par défaut puisse être révisée dans l'État membre d'émission.[89] D'après CJUE le MAE est compatible avec la Charte des droits fondamentaux de l'Union européenne et n'intervient nullement dans le droit au procès équitable.

Il résulte de cette argumentation que la protection nationale des droits fondamentaux ne peut pas être plus large que leur protection au niveau de l'UE puisque une interprétation d'un procès équitable prévu par la constitution espagnole n'était pas prise en considération. La Cour de justice a ainsi donné la primauté à l'uniformité du droit de l'UE et au principe de la primauté absolue résultant devant des spécificités constitutionnelles d'un État membre réflétées dans l'art. 4, paragraphe 2 du TUE.

Le droit secondaire était traité aussi dans les affaires jointes *Bero Pham*.[90] La question était de savoir s'il était possible de retenir les immingrés des pays tiers en attente de l'éloignement dans des établissement pénitentiaire au motif qu'il n'existait pas de centres de rétention spécialisé en vertu de l'art. 16 paragraphe 1 de la directive n. 2008/115/CE. Dans la procédure, la République fédérale d'Allemagne a argumenté par l'obligation de l'UE de respecter l'identité nationale d'un État membre et elle enchaine que « le gouvernement allemand soutient qu'il serait porté atteinte à la souveraineté

87 Arrêt de la Cour de justice du 26 février 2013, *Melloni,* C-399/11, ECLI:EU:C:2013:107.

88 Conclusion de l'avocat général Yves Bota du 2 octobre 2012 dans l'affaire *Melloni*, C-399/11, ECLI:EU:C:2012:600, points 139 – 142.

89 *Melloni*, C-399/11, point 64.

90 Arrêt de la Cour de justice du 17 juillet 2014, *Bero Pham*, C-473/13 a C-514/13, ECLI:EU:C:2014:2095.

administrative d'un Lander si ce dernier ne pouvait placer les migrants en attente d'éloignement dans un établissement pénitentiaire de son ressort au motif qu'il existe ailleurs sur le territoire national des centres de rétention spécialisés. »[91]

Cependant, d'après l'avocat général « un État membre ne peut exciper de dispositions ou de pratiques nationales découlant de son organisation fédérale pour éventuellement justifier le non-respect des obligations prescrites par une directive. »[92] Dans le cas où un État membre a sur son territoire des centres de rétention spécialisés avec une capacité disponible suffisante, la personne interessée doit être placée dans ce centre, peut importe l'organisation fédérale de l'État. L'avocat général a soutenu cette argumentation par la condition aux États membres d'observer le principe de coopération prévu dans l'art. 4, paragraphe 3 du TUE, et s'abstenir ainsi de toutes mesures susceptibles de mettre en péril la réalisation des objectifs de l'UE.[93]

La Cour de justice a enchaîné à la conclusion de l'avocat général et a estimé que « l'obligation, prévue à la première phrase de l'article 16, paragraphe 1, de la directive 2008/115, d'effectuer la rétention en règle générale dans des centres de rétention spécialisés s'impose aux États membres en tant que tels, et non pas aux États membres en fonction de leur structure administrative ou constitutionnelle respective. »[94]

Comme dans l'arrêt *Melloni* aussi dans l'arrêt *Bero Pham* la Cour de justice ne s'est nullement exprimée même si les États membres ont reclamé ses specificités constitutionnelles. Pour tous les arrêts mentionés dans le présent chapitre il est typique que la CJUE n'a pas une seule fois appliqué le test de proportionnalité.

4 CONCLUSION

Dans la jurisprudence avant Lisbonne de la Cour de justice, la notion de l'identité nationale ou bien constitutionnelle ne jouait pas un rôle important parce que pedant cette période la CJUE n'a mentionnée la notion de l'identité nationale que dans ses trois décisions. Dans tous ces arrêts la Cour n'a en plus utilisé l'identité nationale que comme un argument subsidiaire. Ainsi, la CJUE n'a probablement pas voulu restreindre la compétence du droit de l'UE dans le cas où l'obligation de respecter l'identité nationale ne la liait pas et gardait ainsi le principe de primauté absolue du droit de l'UE défini dans l'arrêt *Internationale Handelsgesellschaft*.[95]

Contrairement à la CJUE les avocats généraux comprenaient positivement la conception de l'identité nationale. Surtout l'avocat général Miguel Poiares Maduro a essayé d'apporter dans ses quelques conclusions un peu de lumière sur ce concept. En revanche, Pedro Cruz Villalón, par exemple, dans sa conclusion, sans analyse plus profondes, n'a répété qu'avec austerité l'argument d'un État membre réclamant la sauvegarde de son identité nationale. Ce qui est clé c'est surtout l'interprétation de la conception de l'identité nationale par la Cour de justice car ce sont justement ses arrêts qui sont obligatoires.

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91 Conclusion de l'avocat général Yves Bota du 30 avril 2014 dans l'affaire *Bero Pham*, C-473/13 a C-514/13, ECLI:EU:C:2014:295, point 122.

92 Ibid., point 143.

93 Ibid., points 144, 145.

94 *Bero Pham*, C-473/13 et C-514/13, point 28.

95 Arrêt de la Cour de justice du 17 décembre 1970, *Internationale Handelsgesellschaft*, C-11/70, ECLI:EU:C:1970:114.

La CJUE ne commençait à se préoccuper considérablement de la conception de l'identité nationale ou bien constitutionnelle qu'après l'entrée en vigueur du Traité de Lisbonne. Ni même dans ces arrêts l'argumentation de l'art. 4 paragraphe 2 TUE ne jouait pas un rôle primaire. Même si dans ces procédures on a réglé une collision du droit européen avec les spécificités constitutionnelles des États membres et les États membres renvoyaient directement à l'art. 4 paragraphe 2 du TUE, l'argument principale de la Cour de justice a été l'argumentation résultant de sa jurisprudence constante soutenue dans certains cas par une mention de l'identité nationale.

Pour la plupart des arrêts de la Cour de justice concernant l'identité nationale il est typique que ce sont les parties de la procédure ou bien les sujets intervenants qui argumentent sur l'identité nationale ou bien constitutionnelle. Ces sujets révendiquent souvent leur identité nationale comme l'exception en droit de l'UE. Quoique la CJUE réagit à cette argumentation différement, souvent il est obligé d'adopter une position à l'identité nationale. Soit, la CJUE ne s'exprime point, soit elle assume qu'il n'est pas possible de l'appliquer dans ce cas concret, soit elle l'utilise comme un argument de soutien.

Le problème de la jurisprudence ici analysée est le fait que la CJUE n'applique pas l'art. 4 paragraphe 2 du TUE par un procédé fixe. En général, il résulte de sa jurisprudence que l'identité nationale d'un État membre peut représenter un but légitime permettant à l'État membre une dérogation au droit de l'UE. Cependant, en aucun cas l'art. 4 paragraphe 2 ne représente une dérogation automatique au droit de l'UE car dans aucun des arrêts la CJUE n'a utilisé l'identité nationale séparement comme une justification de la dérogation au droit de l'UE. La Cour de justice relie en général l'identité nationale à sa jurisprudence constante et à l'application du principe de proportionalité. Néamoins dans certains cas on n'arrive jamais à parvenir à l'application du test de proportionalité.

La CJUE enchaîne avec ses décisions précédentes où elle a accepté différents principes du droit constitutionnel interne d'un État membre sans référence à l'identité nationale comme la justification de la restriction des droits fondamentaux. De cette catégorie relève aussi par exemple la liberté de réunion et d'expression,[96] la dignité humaine[97] ou bien la pluralité des médias.[98] Dans ces décisions aussi que par exemple dans *Sayn-Wittgenstein, Runevič-Vardyn* et *Digibet Albers*, la CJUE a donné aux autorités nationales une certaine liberté pour la considération. Ce qui est différent c'est que l'objectif identique, c'est-à-dire le respect de certaines spécificités constitutionnelles des États membres, dans les affaires précédentes étaient atteint même sans faire références à l'identité nationale des États membres.[99]

En réalité, en application de l'art. 4 paragraphe 2 du TUE, la CJUE n'a pas crée de nouvelle approche aux restrictions au droit de l'UE mais elle n'a que fait classé l'art. 4 paragraphe 2 du TUE dans son arsenal des arguments qui sont conformes à son actuelle pratique décisionnelle.[100] La CJUE a ansi « neutralisé » la conception de la sauvegarde de l'identité nationale et par sa elle lui a ôté son contenu potentiellement explosif. »[101]

Le résultat de chaque procédure devant la CJUE où se présente l'argumentation par l'identité nationale dépend des circonstances concrètes de l'affaire. De la jurisprudence actuelle de la CJUE ne résulte

96 Arrêt de la Cour de justice du 12 juin 2003, *Schmidberger*, C-112/00, ECLI:EU:C:2003:333.
97 *Omega*, C-36/02.
98 Arrêt de la Cour de justice du 26 juin 1997, *Familiapress*, C-368/95, ECLI:EU:C:1997:325.
99 CLAES: *National Identity…*, s. 133.
100 TONIATTI, Roberto. Sovereignty Lost, Constitutional Identity Regained. In: ARNAIZ, Alejandro Saiz, LLIVINA, Carina Alcoberro (ed). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013, p. 71.
101 CLAES: *National Identity…*, p. 134.

pas un mécanisme constant qui généralement pourrait être appliqué dans le cas d'une collision du droit de l'UE avec des spécificités résultants des Constitutions des États membres. Au contraire, il s'agit d'un équilibre classique des intérêts divergents faisant partie de la jurisprudence constante de la CJUE.

En définissant la conception de l'identité nationale ou bien constitutionnelle il faut prendre en considération le fait que la CJUE ne peut pas interpréter le droit national des États membres et c'est pourquoi pour elle, reste clé la coopération avec les acteurs nationaux qui peuvent remplir l'argument de l'identité nationale par un contenu correspondant pour chaque État membre. On ne peut pas comprendre le principe de l'art. 4 paragraphe 2 du TUE par l'analyse de la jurisprudence seulement d'un acteur car le respect de l'identité national est toujours le résultat de dialogues des acteurs européens et nationaux et donc il a toujours deux faces : nationale et internationale.[102] Les arguments des institutions nationales peuvent résulter aussi de la jurisprudence constante des juridictions nationales constitutionnelles. Il reste ainsi à la Cour de justice d'évaluer leur pertinence du point de vue du droit de l'UE. Cette mutuelle coopération résulte entre autre du principe de la coopération loyale entre les acteurs européens et nationaux conformément à l'art. 4 paragraphe 3 de TUE.

Le problème est que la CJUE non seulement s'exprime très peu dans ces décisions sur l'identité mais elle transforme aussi dans sa jurisprudence constante les prétentions qui en résultent. C'est une démarche complétement contraire à celui par lequel les juridictions constitutionnelles nationales interprétent l'identité nationale ou bien constitutionnelle.[103]

L'art. 4 paragraphe 2 du TUE est ainsi par la jurispridence constante de la Cour de justice retransformé de la collision du droit européen avec les principes résultant des constitutions nationales dans la question se rapportant à l'incorporation des intérêts divergents et des principes justifiant la dérogation du droit de l'UE qui cependant résultent du droit de l'UE même ou bien de la jurisprudence de la Cour de justice.[104]

À la question posée tout au début on peut répondre que la CJUE par sa jurisprudence n'a pas crée de l'art. 4 paragraphe 2 TUE une conception autonome qui pourrait lui seul justifier la dérogation au droit de l'UE, mais il ne fait que l'attacher à sa jurisprudence constante.

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[103] Par exemple la décision de de la Cout fédéral constitutionnll du 30 juin 2009, 2 BvE 2/08 Lissabon-Urteil.

[104] CLAES: *National Identity…*, p. 130.

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Contact information:

JUDr. Ondrej Hamuľák, Ph.D
ondrej.hamulak@upol.cz
Faculty of Law, Palacký University Olomouc

Mgr. David Kopal
kopaldvd@gmail.com
Faculty of Law, Palacký University Olomouc
tr. 17. listopadu 8
Olomouc 771 11
Czech Republic

prof. Tanel Kerikmäe, Ph.D.
tanel.kerikmae@ttu.ee
Tallinn Law School, Tallinn University of Technology
Akadeemia tee 3
Tallinn 12618
Estonia

RETHINKING THE POTENCY OF ICAO SARPS ON GLOBAL REDUCTION OF AVIATION EMISSION AND PROTECTION OF GLOBAL ENVIRONMENT

Murtala Ganiyu A Murgan, Abdul Ghafur Hamid, Maizatun Mustapha
University of Ilorin, Faculty of Law
International Islamic University, Ahmad Ibrahim Kulliyyah of Laws

Abstract: The Standards and Recommended Practices (SARPs) of Annex 16 Vol. II, Chicago Convention 1944, are created and adopted by the International Civil Aviation Organization (ICAO), for the purpose of regulating aircraft emission in the civil aviation sector. The creation of ICAO standard and Recommended Practices on aviation environment came up in 1981, following the declaration in Article 2(2)[1] of Kyoto protocol to UNFCCC that developed countries of (Annex I parties), shall pursue limitation or reduction of emission of greenhouse gases from aviation by working through the international civil aviation organization (ICAO). However, while the SARPS have been recognized by ICAO and the contracting states as the sole international regulations for reduction of aviation emission, the SARPs are also known to have some limitations on reduction of aviation emission. This paper therefore examines the capacity of SARPs Annex 16 Vol II of Chicago Convention 1944 to make effective reduction in international reduction of aviation emission for protection of environment. This involves identifying the strength and limitations of ICAO SARPs on reduction of aviation emission as well as making recommendations for improved performance. A qualitative-doctrinal research approach is adopted where by the bulk of analysis on the study is based on information from library research materials The study concludes the ICAO SARPs have more limitations than strength and would require some improvement for achieving a more effective reduction in aviation emission.

Key words: Rethinking, Potency, SARPs Annex16 Vol. II, Reduction, Civil Aviation Emission

1 INTRODUCTION

The ICAO's Standard And Recommended Practices (SARPs)[2] are established and adopted by the International Civil Aviation Organization (ICAO), for the purpose of regulating aircraft emission in the aviation sector. These standards and Recommended practices are contained in Annex 16 Vol II of Chicago convention 1944. The creation of ICAO standards and Practices on aviation environment came up in 1981, due to the declaration in Article 2(2)[3] of Kyoto protocol to UNFCCC 1997, that developed countries of (Annex I parties), shall pursue limitation or reduction of emission of

1 Article 2 (2) of Kyoto Protocol delegates responsibility for reduction of greenhouse gases in the aviation sector to ICAO.
2 SARPs Annex 16 Vol. II of Chicago Convention 1944, are the standard and recommended practices on aviation environment.
3 Article 2 (2) of Kyoto Protocol delegates responsibility for reduction of greenhouse gases in the aviation sector to ICAO.

greenhouse gases from aviation by working through the international civil aviation organization (ICAO). Subsequent to this directive, the responsibilities for making and adoption of standards and recommended practices for control of aviation emission became a mandatory function for ICAO.

The Chicago Convention is the legal instrument that established ICAO. The Chicago convention came into existence in 1944. Since its creation, it has continued to serve as the body of rules which provided ICAO with the power to make standard and recommended practices to regulate aviation emission in the civil aviation sector. However, it shall be known that there was no mention of environmental protection as a mandate area for ICAO in the Chicago convention until 1981,[4] but the continued growth of the aviation industry and the demand for sustainable aviation development necessitated the need for ICAO to provide environmental Standard for aviation industry.

The process of creating SARPs involves a continuous and periodic review of the proposed standards and practices by states and members of the aviation industry as well as the committee on aviation environment protection (CEAP) which exists under ICAO. The considered standards are then passed to ICAO council which also adapts them inform of resolutions. These resolutions finally become Annexes of the standards in Annex 16 volume II of Chicago convention. Accordingly, all member states are therefore expected to follow and enforce the standards domestically and this is usually done through the process of domestication into national legislation by member states. However, it is relevant to mention that ICAO Assembly achieves its work through the effort and committee on Aviation Environmental protection (CAEP).

Article 37 of Chicago convention is the authority bestowed on ICAO to produce standards and practices for all parties participating in aviation activities. The Article provides that ICAO should work in line with the changes in aviation industry, to ensure an up to date work and procedure that promotes change driven standards. The article states: "Adoption of international standards and procedure. Each contracting state under takes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, air ways and anxiliary services in all matters in which such uniformity will facilitate and improve aviation and its activities. To this end, ICAO shall adopt and amend from time to time as may be necessary, international standards and recommended practices and procedures".[5]

The above article clearly states the responsibility of ICAO on international civil aviation. However, the next article in the convention Article 38 is relevant to be read along with article 37 in the sense that it shows the limit of the power of ICAO on mandatory enforcement of SARPs by ICAO members states. Articles 38 states: "Any state which finds it impracticable to comply in all respect with any such international standard or procedure or bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by international standard, shall give immediate notification to the international civil aviation organization of the differences between its own practice and that established by the international standard. In the case of amendment to international standard, any state which does not make the

4 See Heather L. Miller, n. 4 at 26.

5 See Article 37, Chicago Convention 1944 on the responsibilities of ICAO. According to Chicago Convention Article 37, ICAO the power and the legal basis for the adoption of amendment of international Standards and recommended practices and procedures (SARPs) are established by the council and promulgated as annexes to the Chicago Convention. For example, circumventing the formal treaty process and the need to amend the instrument of the organization. Traditionally, the legislative function of ICAO has been confined to the task of dealing with very technical issues with little room for political disagreement. See BUERGENTHAL, T. Law Making in the International Civil Aviation Organization, p. 62.

appropriate amendments to its own regulations or practices shall give notice to the council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the council shall make immediate notification to all other states of the differences which exists between one or more features of an international standard and the corresponding national practice of that state"[6].

In essence, what can be understood from the provisions of article 37 and Article 38 above is that while Article 37 bestows on ICAO the power to ensure an update work on the changes in aviation industry and ensure each contracting State observes conformity with the standard on improvement on aviation activities, article 38 limits the mandatory enforcement of standard practices by contracting states. Also none of the provisions of this article mentioned everything regarding reduction of aviation emission.

Also the procedure for implementation of SARPs entails that all contracting states of the Chicago convention are required to implement SARPs in their different countries at the national level by bringing national regulations and practices into full accord with SARPs. However, it is expected that states who find it difficult to comply with SARPs and those who find it necessary to adopt regulation or practice different from that of SARPs should notify ICAO within the approved time frame. ICAO adopted a resolution at its 32 ordinary session in 1998 which led to the establishment of Universal Safety Oversight Audit Programme (USOAP).[7] The aim for establishing (USOAP) was to promote national implementation of SARPs among contracting states. The USOAP Audit programme entails regular mandatory harmonized safety audit to be carried out on contracting states it came into effect in 1999 and at the 2nd of that year about 49 states led been audited through the process of seeking cooperation of the contracting states and paying respects to the sovereignty of each contracting state.[8] Therefore, the objectives of this paper are to assess the capability of SARPs for reduction of aviation emission, to identify its limitations and make necessary suggestions for improvement.

2 ANALYSIS OF SARPs ANNEX 16 VOL. II ON REDUCTION OF AVIATION EMISSION

The substantive provisions of ICAO standard and recommended practices are contained in Annex 16 vol. 2 of Chicago convention. By definition, the international standards are referred to as any specification for political characteristics, configuration, material performance, personnel or procedure which its uniform application in recognized for safety of international air navigation and for which member states are to comply in accordance with convention and where notification of the lying states.[9] The recommended practices on the other hand, are referred to as any specification for physical characteristics, configuration, material performance, personnel or procedure which

6 Convention on International Civil Aviation, (Doc 7300/9) www.icao.int/publications/pages/doc7300.espx Accessed 22 August 2015. Also see Article 38 Chicago Convention on limitation of mandatory enforcement of standard practices among contracting states.

7 ICAO establishment of an ICAO Universal Safety Oversight Audit Programme, Assembly Resolution A32-11 at 32 session of the Assembly.

8 ICAO milestone achievement of 1999 emphasized safety and security of Global Air Transportation. News released at p10, 19/19 icao website on line http://www.icao.int/icao/en/1999 accessed 7/5/15.

9 See part 1, Standard And Recommended Practices (SARPs) Annex 16 vol. II.

its uniform application is organized as desirable in the interest of safety regulations or efficiency of international air navigation and to which member state shall conform in accordance with the convention the simple understanding of the definitions above, is that both the international standards and recommended practices are not binding but notification of difference in respect of standards is compulsory for noncomplying states. Also, recommended practices have no obligation on notification of differences and are considered advisory in nature.[10]

From the above, the substantive provisions of SARPs of Annex 16 vol. II. Of Chicago convention, are the standards for control of smoke and gaseous emission from aircraft from international civil aviation. These also include standard on aircraft engine certification and standard for international fuel venting involving international discharge in to the air of liquid fuel nozzle manifold of aircraft during engine shut down in normal flight or ground operations. The main objectives of this annex 16 Vol II (SARPs) is to achieve reduction in the level of aviation emission pollutants from air craft engine.[11]

A careful study of Annex 16 vol. II on ICAO SARPs shows that it is organized into three parts. Part 1 contains definitions and symbols used and meaning ascribed to these definitions. Meanwhile, the definition of Standards and recommended Practices has been given above. Part II contains standard on vented fuel while part III contains standard on smoke and gaseous emission certification which apply to different classes of aircraft engines that are fitted to aircraft civil aviation.

The Standard Relating to Vented Fuel[12] is one of the prominent standards of Annex 16 Vol.II. The above provision which is contained in part II SARPs Annex 16 Vol II applies to all turbine engine powered aircraft intended for international navigation that are manufactured after 18th February 1982. According to this part, the certification for prevention of international fuel venting shall be granted by relevant authority based on satisfactory evidence that the aircraft or the aircraft engine complies with the requirements of this part. However, a note on the recommended practices is also written on the requirement on part II. The recommended practices state that documents attesting certification on fuel venting may take the form of certification or a statement contained in another documents approved by the certificating authority. Further, contracting states shall recognize as a valid certificating, a certification on fuel venting granted by another contracting state provided the requirement for granting the certification was not less stringent then the provision of volume II of this annex.[13]

However, it is observed that the above contains no provisions stipulating any avenue for accepting a contracting state that has been granted a certification by another contracting state under less stringent condition than those contained in the annex.

It is also observed that part II of the annex that required manufacturer of aircraft engine to prove to the certification authority with satisfactory evidence that his product satisfies the emissions and fuel venting standard and safety standard is inadequate. Although the above standard is applicable to aircraft manufactured after 1982, the fact that considerable number of commercial aircraft in service are manufactured before 1982 shows that the standards contained in part II of annex 16 can only succeed in control of fuel venting partially further it is observed that this provision contains no statement on whether or not the certification is subject to expiry and renewal.

10 Also, see SARPs above on definition of recommended practices.

11 See ICAO Assembly resolution in force at 5th oct.2001 in ICAO document 9790.

12 See part II, of SARPs, Annex 16 vol. II.

13 See part II chapter 1.3 of SARPs Anne 16 vol. II.

The standard on Smoke and Gaseous Emission[14] is next to the above. The standard relating to control of aviation emissions certification is contained in part III Annex 16. This requires certification of aircraft engine and not the aircraft. Just like in the case of standard on vented fuel the certification authority for engine or equivalent procedure shad been carried out, national certification will be exempted the standards on smoke are made inform of regulating smoke number and apply to turbo engine and turbo fan engine manufactured on or after Jan 1993. The gaseous emission standards for HC and CO are applicable to engine with rated output is greater the 26.7 KN and while date of manufacture is on or after 1986.[15] Engine can be certified during test unless they meet with the above regulatory standard which the above regulatory standard which expressed inform of regulatory level

As regards emission limits for next (oxides of Nitrogen) three level of stringency of regulatory level are prescribed by standard. The first level of stringency which is least straight is for engine model manufactured on or before 31 Dec. 1995 or for which the date of manufacture of the model engine was or before 31 Jan 1999. [16]The most level of stringency test applies to engines or model for which management for individual production was after Dec 1999 for date of manufacture of individual engine. The third level of stringency applies to engine or model which production of the first individual production was 31st Dec. 2003. Engine with higher rated thrust pressure are acted to most stringency standard engine for international air navigation must its emission of its Nitrogen Oxides when measured and tested, must meet up with recommended and required standard before it can be certified.

However, different standards are recommended for aircraft engine intended for propulsion at subsonic speeds and supersonic speeds.[17] In both cases, engine shall be tested according to specified reference landing and take-off LTO cycles. The emission measured and reported with the specified standard. The emission to be controlled is smoke and gaseous emissions which in a generic term comprises of Hydro Carbon (HC), Carbon Monoxide (Co) and Oxides of Nitrogen (NOx). The shortcoming of the above standards is that since the standards are designed to deal with the problem of air quality control within the airport vicinity and since this standard is recommended for emission within LTO[18] circle below 915 metres (3ooo feet), the certification standards do not include other flight regime at climb and cruise level.[19]

Engine Intended for Supersonic Propulsion is another standard.[20] This standard for supersonic propulsion apply to all turbo jet and turbo fan engines manufactured before or after Feb. 1982. Emission of Hydro carbon (HC), Carbon monoxide (CO) and Oxides of Nitrogen (NOx) measured and reported must conform with the standard before certification can be granted. However, only one level of stringency is available as no emission will be determined for this after burning can be allowed by the certificating authority using the inference LTO cycle and the fact that the validity of such data provided is adequately demonstrated.

All Engines Intended for Subsonic Propulsion[21] also represents a standard. The standard for engine certification in this category, is applicable to all turbo jet and turbo fan engines and other

14 See SARPs part III Annex 16 Vol. II, Chicago Convention.
15 Part III SARPS Annex 16 vol. II.
16 Ibid.
17 See part III chapt 1 & 2 of SARPs Annex 16 Vol. II.
18 The reference emission Landing and Take Off (LTO) cycle consists of: Climb, Approach and Taxi/ground idle see part III.
19 See CRASTON, J. Civil Aviation and The Environment, p. 16.
20 See SARPs part III, chpt 2. 1.
21 See part III, Chpt.4.2 SARPs Annex 16 Vol. II.

engines designed for certification. The standard on smoke on turbo jets and turbo fans only apply to aircraft manufactured before 1st Jan 1983 while those aircraft before 1965 are exempted from certification. It is also noted that all turbo jets and turbo fan engines including other engines designed for application are to meet up with the required standards before being approved for certification.

As part of recent development, it is observed that a new provision on aircraft carbon dioxide (CO2) emissions Standard will soon be added to the existing SARPs Annex 16.This new volume which will be known as volume III.[22] A Carbon dioxide metric system with CO2 emissions for aircraft types with different technologies which had earlier been recommended upon by the Committee on Aviation Environmental Protection (CAEP) on 10 July 2012 was finally endorsed in 2013, while agreement on its certification procedure was equally reached.[23] Following a unanimous agreement by 170 international experts of CAEP on February 2016, a new aircraft CO2 emission Standard was ultimately adopted by the ICAO Council.[24]

3 THE PROBLEMS OF SARPs ANNEX 16 VOL. II ON REDUCTION OF AVIATION EMISSION

A critical look at the performance of SARPs, shows that SARPs have maintained standard in the aviation industry. The standards put in place are referred to as models which applied to many states if not all. There has also been partial implementation of SARPs among large economic group and richer nations in the EU, North America, Australia etc.[25] However, it is observed that despite the above contributions, the provisions of SARPs are not adequate for effective reduction of aviation emission. It is observed that SARPs have problems that militate against effective reduction in aviation emission. The following therefore, are therefore identified as the problems of SARPs on reduction of aviation emissions:

A careful examination of part two of Annex 16 vol. II shows that the provision in this part of the Annex is more or less put in place to address facilitation of orderly air traffic growth rather than show concern for climate change. This same lack of concern to address reduction in aviation emissions is also reflected in Article 37[26] of Chicago convention on the creation of SARPs. Article 37 vests ICAO with original authority to adopt and amend SARPs in dealing with issues concerning airports and landing areas, rule of air and air control practices, worthiness of aircraft custom and immigration procedures, aircraft in distress and investigating accident while it said nothing about reduction of aviation emissions. By simple interpretation, the above shows that SARPs are originally intended to cater for growing needs of civil aviation and was limited to safety and efficiency of air navigation

22 See HOPE, J. Aviation and Environment Development since the Last Assembly (Unpublished Presentation delivered at the ICAO symposium on Aviation and Climate Change,' Destination Green", Montreal 14 – 16 May 2013). See also Md Janveer Ahmad "Global Civil Aviation Emission Standards-From Noise to Green Fuels;, Ocassional paper Series No 25, 2016, Sustainable International Civil AViatio, Centre for Research and airspace law, MC Gill University, Canada, 2016.

23 See Pres release by ICAO, Com 15/12 " New Progress on Aircraft C02 Standard:, accessed 11july 20i6 www.ICAO.int/newsroom/pages/new progress-on-aircraft-CO2-standard.aspx.

24 See Hupe, Aviation and Environment Development Since the last Assembly, 37.

25 See Allen P. Jan and Annie Petsonk, n. 74 at 65. Also see Beatrix Martinez and HarrqVan Asselt.

26 Article 37 n. 112. Also see ICAO Definition of "International Standards and Recommended Practices Assembly ResolutionA1-31. ICAO doc. 4411 (Assembly Resolution A1-31. SeeThomas Beurgenthal, Law Making in the international civil Aviation Organization (New York Syracuse UniversityPress1969), 60.

rather than cater for aviation emission.[27] Although it is true that Annex 16 vol.2 of Chicago convention was tagged Environmental protection Standards for preventing international fuel venting or international pollution through aircraft engine certification, the practice of preventing international venting fuel and aircraft pollution through engine certification is actually a regulatory activity carried out within the scope of aviation safety. The understanding of part II of Annex 16 II looks like environmental protection was squeezed into broader interpretation of the safety of air navigation, there was no specific power, or duty or clear cut intention to address environmental protection in the SARPs. Going by the above, ICAO SARPs on aircraft emission have problem in combating reduction in aviation emission related climate change.

Also, following a close examination of the SARPs, it is observed that part III of Annex16 vol. II focused on aircraft engine certification but not on the certification of aircraft. It is important to know that certifying aircraft engine alone is not sufficient for controlling emissions because this is just a part of the whole aircraft design. It may be sufficient in term of fuel efficiency but not in term of weight and suitability of aircraft. The certification of aircraft as a whole appears to make more sense rather than only its engine from environmental perspective.[28]Although the present system of certifying aircraft engine in relation to emission is reasonable, there is need to consider other factors like aircraft weight in order to have a complete aviation emission control.[29] Therefore with absence of concern for other parts of aircraft design, the ICAO SARPs in Annex 16 vol. II cannot totally control aviation emission.

It is further observed that ICAO standards as contained in Annex 16vol.II of Chicago convention are inadequate because the ICAO Standards only laid down standards with respect to discharge of emissions like hydrocarbons, carbon monoxide and Nitrogen oxide, while real implementation is yet to resume on the standards to cover carbon dioxide which is the major man made cause of global warming.[30] This inadequacy in the provisions of ICAO Standards thus made it difficult for effective reduction in aviation emission

It has been found that ICAO SARPs do not have the power of enforcement and compliance. This can be explained in the sense that members states of ICAO who fail to implement the provisions of ICAO Standards are required to give notice to ICAO but shall incur no penalty for refusal to comply. The above weakness is further reinforced by the fact that while states may invoke dispute settlement provision over disagreement between states on application of ICAO Standard, the Chicago convention is silent on what action to be taken over a state that doesn't comply after giving notice to the ICAO.[31] While it is true that some over sight powers were given to ICAO to regulate aviation emission under Annex16 of Chicago Convention vol. II, it is discovered that this power did not give room for exclusive control, as member states of ICAO to a large extent remain free within the provisions of "Opt Out" rule of SARPs decide not to work with the provisions of SARPs but developed a consensual treaty based approach to carbon emission reduction without any penalty. A case in point is that of EU states acting through the EU Commission, unilaterally imposed carbon trading system on

27 See LIU, J. The Role of ICAO in Regulating Greenhouse Gas Emission from Aircraft, Carbon and Climate Change. In Carbon and Climate Change Law Review, p. 420. Also see SARAO, E. J. Global Versus Unilateral Measures to protect the World's Environment: Implications for the Air Transport Industry. In Journal of Air and Space, p. 51.

28 Paul S. Dempsey, n. 5 at 54.

29 Ibid.

30 Brian F. Havel and Gabriel Sanchez, n. 22 at 360.

31 CHARNEY, J.L. From Commitment and Compliance, The Role of Nonbinding Norms. In SHELTON, D. (ed.) Compliance with International Soft Law, p. 15.

all airliners, regardless of national origin while the air liners operated at the airports within the EU territory.[32] Failure of SARPs to ensure enforcement and compliance to standards shows that SARPs were weak laws that are not effective for reduction of aviation emission.

It has been reported that the environmental protection measures adopted under Annex 16 vol. II of Chicago convention are only geared towards the narrow objective of reducing the level of pollutants from aircraft engine instead of broad goal of environmental sustainability. The reason for this is because it has been difficult to get a suitable medium for addressing the assimilative capacity of the environment in relation to aircraft engine emission, particularly, when the level of uncertainty surrounding the atmospheric effect of aircraft engine emission and the processes that take place at altitude are considered.[33] Therefore, it has been concluded that all regulatory measures of SARPs that were used in the absence of a suitable medium for determining assimilative capacity of the environment were only directed towards reduction of aircraft emission at a shallow level and thus not effective for broad goal of environmental sustainability.

It has also been reported that one of the reasons for ineffective reduction of aviation emission by SARPs is the limitations to assumptions on aircraft engine certification. The scheme for certification of aircraft engine on international fuel venting, smoke and gaseous emission as of Annex 16 vol. II, can be said to be highly characterized as a preventive measure designed to have good effect on reduction of aviation emission in the sense that it was based on the assumption that the quantity of pollutant from global aviation emission sector can be dumped into the atmosphere without exceeding its assimilative capacity is known or can be estimated and that the level prescribed by standard bear close relationship to those values[34] In reality, the assumption about notification scheme is that the scheme lacks required variables like the total number of aircraft and engines engaging in international air navigation which have to be regulated as well.[35] Assuming the assimilative capacity of the environment in term of knowing the quantity of pollutant that can be safely absorbed by the environment without causing a permanent damage is known or be estimated. Achieving optimal environmental result from certification of aircraft engines will be difficult since there are no limits on the number of air craft or engine that may be certified by relevant certification authority of each contracting states under the annex. In addition to this preventive measure acting by itself are not always enough for purpose of controlling pollution.[36] Despite operation of the certification scheme since1981, there are still complaint of increasing volume of aviation emission. Therefore, there is need for a more effective measure to complement the certification scheme. It is believed employing other measures like emission Trading will improve reliance on this preventive measure.

It has further been observed that ICAO SARPs rules are asset of soft law that lack power of compliance on members. This is because the "Opt Out" rule present in the SARPs disempowered the convention from enforcing the SARPs on contracting states, thereby permitting noncompliance with

32 Ibid.

33 Paul S. Dempsey, n. 5 at 637 Also see David S Lee, Aviation and Climate Change, n. 1, 30.

34 Bin Cheng, n. 91 at 65.

35 CHARNEY, J.L. From Commitment and Compliance, The Role of Nonbinding Norms. In SHELTON, D. (ed.) Compliance with International Soft Law, p. 17.

36 Ruwantissa Abeyratne. The Legal effects of ICAO's Decision and Empowerment of ICAO by Contracting States. Annual Review of Air and Space Law, Vol. 32/2009, p. 58. Also note that ICAO Resolution A35-5 Consolidated statement of Continuing ICAO's policies and Practice related to environmental protection 2004. Appendix A and I of ICAO Assembly Resolution have been classified as soft law or quasi law for this purpose. This goes to show that even though the laws are not legally binding, contracting states are expected to follow them unless they express reservation. See Brian Havel And Gabriel Sanchez, The principles and Practice of International Law (CUP 2004), 60.

the standards and practices on reduction of aviation emission. The primary attributes that would have made SARPs hard law and ensure compliance were non-existent.[37] Therefore, the prevalence of soft law in SARPs accounts for the ineffectiveness in reduction of aviation emission.

4 CONCLUSION

The paper discussed the Standard And Recommended practices (SARPs) Annex 16 Vol. II of Chicago Convention as the law approved for reduction of aviation emission by ICAO. The content of SARPs Annex 16 Vol. II has been analysed and it is found that Part II contains no provision which allows a contracting state to be granted a certification by another contracting state unless under a stringent condition similar to ICAO. It is also observed that Part II of SARPs which requires certification on fuel emission, fuel venting standard and safety standards by aircraft manufacturers is not adequate. There is also no provision on whether or not the certification on the above standards is subject to expiration or renewal. Other problems of SARPs Annex 16 Vol. II are found to include lack of concern for Climate Change while the engine certification lack consideration for aircraft. The SARPs do not cover carbon dioxide emission and also lack the capacity for enforcement and compliance. SARPS are found to have no definite objective while the engine certification lacks required variables.

Since it has been observed that the existing ICAO Civil Aviation Emission Standards and Practices are not potent for effecting adequate reduction in aviation emission and for enhancing sustainable aviation environment, the following are therefore recommended for improving the deficient condition. The SARPs Annex 16 Vol. II of Chicago Convention 1944, should be amended to include provisions for control of all necessary greenhouse gases and other modern innovations that could enhance its effectiveness on reduction of aviation emission. To this end, the emission standards should be upgraded to cover carbon dioxide emission and water vapour. Also, the Global Market Based Measures (MBM) for reduction of aviation emission such as Global Aviation Emission Trading should be implemented to serve as additional supporting measure to the existing regulations of SARPS. Further, the ICAO law making body and the ICAO Committee on Aviation Environmental Protection (CAEP) should dissuade themselves from embarking on decisions and actions that will always encourage the growth of aviation emission. ICAO should accord commitment and seriousness to giving approval to implementation of its regulations and standards by member states. It is further recommended that SARPs should be transformed to a hard law and provided with full power for enforcement and compliance on contracting states. The engine certification standards should be reviewed to have the required technical variables and also have full consideration for aircraft.

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Contact information:

Dr. Murtala Ganiyu A Murgan
University of Ilorin, Faculty of Law
1515, Unilorin Staff Quarters, Amodu Bello Way
Ilorin
Nigeria

prof. Dr. Abdul Ghafur Hamid
International Islamic University, Ahmad Ibrahim Kulliyyah of Laws
50728 Kuala Lumpur
P. O. Box 10
Malaysia

Assoc. Prof. Maizatun Mustapha
maizatun@iium.edu.my
International Islamic University, Ahmad Ibrahim Kulliyyah of Laws
50728 Kuala Lumpur
P. O. Box 10
Malaysia

CYBER SECURITY AND THE INTERNATIONAL LAW

Peter Vršanský, Daniel Bednár
Comenius University in Bratislava, Faculty of Law

Abstract: The Cyber security topic becomes a complex, interdisciplinary and multidimensional problem in the contemporary theory and practice of the International Law.

Key words: Cyber security, International Law, Cyber Attacks, Regulation

Motto:

The sovereign States apply their national law within their territories and their national interests outside their territories.

1 INTRODUCTION

The Cyber security is a complex, interdisciplinary and multi-dimensional problem.

The complexity of the issue consists in a variety of the challenges that have emerged with respect to the Cyber security issue in international relations. However, many crucial actors, who are involved in the multiply Cyber security activities, are not the sovereign States at the time being. The Non-governmental bodies, the supra-national private corporations, various natural and legal persons and other legal subjects of law actively engage in the Cyber security related matters in our days. Ultimately, the autonomous self-executing IT systems *à la* "Matrix", which have emancipated themselves from the Humankind's control, might commence to launch "their-own-way" acting in the Cyber security area one day.

The Cyber security topic is an interdisciplinary problem. The Public International Law norms, the Private International Law norms, the Interntional commercial law norms, the EU law regulations as well as the domestic law norms, included the constitutional law norms, civil law norms, commercial law norms, criminal law norms, administrative law norms and other law norms govern the Cyber security issue at the time being. Furthermore, the Cyber security related issues do not refer only to material law circumstances, to processual law norms but also to conflicts of laws as well. Regardless of this, still one cannot use the argument *a completudine* with respect to the existing Cyber security law regulation. The existing law regulations do not cover all particular aspects of the problem. Majority of the Cyber security issues are not yet covered by "hard law" or even "soft law" norms. The process of codification and/or progressive development of the normative regulation in this field are not in capacity to respond, in an effective way, to variety of the rapidly emerging problems that have originated both from the past needs and future challenges.

The Cyber security issue is a multi-dimensional problem to the effect that it comprises, besides the various legal aspects, a bulk of miscellaneous political, security, economic, legal, social, technological, psychological and cultural aspects. They all have strong impact on the evolution of the general and particular problems, which occur within the Cyber security area.

Thus, the international community as a whole, the individual States, the relevant international and regional organizations, they all should devote their attention and energy to further vigilant analysis of the Cyber security issue on the international, regional and national levels.

The Cyber security issue becomes the priority to the effect that it has been inflicting many areas of the sovereign States activities. The magnitude of peril that emerges from the Cybercrime attendant circumstances is unpredictable. Likewise, the amount of conceivable damages that relate to the Cybercrime is unanticipated at the time being. Nevertheless, the Cybercrime cases that have yet occurred in the international relations clearly point out the threat. The Cybercrime puts at risk the global peace and security, the peaceful development of the international relations on the daily basis.

2 METHODS OF ANALYSIS

In our view, only a profound historic, systemic, semantic, grammatical, logical and legal analysis of the Cyber security related matters would provide the international community of States with the due answers and pragmatic solutions how to effectively deal with the challenges that have been rapidly emerging.

Historical analysis

The historic analysis of the problem will help the international community of States to understand better the evolution of the Cyber security issue in its historic perspective. As far as analysis of the legal texts is concerned, the historic analysis will help us to learn more about the partial phases of the "legal life" of the relevant legal documents. It seems to be very important to take into account the specific time limits, in which the sovereign States adopted the texts of the respective legal documents, when they made reservations and objections to reservations with regard the texts. It is necessary to know, when the relevant legal texts have entered into force, when the amendments and modifications of the text entered into force, and last but not least, when the decisions on termination of the respective texts entered into force.

Systemic analysis

The systemic analysis of the Cyber security issue would provide the international community of States with a due information concerning the Cyber security issue's location within the International Law system, within the regional law systems and within the domestic law systems. The systemic analysis shows us the contextual position of the particular Cyber security issues within the structure of the individual legal documents (preamble, operative text, transitive provisions, annexes, and so on) as well. Moreover, the systemic analysis provides us with information on a broader contextual linking of the Cyber security issue to other relevant aspects of the problem under consideration. For example, on the agreements or unilateral acts adopted in the process of preparation of the relevant legal documents. Likewise, on the subsequent agreements, unilateral acts, subsequent practice or other relevant rules of the International Law, concerning the application and interpretation of the respective legal documents.

Semantic and grammatical analysis

The semantic and grammatical analysis would provide the international community of States with a correct definition of the "traditional meaning" of the basic Cyber security issue terms that should be correctly used in the relevant legal texts in the light of their objects and purposes. Despite of the fact that many writers devote their attention to the Cyber security related matters trying to formulate the respective definitions, there does not exist a generally accepted clear-cut written definition of the term "Cyber security" in the contemporary International Law.

Some authors share the view that the "Security is a process not an end state", the "Security is the process of maintaining an acceptable level of perceived risk" and/or the "Security has three main features", *i.e.* – integrity, availability and confidentiality. [1] The UK Cyber Security Strategy, 2011 defines the Cyberspace as follows: "Cyberspace is an interactive domain made up of digital networks that is used to store, modify and communicate information. It includes the internet, but also the other information systems that support our businesses, infrastructure and services."[2]

Bearing in the mind the argument *a coherentia* together with the argument *a completudine*, the above approach would help the international community of States to both unify and clarify the existing terminology as well as to prevent emergence of the disputes concerning the application or interpretation of the relevant legal texts in force.

The Good Faith *(Bona Fide)* principle should govern the overall creation, application and interpretation of the existing rules. The same applies for the States aimed at the progressive development and codification of the International Law norms concerning the Cyber security topic.

Nevertheless, a serious question arises, whether and to what extent the sovereign States and the other actors wish to adopt any more detailed definition of the "traditional meaning" of the cardinal Cyber security terms in written? It seems that some actors would rather prefer adopting a "special meaning" of the terms, which would be agreed upon only on a national or regional level at the time being. Not on the International Law level. The adoption of the written universally binding "hard law" norms of the International Law, which might even possess the normative quality of *iuris cogentis*, does not seem to be very realistic at the time being.

The reason for a circumspect attitude of the sovereign States in this respect lies in the realities of the contemporary international relations, *e.g.* in the above-mentioned politic, security, military, economic, social or cultural factors that influence the behaviour of the States or other actors in the domain of the Cyber security related issues.

For example, a "special meaning" of the term "espionage" might assist to solving the discrepancy between the urgent need to fight over the terrorism and the constant obligation to protect the rights of individuals. This would also assist to preventing the problems concerning the State responsibility with respect to violation of human rights and fundamental freedoms, *e. g* violating the right of an individual to private and family life in result of the State activities aimed at fighting over the Cybercrime.

Thus, the progressive interpretation of the existing rules of the International Law would assist to regulate the urgent challenges that emerge in the transitory absence of the relevant legal regulation in the field of the Cyber security related issues.

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1 https://www.itu.int/en/ITUD/Cybersecurity/Documents/Introduction%20to%20the%20Concept%20of%20IT%20Security.pdf

2 https://www.cyberessentials.org/system/resources/W1siZiIsIjIwMTQvMDYvMDQvMTdfNDdfMTdfNjMwXzEwX3N-0ZXBzX3RvX2N5YmVyX3NlY3VyaXR5LnBkZiJdXQ/10-steps-to-cyber-security.pdf

There exist general, supplementary and linguistic arguments of interpretation of the legal texts that promote the general call for a more progressive interpretation of the legal texts concerning the Cyber security issues.

As provided in the articles 31 – 33 of the Vienna Convention on the law of treaties[3], these arguments of interpretation are as follows:

The Article 31 (General rule of interpretation) provides that

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Article 31 paragraphs 2 and 3 contain the interpretation of the term "context" and "broader context" providing that "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of International Law applicable in the relations between the parties.

The Article 31 paragraph 4 stipulates that "4. A special meaning shall be given to a term if it is established that the parties so intended."[4]

The Article 32 (Supplementary means of interpretation) provides that: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."[5]

In this respect, the other arguments of the legal interpretation, i. e. argument a coherentia, argument a completudine, argument a contrario, argument a fortiori, argument a simili/per analogiam, argument ab exemplo, the historic argument, the psychological argument, the economic argument, the systemic argument, the logic argument, the apagogic (reductio ad absurdum) argument, the naturalistic argument and other relevant arguments, may serve in capacity of an efficient supplementary means of the legal interpretation of the relevant texts and documents concerning the Cyber security issue regulation as well.

The Article 33 regulates the interpretation of the texts of treaties that are authenticated in two or more languages. The Article 33 stipulates, that "1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of

[3] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[4] Vienna Convention on the law of treaties, Article 31.

[5] Vienna Convention on the law of treaties, Article 32.

meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[6]

Logic analysis

The logic analysis of the relevant documents is also very important to the effect, that it uncovers the intrinsic imperfections of the relevant texts under consideration.

Legal analysis

As far as the further legal analysis of the Cyber security issue is concerned, some more detailed answering the following legal questions seems to be very important:

1. Who are the contemporary actors in the field of the Cyber security (natural persons, legal persons, autonomous self-executing IT systems)?
2. What contemporary legal rules and norms govern the Cyber security issue (hard law, soft law, treaties, customary International Law)?
3. What is the current situation with regard to the progressive development and codification of the Cyber security issue law?
4. What peaceful means of settlement of disputes seem to be optimal with respect to solving the Cyber security challenges (International, regional, national; Negotiations, good services, enquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies or arrangements, other peaceful means?)
5. What coercion means and sanctions seem to be optimal with respect to Cyber security issue?
6. How to deal with the responsibility and liability issues related to Cyber security topic? Are the circumstances precluding the wrongfulness of conduct of a sovereign State applicable with respect to Cyber security activities? How to deal with the responsibility and liability of Non-governmental or supra-national actors? Who will bear the responsibility for unlawful acting of autonomous self-executing IT systems, which have liberated themselves from any human beings control?
7. What sanctions would be optimal with regard to punishing the perpetrators of the crimes related to Cyber security issues?

The national and international institutions or Non-governmental organizations, legal experts, who are involved in research and practice of the International Law, they all have perceived many other important particular legal challenges that would deserve due attention both in the theory and practice of the International Law.[7] The United Nations Interregional Crime and Justice Research Institute (UNICRI) database contains a very interesting bibliography in this respect too.[8]

6 Vienna Convention on the law of treaties, Article 33.

7 See e.g. An Assessment of International Legal Issues In Information Operations, May 1999 – http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf

8 See e.g. The United Nations Interregional Crime and Justice Research Institute http://www.unicri.it/services/library_documentation/bibliographies/cyber_threats/cyber_threats_database.php

The available International Law regulations reached their operational limits

The contemporary International Law starts to be obsolete in many fields of regulation because the adoption of new written International Law norms has delayed. On the other hand, a stagnation in the field of codification of the International Law might be interpreted as the very fact that the codification process has reached the limits that are generally acceptable by the sovereign States, as far as the written form of obligations is concerned. By and large, no relevant customary International Law norms did not come to the existence due to lack of *usus longaevus* and *opinio iuris* elements.

This applies also for creation of new principles of International Law "recognized by civilised nations", the subsidiary means like the judicial decisions, or well, the works of the well-known writers.

The interpretative activities of "glossarists" and "post-glossarists" are inevitable

Paradoxically, even the Ex *aequo et bono* principle seems to be more practical way how to seek for mutually acceptable solutions in the field of the Cyber security related issues than exploring the "classical" obsolete sources of the written International Law in our days. Somehow, the era of the medieval "glossarists" and "post-glossarists", who had commented on the Roman Empire Law, after the former Roman Empire had disintegrated, in the transitory absence of the law norms of the newly emerging feudal legal system, is recurring in the 21th century. The contemporary "glossarists" and "post-glossarists" are commenting on the norms of the old International Law system of the Bipolar World, which ceased to exist after disintegration *(dismembratio)* of the former Soviet Union Empire, in the transitory absence of the law norms of the newly emerging International Law system of the 21th century.

The "era of implementing the exemptions from the International Law rules" is about to displace the "era of implementing the International Law rules

The time has come to remove from the "era of implementing the International Law rules" to "era of implementing the exemptions from the International Law rules" These exemptions form a constituent part of the articles regulating the protection of human rights or fundamental freedoms end they are enlisted in various multilateral International Law instruments. The reason for such transfer in conduct of the sovereign States is the on-going process of stagnation and fragmentation of the codification process concerning the domain of the Cyber security law.

Accordingly, one should give the due attention to potential utilizing the reasonable legal, legitimate and proportionally acceptable exemptions that would allow the sovereign States to neglect, if necessary, the existing human rights and fundamental freedoms in force in cases of alleged perpetration of the Cybercrimes or in cases of taking preventive actions aimed at fighting over the Cybercrime.

For example, The European Convention on Human Rights[9] contains a variety of reasons where a member State of the Council of Europe has the right to interfere into the process of enjoyment, by the individuals, of the human rights and fundamental freedoms. The limited text of the article allows us to mention only several of them.

[9] See: http://www.echr.coe.int/Documents/Convention_ENG.pdf

As far as the *Right to respect for private and family life* is concerned, the Article 8 paragraph 2 of the Convention stipulates that "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[10]

As far as the *Right of expression* is concerned, the Article 10 paragraph 2 of the Convention provides that "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[11]

As far as the right to *Derogation in time of emergency* is concerned, the Article 15 paragraph 1 of the Convention provides that "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[12]

As far as the *Restrictions on political activity of aliens* are concerned, the Article 16 of the Convention provides that "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."[13]

Rebirth of the Article 107 of the UN Charter?

A progressive interpretation of the Article 107 of the UN Charter, which deals with the coercive measures adopted with regard the "enemy states" in the World War I, is another theoretical possibility how to solve a discrepancy between the urgent need to fight over terrorism within the Cyber security space on one hand ant to protect the human rights and fundamental freedoms on the other hand. The Article 107 provides that "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."[14]

Circumstances precluding the wrongfulness of an act of the State

Another effective solution with regard to solving the Cyber security challenges, particularly the Cybercrime problem lies in the progressive interpretation of the circumstances precluding the wrongfulness of a State's conduct, by which the State violated its international obligations, *e.g.* in the domain of the human rights protection.

10 European Convention on Human Rights, Article 8.
11 European Convention on Human Rights, Article 10
12 European Convention on Human Rights, Article 15
13 European Convention on Human Rights, Article 16
14 UN Charter, Article 107 – http://www.un.org/en/sections/un-charter/chapter-xvii-0/index.html

The International Law Commission adopted the Articles on State Responsibility in 2001. They formulate several circumstances precluding the wrongfulness of an act of a sovereign State. They are as follows[15]:

- Consent (Article 20)
- Self-defence (Article 21)
- Countermeasures in respect of an internationally wrongful act (Article 22)
- Force majeure (Article 23)
- Distress (Article 24)
- Necessity (Article 25)
- Compliance with peremptory norms (Article 26)

It would be reasonable to go into the problem and scan the available justification for use of the circumstances precluding the wrongfulness of acts of States in fighting the Cybercrimes.

By the way, the sovereign States that are members of the European Union or members of the other international governmental organizations are regularly granting their official consent with respect to the preventive activities of another States or international organizations aimed at preventing the international terrorism. For example, they give their official consent (through national courts) with regard to controlling the private IT communications of citizens even in our days. This applies also with respect to self-defence activities of the sovereign States. The collective ones or well those that are taken in conformity with the Article 51 of the UN Charter. In our opinion, it is also fully reasonable for a sovereign State to react, by implementing various effective countermeasures with respect of an internationally wrongful act of another State in the Cyber security area.

Vienna Convention on law of treaties

The Vienna Convention on law of treaties, namely the legal argument "Fundamental change of circumstances" as set in the Article 62 of the Vienna Convention on the law of treaties, offers the sovereign States another legal possibility how to solve the different contemporary challenges related to the Cyber security area.[16]

3 INSTEAD OF CONCLUSIONS

According to the previous analysis, one of the most recent pertracted terms is the term "cyber warfare" or "cyber attacks" [17]. Is there a need for new law or the recent international regulation is sufficient? We would like to address it in terms of three sub-questions.

First, with respect to cyber warfare, is there a gap in international law, and if so does that pose an international legal crisis?

Second, what are the challenges to interpreting existing law or developing new international law in this area?

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15 http://legal.un.org/docs/?path=./ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF

16 Vienna Convention on the law of treaties, Article 62

17 See also VALUCH, J. – GÁBRIŠ, T. – HAMUĽÁK, O. Cyber Attacks, Information Attacks and Postmodern Warfare. In Baltic Journal of Law & Politics, pp. 63–89.

And, third, what might the future hold with respect to international legal development and cyber warfare?

Definitions of that term vary widely, and the range of hostile activities that can be carried out over information networks is immense, ranging from malicious hacking and defacement of websites to large-scale destruction of military or civilian infrastructure that rely on those networks. By "cyber attacks", we mean efforts to alter, disrupt or destroy computer systems or networks or the information or programs on them, which is still a broad category. That breadth – encompassing activities that range in target (military versus civilian, public versus private), consequences (minor versus major, direct versus indirect), and duration (temporary versus long-term) – is part of what makes international legal interpretation or regulation in this area so difficult with respect to *ius ad bellum* and *ius in bello*. With that in mind, *is there a gap in the law, and is it a crisis?* On the one hand, this is a very new problem. The information technologies involved are new and changing constantly and rapidly, and our dependence on information technologies and their networked architecture creates new security vulnerabilities. This raises difficult questions such as when might attacks on informational infrastructure using only bits and bytes of information – electronic ones and zeros – give rise to a right of armed self-defence, or during the course of armed conflict when might such actions violate precautionary targeting requirements or constitute grossly disproportionate civilian harm? On the other hand, though, this is a very old and common legal problem. That is, it has always been possible to wage conflict using means other than kinetic violence, and there has long been much debate and disagreement about how and where to draw such lines. During the Cold War, for example, much debate centred on questions about when the use of economic power or political interference in another state's affairs violated international law or could give rise to the right of self-defence. Ancient methods of conflict like sieges and modern ones like strategic air bombardment have prompted questions about the limits on means of warfare that have indirect (or sometimes very direct) and very devastating effects on civilians. In that regard, cyber warfare emerges within a legal framework that goes back centuries, with significant refinement and codification in the 20th Century. As to *ius ad bellum*, we look primarily to the UN Charter, including Article 2(4)'s prohibition on the use or threat of force, and Article 51's recognition of self-defence rights. As to *ius in bello*, there are treaty instruments like the Hague and Geneva Conventions, though much of that regime boils down to the core principles of necessity, distinction, and proportionality. As new technologies arise, of course, they present translation challenges for these bodies of law. They always have. During the last century, such conflict methods as proxy conflicts through support for insurgencies, counter-insurgencies, and terrorism, as well as forms of economic strangulation or political subversion, raised tough questions about legal categories and boundaries. During the first Gulf War, the coalition air campaign destroyed Iraq's dual-use electrical power system, which degraded Iraq's military capacity but also resulted in widespread and long-term civilian deprivations, therefore, raising questions about targeting distinction and proportionality. In the course of Kosovo air operations, NATO forces bombed Serbian television and radio stations because these information systems were integral to Serbian war-making capacity, again raising questions about how to classify and assess legally such targeting. Cyberattacks and cyber warfare undoubtedly present new and perhaps more difficult legal translation problems. However, the point of these historical examples is to show that these challenges differ more in degree than in kind from previous legal challenges. The law may not be as clear or as effective as we would like as we try to map cyber warfare onto it, but cyber warfare is not emerging in a gaping legal hole or creating a new legal crisis. That is not to say that there are

not *new challenges to refining the law or developing new law* with respect to *ius ad bellum* and *ius in bello*[18] of cyber warfare. Some of those challenges include:

- Substantive understanding of cyberattacks and threats: some states want to preserve the flow of information, while others want to be able to disrupt and control it, and powerful states have varying views on cyber security because of differences in international political systems and relations between the public and private sector.
- Identification challenges: it may be difficult to distinguish in real-time between offensive and defensive actions, or hostile attacks versus intelligence activities in cyberspace.[19]
- Verification problems: it will be difficult to monitor, detect, and substantiate violations of norms in this area because of technical and jurisdictional limits.
- Attribution issues: thorny issues will arise as to whether and when actions by private individuals or groups in cyberspace may be attributed to a state – both as a matter of forensics in linking cyber activities to their human perpetrator and as political matter in establishing the level of state control or sponsorship.
- Secrecy: Not only will states be very reticent and guarded over their offensive and defensive actions, they will also be reluctant to disclose information about attacks they might suffer or repel, for fear of compromising intelligence capabilities or exposing vulnerabilities. An upshot of this set of challenges is that new comprehensive treaty or interpretive consensus of existing law is unlikely anytime soon in this area (at least absent a catastrophic event). We may continue to see agreement or refinement of multilateral treaties that deal with specific pieces of the cybersecurity problem, like the International Convention on Cybercrime, which requires parties to develop criminal laws against hacking and other illicit cyber activities like computer fraud. Alternatively, we may see policy agreements among small numbers or subsets of states, like a NATO strategic concept with respect to cyber defence or joint declaration among like-minded states that seek to block information activities they view as subversive. New treaties are a long way off, though, unless the states elevate form over substance, and they negotiate and adopt treaties with vague language that papers over differences and merely restates the toughest questions So, if this prognosis is correct, it leads to my third question: *what will the future look like with regard to law in this area*? In short, we are likely to see law develop not through negotiation of comprehensive treaties but through slow and uneven development of state practice. This process could be even slower and more uneven than in past eras of radical transformation in the technology and mode of conflict, though, for several reasons related to the challenges outlined above. To an even greater degree than prior forms of warfare, cyber warfare may lack clearly discernible starting points and readily observable or provable actions and counter actions. This does not mean that legal line-drawing through un Charter and IHL interpretation or new international legal agreements is impossible with respect to issues like prohibited attacks and self-defence. It does mean, however, that while information technology continues to evolve at faster and faster rates, the processes of claims and counterclaims toward a predictable, stable outcome, or the accretion of interpretive practice commanding broad consensus, will likely be slow and uncertain.

[18] See: VALUCH, J. – HAMUĽÁK, O. Cyber Operations within the Conflict in Ukraine and the Role of International Law. In SAYAPIN, S., TSYBULENKO, E. (eds.) The Use of Force against Ukraine and International Law – Jus ad bellum, jus in bello, jus post bellum.

[19] About Cyberspace see also VALUCH, J. Kybernetický priestor a medzinárodné právo In Bratislava legal forum 2016, pp. 115–124.

This legal evolution will occur less through formal negotiation, and more through posturing and policies to advance particular interpretations by states, international organizations, and other influential actors in the international system – that is, through a process of translating old law to meet new challenges, or what Michael Resiman describes as "a process of counterclaims, responses, replies, and rejoinders until stable expectations of right behaviour emerge". Examples of this that we are seeing include us declaratory policies with regard to self-defence; the drafting of the Tallinn manual on international law applicable to cyber conflict, and reactions by states to it; the London diplomatic summit on cyber security; and diplomatic discussions among China, Russia and other states about appropriate international responses to cyber threats. In sum, (1) many issues of cyber warfare are at the same time technologically unique and novel yet also legally familiar and historically recurring; (2) some particular characteristics of cyberattacks – including the low visibility of attacks and counter-actions, likely disputes about key facts, and difficulties in establishing attribution – will make it especially difficult to build legal consensus in assessing real-world scenarios; and (3) therefore, for the foreseeable future, states will have to pursue offensive and defensive strategy within existing legal frameworks regulating force, with an eye toward incremental interpretive evolution through state practice.

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Contact information:

doc. JUDr. Peter Vršanský, CSc.
peter.vrsansky@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

JUDr. Daniel Bednár, PhD.
daniel.bednar@flaw.uniba.sk

Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

ARTICLES

SOCIAL PROTECTION IN SLOVAK REPUBLIC IN THE FIRST DECADE OF THE 21ST CENTURY

Zuzana Macková
Comenius University in Bratislava, Faculty of Law

Abstract: The article is a critical analysis of neoliberal approach to system of social protection in Slovakia, especially after the year of 2004, when a major reform of the Social Security Law and social policy took place. The focus is on specific sub-systems of the social protection – i.e. the system of social insurance, the system of state support and the system of social assistance – in the light of the constitutional and fundamental principles of law (liberty, equality, justice and solidarity), the actual content of the abovementioned systems of social protection and values and principles of the European social model of welfare state – and leads to author's overview of major flaws and spaces for improvement.

Keywords: social protection, social insurance, Social Security Law, neoliberal reform, fundamental principles of law, European social model, solidarity, social justice

1 INTRODUCTION

Humanity has already witnessed the first decade of the third millennium – being confronted by process of globalization – that except of its economic dimension influences all spheres of human existence and contributes to deepening of socio-economic inequalities across the world.

Also we – the inhabitants of Central and Eastern Europe – evaluate the previous 26 years of the post-socialist era after the fall of the Iron Curtain. The beginning of transition period of social transition was characteristic by continuing belief and expectation that the foundations of basic social security such as paid employment and the right to work, accessible housing, gratuitous health-care and education, subsidised public transportation and culture etc. would always be a natural, inherent and automatic feature of societal organisation, and no struggle in this respect would be needed or required. Voices that warned against limitless strengthening of the role of the market and reduction of the role of the state to its minimum – shifting the power-dynamic very quickly and leading to collapse of most of the locally-built industries and enterprises – i.e. extensive de-industrialisation, transformation of the national property into private one through process of privatisation, followed by deregulation, liberalisation, reduction of direct taxation for the benefit of increasing the indirect one, elimination of trade unionisation and trade unions' impact on employment and wages – were considered to be the enemy of free-market and new political freedom as such. In those hectic times, few had realised that „capitalism as heartless asocial system" would prevail.[1] In other words, the neoliberal policies of the so-called Washington consensus, despite the fact that they had previously

[1] HAUSER, M. Kapitalismus jako zombie neboli Proč žijeme ve světě přízraku (Capitalism as a zombie or Why we live in the world of phantoms), pp 210–212.

proved socially damaging in other parts of the world, were presented as the best and only alternative and condition *sine qua non* political freedoms or democracy could be realised. Such neoliberal form of the capitalist system was then euphemically defined as „socially and ecologically oriented market economy" and in 1993 found its official expression in the Article 55 (1) of the Constitution of Slovak Republic.

2 SOCIAL REFORMS IN SLOVAKIA AFTER 1993 TILL PRESENT

The impact of polical and economic transformation was also reflected in the area of social policy, formed at its core by the system of social security that is from 1991 also subject to a specific branch of law. This – known as the Social Security Law, then evolved in three consecutive stages of development.

In the decade between 1993 and 2003 the critical approach towards the previous forty years of the state paternalism characteristic for universal or „collectivist" model of social policy prevailed, claiming that such system promoted passive individual attitude and suppressed individual responsibility for one's own future. The proposals of the time therefore stressed a need for introduction of social insurance schemes and co-participation of the employees on their financing, as well as re-introduction of the private pension schemes. The social reform scenario stemmed from strengthening of the role of the market according to theories of the minimum state of Milton Friedman, Friedrich von Hayek, Robert Nozick and other neoliberals whose works became an ideological basis for all socio-economic reforms.

The new concepts in social security such as parental allowance for parents (of the newly born child), pension for widowers or the subsistence minimum were introduced, along new adjustment mechanisms such as valorisation of pensions and establishment of new institutions – especially the Office or Bureau for Employment (serving especially the unemployed) and the Slovak Administration or Office for Social Security. The system of social security of the time consisted of the system of pension insurance, system of sickness insurance, system of state social benefits and system of social care – from 1 August 1998 transformed into the system of social assistance.

Generally speaking, Slovakia was trying to follow the model of the original member states of the European Union (EU 15) based on three branches of social security: social insurance, state support or assistance and social assistance, through which the social protection of the entire population in various life situations (i.e. "from the craddle to the grave") was supposed to be in place. Between 1993 and 1998 the Strategy for Transformation of the Social Sphere in the Slovak Republic was adopted, with the aim of establishing public institutions that would be responsible for management of social insurance – consisting of sickness and pension insurance schemes, health insurance and insurance in case of unemployment. The core of the system was still formed by the public social insurance system based on principle of inter-generational and social solidarity, which „especially after the WWII. released the vast part of population of material insecurity and guaranteed social harmony".[2] From 1 May 2000 the insurance in case of unemployment, and from 1 April 2002 the insurance in case of accident at work were introduced and became part of the system of social

[2] ŠVIHLÍKOVÁ, I. Globalizace a krize: souvislosti a scénaře (Globalization and crisis: interconnections and scenarios), pp. 184–185.

insurance. The system of social insurance, as of 1 July 1996, was complemented by the system of complementary pension insurance based on principle of participation and individual responsibility of citizens or employees and employers, especially in more demanding sectors of employment, to cover particular social risks. But from the very beginning, the principle of equality of subjects before the law was violated, as it was only the employees of the industrial, productive sphere, but not the employees of non-productive public sectors of economy (such as education or administration), nor the individual entrepreneurs and their employees who could participate in the scheme. In addition, the introduction of specific and independent social insurance system for the armed forces and its exclusion from the general system managed and represented by the Slovak Office of Social Insurance has become, and still is, the reason of substantial weakening of the social security system as such, and of societal and inter-generational solidarity.

In the system of state social benefits (i.e. state social support or state social assistance) from 1 September 1994, the individualised, income-dependent provision of benefits became the rule, claiming more relevance and legitimacy especially in relation to the benefits-dependent part of population. This concerned for instance the child allowances, that were shifted from the system of salary-dependent insurance into the relatively uniform system of state social benefits, which meant that the amount of monthly child allowance became linked to the subsistence (or living) minimum and became paid at flat or fixed rate to entitled parents for all children regardless children's age. In other words, the idea of social justice was promoted through combination of „equality as sameness" (i.e. payment of flat rate of the child allowance regardless the age of the child) and the principle „to everyone according to his or her needs", in a sense that parents of lower income groups had the certainty of the entitlement, while many employees of public sector as well as private entrepreneurs with salary or income at the level of median national income lost their entitlement to child allowances. Together with stagnation of salaries, especially the minimum salary – that was only 2 450 Sk (i.e. less than 75 €) and did not change from 1 October 1993 till 31 March 1996, such policy contributed to fall of the middle class to the living standards of economically inactive members of the society (e.g. unemployed).

In addition to the above, the subsistence or living minimum ceased to be calculated as amount necessary to cover the nutrition and other basic needs of an individual person rated according to the age, plus the allowance to cover basic needs related to the household, but was replaced by a uniform fixed amount for each adult person at the rate of 3 000 Sk per month.[3] This measure also caused a substantial discrepancy at the labour market, as the minimum salary of that time was set at the same level of 3 000 Sk per month, which caused that economically inactive part of the population was receiving the full amount in the form of untaxed social benefit, while those working for the minimum salary were receiving lower amount of approximately 2 450 Sk as a result of deduced social insurance and taxation. This further undermined the social position of many working people and contributed to rising levels of poverty.

The major changes in the system of social and health insurance as well as the residual system of social assistance, were realised under the auspices of the World Bank and the IMF, and after 1 January 2004 led to adoption of the „reform laws" – consisting of Law no. 461/2003 O.J. on social insurance, Law no. 580/2004 O.J. on health insurance and the Law no. 95/2002 O.J. on the system of insurance. These generally reduced the personal coverage and standard of protection through exclu-

[3] MACKOVÁ, Z. Dvadsať rokov transformácie sociálneho zabezpe čenia (Twenty Years of Transformation of the Social Security System). In Právny obzor č. 1/2011, pp. 34–35.

sion of payment of obligatory social insurance for employees working on part-time and over-time contracts – of up to 10 work-hours a week or 350 work-hours annually, students of secondary and tertiary education as well as persons in liberal creative professions – such as artists, writers or journalists. Till 2012, this affected more than 800 000 employees (of the entire Slovak economically active population of 2 200 000), on behalf of whom – despite being in paid employment in non-standard / non-full-time form – no social insurance was paid. Health insurance was paid only by employees, not employers, and only at the minimum rate corresponding to level of health insurance contributions paid from the minimum wage (i.e. out of 339, 89 € at the time, representing 47,58 € for health insurance per month). This certainly contributed to less costs and rising profits for the employers, but higher social risks for the employees, who were as a result of this legislation not entitled to any benefits from the system of social insurance – such as benefits in unemployment in case of termination of employment, sickness benefits in case of inability to work, maternity or parental benefits, disability pension, pension in the old age etc. Moreover, the number of such part-time or over-time labour contracts was not, and is still not limited, meaning that some employees have two, three, four or even higher number of such contracts instead of more socially secure work-arrangement. The overall number of working hours is then also unlimited, which clearly violates the international – ILO standard of the eight-hour working-day, codified already in 1919, recognising that it is only when after eight-hour work employees also have eight hours of physical rest and recovery, and eight hours to spend with their family or otherwise than work, they can keep physical and mental integrity for long-term work and healthy life-style. But with multiple contracts and unlimited hours no principle of work-life balance, the right to adequate time for leasure and recovery and even health and safety at work (leading to accidents as a result of over-work in multiple employments etc.) are respected. At the same time, with the multiple part-time contracts, no minimum monthly salary was guaranteed, except of minimum hourly-rate, but not on monthly-income basis. Partial correction was legislated from 1 January 2013, since when the obligation to pay social and health insurance by the employers was re-introduced. The obligation, however, is often avoided through declaration of „irregular income" or irregular pay, that allows for substantial reduction of contributions to public social security and health-care system. To diminish their social costs and responsibilities, the employers also prefer to employ students on „ad hoc" or other flexible contracts that do not require any contributions to social system (with salary of up to 155 € per month or on any other „irregular basis", in case of university students, for instance, based on Art. 4 (5) of the Law no. 461/2003 on social insurance). Such organisation must pose a question about possible deformation of the labour market – more specifically – whether employing full-time students, in situation of high unemployment-rates for age group of 45+ is fair, reasonable and socially sustainable, especially *vis-à-vis* consequent impact on pension-levels of the long-term unemployed people some five to ten years prior to their retirement.

A broader and more fundamental question concerning social and legislative reforms can be posed in relation to underpinning values and basic principles of the European social model – especially social justice and solidarity, and adequacy or adequate standard of social protection, reflected in the actual entitlements and benefit-levels. More specifically, the amount of sickness benefits – despite requirement to represent at least 60% of the average or at least of the minimum salary – legislated internationally by the European Social Charter and the ILO Conventions 130/1969 and 128/1967 that were ratified by the Slovak Republic, are only at the level of 55% of the above, and due to relaxed, pro-market national legislation – the Law no. 461/2003 on social insurance. Similarly, the international standard for level of pension in the old age or pension for orphans has been determined at

the level of at least 45% of the average or the minimum salary, while in 2004 in Slovakia the pension for orhpans was only at the level of 30% of the above. Due to positive economic development and growth, in 2005 the so-called „second (capitalisation) pillar" in the area of pensions was introduced. At the same time, the principle of solidarity and universality (general coverage) weakened and so did the level of social protection of the overall population.[4] With the introduction of the flat-tax system after 2004, the upper income-limit for progressive taxation was substantially lowered, while indirect taxes rose – releasing the high-income classes and burdening the low-income ones.[5] Till 2008 the official rhetoric praised the Slovak economic growth („Slovakia as the tiger of Europe"), but after the global economic collapse it became obvious that the actual situation is more characteristic by stagnation of salaries, rise of costs of living and rising indebtedness – both on personal or individual and state or public level, and rise of unemployment often followed by poverty and social exclusion.[6]

In partial response to this situation and due to the EU Lisbon Strategy, after 2008 a few new types of state social benefits were introduced – especially the allowance for parents providing daily care for a child. Measures that were adopted were to mitigate the negative impact of the global financial crisis, achieve better balance between family and professional life and gender equality, improve access to labour market and employment of parents of minor children. As of 2013, also employees working on part-time contracts became subject to obligatory payment of social insurance. This obligation does not, however, include working pensioners nor working students, with salary of up to 200 Euros per month. Also the universal, public pension system witnessed strengthening of principle of solidarity, when the upper-income-limit for progressive or proportionate payment of contributions to system of social and health insurance has been risen to income level of five-fold sum of the national average or median salary.

Taking these measures, the principles of universality and inter-generational and pan-societal solidarity have been strengthened, however, leading only to „limited social protection and social justice".[7] As part of this process, the second, private or „capitalisation" pillar of the pension system was open from 15 March to 15 June 2015 for the contributors to decide – i.e. for those who may wish to leave the system – to opt out, or – for the interested – to enter. It was a result of the calculation and payment of the first pensions from this system that were nominally very low – with the average total amount of savings being at the level of 3 800 Euros per contributor, and corresponding monthly pension being calculated at 43 Euros[8] which clearly confirmed high-risk and socially disadvantageous nature of the second-pillar or capitalisation pension system. This is due to export of the capital overseas, high operating costs, „gamble" or win-or-lose dimension of pension systems linked to commercial banking, investment and global financial services, and weakening impact of

4 MACKOVÁ, Z. Dvadsať rokov transformácie sociálneho zabezpečenia (Twenty Years of Transformation of the Social Security System). In Právny obzor č. 1/2011, pp. 26–26.

5 ŠVIHLÍKOVÁ, I. Globalizace a krize: souvislosti a scénaře (Globalization and crisis: interconnections and scenarios), p. 185.

6 MACKOVÁ, Z. Dynamika versus rigidita práva sociálneho zabezpečenia v Slovenskej republike na prahu XXI. storočia (Dynamism versus Rigidity of the Social Security Law in Slovak Republic at the beginning of the XXI. Century). In: Ako právo reaguje na novoty, p. 198.

7 MACKOVÁ, Z. Dynamika versus rigidita práva sociálneho zabezpečenia v Slovenskej republike na prahu XXI. storočia (Dynamism versus Rigidity of the Social Security Law in Slovak Republic at the beginning of the XXI. Century). In: Ako právo reaguje na novoty, p. 200.

8 PRAVDA.SK. Private pension system in Slovakia, 2014 (Na penzii z 2. piliera ľudia prerobia mesačne 3 eurá; On pensions from the second pillar people lose 3 Euros a month). 29-01-2014. In http://spravy.pravda.sk/ekonomika/clanok/306688-na-penzii-z-2-piliera.

the private pension systems on the universal, public system due to diminished contributions to the latter, by part of the resources being channelled to the former.

The corporate profitability of the private pension systems has led to persisting interest of several foreign and international financial groups that would like to act as „pension management companies", boards or groups in Slovakia and other countries of Central and Eastern Europe. But due to their highly individual, income-dependent nature, some states such as Hungary have decided to abandon or not to introduce the private-pension system (Czech Republic), or – as in the case of Poland – to substantially marginalise it through reduced, symbolic contributions and obligatory opt-out for contributors older than 50 years of age.[9] Critical voices come also from experts in the area of social security, pointing at studies and analyses proving that even in case of Germany – not every employee would have sufficient income to contribute to private, capitalisation fund. In other words, private pension insurance through the so-called capital or capitalisation funds can only be complementary, as it cannot guarantee sufficient and sustainable level of social protection. Just like the public pension system, the private-fund system is subject to demographic fluctuations, but in addition to that – it is also subject to investment and financial shocks and failures, providing very low level of pensions and social protection in cases of early or unexpected termination of employment for health or disability reasons, unemployment and other hardship events. To compensate for these voids, state guarantees are required – to step in in cases of capital losses or insufficient sources. This is in fact a frequent reason why many countries have been reluctant to follow this path, trying to keep universal, public pension systems based on inter-generational solidarity.

In the end, no fully neoliberal, pro-private-fund reform of the national pension system has been realised in any of the original member states of the EU (EU 15). Quoting Ivo Tomeš – the Czech expert on social security „the verification of the recommendations of the presumably independent institutions has been facilitated by the global financial crisis, that in its consequencies led to „society of greed" and to collapse of social relations inspired by European humanist ideals. The values of „society of greed" replaced the values and ideals of the welfare states that originated after WWII." He also pointed out that the neoliberal discourse and recommendations of the World Bank in the area of social security were – among other – successfully introduced during the military dictatorship in Chile and other Latin American countries as well as the post-1990 Central and Eastern Europe, leading to catastrophic social consequencies and rising social tensions. At the same time, these policies promoted by the international financial institutions stand in the opposition to values and principles entailed in the UN documents and the „European social vision" based on principle of solidarity as precondition to enhanced social justice and cohesion.[10]

3 THE EUROPEAN SOCIAL MODEL

The European social model established after the WWII., also known as social-democratic or universalist welfare model, confirmed the necessity as well as many benefits of reducing social inequalities through fair and adequate social redistribution that has been a matter of political choice and commitment rather than purely economic or market calculation. The model has become a platform for

[9] ŠTANGOVÁ, V. Vývojové tendence sociálního zabezpečení v ČR na počátku 21. století (Development Trends in Social Security of the Czech Republic at the beginning of the 21st century). In: Sociálne zabezpečenie – na rázcestí? pp. 47–48.

[10] TOMEŠ In MACKOVÁ, Z. In: Sociálne zabezpečenie – na rázcestí? pp. 96–118.

equitable and sustainable socio-economic development. It is true that the social policies are influenced by the economic policy, but the equal importance of the reverse dynamics – i.e. the positive economic impact of considerate and generous social policy, have been already proved. The quality of life in a particular society is predetermined by level of social cohesion, inclusion, opportunities for personal contribution and development, by predominant or preferred values, condition of mutual trust and overall social atmosphere. Such interconnection and inter-dependence of all human rights has found its expression and guarantee in the constitutions of most European states – codifying not only fundamental rights and freedoms, but also economic, social and cultural rights of their citizens. It is also the case of Slovak Republic which in Articles 35 to 42 of its Constitution lists a broad set of rights that „are an expression of values determining the progressive advancement of the society and the state, responding to lessons learnt in the past, and providing guarantees and protection of values that are to be preserved and enhanced also in the future".[11]

The European social model stems from and follows the ethical principle of the so-called Golden rule, that on societal level represents basic social consensus over core values and ethical positions related to freedom, equality, justice and solidarity. These are also an inherent and integral part of every major religious and moral system from Judaism and Christianity, through Islam, to teachings of Buddha and Confucius, and include respect for physical integrity of every person, freedom of conscience, special attention and care provided for the marginalised and weakest members of the society, dialogue, tolerance, the importance of the ethical dimension of public representation including politics, personal responsibility and refusal of instrumentalisation or subjecting of human being to external forces, including limitless power of the market and corporate competition.[12]

Europe is not only a continent but also a civilisation based on Judaic-Christian and humanist legacy that is also reflected in the legal system and of which a systemic assistance to disadvantaged members of the society – the disabled, widows, orphans, foreigners and elderly, forms one of the core pillars – finding its materialisation in public health-care and pension systems and systems of social assistance guaranteeing, among other, the subsistence minimum for all members of the society, at the recommended level of 50% of the average salary in a particular country. Human dignity is ethical, philosophical, religious and legal category – present in all human rights documents and codified and elaborated also in the EU Charter of Fundamental Rights. It represents respect for each human being as a unique entity and an end in her or himself. A human can never be an instrument to economic, political or other ends, and so everything on our planet – economy, trade, resources, policies, social systems and overall organisation of life, shall serve people. The famous definition of human-dignity approach can be found in Immanuel Kant's „Foundations of Metaphysics of Morals", in which Kant stressed that to „have dignity" means to have an absolute value that is not comparable to the value of anything else, and so the value of human being cannot be calculated in price – like a material or economic asset. Dignity of a human stems from his reason, his free, moral and responsible being – it is a constant value to be attributed to each human being. For this reason, human being must be treated always as an end in him or herself, never as means to an end. According to Kant, this is the ultimate law of morality. At the same time it carries a duty of beneficence toward other persons – i.e. promotion of their welfare, respecting their rights, avoiding harming others and generally endeavor, so far as we can, to further their ends, too. Human dignity

11 BÁRÁNY, E. et al. Zmena práva (Transformation of Law), pp. 112–113.

12 CSONTOS, M. Slobodný človek v spravodlivej spoločnosti. Pohľad na človeka v myslení Johna Rawlsa (Free Man in a Just Society: A View of a Man in Teachings of John Rawls), p. 269.

is then a cornerstone of the natural law and fundamental rights.[13] It also becomes realised through realisation of rights – including social and economic rights, such as the right to work, the right to fair and adequate working conditions, the right to rest and leisure after work, the right to paid holidays, the right to adequate social security and standard of living etc. Respecting human dignity means respecting inherent worth of all human beings, of their rights and needs.

In the realm of law, the framework expression of natural law – as rules and morality valid across time and space and applicable to everyone can be found in the constitutions. It is no different in context of Slovak Republic that in the Article 12 (1) of the Constitution guarantees equal rights and human dignity to all, followed by the entire – second chapter dedicated to full catalogue of rights – fundamental rights (section 2), political rights (section 3), rights of national and ethnic minorities (section 4), economic, social and cultural rights (section 5), the right to protection of the environment and cultural heritage (section 6) and the right to judicial and other legal protection (section 7). They are non-derogable, non-transferable and universal. This is, in fact a transposition of internationally recognised standards that in their integrity first appeared in the Universal Declaration of Human Rights, the International Pacts – of both on Civil and Political and the Economic, Social and Cultural Rights, number of Conventions of the International Labour Organisation (ILO) that Slovakia has signed and ratified, as well as European Social Charter and relevant provisions of the EU Charter of Fundamental Rights. Further elaboration and detailed legal guarantees then appear in the Slovak Labour Code and specific legislation – such as the Law no. 663/2007 of the Official Journal of Laws on the Minimum Salary. The neoliberal discussion on limitless extension of the working time, proposals for symbolic monthly salary as low as 50 euros or even discussion on abandoning the minimum salary as such, are totally inadequate and absurd, unworthly of Europe in the 21st century as well as one of the founding countries of the ILO (as former Czechoslovakia).

In the end, a person becomes valid member of society when s/he enjoys not only civil and political status of an equal citizen, but also the social one. „The rights and duties stemming from all three areas – of civil, political and socio-economic social sphere, are necessary for a person to enjoy a decent and equitable position in a society."[14] The very role of the welfare state, social system and public services is to guarantee and promote social justice and at least minimum human dignity for all members of society. To a great extent it is then the right to work, access to employment and fair working conditions on which the quality of life depends. Even in the words of Pope Francis „work means dignity, work is a synonym for bringing bread home. Men and women sustain this world by their work. It is difficult to enjoy dignity without work".[15] It is more than just a philosophical or moral contemplation, it is in fact the reality of life. Paid employment forms the very core of social organisation and social identity of individuals. It provides for means of living as well as social involvement and status.[16] „Employment is an entry ticket to the society and loss of it is a way to social exclusion and poverty".[17] The present daily reality in Slovakia, all over the European Union and in other parts of the world clearly confirm the above.

13 BARANCOVÁ, H. et al. Základné práva a slobody v pracovnom práve (Fundamental Rights and Freedoms in Labour Law), p. 35.

14 ČAMBÁLIKOVÁ, M. Sociálny štát: občianstvo, práva, začlenenie (Welfare State: Citizenship, Rights, Inclusion), p. 49.

15 TORNIELLI, A. Perly a perličky pápeža Františka (Quotations of the Pope Francis), p. 179.

16 MAREŠ, P. Nezaměstnanost jako sociální problém (Unemployment as Social Problem).

17 JURÍČKOVÁ, V. – KOŠTA, J. Politika zamestnanosti a sociálna politika. Dlhodobá nezamestnanosť a jej sociálne dôsledky v Slovenskej republike (The Policy of Employment and Social Policy. Long-term Unemployment and Its Social Consequences in the Slovak Republic). In Sociológia no. 1–2/1995, p. 45

Nevertheless, life fulfilled with satisfaction and human dignity does not depend only on work, but also on working conditions, adequate working time and fair remuneration that have effect on personal and family life, health and overall human well-being as well as personal, family and societal prosperity. Working time – as one of the most decisive, key aspects of balancing life and work, forms a core of the labour relations and labour legislation from the inception of modern Labour Law that started to shape at the beginning of the 20th century. Provisions of the EU Charter of Fundamental Rights guaranteeing the right to fair and adequate working conditions, considerate of health, safety and dignity of all employees, the maximum length of the working time, the right to daily and weekly rest as well as paid annual (or pro-rated) holiday, were previously formulated and codified in early international documents – such as the ILO Convention no. 1 on Hours of Work in the Industrial Enterprises from 1919, setting the 8-hour working day and the 48-hour working week. Article 2 of the same Convention clearly states that the working hours of persons employed in any public or private industrial undertaking or in any branch thereof, shall not exceed eight in the day and forty-eight in the week. It is therefore a paradox that almost a century later, having achieved multiple rise in productivity and economic output, the length of the working time does not seem to reflect this reality and is rarely adjusted – i.e. *shortened* – accordingly. Quite the opposite – the process of liberalisation often leads to the trend of prolonging the working time, especially through individual extension of the weekly working time („opt-out"), multiplication of labour contracts as a result of existential necessity to have more than one employment, flexible forms of labour and other – economically convenient, but little protective, socially considerate and progressive – measures. And even though in 2008 the European Parliament turned down legislative proposal for exemptions from working-time over 60 or even 65 hours per week, arguing that such anti-social approach would represent regress to the 19th century, Slovakia found itself on the 10th position in over-work in global/world-wide terms, with the average of 1 749 working hours per employee per year[18] (see Table 1).

Table 1[19]

State	The average number of working hours per year	The average / median annual salary
Mexico	2 317 (on average 45 hours a week)	9 885 USD
Chile	2 102 (16 % of employess working 50 hours per week)	15 820 USD
South Korea	2 092	35 406 USD
Estonia	2 021 (with high levels of long-term unemployment)	17 323 USD
Russia	2 002 (with 28 days of paid holiday, including state holidays)	15 286 USD

[18] ZOZNAM.SK. Slovaks are the tenth most-working nation in the world. 21-08-2013. In http://karierainfo.zoznam.sk/c1/1000156/1356391/Slováci-sú-10-najpracovitejší-národ.

[19] Ibid.

Poland	1 893 (on average 40 hours a week, with 10 % of employees working up to 50 hours per week)	20 069 USD
USA	1 798 (four out of five Americans work approximately 35 hours per week, but the employer has no obligation to provide paid holiday, sickness leave and / or maternity leave; Average working hours in mining industry and forestry are 44 hours per week	54 450 USD
Hungary	1 797 (on average 39 to 41 hours per week)	19 437 USD
Japan	1 765 (improvement / lower rate if compared to 1990 by approximately 145 hours)	35 143 USD
Slovak Republic	1 749 (on average more than 40 hours a week, and only 4 % of employees working less than 30 hours a week)	19 068 USD

This is a result of multiple labour contracts, over-time work, emergency work and flexible forms of labour – especially the so-called flexi-account. It is undeniable that such approach contributes to diminishing social protection or even social dumping, worsening health condition of many employees, but also unequal division of labour, high unemployment and rising social inequalities and tensions.

4 CONCLUSION

In the past 26 years, the populations in countries of Central and Eastern Europe including Slovakia, witnessed a substantial social fragmentation of shaping of a new socio-political and economic „elite", diminishing middle class and rising levels of poverty. This is to a great extent result of the neoliberal social reforms and relaxed and evasive taxation policy, sometimes leading to „social tsunami" or social consequences that have to be healed by long-term comprehensive strategies like the EU Strategy 2020. Mass unemployment and material poverty stemming from impossibility to make a living, led into situation when every fourth person in the EU lives in poverty. Even in Germany, for instance, this represents 16,1% of the population or 13 millions, who live on the net income of less than 979 Euros per month in household of one single person, 2056 Euros in household of two adults with two minor children and others at income level of up to 60% of the median national salary (Poverty in Germany).

A long-term weakening of social protection, high unemployment, stagnant and low salaries and in many cases also substantial reduction or elimination of social benefits have certainly contributed to rising levels of poverty from 56 million in 2004, to 80 million till 2008 and 123 million after the first year of crisis, which actually represents 24% of the EU population (European year against

poverty and social exclusion, 2010). The majority of the affected are women, elderly, disabled and especially children – reaching 20 million of minors in Europe. Also the ILO in its 2014 and 2015 reports warns that the right to social security covers only 27% of the world population, while the entire 73% has no social protection. Given that a vast majority of the socially unprotected live in Asia, Africa and the Americas, the progressive, pro-social and humane character of the European social model of welfare state is obvious.

And precisely today, „in times of crisis that is not only financial and economic but especially the crisis of values – such as diminishing or absent social justice, equality and solidarity – as timeless and universal values necessary for a functioning society"[20] (Barinková 2009, 7), we should learn a lesson and transform it into historical opportunity. Opportunity to appreciate, embrace and defend the qualities and benefits of the European social model – broadly perceived – i.e. including its inherent respect for human dignity, right to adequate standard of living and social security – all based on solidarity through social redistribution, when 20% of GDP in Europe has been channelled into public services and system of social protection. It is something of a Christian or European „constant" – almost at triple level as are approximately 8% of the GDP investments into social services and well-being elsewhere. Due to such resources the European model typically includes universally accessible education, health-care and universal, public pension systems.[21]. By extension it offers protection against social exclusion and it is a genuine platform for social prosperity and cohesion, in fact gradually inspiring some countries in Asia, such as China and Japan.[22]

Human life is a unique gift and therefore no human being should be subject to trade, exchange or exploitation[23] (Pope Francis, 2015). It naturally consists of periods – like childhood and adolescence, maternity or parenthood, sickness or unemployment and old age – characteristic of various levels of dependence on others and society as such. In fact, the quality of human life depends on fair and just organisation of the society most of the time. Is it then realistic to rely and be forced to rely on one's individual capacity to provide for oneself and for our families at every moment of life, in every circumstances or social situations? What will the purchasing power of the present-day savings be in ten, twenty, thirty or even forty years, when Slovak median salary in 2014 has been 858 Euros per month, while the same in 1950 had been at the level of 854 Czechoslovak crowns – i.e. by the applied exchange rate (of approximately 27 Czech crowns per Euro and 33 Slovak crowns per Euro at the time of Slovak transition to Euro) only up to 30 Euros a month?

In times of economic globalization and European integration, the social aspects and dimension of the role of the state and society cannot be reduced. Quite the opposite – new forms, means and intensity of social protection are required – to balance both local and global inequalities. And despite the primary – human aspect of the welfare state – it should not be omitted that its establishment was not an outcome of blind altruism, but sophisticated recognition that without respected,

[20] BARINKOVÁ, M. Európska dimenzia podnikovej sociálnej zodpovednosti a jej vplyv na reguláciu pracovnoprávnych vzťahov (The European Dimension of Corporate Social Responsibility in the Area of Labour Relations). In: Zborník príspevkov účastníkov sympózia s medzinárodnou účasťou, p. 7

[21] ŠIMÁČKOVÁ, K. Nový welfare model? Sociální ochrana ve střední a východní Evropě 20 let po demokratizaci (New Welfare Model? Social Protection in Central and Eastern Europe 20 years after Democratisation). Časopis pro právní vědu a praxi 4/2009, pp. 328–329.

[22] TOMÁŠEK, M. Výzkum evropského práva v Japonsku (Research of European Law in Japan). Právník 9/2009, pp. 1007–1008.

[23] POPE FRANCIS/PAPA FRANCESCO. Questa Economía Uccide / This Economy Kills, Edizioni Piemme Spa, Milano. (Slovak version translated from: TORNIELLI, A. a G, GALEAZZI, 2015. Pápež František. Táto ekonomika zabíja).

well-treated, healthy, educated and qualified labour force, there is no prosperous economy, and that the high standards of social rights and human dignity for all are basic precondition for sustainable development, prosperity, social harmony and life in peace.[24]

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[24] MACKOVÁ, Z. Reformy v sociálnej oblasti – (ne)rešpektovanie záväzkov vyplývajúcich z medzinárodných a európskych dokumentov (Social Reforms – (Non)Respecting of International and European Obligations). In: Finančné a sociálne aspekty dlhovej krízy z pohľadu ekonómie a práva, pp. 145–179.

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Contact information:

JUDr. Zuzana Macková, PhD.
zuzana.mackova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
810 00
Bratislava
Slovak Republic

HUMAN DIGNITY UNDER THE *"REBUS SIC STANTIBUS"* DOCTRINE*

Mária Patakyová, Mária T. Patakyová, Barbora Grambličková
Comenius University in Bratislava, Faculty of Law

Abstract: This article deals with the applicability of the Rebus Sic Stantibus doctrine, which is a lawful exception to the *Pacta Sunt Servanda* principle. It deals with the question on whether the *Rebus Sic Stantibus* could be applied on the impossibilities of performance caused by subjective reasons (besides the *force majeur* events which are traditionally connected with the doctrine). The hypothetical situation which is discussed in the article consists in a business relation between two entrepreneurs, whereas one party exercises a personal performance for the other, and this personal performance becomes to infringe human dignity of the performer. Particularly, the article asks the question on how, if at all, it is possible for a personal performance breaching human dignity to trigger the *Rebus Sic Stantibus* exception. The article, after discussing the concept of human dignity as well as the *Rebus Sic Stantibus* doctrine; answers, that the application is possible. The Slovak legal order is chosen as the working field for this article, however, the findings are applicable more broadly, as the article also elaborates on the theoretical bases of the question at stake.

Key words: human dignity, human rights, *Rebus Sic Stantibus*, impossibility of performance

INTRODUCTION

The human rights are getting more and more attention during last decades. They evolved from the protection of the basic human needs to the protection of the various rights which might be questionable. One might believe that nowadays, at least in theory, the law, which is intertwined with the human rights, protects those who need it. However, this is not always the case.

Business law is a field of law designed for entrepreneurs. As a rule, the human rights should not be at stake in relations between businessmen, and the autonomy of will and the principle of contractual freedom prevail over the statutory rules in most of the cases. Nevertheless, there are situations which question the applicability of the general rules. One of such situation is when a personal performance is the object of the particular contract. What would happen if the personal performance would be against the human dignity? Naturally, many of those performances are illegal and thus cannot be an object of a valid contract. However, what if the performance started to breach human dignity only in the course of the contract? To be more specific, what if the performing party started to be abused by the ordering party in such gravity that it would be against human dignity to continue with the personal performance at stake? We deliberately choose to focus on human dignity rather than on the human rights, as the human rights are a broad concept covering many partial rights. However, as flows from the text below, human dignity should be intrinsically related with the very essence of the human beings and it should refer to the core of the human rights doctrine.

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One possible way out is to use the doctrine *Rebus Sic Stantibus*. This doctrine is disputable in itself, as it is usually overridden by the general principle of *Pacta Sunt Servanda*, however, this does not exclude the possibility of its use. None the less, the *Rebus Sic Stantibus* exception is traditionally connected to the *force majeur* events. This article, as suggested, concentrates on the subjective impossibility of a natural person to fulfil the obligations stemming from a contract due to the infringement of his or her human dignity. Eventually, the article focuses on human dignity as a probable tool in the business relations between natural and legal persons.

Therefore, the research question of this article is: How, if at all, is it possible for a personal performance breaching human dignity to trigger the *Rebus Sic Stantibus* exception? In order to answer the question, the first part of this article focuses on the term human dignity and its correlation with the human rights. The second part deals with the *Rebus Sic Stantibus* doctrine and its application in general. To be more specific, the article chooses a concrete legal order of the Slovak Republic to show how the case would be dealt in practice.

HUMAN DIGNITY

In some national legal orders, human dignity is a well-defined concept. It is understood as a constitutional right, supreme constitutional principle or a constitutional value.[1] In the very beginning, it is important to briefly define the term human dignity for its further usage. Human dignity may have various meanings,[2] however, for the purposes of this article, the meaning within the context of human rights is the most predominant one.[3] At its core, the term is to be understood in correlation with the equality among those whom dignity was attributed to.[4] This understanding is connected to Kant and his philosophy of not using the others as the means and of the sanctity of the elementary worth of each person.[5] It is also referred as the concept of autonomy.[6]

Human Dignity in the International and the European Catalogues of Human Rights

The interaction between the human rights and human dignity can be understood in three ways. Firstly, dignity can be understood as a foundation of the human rights. Possessing dignity permits the person to claim the human rights.[7] Secondly, the society recognises dignity only because

1 DUPRE C. Unlocking human dignity: towards a theory for 21st century, pp. 191–193.

2 For the various definitions of the term dignity, see WALDRON J. Dignity, Rights, and Responsibilities, pp. 1118–1121.

3 Some authors state that human dignity has been connected to the human rights doctrine since the modern era of human rights. See WALDRON J. Dignity, Rights, and Responsibilities, p. 1117. On the other hand, there are researches proving that the term dignity started to be connected to persons in the USA only in the 1940 s. KABL J. Litigating Dignity: a Human Rights Framework, p. 1728. Therefore, the modern era should be understood as the era after the second world war.

4 CHIBUNDU M. O. Can, Do, and Should Legal Entities Have Dignity? The Case of the State, p. 196.

5 Ibid.

6 DUPRE C. Unlocking human dignity: towards a theory for 21st century, p. 193.

7 There are opinions against this concept of human dignity, arguing that the concept of human dignity is not natural but rather moral, political and legal one. See MONSALVE V. B., ROMÁN J. A. Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law, pp. 41–42. Some others state that this concept does not refer to real life, in which many people live without dignity. See DUPRE C. Unlocking human dignity: towards a theory for 21st century, pp. 193–194. However, this is exactly the meaning we would like to stress, as it is more theoretical and as it refers to the most basic human characteristic. All people are entitled to dignity, although (unfortunately) not all people can live dignifiedly too.

it recognises the rights of the person. Thirdly, dignity can simply be viewed as one of the human rights.[8]

In our opinion, the first concept captures the interaction most appropriately.[9] This is confirmed by the preamble of the principal document of the international protection of human rights, the Universal Declaration of Human rights,[10] in which it is stated in its very first sentence, that the "[…] *recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*"[11] Therefore, human dignity is inherently in every human being and the states can only recognise it, as it is necessary for the principles of freedom, justice and peace.[12] The vital role of the human dignity is confirmed in the articles of the Universal Declaration, for instance Article 1[13] or Article 23[14]. International Covenant on Civil and Political Rights follows the universal Declaration as a binding document. The Covenant's Preamble states that the human rights "[…] *derive from the inherent dignity of the human person*".[15] Furthermore, the term may be recognised in plenty of other articles[16].

The European catalogues of human rights[17] are interconnected with the human dignity concept as well. Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) does not expressly refer to human dignity[18], however, the concept is implicitly presented in various articles.[19] Moreover, the explicit reference to the Universal Declaration in the preamble of the ECHR confirms the assumption that human dignity plays an essential role within the protection of human rights under the Council of Europe. Eventually, the original version of the ECHR contained only the human rights and freedoms which were broadly uncontroversial and which were built upon the natural law and the principle of human dignity.[20]

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8 CHIBUNDU M. O. Can, Do, and Should Legal Entities Have Dignity? The Case of the State, pp. 198–202.
The third concept is partially present in the Charter of fundamental rights of the European Union. However, we believe that the mere fact that human dignity is listed as one of the fundamental rights in this document does not mean that it is not the founding idea of the human rights doctrine.

9 This is also confirmed by the other authors, although the view is not universal. See, for instance: MONSALVE V. B., ROMÁN J. A. Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law, pp. 39, 54.

10 Despite of not having legal value of a convention, the Universal Declaration has still great symbolic and practical value. See, for instance, ŠABATOVÁ, A. Ombudsman a lidská práva, p. 17.

11 Preamble of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948.

12 MONSALVE V. B., ROMÁN J. A. Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law, p. 45.

13 Article 1 of the Universal Declaration of Human Rights: "*All human beings are born free and equal in dignity and rights*. […]"

14 Article 23 (3) of the Universal Declaration of Human Rights "*Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection*."

15 International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

16 See, for instance, Article 1, Article 3, Article 7, Article 10 of the International Covenant on Civil and Political Rights.

17 Under the term European catalogues of human rights, we understand, firstly, the Convention for the Protection of Human Rights and Fundamental Freedoms; secondly, the Charter of fundamental rights of the European Union.

18 Apart from Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances.

19 See, for instance, Article 3 Prohibition of torture; Article 4 Prohibition of slavery and forced labour; Article 14 Prohibition of discrimination.

20 RAINEY B., WICKS E., OVEY C. The European Convention on Human Rights, p. 4.

The Charter of fundamental rights of the European Union (hereinafter "*the Charter*") as the human rights' catalogue of the European Union is worth mentioning in particular, since the human dignity is one of the foundations of the EU.[21] Furthermore, first of the six titles of this document is named "*Dignity*" and it is understood as the cover name for the first generation of human rights. The very first article of the Charter is dedicated to the human dignity.[22] The significance of the human dignity is furthermore stressed in relation to the rights of the elderly[23], rights to fair and just working conditions[24] and may be implicitly recognised in many other provisions of the Charter.

(Human) Dignity and Legal Persons

Bearing in mind the research question of this article, the discussion on dignity of the legal persons cannot be omitted. Is a personal performance, thus a performance of a human being, different in any manner from a performance of a legal person? More broadly, could legal persons claim to possess dignity? If the answer was in the affirmative, their performance should not be differentiated from a performance of a human being.

If we understand a legal person as a contingent of the human beings possessing human dignity[25], then, consequently, dignity may be transferred to the legal person itself.[26] However, even though this concept may be acceptable as regards certain legal persons, such as states, it is more disputable in connection with *"private"* legal persons such as companies. "*Private*" legal persons exist because they are recognised by a state.[27] This "*fiction*" legal personhood enables a legal person to exist separately from its owners.[28] Hence, the theoretical concept based on the shift from owners' human dignity to legal person's "*human*" dignity bears a risk that the separate legal personhood of legal persons is eliminated. We cannot automatically entitle the legal persons of attributes of their owners, unless we diminish the existence of separate legal personhood.

Approaching the issue from another perspective, what would be the implications of ascribing dignity to legal persons? It may be claimed that certain enshrinements are already presented, such as the protection of the good name of the company or the enlargement of certain human rights, for instance right to a fair trial or right to privacy[29], to the legal persons. However, we are of the opinion

21 Preamble to the Charter.

22 Article 1 of the Charter: "*Human dignity is inviolable. It must be respected and protected.*"

23 Article 25 of the Charter.

24 Article 31 of the Charter.

25 Leaving apart the legal entities which cannot be defined in this manner, for instance contingents of the property.

26 See, mutatis mutandis, CHIBUNDU M. O. Can, Do, and Should Legal Entities Have Dignity? The Case of the State, p. 202 etc.

27 See, for instance, ŠTEVČEK M. et al. Občiansky zákonník I. § 1 – 450. Komentár, pp. 100–101.

28 Naturally, we accept that there are other theories explaining the existence of the legal persons, some of them might be even more adequate than the theory of fiction. To this end, see: PATAKYOVÁ M., CZÓKOLYOVÁ, B.: Teória spoločnosti v triáde rozhodnutí Daily Mail, Cartesio a VALE – spoločnosť ako fikcia, *nexus* kontraktov alebo reálna osoba?
The argument against the theory of fiction can be based also on the formulation of Section 18 para. 1 and Section 19a para 1 of the Civil Code which enable legal persons to possess full legal personhood. See: PATAKYOVÁ M. In PATAKYOVÁ, M. et al. Obchodný zákonník: komentár, p. 54.
Nevertheless, it may be claimed that, under Slovak law, legal persons do not come into existence purely by their own will, the recognition of the state is necessary.

29 *Société Colas Est and others v. France* App no 37971/97 (ECtHR, 16 April 2002), *Delta Pekárny A.S. v. République Tchèque*, App No 97/11 (EctHR 2nd October 2014).

that the legal persons are not full holders of "*human dignity*", despite of the existence of certain elements which are the same as the manifestations of human dignity. The concept is well known also in the human rights field, where the legal persons can be entitled to the human rights only when it is intrinsically possible for legal persons to possess them.[30]

This concept is substantiated by the observation that the legal persons should possess the rights and obligations which are compatible with their nature. For instance, the right to own property is compatible with the nature of the legal persons, as it is necessary for fulfilment of the purposes which they are established to for. However, the legal persons do not have right to marry,[31] as this is not compatible with their very nature. We do not need to wonder why it is so, as the very purpose of the marriage is simply not possible apart from the natural persons.[32] By the same token we may claim that the legal persons have only certain enshrinements of (human) dignity. The legal persons have right not to be verbally assaulted- defamed, however, they do not have right not to be sexually assaulted, as the latter, again, is not compatible with their very nature.

Human dignity in private relations

Since this article is concerned with the questions on the human dignity in private relations, one may ask how the human rights and human dignity correlate with the private law. It is the role of a state to enforce human rights, not of a private party.[33] The private law is based on the autonomy of will, thus the restrictions based on human rights protection is at odds with the former. However, the autonomy of will itself follows from the human rights doctrine, therefore the clash between them is not inevitable. What may cause an issue is the exaggerated application of the human rights in the private relations.[34]

Although the human rights protection is applicable in the vertical relations between states and private persons, the state may be held liable for the infringement of the human rights via Acts of Law which do not respect the human rights; or via not protecting a private party against another private party in a judicial proceeding. Thus, the horizontal application of the human rights is connected with the positive obligations of the state.[35] Applied on our research question, human dignity as the base of the human rights, cannot be ignored in the private relations, otherwise the state may be indirectly liable for the infringement of the human rights. This should result in the interpretation of the private law which is in favour for the protection of human dignity.

30 BARTOŇ M. et al. Základní práva, p. 63.

31 It is so even though certain human rights catalogues does not explicitly exclude this possibility. For instance, the Charter states in Article 9: "*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*." There is no mention that the right to marry and the right to found a family shall be guaranteed only for the natural persons.

32 The mergers are of completely different nature than marriage. At very least, in the case of a marriage, there are still two separated natural persons, which is not true as regards the mergers.

33 WEISSBRODT D.: Business and Human Rights, p. 55.

34 BARTOŇ M. et al. Základní práva, pp. 55–56.

35 BARTOŇ M. et al. Základní práva, p. 57, 58, 70, 71.

REBUS SIC STANTIBUS VERSUS *PACTA SUNT SERVANDA*

Meaning of the *Rebus Sic Stantibus* Doctrine

Certain forms of the *Pacta Sunt Servanda* doctrine may be recognised in the old religions, where the gods were "*guarantors*" of the contract. Likewise, the Bible and the Koran teach that the obligations shall be fulfilled.[36] The recognition of the principle *Pacta Sunt Servanda*, however, can be dated to the Roman law. It is the basic principle which overrules many others due to the fact that it brings stability to the relations between persons.[37] Even though only the formally concluded contracts were seen as the valid ones back in Roman era, the *Pacta Sunt Servanda* principle is still valid in today's society of rather liberal conclusion of contracts.

However, what plays a vital role in the negotiations between the parties is the foreseeability of the future events, especially as regards the risk allocation.[38] The economic considerations and the natural justice call the contract, once it fulfils the requirements prescribed by law, to have the effects similar to law for the participants of the contract.[39] Nevertheless, what if the event in question is unforeseeable? What if the circumstances have radically changed? Should the *Pacta Sunt Servanda* principle prevail anyway?

The Pacta Sunt Servanda is not an unlimited principle. *Rebus Sic Stantibus* is likewise important for the proper functioning of the business relations as an important exception to the *Pacta Sunt Servanda* principle. Despite its Latin linguistic basis, it played only limited role in the Roman law.[40] As recognised by Thomas Aquinas in his *Summa Theologica*, the *Pacta Sunt Servanda* principle is conditional upon the preservation of the conditions under which the contract was concluded.[41] As claimed by P. J. Mazaccano, Thomas Aquinas based this idea on the works of Seneca and Cicero.[42] The *Rebus Sic Stantibus* exception was known to canonical law since 14th century and to the civil contract law since the beginning of the 16th century.[43] One fact ought to be borne in mind regardless of the age in which we apply the principles: there is always need for delicate balance to be preserved between them[44], with the application of common sense.[45]

Rebus sic stantibus in the Slovak legal order

Slovak law serves as an example of a national regulation of *Rebus Sic Stantibus*. Before moving to the doctrine itself, it is appropriate to state that the hypothetical situation presented in the introduction

36 MARJÁK D. Klauzula Rebus Sic Stantibus, p. 342–343.

37 See, for instance, MAZACCANO P. J. Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance, the Historical Origins and Development of an Autonomous Commercial Norm in the CISG, p. 6.

38 PARK W.W.: Gaps and Changed circumstances in Energy contracts: The Devil in the Detail, p. 90.

39 MARJÁK D. Klauzula Rebus Sic Stantibus, p. 342.

40 REBRO K., BLAHO P. Rímske právo, p. 346.

41 This is so regarding the contracts other than one-time contracts.

42 MAZACCANO P. J. Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance, the Historical Origins and Development of an Autonomous Commercial Norm in the CISG, p. 8.

43 MARJÁK D. Klauzula Rebus Sic Stantibus, p. 344.

44 Both principles are necessary for the proper solutions of the events which occur in business relations. See: MAZACCANO P. J. Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance, the Historical Origins and Development of an Autonomous Commercial Norm in the CISG, p. 6.
PARK W. W. Gaps and Changed circumstances in Energy contracts: The Devil in the Detail, p. 7.

45 PARK W. W. Gaps and Changed circumstances in Energy contracts: The Devil in the Detail, p. 102.

of this article might be solved by various institutes of the Slovak law. For instance, Section 265 of the Slovak Commercial Code[46] states that "*exercise of a right that is contrary to the principles of honest business relations shall not enjoy legal protection*". Therefore, if the performer refused to continue with the performance based on the fact that the further performance would infringe his or her human dignity, the ordering party could not force him or her to continue with the performance via court. Nevertheless, this article deliberately uses the *Rebus Sic Statntibus* doctrine, as it is the goal of the article to explore the possibilities of the doctrine for a subjective impossibility to perform.

The "*impossibility of the performance*",[47] as a situation legally described in Section 575 of the Slovak Civil Code[48], encompasses objective as well as subjective hindrances.[49] The possible situations which may be subsumed under the "*impossibility of the performance*" are clarified by a negative enumeration[50] in a sense that the performance is not impossible if it can be performed under more onerous conditions, with higher costs or with a delay. Consequently, if the performance does neither fall within the enumerated one, nor it is similar to them, even subjective impossibility can be seen as "*impossibility*" in the sense of the referred provision.[51]

The duality of the contracts' regulation in the Slovak Legal order implies that it is necessary to look into the regulation of the Slovak Commercial Code too. As the parties in our hypothetical situation are in a business relationship, the Commercial Code would apply to them.[52] It is important to note that the Commercial Code is *lex specialis* to the Civil Code. It flows from the principle of subsidiarity that the rules of the Civil Code will apply unless the Commercial Code set different rules. The impossibility of the performance is only partially regulated in the Commercial Code and the basic provisions are encompassed in the Civil Code which were discussed above.

The Commercial Code adds to the specification of the "*impossibility*" a situation when the obligation can be fulfilled with aid of another person.[53] However, in the case of personal performance, this possibility is implicitly excluded. [54]

As to the further conditions imposed to the debtor, he or she is obliged to notify to the creditor, without superfluous delay, the circumstance which makes the performance impossible, otherwise the debtor will be liable for the damage caused by the undue notice.[55] The Commercial Code adds that the burden of proof as to the performance being impossible lies on the debtor who is also li-

46 Act no. 513/1991 Coll. Commercial Code.

47 Traditionally, impossibility of the performance is divided into the legal impossibility and the factual impossibility. See: ŤAPÁK, J. In VOJČÍK, P. et al. Občiansky zákonník, stručný komentár, p. 766. However, part of the legal doctrine subsumes the legal impossibility under Section 39 of the Civil Code with the consequence of absolute invalidity of the legal act. See: SEDLAČKO, F. In ŠTEVČEK, M. et al. Občiansky zákonník II. § 451–880. Komentár, p. 2028.

48 Act no. 40/1964 Coll. Civil Code.

49 FEKETE I., FEKETEOVÁ M. Občiansky zákonník. Prehľadný komentár, p. 793.

50 Section 575 (2) of the Slovak Civil Code.

51 Although, it has to be admitted that opposite opinions can be found as well, claiming that the subjective impossibility cannot be accepted. See: KRISTOVÁ, K. In LAZAR, J. et al. Občianske právo hmotné 2, p. 98.

52 This fact is based on the Section 261 of the Slovak Commercial Code.

53 Section 352 (1) of the Slovak Commercial Code.

54 It is necessary to stress that there is also a special provision in relation to agreement on conclusion of a future contract, where Section 292 (5) of the Slovak Commercial Code states: "*The obligation to conclude the future contract or supplement the missing content of the contract also expires if the circumstances to which the parties clearly referred when this obligation was established have changed to such a degree that it may not be reasonably required of the obliged party to conclude the contract. However, expiry shall occur only if the obliged party notified the entitled party of this change of circumstances without undue delay.*" However, this is considered to be out of the reach of the presented article.

55 Section 577 (1) of the Slovak Civil Code.

able for damage caused by the termination[56] of the contract, unless there is a circumstance which excludes the liability according to the general provisions on compensation of damage.[57] "*A circumstance excluding liability shall be deemed an obstacle that occurred independently of the intent of the obliged party and that prevents them from fulfilling their obligation, if it may not be reasonably assumed that the obliged party could have averted or overcome this obstacle or its consequences, or that they could have foreseen this obstacle at the time when the obligation was established*."[58] Moreover, the debtor cannot be "[…] *already in default in fulfilment of their obligation, or by an obstacle that arose from their economic situation*."[59] The circumstance excluding liability must be objective[60], unpredictable, inevitable.[61] In any case, it is essential to bear in mind that it is only a default rule and thus may be subject to amendment by the parties.[62]

Hence, the Slovak legal system distinguishes between the termination of the contract and the liability for damages due to this termination. For the former, it is necessary to fulfil the conditions of *Rebus Sic Stantibus* provisions, however, in the practical terms, it is also necessary to fulfil the provisions for the exclusion of liability, otherwise the performing party would be obliged to compensate the damages which may diminish the meaning of the *Rebus Sic Stantibus* exception.

Therefore, applied to our hypothetical situation, this hypothetical situation is not listed in the negative enumeration. Likewise, the performance cannot be done by another person. It is also inevitable for the impossibility of performance to be of permanent character and to be *impossible* and not only more onerous. Assuming that the performer notified the ordering party of the impossibility, the requirements of the Slovak legal order are met. However, to exclude the liability for damages caused by this termination of the contract, the performer would need to prove six conditions[63]. First, the impossibility of performance occurred independently of his intent.[64] Second, it prevents him from fulfilling his obligation.[65] This condition is inherently present in the *Rebus Sic Stantibus* doctrine itself. The same is true about the third condition, namely averting and overcoming the obstacle causing the impossibility of the performance.[66] However, a particularly difficulty arises regarding the fourth condition, as the obstacle could have not been foreseen at the time when the obligation was established.[67] Therefore, it is not enough to prove that the infringement of human dignity was not present at the moment of the inception of the contract, but it is also necessary to prove that this infringement was not foreseeable. Fifth, the performing party cannot be already in default in fulfilment of his obligation.[68] Sixth, the impossibility of performance cannot arise

56 Moreover, it shall be noted that the termination of the contract, as foreseen by the Slovak legal system, does not exclude the possibility of the voluntary re-negotiation of the contract by the parties.

57 Sections 373 – 386 of the Slovak Commercial Code.

58 Section 374 (1) of the Slovak Commercial Code.

59 Section 374 (2) of the Slovak Commercial Code.

60 The objectivity of a circumstance excluding liability is the same as the objectivity of a circumstance triggering *Rebus Sic Stantibus* exception. Thus, the infringement of human dignity may be seen as an *objective* circumstance, as it is *objectively* impossible for the performer to continue with his obligations.

61 ĎURICA M. In PATAKYOVÁ, M. et al. Obchodný zákonník: komentár, p. 1260.

62 Ibid., pages 1215. 1261. See also Section 263 (1) of the Slovak Commercial Code.

63 The conditions need to be met cumulatively. See ĎURICA M. In PATAKYOVÁ, M. et al. Obchodný zákonník: komentár, p. 1261.

64 Section 374 (1) of the Slovak Commercial Code.

65 Section 374 (1) of the Slovak Commercial Code.

66 Section 374 (1) of the Slovak Commercial Code.

67 Section 374 (1) of the Slovak Commercial Code.

68 Section 374 (2) of the Slovak Commercial Code.

from his economic situation.[69] This should not be the case when the infringement of the human dignity is at stake.

CONCLUSION

Nowadays, the human rights are penetrating into more and more fields of law. Commercial law is, with some exceptions, immune from the human rights considerations. The articles on business and human rights are usually connected with the obligations of supranational companies to observe the human rights. These obligations are based on the international law. However, what is often out of the scope is the situation when the infringement of the human rights occurs directly in the business relationship between two entrepreneurs.

We believe that this situation should not stay unregulated. However, rather than adopting new rules, the solution should be seen in a reasonable interpretation of the already existing rules. Thus, returning to our research question, we claim that a personal performance breaching human dignity may trigger the *Rebus Sic Stantibus* exception. Yet, as stated in the last part of the article, the conditions for its launching are rigid and uneasy to fulfil. This is even more true when it comes to the exclusion of the liability for damages. The conditions for exclusion should be met, otherwise the performer will be punished for the impossibility of the performance. The strictness of the law may be seen in a positive way too, as it prevents the misuse of the *Rebus Sic Stantibus* doctrine.

To conclude, the mere fact that the subjective impossibility to perform a personal performance in a business relation may be based on an infringement of human dignity is interesting, as it overrides the principle of objectivity which is present in commercial law in general. However, this exception is acceptable for the proper functioning of the business relations as well as for the fulfilling of the functions of law *per se*.

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[69] Section 374 (2) of the Slovak Commercial Code.

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Contact information:

prof. JUDr. Mária Patakyová, CSc.
maria.patakyova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

JUDr. Barbora Grambličková, LL.M. (neé Czókolyová)
barbora.czokolyova@uniba.sk
Comenius University in Bratislava, Faculty of Law

JUDr. Mária T. Patakyová, PhD.
maria.patakyova2@flaw.uniba.sk

Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

CONCEPTUAL AND FUNCTIONAL DIVERSITY OF THE OMBUDSMAN INSTITUTION IN ASIA (COMPARATIVE CONSTITUTIONAL LAW ANALYSIS)

Lívia Trellová
Comenius University in Bratislava, Faculty of Law

Abstract: This paper deals with conceptual and functional diversity of the Ombudsman Institution in Asia from comparative constitutional point of view. The author analyses ombudsman institution in Asia. Characteristics and definiton of Ombudsman made by European legal doctrine and also by the International Bar Association resolution was used as an starting point to set certain criteria upon which Asian ombudsman institutions are subject to comparative anaysis. Finla part throws light on the prospects and problems of models, establishment and functioning of ombudsman institutions in Asia.

Key words: Parliamentary Ombudsman, Ombudsman definition, Asian Ombudsman systems and institutions

1 INTRODUCTION

The ombudsman institution has its origin in Sweden where the first Ombudsman Office (*justitieombudsman* as an ombudsman for justice) was established in 1809. The concept of the ombudsman has developed over the years in Sweden. At the present time according to the swedish constitution of 1974 there are four Parliamentary Ombudsmen (*Riksdagens ombudsmän*), one of whom is designated Chief Parliamentary Ombudsman. In addition to this, there may be one of more Deputy Ombudsmen. They are primarily established to supervise, to the stated extent, that those who exercise public authority are to obey the laws and other statutes and fulfil their obligations in other respects. But we have to mention that the mandate of the parliamentary ombudsmen has dual nature: supervising the rule of law in the public administration and the judiciary, and ensuring that fundamental rights and freedoms of the citizens are not encroached upon in public administration.[1] Typical features of the Swedish classical model of ombudsman, as widely agreed, were described by Donald Rowat as follows: an independent and nonpartisan officer of the legislature, usually provided for in the constitution who supervises the administration; who deals with complaints from the public against administrative injustice and maladministration; and who has the power to investigate, criticise and publicise, but not to reverse administrative action.[2]

The idea of the ombudsman did not spread beyond Sweden until the early twentieth century when newly independent Finland incorporated ombudsman office in its 1919 Constitution. Considerably lately it was followed by adoption of little bit different version of ombudsman office in two

[1] The Act with Instructions for the Parliamentary Ombudsmen (Lag [1986:765] med instruktion för Riksdagens ombudsmän – "JO-instruktionen") issued 13 November 1986, revised 1 September 2014 by SFS 2014:802. Available at: https://www.jo.se/en/About-JO/Legal-basis/Instructions/.

[2] ROWAT, D.C. (ed.): The Ombudsman. Citizen's Defender, p. xxiv.

other Scandinavian countries (Constitution of Danmark of 1953 and in Norway in 1962). Following this development has the concept of the public sector ombudsman gained its popularity and spread throughout the world in less than two hundred years. The ombudsman office was also increasingly established in other counties but it was not until the 1980 s that federal or national ombudsmen began to appear on the Asian landscape, and the offices established since have taken many different forms. The adaptation of the ombudsman concept has been based on the need of alternative complaint processes to the courts, as an public authority that plays an important role for for strengthening democratic governance, rule of law and civil society.

The office has a name unique to the country concerned. It is difficut to define ombudsman in precise term. The International Bar Association resolution of 1974 provided the following definition of Ombudsman : An office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[3] Main functions and primary tasks that could be assigned to ombudsman office in general are: to investigate complaints from members of the public against public authorities, or initiate own-motion investigations; where complaints are found to be justified to secure or recommend redress for aggrieved persons; and to recommend improvements in systems, working practices and administrative procedures generally; or, if there are no systems, to recommend that there should be, in order to minimise the risk if the same mistakes being repeated.[4] The ombudsman must be impartial and independent, but same way is characterised by accountability, an attribute that takes number of forms. An ombudsman as a public body performing public functions with public money must clearly be accoutable to the law by means of judicial review. He must also be held accountable to the people (both directly and through their elected representatives), by the means of its published reports, for the exercise of its powers and for the efficient and effective use of the resources allocated to the office.

There have been various adaptations of the legislative ombudsman around the world at he national and sub-national levels of government. Over the past few decades, the ombudsman concept has been expanded into other areas, in both public and private sectors, and even into the international or supranational level of governance. Public and private sectors institutions have seen the ombudsman mechanism- which is free of charge, accessible, informal and relatively fast compared to the courts – as a way of resolving disputes effectively and efficiently. The ombudsman is also seen as an means to offset the inequalities of size and bargaining power between large organizations and individulas with complaints. In this respect, the many uses of the ombudsman mechanism are forms of alternative dispute resolution.[5]

2 CONCEPTUAL FRAMEWORK : OMBUDSMAN INSTITUTIONS IN ASIA

As it was already mentioned ombudsman institutions arrived relatively late in Asia. Historically in a first phase formation of Asian grievance redress institutions of different origins took place in

[3] Quoted in HOSSAIN, K., BESSELINK, L., SELASSIE, H., VÖLKER, E. (eds.): Human Rights Commissions and Ombudsman Offices: National Experiences throught the World, p. 642.

[4] GREGORY, R., GIDDINGS, P. (eds.): Righting Wrongs. The Ombudsman in Six Continents, p. 5.

[5] REIF, L.C. The Ombudsman, Good Governance and the International Human Rights System. p. 25.

1940 s and early 1950 s by Communist governments in the People' s Republic of China (hereinafter: China) and Vietnam. These states established systems of internal supervision (within the executive branch), concretely the People's Supervisory Commision (later Ministry of Supervision) in China and the Special Inspection Board (later Government Inspectorate) in Vietnam. In the late 1960 s and 1970 s certain non-Communist governments went on to establish internal mechanisms of grievance redress, e.g. Japan (The Administrative Inspection Bureau), Malaysia (the Public Complaints Bureau). Third phase with its beginning in the early 1970 s and continues until present day. In this period much more independent institutions explicitly referenced existing ombudsman traditions were created.

First ombudsman office was established in the Indian province of Maharashtra in 1972[6], but there is no uniform structure of the Lokayukta system. India also does not have a federal ombudsman. India was followed by many countries in the region that had adopted similar intitutions and minority of them incorporated it also into its constitutions. The first country which named an institution explicitly as ombudsman was Bangladesh in 1980 (however the institution was never established). Sri Lanka adapted Parliamentary Commissioner for Administration in 1981.

Pakistan was the first to adopt the classical ombudsman model at federal level. Against the backdrop of the court system being the only avenue open to the general public for seeking relief against the excesses by public agencies in administrative matters, and recognizing the difficulties faced by the citizen in going through the elaborate and expensive court process, the Pakistan government decided to set up the Office of the Wafaqi Mohtasib. This office would work as an administrative justice forum to deal with citizens' complaints and provide complainants with a quick and cheap alternative for the redress of their grievances. Pakistan's Interim Constitution of 1972 first provided for the appointment of a federal ombudsman as well as provincial ombudsmen. But it was not until 1983 that the Office of the Wafaqi Mohtasib started functioning. Provincial ombudsmen have also been appointed in three of the four provinces, in Balochistan, Sindh and Punjab, as well as in Azad Jammu and Kashmir. Other countries and jurisdictions followed suit. In 1988, Philippines established its Ombudsman Office. This was followed by Hong Kong (1989), South Korea (1994), Thailand (2000) and Indonesia (2000).[7] From the relatively newer ombudsman institutions it is worth mentiong establishment of Jordanian Ombudsman Bureau in 2009 and two Bahraini institutions in 2012 (Inspector General Office – National Security Agency; Ombudsman for the Ministry of Interior).[8]

Asian continent is characterised by many historical, cultural, religious and political differences. All these differences cause ombudsman-like institutions differ significantly from the concept of the parliamentary ombudsman prevailing in European states. Despite all this many of ombudsman institutions and similar public grievance redress systems in Asia incorporate typical features of the internationally renowned ombudsman concept. On the other hand, there are numbers of institutions that are only partly comporting with traditional ombudsman concept and definitions, sometimes they can be more generally referred to as „administrative grievance redress mechanisms".

6 In India, the Administrative Reforms Commission in its interim report from October 1966 suggested to the Government of India to establish the institution similar to Ombudsman (Lokpal in the Centre and Lokayukta in the States). Various abortive attempts were made from 1968 to 1989 to establish the institution of Lokal in the Centre by introducing different Bills in the Parliament. No Bill became an Act due to different reasons and that is the why no institution of Lokpal could be created at the Centre. On the other hand there was different approach towards formation of Lokayukta system.

7 TAI A. Diversity of Ombudsmen in Asia. In IOI Stockholm conference: 29. Back to Roots : Tracing the Swedish Origin of Ombudsman Institutions. Available at: http://www.theioi.org/publications/stockholm-2009-conference-papers.

8 International Ombudsman Institute (IOI) at: http://www.theioi.org/ioi-members#anchor-index-1690.

However mandates and powers of ombudsman-like institutions vary from country to country, we have chosen certain criteria upon which ombudsman-like institutions are to be compared (mainly criteria regarding the institutional structure, legal basis, independence and impartiality and powers of institutions).

The criteria mentioned are those that can be derived from the IOI Constitution criteria for institutional membership.[9] These criteria describe the following characteristics of ombudsmen: They are created by law (or constitution), protect against named acts by public authorities, are independent of public authorities especially those over which they have jurisdiction, have the power to investigate complaints and make recommendations, are accountable through public reports to appropriate authorities, and have one or more incumbents appointed by the legislative body who can be removed only for cause.[10]

2.1 Legal Basis

Only a minority of institutions on the national level- and none on the regional level-is embodied in the respective national constitution. These include the Offices of the Ombudsman in Philipines, Thailand and Bangladesh[11], the Provedor for Human Rights and Justice in Timor-Leste, the Parliamentary Commissioner for Administration in Sri Lanka, the Commission Against Corruption in the Special Administrative Region of Macao in China (hereinafter: Macao) and the General Inspection Organization in Iran. Most institutions on the national and regional level were estabished by

[9] A public institution whether titled Ombudsman, People's Defender, Parliamentary Commissioner, Mediator, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, shall be eligible to become an Institutional member provided it exercises fully the following functions and meets the following criteria: (Article 2 Purpose and Principles, 2 of IOI Constitution):

a) it should be provided for by a Country, State, Regional or Local Constitution and/or an Act of a Legislature, or by international treaty,
b) its role should be to seek to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority, or official acting or appearing to act in a public capacity, or officials of a body providing devolved, partially or fully privatized public services or services outsourced from a government entity, and which could also function as an alternative dispute resolution mechanism,
c) it should operate in a climate of confidentiality and impartiality to the extent its governing legislation mandates, but should otherwise encourage free and frank exchanges designed to promote open government,
d) it should not receive any direction from any public authority which would compromise its independence and should perform its functions independently of any public authority over which jurisdiction is held,
e) it should have the necessary powers and means to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in the kind of action specified in paragraph 2 (b),
f) it should have the power to make recommendations in order to remedy or prevent any of the conduct described in paragraph 2 (b) and, where appropriate, to propose administrative or legislative reforms for better governance,
g) it should be held accountable by reporting publicly to a Legislature, or other elected body, and by the publication of an annual or other periodic report,
h) its incumbent or incumbents should be elected or appointed by a Legislature or other elected body, or with its approval for a defined period of time in accordance with the relevant legislation or Constitution,
i) its incumbent or incumbents should only be dismissed by a Legislature or other elected body or with its approval for cause as provided by the relevant legislation or Constitution, and
j) it should have adequate funding to fulfill its functions.

[10] GOTTEHRER, D. Fundamental Elements of An Effective Ombudsman Institution. In: IOI Stockholm conference: Plenary Session II: Developing the Working Methods and Tools of the Ombudsman. Available at: http://www.theioi.org/publications/stockholm-2009-conference-papers.

[11] Institution not yet established.

a simple act of the legislature (Bahrain, China, Indonesia, Japan, Jordan, South Korea). Some are even based on a mere regulation, decree or ordinance[12] (e.g. certain Pakistani institutions, China- the State Bureau for Letters and Calls, Malaysia, Vietnam).

2.2 Appointment of Incumbent Officers and Term of the Office

Contraty to the Swedish ombudsman model, heads of the ombudsman institutions are almost exclusively appointed by an executive authority. This is very similar to so called „executive ombudsman" or „quasi-ombudsman" as are known in Europe, both are public sector ombudsmen appointed and responsible to the executive power, but still independent in law and practice (e.g. UK, France). In Asia the appointing authority is predominantly head of state, or its equivalent (the King, the President), the (head of) government (the Chief Executive), or another representative of the executive branch on the national or regional level.

Some states have the ambition to make the appointment process more transparent and open so other branches of government (legislature, judiciary) or special councils may additionally be involved. In Thailand Ombudsmen (the Ombudsman Office comprises three Ombudsmen – the Chief Ombudsman and two other Ombudsmen) are appointed by the King of the Thailand, by that time appointment is countersigned by a Minister and National Legislative Assembly providing advice. In accordance with Constitution of 2007 appointments follow a selection procedure- a recommendation by a Selection Committee is required.[13] In Hong Kong[14], the Ombudsman is appointed by the Chief Executive after an open recruitment exercise which is locally advertised and organized by an executive search firm. The application and selection process is overseen by a Selection Committee comprised of two unofficial members of the Executive Council, the Chairman of the Public Service Commission, and the Director of Administration.[15]

At least three states do not state the dominant role of the executive in appointing process of ombudsman (e.g. Indonesia, Timor-Leste, Iran). In Indonesia and Timor-Leste, the Ombudsman is elected by the legislature, the former being chosen from a selection of candidates nominated by the President. In Iran, the judicial branch appoints the President of the General Inspection Organization.[16]

The Ombudsman is generally appointed for a fixed term of office set by legislation. Terms may vary from three years (South Korea), four years (Jordan, Pakistan), five years (Bahrain, China, India), six years (Thailand), seven years (Phillipines) or exceptionally eight years. In certain cases the term of the office is not stipulated but is limited by reaching age limit.

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12 KRIEBAUM, U., KUCSKO-STADLMAYER, G. (eds.) Asian Ombudsman Institutions. A comparative legal analysis, p. 9.

13 The Selection Committee comprises the President of the Supreme Court of Justice, The President of the Constitutional Court, the President of the Supreme Administrative Court, the President of National Legislative Assembly (previously the President of the House of Representatives and the Leader of the Opposition).

14 Hong Kong is not a sovereign state, but is an integral part of China, in a form of special administrative territory. However, in the context of One country- Two systems policy (one for Hong Kong and the other for the rest of China) that underlies Hong Kong's Constitution, so Hong Kong's Ombudsman can be deemed as a national Ombudsman (not only for the purpose of this paper, the same approach is set out in e.g. GREGORY, R., GIDDINGS, P. (eds.) Righting Wrongs. The Ombudsman in Six Continents. p. 75; LO, S.S. Hong Kong's Indigenous Democracy: Origins, Evolution and Contentions. 2015.

15 TAI A. Diversity of Ombudsmen in Asia. In IOI Stockholm conference: 29. Back to Roots : Tracing the Swedish Origin of Ombudsman Institutions. Available at: http://www.theioi.org/publications/stockholm-2009-conference-papers.

16 KRIEBAUM, U., KUCSKO-STADLMAYER, G. (eds.) Asian Ombudsman Institutions. A comparative legal analysis. p. 10.

Another very important question determined by the term of the office is the possibility of removal from the office. Generally could be stated that ombudsman may be removed from office before the expiry of the term by an executive authority (the head of state, the head of the governement or another representative of the executive branch)[17] or special councils may be involved in this procedure as well. In removing the ombudsmen, relevant bodies are subject to different levels of preconditions and must observe more or less stringent procedures. Reasons that might serve as justification for removal are as follows: loss of confidence, loss of eligibility, physical or mental incapacity, criminal conviction, misbehaviour or failure to carry out the intended functions, misconduct, loss of citizenship, absence, insolvency or incompatibilities with the position.[18]

2.3 Independence and impartiality

There is an continuing debate over whether executive ombudsmen meet the definition of a classical ombudsman as it can be argued that their ability to act with independence is brought into question by reason of the fact that they have the task of investigating administrative arm of the government body which has appointed them.[19] On the contrary an ombudsman who acts as an officer of a legislative body and is independent of the organizations reviewed is more difficult for others to control. Independence is strengthened when the Ombudsman is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the ombudsman reviews. The best processes prevent political appointments.

The independence question is so actual in Asia because it is noteworthy that some Asian ombudsman and ombudsman-like institutions are explicitly declared to be independent (e.g. Bahrain, Indonesia, Malaysia, Jordan, Macao, Philipinnes, Thailand, South Korea) while others are not. The relation between ombudsman and executive branch is highly relevant because its main role is to investigate the public administration. In this context, at the beginning there was need for creation of an independent machinery falling outside the control of administration, and also for the protection of the human rights of the people.

However, of higher relevance could be regarded existence of institutional safeguards for the institutions' independence. A fixed, long term of office providing for reappointment and allowing for removal of the ombudsman only for cause (and preferably by a supermajority of the appointing entity) can be viewed as certian independence safeguards. So it coud be said, most ombudsmen enjoy remuneration safeguards; they cannot be removed except for cause and even then, it can only be done with the endorsement of Parliament or its equivalent. Financial well-being is another indication of institutional independence.

Another overriding essential feature which should not be avoided in this context is impartiality and fairness of ombudsman. Independence and impartiality are clearly of fundamental importance to the success of ombudsman work. The role of the ombudsman is to carry out impartial and

17 By the Head of state: Pakistan, Bahrain, Bangladesh, China, Thailand, Sri Lanka, Vietnam, South Korea; by the head of the governement : Malaysia, Macao, Jordan; or by another representative of the executive branch: India, Japan, China…

18 KRIEBAUM, U., KUCSKO-STADLMAYER, G. (eds.) Asian Ombudsman Institutions. A comparative legal analysis, p. 31.

19 E.g. GREGORY, R. Building an Ombudsman Scheme: Statutory Provisons and Operating Practices. In International Ombudsman Anthology, pp. 134–136; also REIF, L.C. The Ombudsman, Good Governance and the International Human Rights System, pp. 14–15.

objective investigations into complaints and the official action to which they relate. At the end of the investigatory process the ombudsman must adjudicate impartially upon the facts disclosed by his investigation without making any presumption in favour of either person or department. As it was already described ombudsman should be in position to make findings and recommendations without fear or favour, and without regard to the consequences for himself or his office.[20] And the ombudsman will be able to act in this manner only when he is independent.

2.4 Powers of the Institution

Ombudsman institution, in general, has been given extensive powers to investigate complaints. The institutions should protect citizens against injustices committed by government officialls, administration. The powers of ombudsman differ significantly from one Asian state to another. Moreover, an important distinction is also between the powers as institution enjoys during the course of investigation, in particular which instruments it is offered to collect the evidence, and the powers an institution enjoys following the conclusion of an investigation.

Investigatory powers of ombudsman could be divided into following areas (in this order it is searched): obligation to assist, enforcement of duty of assistance, interrogation of functionaries and other persons, acess to places of detention and other (governmental) premises. An area of powers after the conclusion of investigation involve recommendations, enforcement of the findings and the recommendations of the institution, annual reports, special reports.

Ombudsman usually investigate conduct of administrative bodies or public authorities, public servants. Thus, effective and correct taking of evidence requires certain assistance by the administration. The public administrations have obligation to assist their respective ombudsman during the investigation procedure and this is laid down by almost all jurisdicitons in Asia. Certain differences are whether this obligation is either unlimited[21], or exist certain exceptions regarding secret and / or confidential information. Although it may seem complying with the ombudsman concept, the effectiveness of such prescribed obligation depend on whether compliance is based on the goodwill of the administration, or the ombudsman is granted instruments for its enforcement.

A large number of institutions, in particular in South Asia, have the power of compulsory interrogation. Some institutions may utilize police in that regard, or have the general power to issue arrest warrants. In cases where public servants fail to assist institutions, several jurisdictions foresee disciplinary proceedings against relevant public servant.[22] While some institutions may only refer the matter to a superior authority, others may institute proceedings themselves. Indonesia and Thailand are examples of states where institutions report to a superior authority, while the institutions in Iran and the Philippines, may recommend the suspension of a public servant during an investigation. Additionally, Thailand and Sri Lanka protect confidentiality of proceedings by penalizing the disclosure of information obtained during investigations.[23] Ombudsman institutions are often granted a general right to enter and search (governmental) premises, but in

[20] GREGORY, R. Building an Ombudsman Scheme: Statutory Provisions and Operating Practices In REIF, L.: The International Ombudsman Anthology: Selected Writings from the Internatonal Ombudsman Institute, p. 139.

[21] Bahrain, Indonesia, China, Japan, Jordan, Macao, Malaysia, Phillipines, South Korea, Sri Lanka, Thailand, Vietnam.

[22] China, Indonesia, Jordan, Iran, Macao, Philippines, South Korea, Vietnam.

[23] KRIEBAUM, U., KUCSKO-STADLMAYER, G. (eds.) Asian Ombudsman Institutions. A comparative legal analysis, p. 46.

prevailing number of jurisdictions explicit permit legal basis is missing (exceptions are e.g. Bahrain, Timor-Leste).

Essential power of ombudsman should be to issue (usually not legally binding) recommendations to the public administrations following the investigation. These recommendations may address issues raised in the underlying complaint itself, or relate to systematic issues of maladministration. Many Asian ombudsmen are not explicitly granted a right to provide recommendations, they merely issue case reports, addressed to a competent official or the subject of the complaint. This predominant concept when ombudsman is required to address his recommendation to the body concerned or subject to the complaint, when some are directed towards superior authorities or others to both, could be regarded as sufficient when it has legal manifestation. Concerning enforcement of recommendations and findings, various mechanisms are employed to facilitate compliance (e.g. disciplinary proceedings against a public servant…). In many states where recommendations and findings are declared as not binding, bodies may be subject to an obligation to react (requiring notification on actions taken, or reasons for filing to do so) in stated time period. An Indonesian ombudsman may additionally monitor implementation of his recommendations through on-site inspection.

Other typical ombudsman task to publish annual report on ombudsman activities is required by almost all ombudsman institutions in Asia. Ombudsman should in annual report give an overview peformed over the course of preceding year, statistical data on cases disposed of and selected or general recommendations to the administration. Most of the ombudsman have to submit their annual report to an executive authority[24], which itself is then often required to forward such reports to the legislature directly. Only few institutions are not required to submit annual report at all.[25] Some ombudsman are also obliged to provide Head of State, Ministry of Interior or Governor of Province with special reports, regarding individual cases, in addition to their annual reports.[26]

3 CONCLUSION

Asia is endowed with a rich variety of legal and constitutional systems. For that reason there are bound to be significant differences of detail between Asian ombudsman schemes. A meaningful comparison of the multitude of Asian ombudsman concepts and institutions is difficult, not only because of diversity of legal systems, but also because of paucity of information on these systems. It was therefore set to limit this paper to general comparative overview based on analysis by given criteria. My main aim was to mention typical characteristics of ombudsman concept as it is decribed in the European and American point of view. In relation to these features I tried to present examples of Asian states where they are regulated or not.

Adopting a comparative approach, I have attempted to show the variety of schemes and models of ombudsman concept as it is regulated in states in Asia. The ombudsman is considered to be institution responsible for ensuring the quality of the implementation of government responsibilities in relation to the individual citizen, or through which the individual can seek redress. The ombudsman is instrument to encourage dialogue between the state (public authorities) and its citizens.

24 Bahrain, China, India, Pakistan, Sri Lanka, Vietnam.
25 Iran, Japan, Malaysia.
26 Bahrain, China, India.

An ombudsman in terms of utility means „watchdog of the administration" or „ public safety valve". It should be an institution which leads to an open government by providing a democratic control mechanism over the powers of the government The Ombudsmen described earlier function in government to receive and investigate complaints, among other responsibilities. The irreducible minimum characteristics such an Ombudsman must have are four: Independence; Impartiality and Fairness; Credible Review Process and Confidentiality.

In my point of view many Asian institutions called "Ombudsman" lacke one or more of the essential characteristics. Even from a brief glance, it becomes obvious that Asian institutions differ significantly from the European concept of parliamentary Ombudsman. While several states have embraced fundamental ideas of the Europen ombudsman concept, their implementation varies considerably.

The most significant distinguishing factor between Europen ombudsman concept and ombudsman institutions in Asia is certainly the affiliation within State powers. Traditional parliamentary ombudsman concept is based on idea that he is an officer of legislature, i.e. parliament. The only Asian institution that appears to be in line with European parliamentary ombudsman model and pursuant to International Bar Association's definition is the Provedor for Human Rights and Justice in Democratic Republic Timor-Leste. It was established under Section 27 of the Constitution of Timor-Leste in May 2002 and first opened its doors in 2006. He has a dual mandate covering human rights and good governance.[27] The Provedor is a high-level public official that is appointed and removed by the parliament. It is responsible and reports to the legislature, which it may provide with recommendations concerning legislative measures. Human rights are very important part of his mandate and his scope of supervision.

The Office of the Ombudsman in Indonesia nad Phillipines are simlar to this model. The former's head is elected by the legislature, yet the executive branch possesses power of removal. In the Philippines, it is the other way around. Both issue reports and recommendations to the respective parliaments, while human rights are not within their purview.[28]

In many countries, especially those with a longer democratic tradition, the existence of ombudsman has helped focus attention on the need for adequate internal complaints procedures within the governement. That is the reason which probably inspired Asian contries to establish this kind of institution. I have to state that Asian ombudsman institutions appear to have closer ties with administrative organs than the respective legislature. Absence of relationship with legislature could be seen in weak constitutional and legislative safeguards to ensure the independence of investigation. If we omit varying degrees of independence of these institutions, it could be pointed out that Asian ombudsman institutions pursue quite similar objectives as European parliamentary ombudsman. Namely it can be redress of administrative grievances and also good governance. Fight against corruption is also often part of their agenda. All in all Asian ombudsman institutions must be viewed not only in legal but also in political context within their respective national systems.

[27] More details available at: https://en.wikipedia.org/wiki/Office_of_the_Provedor_for_Human_Rights_and_Justice_(Timor_Leste)

[28] KRIEBAUM, U., KUCSKO-STADLMAYER, G. (eds.) Asian Ombudsman Institutions. A comparative legal analysis. p. 59

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Contact information:

JUDr. Lívia Trellová, PhD.
livia.trellova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

GUILT AND LIABILITY BETWEEN ARISTOTLE AND STOICS

Tomáš Gábriš
Comenius University in Bratislava, Faculty of Law

Abstract: Cicero interpreted the Stoic term *ἁμάρτημα*, used already by Aristotle, as a "crime", thus coming to a seeming paradox of equality of all crimes, when explaining the Stoic claim of all *ἁμαρτήματα* being equal. However, should the term refer rather to illegality or "guilt", all quotes become much less paradoxical. This seems even more appropriate in the context of responsibility for "killing one's father" mentioned in Stoic (and Aristotle's) treatises.

Key words: Aristotle; Stoics; Cicero; guilt; punishment; liability

INTRODUCTION

Both Aristotle's and Stoic's importance for later legal and philosophical thought is often emphasized in the literature, especially in the context of the school of natural law.[1] Aristotle is invoked in this respect specifically with regard to the issues of free will and responsibility for one's own actions.[2] In this paper we shall compare the approach of Aristotle and of Stoic philosophers to legal issues closely related to legal responsibility – questions of guilt and punishment. The link is going to take the form of notions *ἁμάρτημα* and *ἁμαρτία*, used by Aristotle as well as by Stoics, and they are even to be found in the New testament, albeitwith a slightly shifted meaning. It is thereby not without interest that according to Cicero, Stoics, unlike Aristotle, refused to distinguish between different kinds of wrongdoings (*ἁμαρτήματα*, *peccata*) and different degrees of culpability. Cicero reports they proposed that punishment should only be based on consequences incurred and on motives of the perpetrator.[3] This specific approach of Stoic philosophers to crime and punishment will be investigated here in greater detail, and our own explanation of the Stoic statement that "all wrongdoings are equal" will be proposed. Our proposed hypothesis is namely that Stoics employed the notion of *ἁμάρτημα* in the modern sense of „guilt".

Wrongful conduct, guilt and punishment in the Aristotle

Free will is a key factor of so-called negligence liability, taking into account the relationship of will of perpetrators to their conduct and to the outcome of their action. Should a person not dispose of

1 See BLITZ, M. Plato's political philosophy, p. 117.

2 SORABJI, R. Necessity, Cause, and Blame: Perspectives on Aristotles's Theory, p. xiv. Aristotle could have influenced, for example, Justinian's concept of *coactus volui* (the forced person subsequently agreed with the action – Digest 4. 2. 21 (5)) and *timor maioris malitatis* (fear of a greater evil, similar to the extreme necessity – Digest 4. 2. 5). Ibid., p. 291, footnote 11. It is also believed that Aristotle influenced the Roman-Law-distinction into intent (*dolus*), negligence (*culpa*) and accident (*casus*). Ibid., p. 293. This is, however, called into question by David Daube – see IBBETSON, D. Wrongs and Responsibility in Pre-Roman Law. In The Journal of Legal History, pp. 99–127. Finally, Ulpian is reported in Digest to have stated – just like Aristotle – that an animal can not cause harm because it has no sense (*Digest* 9. 1. 1.3).

3 Stoic teaching is reconstructed mostly from Cicero's criticism of Stoics. See RIST, J. M. Stoická filosofie, pp. 90 et seq.

free will, one could not freely decide on own actions and should thus never be held responsible for one's deeds; the actions would hence be considered as necessarily dependent (determined, conditional) upon circumstances outside the person itself.

The existence of free will, despite its general acceptance in legal scholarship as a fundamental principle of the accountability for one's own actions, currently seems to be disputed to a certain extent, based on experiments in the field of cognitive sciences – take e.g. the Libet experiment and related control experiments which have indicated that electric impulses in the brain associated with some physical activity precede the individual's will to act, thus questioning whether people are really conscious creators of their actions.[4] However, even in this case, the scientists have come to a conclusion that humans still have some free will despite the experiments – namely, at least in the form of ability to control one's actions, respectively ability not to act – having free won't rather than free will.[5]

In contrast to the negligence liability (based on fault), there exists also a form of so-called strict liability, as a type of liability which is not based on free will or choice (and thus is a liability without fault), historically being considered an exceptional situation, resulting from specific social interests – particularly from the interest in protecting a weaker party standing in the position of victim/harmed/injured person.

In this paper we shall examine first some Aristotle's insights into these problems – namely the issues of free will, fault and responsibility, and subsequently guilt and punishment – on the basis of his Nicomachean Ethics. This involves research at the intersection of philosophy and law, respectively within the broader scope of legal philosophy, which necessarily results from the fact that in the Nicomachean Ethics Aristotle apparently pays attention to these issues also from legal and judicial perspectives (as being "*also useful to legislators regarding honors and punishments*"[6]). His conclusions will thereby partly be confronted with current legal approaches to these problems, despite being aware that such an approach might justly be considered anachronistic.[7] Subsequently, Aristotle's views will be compared to those of Stoic philosophers, as reported by Cicero in his works, paying thereby closer attention to notions of *ἁμάρτημα* and *ἁμαρτία* (translated by Cicero as *peccatum*) used both by Aristotle and Stoics, searching thereby for explanation of the Cicero's unclear account of Stoic theory of guilt and punishment.

Free will in the Nicomachean Ethics

The basic question of whether Aristotle recognized the existence of free will as a basic requirement for establishing fault, is often considered anachronistic.[8] Still, even from among those who do not considere this issue anachronistic, one group of thinkers state that Aristotle expressly denies the concept of free will (as claimed e.g. by Cicero[9]), whereas other authors on the contrary argue for

4 BAYNE, T. Libet and the Case for Free Will Scepticism. In: SWINBURNE, R. (ed.) Free Will and Modern Science.

5 See PYCHYL, T. A. Free Won't: It May Be All That We Have (or Need). Available at: https://www.psychologytoday.com/blog/dont-delay/201106/free-wont-it-may-be-all-we-have-or-need (accessed on 22 September 2017).

6 ARISTOTLE. Nicomachean Ethics. Tr. C. D. C. Reeve, p. 35.

7 BARTLETT, R. C. – COLLINS, S. D. (eds.) Action and contemplation: studies in the moral and political thought of Aristotle, p. xii.

8 HUGHES, G. J. The Routledge guidebook to Aristotle's Nicomachean Ethics, p. 164. Hughes refers to several critics.

9 SORABJI, R. Necessity, Cause, and Blame: Perspectives on Aristotles's Theory, p. x. Free will in Aristotle is refuted also by SAUVÉ MEYER, S. Aristotle on the Voluntary. In: KRAUT, R. (ed.) The Blackwell guide to Aristotle's Nicomachean ethics, p. 138: "*Rather than attributing freedom to agents, the "up to us" locution used by Aristotle implies causal responsibility.*"

free will in Aristotle.[10] Finally, a third opinion stream considers that Aristotle recognized free will only implicitly, when stating that everyone is free to choose how to act:[11] "*Virtue too is up to us, then, and, similarly, vice. For where acting is up to us, so is not acting, and where saying "No" is up to us, so is saying "Yes." Hence if acting, when it is noble, is up to us, not acting, when it is shameful, will also be up to us.*" (Nicomachean Ethics III.5).[12] Hence, in Aristotle's example of a ship's captain who cast out during a storm the goods overboard in order to relief his boat, the captain was completely free to decide otherwise.

The concept of implicit or explicit recognition of free will by Aristotle will be an accepted basis of our further explanations here in this text. In our opinion, Aristotle namely clearly recognized the option of choice – *προαίρεσις* – as a conscious decision (the term *προαίρεσις* is translated into English by different authors as "will", "act of will", "choice", "decision", "purpose", or "intention"[13]). Should it not be possible to decide freely, we would have to deny that human being is "*a starting-point or begetter of his actions as of his children*."[14]

Imputation of voluntary and involuntary actions in the Nicomachean Ethics

A basic classification of human actions to be found in the third book of Nicomachean Ethics is their division into voluntary and involuntary (*ἑκούσιον* and *ἄκούσιον*; their actors are then classified as *ἑκών* and *ἄκων*[15]). The difference between voluntary and involuntary actions thereby lies in the origin of cause of action – if the cause comes from within the actor, it is a voluntary action; if the cause comes from outside the actor, it is an involuntary action. Voluntariness and involuntariness are thereby drawn from the origin of the action – should it arise from within the actor, the action is voluntary; should it arise from outside the actor, the action is involuntary. Voluntariness and involuntariness thus have to do with the origin of the cause, being a characteristic trait of Aristotle's thought.[16] The cause (*ἀρχή*) was thereby seen by Aristotle in the originator (actor), should the originator knowingly (intentionally) give priority (within his choice – *προαίρεσις*) to one action over another – usually based on the desire, *ὄρεξις*.[17] Actions have namely two sources, claims Aristotle (in *De Anima* III.10) – reason (*νοῦς*) and desire (*ὄρεξις*),[18] whereby the reason (mind) itself does not move anything (Nicomachean Ethics VI.1).

According to Aristotle, therefore, an action which has its underlying cause in the actor and where the actor knows the circumstances of the action, is voluntary. In contrast, an action to which the

10 Alexander of Afrodisias in the 3rd century BCE considered Aristotle to be indeterminist. See SORABJI, R. Necessity, Cause, and Blame: Perspectives on Aristotles's Theory, p. x. Freedom of will is seen in the works of Aristotle by PATOČKA, J. Platón a Evropa, p. 197.

11 For the third option advocates HUGHES, G. J. The Routledge guidebook to Aristotle's Nicomachean Ethics, pp. 165 and 167.

12 ARISTOTLE: Nicomachean Ethics. Tr. C. D. C. Reeve, p. 43.

13 PAKALUK, M. Aristotle's Nicomachean Ethics : An Introduction, p. 135.

14 ARISTOTLE: Nicomachean Ethics. Tr. C. D. C. Reeve, p. 43.

15 SAUVÉ MEYER, S. Aristotle on the Voluntary. In: KRAUT, R. (ed.) The Blackwell guide to Aristotle's Nicomachean ethics, p. 141.

16 RAPP, C. Free Will, Choice, and Responsibility (Book III.1–5 [1–7]). In HOFFE, O. (ed.) Aristotle's "Nicomachean ethics". Tr. D. Fernbach, pp. 89 et seq.

17 SAUVÉ MEYER, S. Aristotle on the Voluntary. In KRAUT, R. (ed.) The Blackwell guide to Aristotle's Nicomachean ethics, p. 101. See also ACKRILL, J. L. Aristotle on Action. In RORTY, A. O. Essays on Aristotle's Ethics, pp. 97–99.

18 DAHL, N. O. Aristotle on Action, Practical Reason, and Weakness of the Will. In ANAGNOSTOPOULOS, G. (ed.) A Companion to Aristotle, p. 498.

person did not contribute in any way, and the cause of which is external, taking place against the will of the person, is involuntary.[19] The latter situations are largely those dictated in particular by natural forces, such as being blown away by wind "*what is forced is what has an external starting-point, that is, the sort of starting-point where the agent, or the one being affected, contributes nothing – as, for example, if the wind or human beings with control over him took him off somewhere.*"[20] An action, not originating (rooting) in the person, i.e. an involuntary action, can be further internally divided into two different subspecies according to Aristotle. Here the element of will of the actor plays a certain role. One can thus discern, first, an involuntary action in the strict sense (for example, committed out of ignorance) being retrospectively regretted by the actor, and, second, a non-voluntary action, which is not being regretted by the actor, meaning that the actor subsequently accepted the outcomes of the action. Finally, according to Aristotle, there are also so-called mixed situations, including e.g. cases of coercion by tyrants – e.g. acting under the threat of death penalty against relatives of the actor. In such cases, although the actual action is essentially involuntary, it should overall be considered voluntary according to Aristotle,[21] "*on this occasion and done for these things*".[22]

Presumed liability?

Does voluntariness or involuntariness affect in any way liability for one's actions? Let us pay attention to **involuntary action** first.

Aristotle does not claim in Nicomachean Ethics that involuntary action should automatically result in impunity. On the contrary, the liability was, apparently, arising also from involuntary actions (evoking perhaps our current notion of strict liability, regardless of fault/negligence). Each citizen was namely to behave and be able to control one's actions, otherwise the citizen would slip into a situation of ἀκρασία,[23] and accept a sanction therefor, in the sense of communitarian citizenry, where the whole community is harmed by one's improper conduct.[24] Verification of this argument can perhaps be found also in Plato's Laws (865-74): the Athenian *πόλις* was namely – if the reading of Plato's Laws is correct – supposed to be tarnished by any wrongful act (disregarding its cause) and its cleansing was possible only upon making the offense good in the form of punishment or in providing for relevant compensation.[25] Voluntariness or involuntariness itself might therefore exert no effect as to the rise of liability – the liability and obligation to provide compensation or to accept punishment arose in any case; liability was presumed. Voluntariness or involuntariness of action could perhaps serve only as an argument with respect to a type of punishment.

At this point it is appropriate to pay attention also to the problem of ignorance (lack of knowledge) and its role for considering an action voluntary, involuntary and for the emergence of liability in general. According to Aristotle, ignorance was to always have a consequence of action being

19 HEINAMAN, R. Voluntary, Involuntary, and Choice. In ANAGNOSTOPOULOS, G. (ed.) A Companion to Aristotle, p. 484.

20 ARISTOTLE. Nicomachean Ethics. Tr. C. D. C. Reeve, p. 35.

21 HEINAMAN, R. Voluntary, Involuntary, and Choice. In ANAGNOSTOPOULOS, G. (ed.) A Companion to Aristotle, p. 488.

22 ARISTOTLE. Nicomachean Ethics. Tr. C. D. C. Reeve, p. 36.

23 PRICE, A. W. Acrasia and Self-control. In KRAUT, R. (ed.) The Blackwell guide to Aristotle's Nicomachean ethics.

24 COLLINS, S. D. Aristotle and the Rediscovery of Citizenship, p. 40. On modern communitarianism see MACINTYRE, A. After Virtue: A Study in Moral Theory.

25 SORABJI, R. Necessity, Cause, and Blame: Perspectives on Aristotles's Theory, p. 289.

considered involuntary, not having cause in the person of defendant. Ignorance could have thereby consist in any of six basic individual features of any action: the acting entity, action, object of the action, tool, methods, and outcome of the action. Ignorance in any of these individual items was automatically to have the consequence of being considered an involuntary action.[26] However, it is to be emphasized here again that involuntariness in itself did not exclude the emergence of liability nor of obligation to provide compensation (or accept punishment): "*In fact, they also punish someone for ignorance itself, if he seems to be responsible for the ignorance – as, for example, when penalties are doubled in cases of drunkenness*",[27] "*and similarly in other cases where someone seems to be ignorant because of neglectfulness, on the supposition that it is up to him not to be ignorant, since to take care was in his control*."[28] Thus it seems that even in case of an involuntary action due to ignorance, liability was presumed. The originator of the action could have then probably invoked an evidence demonstrating the ignorance and justifiable reasons for this ignorance.

In case of a **voluntary action**, the liability rules appear to have been even stricter. Aristotle namely assumed that voluntary action is fundamentally the result of a deliberate choice – *προαίρεσις*; still, he did recognize that morally weak people also act out of desire (*ὄρεξις*) and volition (*βούλησις*), or out of fear,[29] and not by deliberate choice – on these grounds they are even sometimes acting against their own *προαίρεσις*, Aristotle claims. Nevertheless, legal consequences of such a situation have not been discussed by Aristotle. It may only be hypothecized that those circumstances were not to be taken into account by the judge, and this distinction by Aristotle was not to serve any legal purposes, but rather only non-legal, moral and ethical purposes, being subsequently used by Aristotle only in his analysis of the nature of man, thus in a non-legal context,[30] having to do with the nature of human actions.[31]

Finally, under the Nicomachean Ethics, voluntary action was not only an action having its origin in the presumed deliberate *προαίρεσις*, but also a conduct originating in non-deliberate actions (such as sudden movements[32]), e.g. an action of a child or of a beast, where the possibility of deliberate choice was not recognized.[33] However, Aristotle is silent here again on the important issues of how to assess such an action, and who should be held liable for the action. It is thereby likely that the originator of the action was to be held responsible, or the child's parents or beast owners respectively – after all, it was a voluntary action, albeit lacking *προαίρεσις*. This fact could have nevertheless been taken into account by judges in determining the amount or form of compensation or punishment.

In conclusion of his analysis, Aristotle finally comes to a synthesis here, and – depending on the type of action (origin of the cause) and liability for the actions – generally distinguishes between four types of wrongful actions.[34] First, he distinguishes between two types of damage (*βλάβη*) caused

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26 HEINAMAN, R. Voluntary, Involuntary, and Choice. In ANAGNOSTOPOULOS, G. (ed.) A Companion to Aristotle, p. 489.

27 ARISTOTLE. Nicomachean Ethics. Tr. C. D. C. Reeve, p. 44.

28 Ibid.

29 SAUVÉ MEYER, S. Aristotle on the Voluntary. In KRAUT, R. (ed.) The Blackwell guide to Aristotle's Nicomachean ethics, p. 140: "*In extreme cases, such as those of weakness of will, the flaw will not even show up in the προαίρεσις, for the weak-willed agent is one who acts contrary to his προαίρεσις*."

30 Ibid.: "*A person's προαίρεσις is a better indication of his character than his actions because the same action can result from very different προαίρεσεις*."

31 Ibid., p. 139: "*The praiseworthiness of a disposition depends on the sort of activity it produces: "We praise the good person, as well as virtue, because of the actions and products…".*"

32 ARISTOTLE. Nicomachean Ethics. Tr. C. D. C. Reeve, p. 38.

33 ROSS, D. – BROWN, L. The Nicomachean Ethics/Aristotle, p. 219.

34 SORABJI, R. Necessity, Cause, and Blame: Perspectives on Aristotles's Theory, pp. 278–279.

involuntarily (i.e. caused by an external cause) – the first is an unlucky accident (*ἀτύχημα*) where Aristotle again keeps silent on the liability issues; the second is a mistake (*ἁμάρτημα*) where the actor is to be held liable similarly as in case of acting out of ignorance (Nicomachean Ethics III, 5). Finally, the other two types of action are cases of voluntary action – *ἀδίκημα*,[35] differing from each other only in the seriousness of the offense (for example, that an action was not only a murder, but murder of one's own father[36]). In all four cases, intentional causation was presumed probably, but Aristotle is silent on this issue.

Summary of Aristotle's perception of liability, guilt, and punishment

Aristotle in the Nicomachean Ethics approached the issue of free will and liability in both legal and moral terms, which is explained by the fact that he acted as a tutor for the young members of Athenian elite.

Should we thereby accept that the Athenian *πόλις* fundamentally presumed liability for any wrongful actions, the reason why Aristotle studied different forms of wrongful action might have been twofold – he could have tried to identify those cases where the originator of an action can nonetheless be liberated or have the punishment mitigated, or on the other hand, Aristotle could have studied these questions exclusively from the moral perspective. Most likely, however, is a combination of both reasons, in the spirit of the Aristotelian ideal of practical philosophy.[37] A contingent by-product of the detailed elaboration of these issues was in any case an indisputable influence on future (including Stoic) jurisprudence and law-making, as we shall see below.

Hence, one may conclude that Aristotle in his treatise mostly presumed the liability of originator of an action. The actor, having free will, was to show excusable ignorance, or that the result did not have the cause in the actor at all.

THE *ἍMAPTIA* and *ἍMAPTHMA* FROM HOMER TO NEW TESTAMENT

We have seen previously that the notion *ἁμάρτημα* (respectively in another form *ἁμαρτία*) was used by Aristotle to denote an action that was a result of a mistake. It was therefore understood by Aristotle as denoting one type of misconduct, acting in error, respectively acting in ignorance. The same notion was later used by Stoics, and can also be found in the Bible (Greek New Testament), however, in both cases in a slightly shifted, more general sense. Translated into Latin as *peccatum*, this term also forms a basis of Cicero's criticism of Stoics, with Cicero claiming that for Stoics "all wrongdoings (*ἁμαρτήματα*, *peccata*) are equal". Prior to the analysis of Stoic understanding of liability, guilt, and punishment it is therefore necessary to closely analyse the said basic terms of *ἁμαρτία* and *ἁμάρτημα* first.

David Ibbetson[38] claims that at least since the times of Hugo Grotius (1583–1645), in Europe the term *ἁμάρτημα* was considered a Greek equivalent of Roman legal term *culpa* (negligence), denot-

35 Ibid., p. 279.
36 Ibid.
37 GADAMER, H.-G. The Idea of Good in Platonic-Aristotelian Philosophy, pp. 159 et seq.
38 IBBETSON, D. Wrongs and Responsibility in Pre-Roman Law. In The Journal of Legal History, pp. 99–100.

ing a type of culpable action. For the earlier period, since around the third century CE, however, it is claimed that Roman *culpa* rather corresponded to Aristotle's term *ἀδίκημα*, referring to a voluntary action. The *ἁμάρτημα* was, in contrast, considered a term that referred only to acting in error, respectively in ignorance, being an involuntary action. This term was actually used in the meaning of acting in mistake already by Homer – specifically in the sense of missing in a javelin throw, and by Thucydides when referring to straying while being on a journey.[39]

Some authors therefore suggest that the notions of *ἁμαρτία* and *ἁμάρτημα* could have actually had two meanings – one general, referring to wrongful conduct in general (meaning *ἁμάρτημα 1*) and the other, more specific, used to describe a case of error or ignorance (*ἁμάρτημα 2*), which we have come across in the Nicomachean Ethics. [40] This argument is supported by the use of this term in the broader meaning even by Aristotle himself in his Poetics – in connection with the tragedy and tragic actions of drama heroes, but also particularly by the use of the term *ἁμαρτία* in the Greek New Testament, where detailed textual analysis[41] shows that it was used primarily to refer to sin in general, i.e. in the above-indicated broader meaning of *ἁμάρτημα 1*. In 175 places within the New Testament, the term *ἁμαρτία* is namely translated into English as a "sin" (and in four other cases the term *ἁμάρτημα* is translated as sin). In 23 other cases where the English translation uses the word "sin", original Greek text uses the term *paraptoma* which otherwise refers in Greek to trespassing the law, or committing an offense[42] specifically, which evokes a more legalistic notion than *ἁμαρτία* or *ἁμάρτημα* which are being used in the New Testament besides the "sin" rather to describe a situation of "missing a target", "failure or neglect", "erring, or doing wrong",[43] hence not having a clearly legal meaning. *Paraptoma* in contrast, in general refers in the text of New Testament to a deliberate offense, or delict, and translates into English as follows: fall (twice), fault (twice), offense (7 times), sin (thrice) and trespass (9 times).[44]

Therefore, it seems that the term *ἁμαρτία*, respectively *ἁμάρτημα* could really be perceived as a term having two meanings – first, being used to describe a wrongful act in general, in the broadest (non-legal) meaning, whereby Aristotle borrowed this term from the general language identifying error, failure, and used it to designate a category of action in error, in ignorance, in the second, more narrow meaning. Then, New Testament translators (and probably also the Stoics) used this term again rather in the more general sense (in which it was probably used already in Aristotle's times, outside the Nicomachean Ethics) to label any "failure" or "wrongdoing".

Wrongdoing, guilt, and punishment in the Stoic philosophy

Trying to uncover the perception of wrongdoings, guilt, and punishment in the Stoic philosophy, we shall again start with the notions of *ἁμαρτία* and *ἁμάρτημα*. Since our source of knowledge on Stoic philosophy is foremost the classical works written by Cicero in Latin, one can encounter quite

39 MARTIN, R. P. Two Hundred New Testament Word Studies That Could Change Your Life, p. 184. Available at: https://pioneernt.files.wordpress.com/2014/11/200-studies-corrected-10-2014.pdf (accessed on 22 September 2017).

40 LURJE, M. Die Suche nach der Schuld: Sophokles' Oedipus Rex, Aristoteles' Poetik und das Tragödienverständnis der Neuzeit. In: Beiträge zur Altertumskunde, p. 372.

41 MARTIN, R. P. Two Hundred New Testament Word Studies That Could Change Your Life, p. 184. Available at: https://pioneernt.files.wordpress.com/2014/11/200-studies-corrected-10-2014.pdf (accessed on 22 September 2017).

42 Ibid., p. 8.

43 Ibid., p. 9.

44 Ibid.

obviously rather the Latin term *peccatum* instead of the equivalent Greek term *ἁμαρτία* or *ἁμάρτημα* (originally used by Stoics in place of *peccatum*). The Latin notion *peccatum* thereby immediately evokes the meaning of "sin" in Latin translations of New Testament, again pointing to the broader non-legal meaning of both the term *ἁμάρτημα* as well as of *peccatum*.

Cicero offers a fairly accurate report on the understanding of the notion of *peccatum* in Stoics in a number of his works. In the following lines we shall, however, analyse only three of his works in this context – "*Pro Murena*", "*Paradoxa Stoicorum*" and "*De finibus*".

It is thereby specifically in the book "For Lucius Murena" where Cicero famously notes that, according to Stoics, "all wrongdoings are equal " (*Pro Murena* 62) – allegedly, even killing a rooster, if not necessary, is (can be) the same sort of wrongdoing (offense) as killing one's own father (*Pro Murena* 61). However, in the same section Cicero admits that Stoics nevertheless recognized there were different degrees of danger (severity) of offenses and various degrees of punishment (*Pro Murena* 63).

In the work called Paradoxes of Stoics,[45] in the book III titled "That offenses are equal and good deeds are equal" in point 20 Cicero further develops the Stoic idea of offenses – the matter in which an offense was committed may indeed be more or less serious, however the offense is still the same, Stoics are reported to claim. According to Cicero, Stoics namely argue that an offense takes place in case of committing any prohibited conduct, and regardless of the severity of the offense there is always a violation present. So far so good, from today's point of view. Cicero also reports here that under Stoics, offenses should ultimately not be punished based on to the results of the action, but rather based on the nature (vices) of persons having committed the offenses – being recognized nowadays as well, when sanctioning repeat offenders. Therefore, according to Cicero, the Stoics recognize that an offense may consist in more serious or less serious conduct, and judges should asses these based on specific circumstances of the offender.

What confuses Cicero and what may confuse today's reader as well, is rather the already mentioned Stoic statement that all wrongdoings (offenses) are equal. However, should we accept that Stoics did not perceive the notion of "wrongdoing" (*ἁμάρτημα*) as a "crime" but rather as a "misdeed, failure" (i.e. the original meaning of *ἁμάρτημα*), the Stoic statement would then not really mean equality of "crimes", but rather only equality of "illegality". This interpretation is not contradicted even by Cicero's account in *Paradoxa stoicorum* III.24 where he states that for Stoics, killing a father and a slave can show the same signs of "wrondoing" / "illegality", and in some cases even the same degree of severity (depending on the circumstances, respectively on the motive; whereby we deem the concept of "circumstances" to be more appropriate here than "motive" used by Cicero). In the point III.25, Cicero himself finally acknowledges that even for Stoics, actual difference existed between killing one's own father and a slave – namely he who killed one's own father, killed not only a man, but also killed an own relative at the same time, a person who raised him, who educated him, etc. Therefore, such an offender deserved stricter punishment even under Stoics. However, at the same time Cicero adds again that according to Stoics the punishment should not be imposed mechanically based only on the wrongful act, but also with regard to the offender – particularly in terms of taking into account the motives and other circumstances of the offense (as Aristotle did in the Nicomachean Ethics, see *supra*). At any rate, it seems correct that Stoics in general perceived any case of unlawfulness as being a conduct disturbing public order, and being illegal, regardless of

[45] See WEBB, M.: Cicero's Paradoxa Stoicorum: A New Translation with Philosophical Commentary. Available at: https://repositories.tdl.org/ttu-ir/bitstream/handle/2346/13953/31295003909982.pdf?sequence=1 (accessed on 22 September 2017).

severity of the offense, as concluded by Cicero himself (*Paradoxa Stoicorum* III. 26). (And probably similarly recognized by Aristotle centuries before Cicero.)

Hence, our interpretation that Cicero's "wrongdoing" should not be understood as a "crime" but rather as "illegality" can ultimately be confirmed by a formulation found in Cicero's work *De finibus* III.48,[46] where Cicero acknowledges that according to Stoics a "wrongdoing" does not have several degrees, but can be perceived as labelling more actions at once (hence, being a general, abstract notion).

The *ἁμάρτημα* as a criminal "guilt"?

The ancient Roman author Cicero apparently perceived equivalence of "wrongdoings" (*ἁμαρτήματα*, *peccata*) as paradoxical. Indeed, as shown *supra*, this might be the case should we view "wrongdoing" as "crime" and not only as "illegality". However, according to John M. Rist, it could still be perfectly possible to hold in place even the meaning of "wrongdoing" as a "crime", without leading to a paradoxical situation, should we do so in the context of the original psychological doctrine of Stoics. Rist namely suggests that the "strangeness" of the Stoic doctrine of "wrongdoings" has its explanation in the older (in the days of Cicero already long abandoned) Stoic "monistic psychology," according to which no matter what degree of self-control one reaches, if not absolutely perfect, the person is still immature as far as it can not completely control oneself.[47] This Stoic thought was based on an earlier idea that within the human *pneuma* (soul) there are waves which are running either arranged or as variables. Any "wrongdoing" was believed to cause instability of the waves, no matter how serious the "wrongdoing" was, explains Rist.[48] At the same time, however, Rist himself notes that the Stoic term "wrongdoing" (in the Greek original *ἁμάρτημα*) probably did not mean "crime" as interpreted by Cicero. Namely, according to Rist, when Stoics say that all *ἁμαρτήματα* are equal (the same), instead of speaking of crime, *ἁμάρτημα* was rather a notion denoting certain internal disposition of the actor, not external aspects of conduct.[49] To some extent, we can agree with this interpretation, but our proposal to perceive *ἁμάρτημα* as "illegality" does not match Rist's conclusions fully. While illegality is namely (to certain extent) an objective fact, Rist speaks only of internal aspects of wrongdoing. Therefore, at this point we shall try to accommodate our hypothesis on the meaning of *ἁμάρτημα* by testing its possible meaning as "guilt", i.e. an obligation to suffer and accept punishment imposed by court. It is thereby not really an outer (external) relationship between a crime and an offender, but rather to a great extent also a situation of "inner disposition" of an offender with respect to the committed wrongdoing, solemnly declared by the court in the end of trial.

In order to test our interpretation of *ἁμάρτημα* as a guilt, we shall now briefly go through the abovementioned Stoic ideas and reported statements to try to apply the newly proposed meaning of the term *ἁμάρτημα* (*peccatum*) as a guilt.

In the first place, Stoics are claimed to recognize that punishment should be imposed not based on "guilt" (*ἁμάρτημα*), but rather based on the number of crimes (actions).[50] Sanctions are therefore

[46] CICERO, M. T. De finibus III. Available at: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/de_Finibus/3*.html (accessed on 22 September 2017).
[47] RIST, J. M.: Stoická filosofie, p. 104.
[48] Ibid., p. 99.
[49] Ibid., p. 101.
[50] Ibid., p. 91.

not to be directly dependent on the "level of guilt"; anyone who commits a crime is namely "guilty" to the same extent; instead, it is motives and circumstances that are crucial for punishment – along with the type and number of crimes.[51] "Guilt" can certainly not have any degrees in fact – it is either proclaimed by the court as being present or not, acknowledging under certain circumstances that even in case of a *parricide* the court may not find the perpetrator guilty. Thus, the Stoic claim seems to be upheld that *ἁμάρτημα* (read "guilt") is not determined by anything other than motive (and circumstances).[52] Similarly, when Rist quotes from *Stobaios*, who claimed that "*wrongdoings are equal but not similar*",[53] again this can be perceived as consistent with our interpretation of the equal "guilt" despite of different actions (and motives). Finally, our hypothesis can also be considered consistent with Rist's claim that *ἁμάρτημα* should be an absolute and not a relative concept[54] – considering someone "guilty" is namely without any doubt an absolute determination.

In our opinion, the outlined correlations between *ἁμάρτημα* in the sense of "guilt", and the Stoic concept of crime, motive, circumstances, and punishment in our above "test" viably correspond to what Cicero reports on Stoics and their teachings.

In conclusion, therefore, we offer for falsification our two-fold proposition that Stoic *ἁμάρτημα* is distinct from "crime", and means either "wrongdoing/illegality" or "guilt", voiced in a judgment, which may be the case even if acting in error or ignorance, provided it is not a case of an excusable ignorance or a case specific in other circumstances and actor's motives. Should the Stoics have sought for a suitable Greek word to denote criminal "guilt", they might have found it in *ἁμάρτημα* – given its broad meaning of "mistake" and "failure", suggesting a specific internal relation between an action and an actor, leading to liability and obligation to bear the consequences of the action. In the Christian doctrine, the same notion of *ἁμάρτημα* could similarly have been later used as an appropriate denotation of sin – "evil deed", "failure", or even "guilt", as determined in the final instance by God – the supreme judge.

CONCLUSION

We have tried here to formulate some thoughts on philosophical approach to liability for illegal conduct starting from Aristotle and ending with Stoics. Both thereby has a tremendous effect upon later evolution of legal philosophy in Europe and in the Euro-Atlantic region in general. In our exposition, we have identified an interesting shift in the Greek notion of *ἁμάρτημα*, which the Greeks had employed since the times of Homer, and which was used in a specific legal meaning connected to liability already by Aristotle. Aristotle thereby used the notion in two different meanings – first to denote an action in error, and second, to denote any wrongdoing in general. Later, the meaning has even further shifted towards the meaning of a sin. Given the changing meaning and use of the word, we have proposed a new hypothesis on Stoic meaning of *ἁμάρτημα*. Cicero as a critic of Stoic paradoxes interpreted this term used by Stoics in the meaning close to that of "crime", thus coming to a seeming paradox of equality of all crimes. However, should we take the view that the term did not refer to "crime", but rather to "illegality/wrongdoing", or to a criminal "guilt" as a liability rela-

[51] Ibid., p. 92.
[52] Ibid., p. 90.
[53] Ibid., p. 94.
[54] Ibid., p. 93.

tionship between an offense and the perpetrator, determined by a court, all Cicero's quotes from Stoic writings seem to gain a much clearer and less paradoxical meaning. Rist has proposed a similar operation prior to us, but he only claimed that the term *ἁμάρτημα* should be perceived as "wrongdoing" instead of "crime", thus essentially gaining only moral significance. Albeit this interpretation can be accepted, we have nevertheless attempted to test also a hypothesis closer to the world of legal terminology and legal institutions, speaking of *ἁμάρτημα* as "guilt". We consider this attempt as appropriate – taking the overall context of Cicero's reports on responsibility for "killing one's father" in Stoic treatises (and used as an example also in the Nicomachean Ethics).

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Contact information:

doc. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA
tomas.gabris@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

LIABILITY OF VEHICLE OPERATORS FOR BUILDING DEFECTS – POSSIBILITIES BASED ON DOCTRINAL AND COMPARATIVE EXPLICATION

Norbert Adamov
Comenius University in Bratislava, Faculty of Law

Abstract: By operation of means of transport some damage may not appear suddenly but after long repeated influence. In such cases application of causality test 'conditio sine qua non' leads to the result that if it is not possible to determine some liable persons unambiguously, damages bears the damaged person. Such a conclusion is not in accordance with the conception of the heightened level of legal protection of damaged persons in cases of strict liability, which is also liability for damages caused by operation of means of transport. The solution may lies in the application of alternative causality tests.

Key words: solidarity, liability, means of transport, damage, wall cracks

1 INTRODUCTION

One of the externalities joined with operation of means of transport are also static faults of buildings standing near of roads. These faults are caused by dynamic factors that act adversely on the building in two ways: On one hand, passing through the subsoil to the base of the building, and hence through the supporting structure upward. These shocks cause small cracks in different parts of buildings, especially around doors or windows. On the other hand, dynamic shocks may, however, also cause an excessive consolidation of base soils and unequal (differential) settlement may cause significant problems for buildings.[1]

It is obvious that property of owners of these objects is harming and it has at least an aesthetic impact. However, it cannot be excluded that occurrence of such failures can substantially affect the habitableness of concerned buildings. Last but not least, such externalities have also a considerable impact on the price of real estates in the case of selling.

In one corner, the externalities in the vicinity of roads have theirs origin in the economic development, which brings out expansion of freight transport. In other corner, political decisions have also a great impact.[2] For instance, changes in road infrastructure charging for vehicles above 3.5 tonnes in the past has led to an enormous increase of traffic on some roads and directly to the increase of negative impacts on the concerned territories. However, these externalities are not only harmful to the property of the concerned entities. In the online discussion forum of the Ministry

[1] Anonym: Statické poruchy. 2011 (online) Accesible via: <http://www.statickeposudky.info/poruchy.html>. Access Date: November 16, 2016.

[2] The list of delimited sections of roads is stipulated in the executive regulation of the Ministry of transport and construction of the Spovak republic Nr. 475/2013.

of Transport of the Slovak Republic[3] one can read contributions which reffer to significant discomfort in housing, which can also be defined as non-property damage consisting in the loss of „joy of housing".

An axample of the building structural defect

2 SEDES MATERIAE

The number of heavy goods vehicles is a factor that is directly proportional to the potential to damage the road itself as well as the buildings nearby. It is the right of hauliers to use all roads if there is no traffic constraint. From the point of view of public law it is necessary to distinguish between:
(a) local weight limitation – typical examples are bridges on minor roads and
(b) weight limits applicable throughout the territory of the state.

The operator of an overloaded vehicle can be penalized under administrative law. The interest to prevent increasing of the road body destruction is thus somewhat reached, even though roads are also pretty weighted down by heavy goods vehicles however weight has not exceeded the specified limit. But as far as the private property interests of real estate owners are concerned, in cases of static failure caused by transit of heavy (or overloaded) heavy goods vehicles to hold somebody to account seems complicated.

The court practice[4] has found that damages caused by transit of heavy goods vehicles is not damage caused by operation of the means of transport but must be considered as damage caused by a particularly dangerous operation (§ 432 of the Civil Code). These decisions in question solved liability for damages caused by transit of lorries and other heavy machines involved in construction activities. The conclusion that such damages should be accounted as damages caused by particularly hazardous operation could be reasonable only if the area where damages occurred could be regarded as part of the building site, because movement of means of transport in the frame of construction site is not considered for operation of means of transport within the meaning of § 427 Civil Code,

[3] See <http://www.telecom.gov.sk/index/index.php?ids=36291&prm1=101&prm4 Access Date: December 12, 2016

[4] See decisions of the Czech Supreme Court 25 Cdo 972/2000 and 25 Cdo 972/2000 which states that as far as an haus near of a road is concerned as particular dangerous operation should be considered also periodic and repeted passing of heavy building machines which cause excessive loading of this road, which is not appropriate from the structural poin of wiev.

according to the decision R 3/1984. But such a conclusion is not verisimilar because the decisions of the Supreme Court of Czech Republic 25 Cdo 972/2000 alike 25 Cdo 972/2000 expresses that the passage of the machinery has caused an ‚excessive burden on the road'.

An explanation of why (in the above-mentioned judgments) the court considered the damage was caused by particularly dangerous operation, it must be sought that in the traditional view of causality, in the sense of the 'conditio sine qua non' test, a damage caused by some means of transport should be the result of its one-off and immediate harmful impact. As in the cases in question, there was repeated detrimental effect of a large number of vehicles which were operated by one operator (a building company), the court concluded that this operator is the operator of the particularly dangerous operation. Of course, such a verdict is possible in this case, but it is questionable, whether it is also the best systemic solution.

If we were to look through the prism of „increased danger" as the reason for which the legislator defined the cases of strict liability for damages associated with objective liability, then it would be necessary to consider whether particularly dangerous operation is such a specific type of risk that under certain circumstances some operation of means of transport is considered to be a particularly dangerous operation.

If we look at the case in question through **the prism of the liable person**, then we could draw a conclusion that if the damage is caused by repeatedly damaging effects of one means of transport it should be subsumed under liability of the operator of this means of transport. But in the case that damage is caused by many vehicles and these are operated by one operator, such a damage should be subsumed under liability of operator of particularly dangerous operation.

If we look through **the prism of the technical device** that caused the damage, then it would be possible to assume that the succesive and cumulative harmful effect of individual technical system (trucks for instance) gives rise to liability for the damage only if:

(a) these technical devices are operated by one operator
(b) and since the individual partial harmful effects can not be considered as causality of the 'conditio sine qua non' type and another causality is not considered by the court to be relevant and therefore it is necessary to look at the harmful action as a whole, which is apparently possible only in the event that the damage caused will be considered as damage caused by particularly dangerous operation.

Paradoxically, if the court accepts that the damage (caused by particularly dangerous operation) can be considered as a whole, it is unclear why the same damage can not be considered as the damage caused by the cumulative detrimental effect of means of transport (operated by one operator). I take the view that, where special liability (liability without fault) for damages caused by operation of means of transport has been established, damages caused by means of transport should be deducted exclusively from that title.

Conversely, liability for damages caused by particularly hazardous operation must be carried out in cases which are not specifically regulated in the Civil Code. However, if the person causing some damage by particularly dangerous operation 'is liable as an operator of a means of transport' (as it is written in the § 432 of the Civil Code), it is not meaningful to refer to § 432 of the Civil Code if a damage was caused by such technical devices which should be regarded as a means of transport in the civil law sense. Replacing liability of operator of means of transport with liability of operator of particularly hazardous operation could have some rationality only if such liability was different (even more stringent, for instance).

3 DOCTRINAL VIEW ON ARISING OF LIABILITY

In order to establish civil liability, it is firstly necessary to conclude whether there is any damage caused by the traffic load (due to noise, dust or vibration). As mentioned above, as far as the consequences of building structural defects are concerned, the existence of damages is apparent. If damage arises, it is necessary to determine what caused this damage.

According to § 427 of the Civil Code, the operator is liable for the damage caused by the special nature of the operation. The collocation „circumstances, which have their origin in operation", is used in the following § 428 of the Civil Code – there are specified circumstances under which the operator may be released from non-faulty liability, as well as the circumstances which cause that liberation is excluded. For the assessment of liability of an operator of means of transport, the § 428 CC is therefore as substantial as the § 427 CC.

The formulation that operators are liable for damages caused by the particular nature of the operation can be interpreted in such a way that the damage can not be inflicted by the nature of the particular operation directly but there must be some circumstance that is a necessary intermediate between the occurrence of the damage and the phenomenon resulting from the nature of the operation. Thus, only a specific circumstance may be the cause of a particular damage, This circumstance is specific and directly related to:

(a) physical phenomena accompanying operation of means of transport; or
(b) control of means of transport by persons or by automatic systems; or
(c) other service staff activities related to transport services.

In cases of building structural defects caused by heavy goods vehicles

(a) the phenomenon resulting from the particular nature of the operation may be considered to be the high mass and the wheel circumvolution and
(b) the circumstance that inflicts a static disorder should be considered to be vibrations induced in the subsoil, what possibly cause changes in the subsoil as a result of the repetitive vibration impact.

Eliáš interprets the special nature of traffic as an operational and technical characteristic that distinguishes the operation of means of transport from other operations. A circumstance originating in the nature of the operation is, as such, to be interpreted as not capable of originating in any mode of operation but in its particular nature, i.e. in the operational or technical condition of means of transport (or equipment) which is not normal (see the decision R 9/72) and it is irrelevant whether the means of transport has undergone technical tests and that it has an official technical worthiness to operate.[5]

If the liability for static disruptions caused by heavy traffic would be assessed according to circumstances that originated in some mode of operation of means of transport, as interpreted by Eliáš, it would not be possible that liability for static disruption caused by transport can arise (unless it is caused by overloaded heavy goods vehicle) because vibrations are an immanent part of its operation. Therefore, if the vehicle is not overloaded, it is not acceptable to claim that vibrations are the result of a defective (abnormal) technical condition of such a means of transport. If the court were to assume that liability for damage caused by operation of means of transport must be linked to an

[5] ELIÁŠ, K. et al. Občanský zákoník. Velký akademický komentář – 1. svazek, p. 885.

„abnormal" state, in other words, that there must be a failure (whether a technical failure or a failure of the crew or another personnel) the externality without which the operation of a particular means of transport is not conceivable could not be considered harmful. However, such a solution can not be accepted because it would considerably disadvantage the injured person.

Novotná pertracts a similar interpretation, namely that the internal circumstances are mainly various defects and deficiencies of means of transport (deviations from the normal operational technical state).[6] However, the use of the word 'mainly' in the quoted thesis (unlike Eliáš's formulation) does not exclude arising of liability if, in the given case, there is no technician failure or failure of the operator.

However, it can be considered as 'abnormal' if a heavy goods vehicle is overloaded to the extent that its operation is not allowed on any road. In any case, an administrative penalty in the form of a fine does not restrict to claim civil damages. In the case that police will reveal some overloaded heavy goods vehicle on a given section of road (where static disruption of buildings had occurred), the position of the damaged person would be strengthened. Under the joint responsibility of a number of wrongdoers (i.e. truck operators whose police have detected as overloaded), compensation could be claimed not only by the owners of the damaged buildings but also by the owner of the damaged road, with the fact that structural parameters and limits of the road in question are given and damages caused by overloaded vehicles are commonly known and as results of technical observations (as the notorious fact), must not be proven in civil proceedings. Such a presumption could also be applied in relation to cracked buildings.

However, operators of heavy goods vehicles who did not exceed the permitted weight (or weight was not checked by the police), they may object to contributory negligence of the injured party (the local authority as the highway administrator) in the fact that, knowing the possible harmful consequences, the traffic of heavy goods vehicles have not been excluded by traffic signs. Although it is necessary to take contributory act into account in some specific case, it should be assumed that liability for damages caused by operation of means of transport is also given in cases where:

(a) damages has arisen as a result of an act which is not prohibited by public law; and
(b) is a breach of rules laid down by public law, but in the frame of civil liability the liable person can not invoke the fact that he (or she) has already been fined under administrative responsibility.[7]

If it is clear that some damage has arisen from circumstances which have originated in the operation of a means of transport, it must be assumed that in those cases it is not a case of force majeure and therefore the operator would not be able to shake of liability for this damage. On the practical level, however, there are several problems with liability, as far as cracked walls (due to vibrations caused by heavy freight) are concerned.

First of all, it is a question of how to define a range of liable subjects. While it is obvious that there is a causal link between the heavy goods vehicle operation and harmful vibrations, it is generally not possible to determine that the damage was caused by a particular vehicle, and in spite ofv the fact walls cracked after passing a particular vehicle, it is very difficult to prove that.

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6 NOVOTNÁ, M. Zodpovednosť za škodu spôsobenú prevádzkou dopravných prostriedkov. In ŠTEVČEK. M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. et al. Občiansky zákonník I. § 1–450. Komentár, p. 1424.

7 NOVOTNÁ, M. Zodpovednosť za škodu spôsobenú prevádzkou dopravných prostriedkov. In ŠTEVČEK. M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. et ak. Občiansky zákonník I. § 1–450. Komentár, p. 1406.

Unlike damages to health caused by exhalations produced by means of transport, it is more realistic to identify a possible range of liable subjects in cases of damages caused by vibrations. For example, it is possible to install an automatic device that takes photographs of each passing vehicle, and from these photos it is possible to make a selection of vehicles which have the potential to cause static disruptions of homes built alongside. Based on the registration numbers, it is possible to identify the operators of these means of transport (assuming that after the monitored section there was no change of the operator, for example as a result of the transfer of the ownership right). If new cracks occured during the monitored period, this would be a significant factor for taking liability towards the so-called circle of liable entities.

However, if a particular wall cracked before the monitoring began, then the defendant may object to the absence of a causal link, with the fact that when they were passing through, such damages already existed. However, the damaged subject could argue that specific means of transport were regularly passing through the village in the past, even at the time when the damage began to appear, but this should be supported by some evidence. An operator of a heavy goods vehicle could also argue that damaged buildings were improperly designed, or the actual construction of the damaged object was made in the wrong way and this contributed to the damage. As far as damage to the road body itself is concerned, operators could object that the operator as a person using the vehicle paid road tax, which can be interpreted as a lump sum compensation for increased road wastage.

However, in terms of the basic assumptions for liability for damage caused by operation of means of transport, it is not disputed that vibrations are circumstances which have their origin in the operation of means of transport because:

(a) they arise as a result of the movement of a vehicle on the road, that is to say when moving from point A to point B,
(b) they arise as a result of rotating wheels, the intensity and hence the degree of damage being a matter of great weight, and both of which may be described as such which arise from the particular nature of means of transport and constitute an essential part of its operation.

If another reason for the cracking of walls on houses standing near roads is excluded by expert judgment, the causal link between the event and the harmful consequences is obvious. But the problem may be that this causal link can not normally be considered as immediate.

4 THE PROBLEM OF THE CAUSALITY

Since the linearity of causalities must be circumscribed by some normative criteria, for example: by protective purpose of legal standards, by foreseeability of harm and, in particular, by adequacy and immediacy of causes, using of the 'conditio sine qua non' test is generally accepted.[8] The 'conditio sine qua non' conditionality test is formulated in the PETL (Principles of European Tort Law) in the Article 3: 101 as the *act or omission which is the cause of the damage if, in the absence of such proceedings, the damage did not arise.*

The Czech Supreme Court in the decision no. 25 Cdo 1946/2000, formulated a broader interpretation, in which the chain of causes are in focus: *The relationship of causal link is when the dam-*

[8] DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 63.

age has arisen as a result of the illegal act of the wrongdoer, that is, if his behavior and the harm are in the relationship of the cause and effect, and therefore, if it is proved that if there was no unlawfully act it would not be the damage. If the cause of the damage is different, liability for the damage does not occur; the cause of the damage can only be the circumstance without which the damage would not have arisen. In this case, the cause must not be the only one, but it is sufficient if it is one of the causes that contributes to the adverse consequences for which the compensation is due, and that the cause is substantial.

If there are more causes, they act either concurrently or subsequently, without overlapping over time; in such cases there is a need for a causal connection to make the string of successive causes and consequences related to the cause of the damage so closely connected (the primary cause immediately caused the different cause and this possibly caused the another cause) that from the impact of primary cause may be established a factual link with the occurrence of a detrimental effect.

The temporal aspect is not decisive, and causal link can not be confused with the temporal link, since injury can be the result of a damaging event, even though it did not arise at the time of the event, but later (see the decision published under no. 7 in the Court of judgments and Opinions, 1992). The existence of a causal relationship can not therefore be related only to the cause of the 'closest' consequence… On the other hand, if the other fact goes into action, which has no relation to acts of wrongdoer, a chain of causes does not establish a causal link between the act of the wrongdoer and the damage. The causal link is interrupted even in those cases where the immediate cause of the damage is a fact which is the very consequence for which the wrongdoer is liable for another legal reason.

The use of the 'conditio sine qua non' test is well-founded in cases where the damage was caused by one subject and caused by one cause. It can not be ruled out that circumstances such as speed, extraordinarily high weight or poor road surface have caused intense vibrations and these vibrations caused a building structure defect as a result of passing of one heavy goods vehicle and thus such a damage was caused by one operator of a means of transport.

However, if we assume that the harmful consequence (cracking of the wall for instance) certainly caused just one of several events, but it is not possible to find out which and therefore can not be detected a 'real' wrogdoer, in such cases it is advisable to consider alternative causality (which is manifested either simultaneous or cumulative effect of multiple causes).

Simultaneous causality is detrmined by more independent conditions, each of which is itself capable of bringing harmful result. There may be a situation where in both directions is a number of overloaded trucks that are going to miss each other in front of a building in question. Although the strongest vibrations are caused by vehicles at a point that is most critical for this building, other vehicles moving in the vicinity, though not yet powerful, also produce vibrations that can still increase the vibration effect of vehicles located in the point of the most intense action.

If the so-called strong 'conditio sine qua non' test (that is to say, when the phenomenon of consequence is viewed as only one necessary condition without which the consequence would not occur), it would lead to the conclusion that if at that moment some of the vehicles in operation will be stopped, the consequence would still be the result of the physical action of the others vehicles. Therefore, the action of any of the vehicles located at a significant distance from the building is not a necessary condition for the occurrence of a detrimental effect.

According to the Swiss legal doctrine, in the case of damage caused by any of several potential wrongdoer, no one is liable. The Swiss theorist von Tuhr justifies this approach by the following example: If the room from which a valuable thing was stolen during the day visited three people and

we do not know who of them is the wrongdoer, on the basis of the joint liability, all three would have to be liable, and such a solution must be refused.[9]

Another solution in the case of simultaneous causality came to court in the American case Corey vs. Havner in 1902.[10] There were two motorcyclists who were at the same time passing around a horse that had been frightened by strong motorbike sounds, and startled injured the plaintiff. The judge ruled that both defendants in this case bear the same liability because it is not possible to determine what proportion of the harmful outcome each of them has.

Arising of co-liability in cases of simultaneous causality is also admitted by the PETL. In such cases, however, PETL does not accept joint liability, but essentially only several, as it results from the Article 3: 103 (2) as the principle of proportionality: *If, in case of multiple victims, it remains uncertain whether a particular victim's damage has been caused by an activity, while it is likely that it did not cause the damage of all victims, the activity is regarded as a cause of the damage suffered by all victims in proportion to the likelihood that it may have caused the damage of a particular victim.*

When considering the causality, in cases of 'crackling walls' we should acnowledge the fact, that although one particular passage did not immediately cause a particular crack, it contributes to the stress of the building structure, which in the case of repeated actions may cause later cracking or enlargement of existed cracks. Every passage of a heavy goods vehicle can also cause changes in subsoil and these changes may be continuous. At certain time point, when the critical limit is exceeded, cracks will occure. In this case, however, it is not a chain of causes (as in the 'conditio sine qua non' test), that cause A leads to cause B and this caused cause C which caused the harmful consequence X, but independent causes (single passes) A1, A2, A3… cause instability of subsoil (cause B), and this instability leads to static disturbances, which is the detrimental effect X.

In cases of **cumulative causality** (as another type of alternative causality) causality is not present in full force, but only potentially.[11] Bydlinski and Koziol prefer jointly liability of wrongdoers and argue it is better if in cases of unsafe causality possible wrongders and not harmed persons bear the burden.[12] In Germany, there is a solidarity of wrongdoers in such cases expressis verbis established in the BGB, § 830 para. 1, in the Czech New Civil Code this handles § 2915 para. 1, and in Austria it is resolved by a doctrine accepted by judicial decisions of the courts.

If damage arises as a result of shocks, it can be argued that even if a particular crack was caused by a particular passing of a heavy goods vehicle, tdamages would not arise if the structure in question had not been exposed for a long time to similar shocks. If, therefore, the conduct of other entities created conditions for the occurrence of damage, it is not essential which of passing heavy goods vehicles caused the appearance of the damage immediately.

Another way how to correct the paradoxes that would result from 'conditio sine qua non' in cases of alternative causality is using of the NESS (what is a test of factual causation). According to the NESS theory (Richard Wright is the originator), a specific condition is a cause of a specific consequence only if it was a necessary element in a set of current conditions that were sufficient for the occurrence of such a consequence. The use of this test is appropriate in cases of simultaneous causality (when each of the simultaneously acting causes would in itself cause some consequence)

9 VON TUHR, A., cited from DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinsko-pravni spory, p. 152.

10 Henry A. Corey vs. Lud C. Havener. Same vs. A. L. Adams, 182 Mass. 250, 1902.

11 DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 152.

12 KOZIOL, H. Basic questions of tort law from a Germanic perspective, p. 144.

as well as cumulative causality (when at least one of the causes itself would not cause such a consequence).

As already mentioned above, in the case of cumulative causality, the harmful consequence arises from an action of two or more causes, but one of the causes alone can not cause a detrimental effect. It is not essential whether the cumulation occurs through a sequence of causes (ie, a repetitive detrimental effect) or by multiple causes at the same time. A case of cumulative causality will occur not only when two heavy goods vehicles are passing each other near of a threatened building, and this is the reason that vibrations are so intense that walls cracks, but also in the case of a sequence of individual passes that are destructive towards subsoil.

Within the framework of cumulative causality, it is possible to work with a model situation that a harmful consequence would not occur if the physical action was not repeated and at a certain intensity. Although in most cases the passage of a particular heavy goods vehicle does not directly cause a particular crack, such a through passage of a particular vehicle would not cause this damage unless the subsoil has been disturbed by a serie of previous transits. Similarly, cracks would not be increased if there were no subsequent shocks caused by through passages of next heavy goods vehicles after the crack appeared. From this point of view, not only the passage of a vehicle, due to which a particular wall cracked but all previous transits created conditions for the apparent and consecutively increased damage. Therefore all previous transits can be considered as the necessary element in the set of current conditions.

Similarly, it is possible to point to the case which state Hart and Honore: Subjects A and B assembled garbage for a while at the wall belonging to the neighbor C. On one day, this weight caused a destruction of this wall. Thus, in cases of cumulative causality, each of this events can be considered as NESS and should therefore be regarded as a cause, even if such a cause has a minimal effect on the occurrence of the detrimental effect. A possible limitation of liability in such a case is not a matter of factual causality, but the matter of a policy-normative decision.[13]

A different view how to deal with cumulative causality in cases of static disturbances (caused by vibrations and shocks due to the passage of heavy goods vehicles), provides von Kries's **theory of adequate cause**. According to this theory for an adequate cause can be marked just such a condition that significantly affects the existence of a consequence or significantly increases the likelihood of its occurrence. In the light of this doctrine, the mere passing of a heavy goods vehicle throgh towns or villages that does not immediately cause the occurrence of some crack can not be described as an action which significantly affects the occurrence of a consequence, because a harmful consequence arised after several hundreds or thousands of through passage of heavy goods vehicles. According to von Kries, an adequate condition does not have to be one cause, but there can be more causes. For instance, such causes may be specific attributes of the subsoil as well as attributes of buildings that were not designed to withstand without failure certain stress of construction.

An objective criterion for determining an adequate cause is, according to von Kries, the distinction whether other fact ordinarily cause such a consequence (thus, there is an objective generalization possible), or the same fact causes a similar result only rarely, for example by chance.[14] If cracks occurred on many objects standing along the entire stage and a similar situation exists also in other towns or villages, then it is possible to incline towards the statement that the transit of heavy goods

[13] DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 128.

[14] VON KRIES, J. A. Über den Begriff der objectiven Möglichkeit und einige Anwendugen desselben. VjSchr. f. wissenschaftl. Philosophie 1888, p. 200. Quoted according to DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 88.

vehicles, linked-up to other factors (the construction and technical dimensions of the road, state of the subsoil, static dimensiones of objects in question) tend to cause such damages. However, if it is only an objectively increased likelihood of a harmful consequence, (according to von Kries) this can not be considered an adequate cause of harmful consequence.[15]

Hart and Honore lean to similar solution in their example of cumulative causality: Each of the wrongdoers gave a small dose of poison to the injured person. This dose on its own, can not have a significant effect after a drink, but a certain multiple of such a small dose may cause death. In this case a separate procedure each of wrongdoers does not increase the risk of death, because it can not be presumed that other individuals would have given additional doses of poison to the beverage in question independently of each other.[16] It may be argued that the application of this method of thinking in the 'cracked walls' case is not entirely adequate, since in the case in question it is liability for the culpable behavior and the assumption of liability being based on the knowledge that there is a possibility of a harmful consequence. In the case of transit of heavy godds vehicles through towns and villages the cumulative causality can not be eliminated by the fact that the operator is not aware that his (her) means of transport is only one of many that produce externalities. In addition, in the case of strict liability, the assessment of such a knowledge is irrelevant.

Legal systems apply an 'all or nothing' rule that leads to two results – either the damaged subject is able to prove the existence of a causal nexus and will receive full compensation or does not prove that existence and will get nothing. However, the application of this rule appears to be problematic in legal disputes where the causal relationship is more or less likely.[17]

As far as determination of causal nexus is concerned, different rules are laid down in this respect in different countries. In the Slovak or Czech Republic, the causal link should be demonstrated with certainty. Here, I can point out the decisions R 21/1992 and 25 Cdo 168/2003, where the Supreme Court of the Czech Republic stated that: *The causal link between the culpable wrongful act of the defendant and the damage to health must be safely proved; the probability is not enough.* „

On the other hand, however, there are also decisions that allow the determination of causality based on probability. For example, the decision of the Czech Supreme Court 25 Cdo 1628/2013 states that: … *the experts quoted the probability of 70% to 80% are sufficient to conclude about the causal link between wrongful proceedings of the defendant and the death of the injured person.*

The causal relationship between static disturbances and the operation of a particular heavy good vehicle can therefore be analyzed through the prism of **hypothetical causality**. Two approaches are possible here:

(a) If the cause A immediately caused the damage, then following causes (causes B, C, D…) are irrelevant to the emergence of liability, in spite of this that if there was no cause A and the damage would cause any of the following causes.[18]

(b) On the other hand, in the PETL Article 3: 104 (3) states that: *If the first activity has caused continuing damage and the subsequent activity later on also would have caused it, both activities are regarded as a cause of that continuing damage from that time on.*

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15 For example, if someone is forced to spend a night in an other city because of an accident on the railway line and he (or she) get infected with an infectious disease. See: HART, H. L. A. – HONORE, T. Causation in the law, p. 486. Quoted according to DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilním právu se zaměřením na medícinskoprávní spory, p. 88.

16 HART, H. L. A. – HONORE, T. Causation in the law, p. 492. Quoted according to DOLEŽAL, A. DOLEŽAL, T. Kauzalita v civilním právu se zaměřením na medicínskoprávní spory, p. 88.

17 DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 181.

18 DOLEŽAL, A. – DOLEŽAL, T. Kauzalita v civilnim pravu se zaměřenim na medicinskopravni spory, p. 146.

5 CONCLUSION

It is clear based on the examples provided above that damages resulting from repeated transit of heavy goods vehicles are real and are caused by the specific nature of the operation of the means of transport. The problem is, how to determine the causal nexus. There are several possible approaches that can lead to different outcomes. But it is essential that 'conditio sine qua non' is not the only causality test that can be used in such cases.

If some damage caused by the operation of a means of transport is linked to the operator's strict liability, and such a damage can not be caused solely by one wrongdoer, it is not in accordance with the principles of justice that burden of damage lies with the injured person only, because the damage results from a cumulative action. In these cases, a solution is offered in one of the alternative causality tests. If the use of alternative causality should be rejected on the grounds that such a way of determining causality has no tradition in Slovak or. Czech (or previous Czechoslovak) law, it would be contrary to the fact that the reason why the lawgiver established strict liability of operators of means of transport is that damaged person should get a compensation easily and faster.

One of the tools which provides high level of protection of damaged persons is also the solidarity of wrongdoers. In the case that the defendant operators lose his dispute, it is up to them to identify the other jointly liable operators and apply regress to them. Taking joint liability for heavy goods vehicle operators can appear very strict, as it is unrealistic to identify all the co-liable entities, but in such cases, the owners of homes or road owners are also very vulnerable.

Obviously, strict liability, in conjunction with joint liability and alternative causality, leads to the conclusion that it is possible to lay claim towards any of the subjects who have cumulatively contributed to the damage. If such a conclusion were considered to be absurd, as it could be hundreds, or perhaps thousands of the joint liable operators of heavy goods vehicles in one case, then it would be advisable to resolve this paradox in the frame of preparation of the new Slovak Civil Code.

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Contact information:

JUDr. Norbert Adamov, PhD.
norbert.adamov@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

CONTRADICTORY TENDENCIES IN BANKING SYSTEMS OF THE SLOVAK REPUBLIC AND THE RUSSIAN FEDERATION[1]

Simona Heseková
Comenius University in Bratislava, Faculty of Law

Abstract: The paper analyzes the banking systems of the Slovak Republic under the influence of the European Union legislation and banking system of the Russia Federation from the perspective of opening the banking sector to foreign capital. A fundamental difference between the given legislations, which is reflected mainly in the recent period, lies in the degree of openness of the banking system to foreign capital. While the banking system of the Slovak Republic under the influence of the European Union law can be considered as highly open banking system to foreign capital, the legislation concerning the Russian banking system is characteristic by legal limitation for foreign capital entry. The analysis of these contradictory tendencies which have common goal – to ensure a stable banking system could bring important knowledge that may help in resolving the issue of stability of the banking system at the global level.

Key words: banking system, the European Union, the Slovak Republic, the Russia Federation, foreign capital

1 THE STRUCTURE OF THE BANKING SYSTEM

The structure of the banking system in the different legal systems reflects the position of banks, defines the scope of activities that banks may conduct and determines the role of central banks in the banking system as well as state influence on the banking system. The national banking systems are influenced by the historical development of state legal system and economy, international cooperation and the financial market requirements. According to S. Polouček[2] equally important factors affecting the banking system are e.g.: the political situation of the country, state regulation, legislation created by the Central Bank, monetary stability, degree of development of financial markets, historical development and traditions of the country, religion and international economic situation.[3] The banking system is also influenced by the processes of integration and in terms of selected countries by their participation in the European Union as well. Banking systems are currently highly influenced by the geopolitical situation and the international relationships between countries.

The structure of the banking system may be given by an explicit legal definition or may implicitly come out from legislation without the existence of a direct legal definition. Considering legal definition of banking system, it is important to note, that the Slovak legislation does not comprise such

[1] The chapter was elaborated as an output in the framework of the project VEGA 1/0440/17 entitled " Innovative forms of funds pooling and their transfer" (duration of the project 2017-2019).

[2] POLOUČEK, S. Peniaze, banky, finančné trhy, p. 279.

[3] "All translations from Slovak and Russian language into English are done by the author of the present work unless otherwise noted."

a definition. The structure of the Slovak banking system is closely linked to the definition of the bank which is contained in the Act on Banks and amending certain laws No 483/2001 Coll. (hereinafter only „Act on Banks"). According to the Act on Banks "*a bank is a legal person established as a joint stock company with a registered office in the territory of the Slovak Republic, classified as a credit institution in Article 4(1) point 1 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26th June, 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, and operating on the basis of a banking authorization. A bank may not have any other legal form*." A banking authorization is an authorization issued to carry on any or all of the banking activities listed in the Act on Banks, in the scope specified in that authorization and under the terms and conditions stipulated by Act on Banks and separate regulations The granting of banking authorizations falls within the competence of competent supervisory authority – Národná banka Slovenska (the Central bank of the Slovak Republic). Only a bank under the banking authorization issued by the Národná banka Slovenska may conduct banking activities such as for example taking deposits and providing loans using repayable funds obtained from other people on the basis of a public offer or the provision of payment and settlement services or investment activities. The bank in the Slovak legislation plays an important role in the banking system, which is determined by an exclusive opportunity to conduct certain activities. Conduct of these activities is characterized by state intervention aimed at protecting bank consumers. This characteristic feature is typical not only for the Act on Banks, but also for other legislation considering the banking system in the Slovak Republic. From theoretical point of view based on the above stated we could define the Slovak banking system as system, which consists of the Narodná banka Slovenska, banks, foreign bank branches and representative offices of bank. The representative office of bank is an organizational unit of bank that promotes the bank's operations abroad or gathers information about the possibilities of economic cooperation abroad. A representative office of bank may not conduct banking activities or do business in any other way.

In contrary to the Slovak legislation, the Russian legislation contains an explicit legal definition of the banking system. The current definition of the Russian banking system under the recent changes reflects a long development of the Russian economy and the legal system.[4] According to V.I. Zalogina „*The banking system is an indispensable part of the monetary and financial system of the Russian Federation. The banking system in the Russian Federation ensures the circulation of money, which is essential to the functioning of the financial system as a whole.*"[5] Under the current legal definition contained in the Federal Act on Banks and banking activities N. 395-1 of the Russian Federation (hereinafter only " the Act on Banks") [6], the banking system of the Russian Federation consists of the Central Bank of the Russian Federation, credit institutions (banks) and representative offices of foreign banks. Primarily legal definition of the banking system in the Russian Federation reflects the most dynamic recent changes in the structure of the Russian banking system. These changes lie in restrictions towards entry of foreign capital to the Russian banking system.

4 According to the author Shestakov was "the banking system of the Russian Federation set up in the present form in 1990 with the adoption of the Act on Banks and banking activities and Act the Central Bank of the Russian Federation." SHESTAKOV, A.V. Bankovskaja sistema RF, p. 29.

5 ZALOGIN, V.I. Bankovskoje pravo, p. 20.

6 Federalnyj zakon N 395-1 "O bankach i bankovskoj dejateľnosti"

2 THE FOREIGN CAPITAL IN THE BANKING SYSTEM

The banking system may be classified according to its degree of openness to foreign banks. From this point of view, it is possible to distinguish highly open banking system, and banking system with greater limitations for foreign capital entry. In terms of openness of the banking system play an important role conditions for conduct banking activities for foreign banks which are stipulated by the national law. From that point of view, it's important to take into consideration: i) within the European Union principle of a single passport which increases the level of banking systems openness, as well as ii) the principle by which the requirements for the conduct of bank activities for foreign banks should more or less comply with the requirements stipulated for domestic banks. In terms of the banking system openness, the process of granting a banking license, and determination of requirements for the conduct of bank activities, the author agrees with opinion that an open banking system can contribute to the stability of the banking system at the global level under several conditions concerning the stability of national banking systems or effective supervision are met. [7] It is possible to agree with an opinion that the banking system is often said to act as the nervous system of an economy. Under certain conditions, the failure of a single bank can prompt depositors to flee from otherwise sound institutions and precipitate a collapse of the system. Therefore, opening the banking sector to foreign capital is a delicate operation that involves more complicated policy considerations than opening of other service or goods sectors.[8] Mainly from a perspective of the banking system openness we can see the most antagonistic tendencies in recent changes in banking systems of the European Union and Russian Federation.

In terms of openness of the banking system, the Slovak banking system can be considered as highly opened banking system. "*Dependence on foreign developments on financial markets it is enhanced by the fact that Slovak banks are mostly owned by European banking groups.*"[9] The specifics of Slovak banking sector is the fact that the most of Slovak banks are owned by parent companies established in other European Member States. More than 90% of bank assets are owned by foreign companies. In the terminology of banking directives, the Slovak Republic is in host Member State position. [10] Undoubted influence on the degree of openness of the Slovak banking system has membership of the Slovak Republic in the European Union. The impact of European law to the openness of the banking system is reflected in the basic principles of the European Union and especially the principle of a single internal market.

The establishment of common or single market has been the cornerstone of the European integration since its inception in 1957.[11] The openness of the Slovak banking system to foreign banks was highly influenced by the idea of single passport. This idea is based on the principles of mutual recognition and the "single passport", a system which allows to financial services operators to be

7 CARNEY, M. The future of financial reform. Bank of England, Spechees and articles. 2014. available at < http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech775.pdf>.

8 MARTINRZ-DIAZ, L. Banking Sector Opening: Policy Questions And Lessons For Developing Countries. Brookings. 2007. available at <https://www.brookings.edu/research/banking-sector-opening-policy-questions-and-lessons-for-developing-countries/>.

9 JURČA, P. – RYCHTÁRIK, Š. Slovenský bankový sektor z makroprudenciálnej perspektívy. In Biatec, pp. 2–8.

10 PENZEŠ, P. Banková únia z pohľadu hostiteľského štátu. In Collection of the Papers from the international scholastic conference "Bratislava Legal Forum 2013", p 183.

11 MARINIELLO, M., SAPIR, A., TERZI, A. The long road towards the European single market. Bruegel publications, 2015, available at <http://bruegel.org/2015/03/the-long-road-towards-the-european-single-market/>.

legally established in one Member State to establish/provide their services to the other Member States without further authorization requirements. The financial crisis which evolved and turned into the Eurozone debt crisis strengthened tendencies of the European Union toward deeper integration of the banking system. The idea of deeper integration of the banking system appeared as the main solution to the situation caused by the financial crisis and resulted in creations of the banking union.

The deeper integration of banking system through creation of banking union should i) ensure banks are robust and able to withstand any future financial crises, ii) prevent situations where taxpayers' money is used to save failing banks, iii) reduce market fragmentation by harmonizing the financial sector rules, iv) strengthen financial stability in the euro area and the European Union as a whole.[12] Banking union is perhaps the most transformative institutional response to the crisis experienced by the euro area in the last few years.[13] One of the mains building blocks of banking union is the Single Supervisory Mechanism.[14] The Single Supervisory Mechanism as a new system of financial supervision is the direct outcome of the recent financial crisis which has shown how quickly and forcefully problems in the financial sector can spread. From the wider perspective the Single Supervisory Mechanism follows the idea of single passport based on the mutual recognition of banks from other Member States and equivalence of their prudential supervision which has been the key element in opening up the borders. The Single Supervisory Mechanism comprises the European Central Bank and the national competent authorities (hereinafter only "NCAs") of mainly euro area countries, including the Slovak Republic. The basis of the Single Supervisory Mechanism is a cooperation between the European Central Bank and NCAs, with Národná banka Slovenska operating as the NCA in Slovakia. For the purposes of the Single Supervisory Mechanism, banks (credit institutions) are categorized into "significant" and "less significant" institutions, with the European Central Bank directly supervising significant banks, while NCAs are in charge of the supervision of less significant banks. On that basis, the following banks in the Slovak Republic were categorized as significant: Tatra banka, Všeobecná úverová banka, and Slovenská sporiteľňa. Other banks in the Slovak Republic that are under direct European Central Bank supervision, in addition to the three most significant institutions, are Československá obchodná banka and ČSOB stavebná sporiteľňa, which are members of the KBC Group, and Sberbank Slovensko, a member of Sberbank Europe AG. The European Central Bank is directly supervising these banks owing to the significance of the groups of which they are part.[15] As a response to the question whether existence of the banking union would prevent future financial crisis, is according to the Governor of Národná banka Slovenska, Mr. Jozef Makúch, necessary to continue in harmonization of rules for banks that are part of the Single Supervisory Mechanism in order to achieve a stage where conduct of bank activities are not affected by national arrangements and interests. More precise rules for banks, improvement of their risk management, better cooperation between supervisors are essential elements of the bank-

12 Council of the European Union, "Banking Union", Consilium Europa, available at <http://www.consilium.europa.eu/en/policies/banking-union/>.

13 VERON, N. Europe's radical banking union. Bruegel publications, 2015, available at <http://bruegel.org/2015/05/europes-radical-banking-union/>.

14 For the second pillar of Banking Union (so-called Single Resolution Mechanism) see ČUNDERLÍK, L. Financial Implications of Mandatory Contributions of Bank Entities in Times of Financial Crisis in the Context of Banking Union Anticipation. In Legal and Economic Aspects of the Business in V4 Countries – Conference Proceedings, pp. 31–50.

15 List of Slovak banks which are subject to Single Supervisory Mechanism is available at http://www.nbs.sk/_img/Documents/_Dohlad/ORM/BankyAOcp/SSM.pdf

ing union. According to Mr. Jozef Makúch there is no doubt that in the event of a future crisis there will be better conditions to avoid it or minimize its consequences.[16]

According to the Act on Banks, a foreign bank can conduct banking activities through its branch located in the territory of the Slovak Republic under the authorization granted by Národná banka Slovenska. In compliance with the idea of single passport a foreign bank established in a Member State may carry on, through its branch, banking activities in the territory of the Slovak Republic[17] without a banking authorization, if an authorization to perform such activities has been granted to this foreign bank in its home Member State, on the basis of a written statement delivered by the competent supervisory authority of that Member State to Národná banka Slovenska. Certain tendencies to restrict the activities of foreign banks in the Slovak Republic were associated with the special mortgage transactions in the first half of 2013. Under the Act on Banks 'mortgage transaction' means: a) the provision of mortgage loans and the related issuance of mortgage bonds; b) the provision of municipal loans and the related issuance of municipal bonds by bank.[18] In 2013 the legislative amendment process took place, which in its original wording proposed completely deleted from the Act on Banks the option to perform special mortgage transactions by branches of foreign banks under banking license. Branches of foreign banks would not be able to obtain a banking license to perform this activity. The wording of the amendment finally was not accepted and foreign banks either with seat in or outside the European Union have the opportunity to provide mortgage transactions if this activity have authorized Národná banka Slovenska. The argumentation in favor of proposal lied in specific nature of mortgage transaction and complexity of related cross-border legal relations in the overlapping of several national legal systems which complicate conduct of special mortgage transactions by branches of foreign banks. In the Slovak Republic there is a specific nature of special mortgage transactions also connected with the issue of 'state interest subsidy'. The state interest subsidy means a percentage by which the rate of interest set in a mortgage loan agreement is reduced by the state. The state interest subsidy for mortgage loans shall be determined for each calendar year by the respective State Budget Act and shall apply to all mortgage loan agreements in the relevant year. In relation with the state interest subsidy was discussed the question of the adequacy of the provision of such benefits to citizens through foreign banks, as well as question of the different legislation concerning state interest subsidy provided by various countries, which entails potential risks from a legal perspective. [19]

As follows from the stated facts, under the influence of the European Union membership, the Slovak banking system does not contain bigger restriction that would prevent the entry of foreign capital into the Slovak banking system. It is mainly due to the fact, that issues which the European Union faced due to the financial crisis has resulted in deeper integration of the internal market.

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16 MENDEL, J. Rozhovor s guvernérom NBS Jozefom Makúchom: Prípravy únie odhalili nové riziko. In Hospodárske noviny, p. 3.

17 except for the special mortgage transactions and performance of the functions of a depository under a separate regulation

18 Under the Act on Banks a mortgage loan is a loan with a maturity of at least four years and a maximum of thirty years, secured by a security interest established in any domestic real property, including property under construction, and financed, up to at least 90% unless this Act provides otherwise, through the issuance and sale of mortgage bonds by a mortgage bank under a separate regulation, which mortgage banks provide for the following purposes: a) acquisition of domestic real property or any part thereof; b) construction or modification of existing buildings or structures; c) maintenance of domestic real properties; or d) repayment of an outstanding mortgage loan drawn for any of the purposes mentioned in subparagraphs (a) to (c); e) repayment of an outstanding loan drawn for any of the purposes mentioned in subparagraphs (a) to (c), other than a mortgage loan.

19 The explanatory statement to the draft law amending the Act on Banks and amending certain laws No 483/2001 Coll. prepared by the Ministry of Finance of the Slovak Republic in cooperation with the National Bank of Slovakia in accordance with the legislative program of the Government of the Slovak Republic for the year 2013

Completely opposite trend is visible in the legislation of the Russian Federation. In the analysis of recent trends in the banking system of the Russian Federation it is necessary to take into consideration the economic and political aspects of international cooperation between the Russian Federation, the European Union and the United States of America which was reflected mainly in sanctions against the Russian Federation. Since the start of the geopolitical tensions, the Russia Federation has been subject to several rounds of sanctions by developed economies. First, sanctions directed at specific individuals, groups, and companies imposed restrictions on travel and business operations and froze their assets. Later, sanctions aimed at Russia's military, energy, and financial sectors followed. The Russia Federation introduced counter sanctions, banning food imports from sender countries. According to the economic report of the World Bank, sanctions and counter sanctions hit the economy through three channels: (i) Massive capital outflows made the foreign exchange market more volatile and caused a significant depreciation of the ruble; (ii) Financial sanctions restricted access to international financial markets for some Russian banks and firms and made external borrowing very expensive for others; and (iii) The already low confidence of domestic businesses and consumers in future growth prospects diminished further, reducing consumption and investment. Sanctions also started to impact trade flows.[20] The purpose of this article and its questions will not be concerned with deeper and more structural analysis of these sanctions but our attention will be fixed on routing of the Russian Federation bank system in term of openness towards foreign investments.

When analyzing the Slovak banking system, it must be taken into account: i) the impact of the European Union law, ii) the existence of a single internal market and iii) the creation of the banking union. In the case of the banking system of the Russian Federation, the situation is different. Analysis of the openness of the Russian banking system to foreign capital is based on the legal definition of the banking system. Under the current legal definition contained in the Russian Act on Banks, the banking system of the Russian Federation consists of the Central Bank of the Russian Federation, credit institutions (banks) and representative offices of foreign banks.[21] Changes in the legal definition of the Russian banking system reflect the extensive changes in the banking system of the Russian Federation in terms of its openness to foreign capital. Probably one of the most important changes in the Russian banking sector is connected with the possibility of foreign banks to conduct their activities through their branches on the territory of the Russian Federation. Until the amendment to the Act on Banks in March 2013, which changed the structure of the banking system largely, the banking system of the Russian Federation consisted of the Central Bank of the Russian Federation, credit institutions, branches and representative offices of foreign banks. The amendment to the Act on Banks has excluded the branch of foreign banks from the list of subjects enshrined in the legal definition of the Russian banking system. By this step the bank possibility to provide services in the Russian Federation through the establishment of a branch was ultimately concluded.[22] The form of representative office of foreign bank remained part of the banking system, but since representative office of foreign bank has a similar character as it has in the Slovak legislation, this form

[20] THE WORLD BANK IN THE RUSSIAN FEDERATION. Russia economic report, World Bank org., 2015, available at <http://www.worldbank.org/en/country/russia>

[21] Until 1996, till the adoption of the amendment to the Russian Act on Banks, the banking system of the Russian Federation under the legal definition consisted of the Central Bank of the Russian Federation, the Bank for Development and Foreign Economic Affairs, Sberbank, credit institutions, branches and representative offices of foreign banks. Significant portion of the shares of the Bank for Development and Foreign Economic Affairs and Sberbank were owned by the Central Bank of the Russian Federation.

[22] The relevant amendment to the Act on Banks is linked to March 2013.

is not relevant when considering possibility to conduct banking activities. A representative office of a bank in Russian Federation, as well as in the Slovak legislation, is just an organizational unit of a bank that promotes the bank's operations abroad or gathers information about the possibilities of economic cooperation abroad. A representative office of a bank may not conduct banking activities or do business in any other way. The possibility of Russian banks, which have a banking license from the Central Bank of the Russian Federation, set up branches or subsidiaries in the territory of other states remained unchanged. The exclusion of branch of foreign bank from legal definition thus has affected only branches of foreign banks in order to prevent foreign banks to provide banking services through the establishment of a branch on the territory of Russian Federation. To achieve this goal, the legislature chose a simple process by which removed the term "branches of a foreign bank" (filialov innostrannych bankov) from the entire text of the Russian Act on Banks. This legislative change represented a relatively simple intervention to the text of the Act on Banks, which, however, had a substantial influence and it is reflected in the different conception of the structure of the banking system in the Russian Federation.

In order to support this legislative steps several Russian authors pointed out that the ability of foreign banks to perform banking activities in the territory of the Russian Federation through its branches may cause a significant imbalance in the banking sector, and distort competition. The reason lies in the fact that branches of foreign banks, unlike subsidiaries did not fall completely under the control of regulatory authorities in the Russian Federation and thus they are not bound by the conditions laid down by Russian legislation concerning the creation of the capital requirements, reports to the Central Bank of the Russian Federation and etc. In light of aforesaid and with reference to the development strategy of the banking sector and its stability, we can find the opinion that "*the establishment of branches of foreign banks in the Russian Federation at the present stage of development of the banking system could be considered as premature*"[23] In terms of the real impact of this amendment, we meet with the opinion that the adopted amendment in fact did not bring major changes in the conduct of foreign banks in the Russian Federation. Several authors have supported this opinion due to the fact that the government of the Russian Federation in agreement with the Central Bank of the Russian Federation had the opportunity to establish allowable quota for participation of foreign capital in the banking system. After exceeding this quota, the Central Bank of the Russian Federation did not issue a banking license. Due to these facts, foreign capital was presented in the banking system of Russian Federation only through subsidiaries. [24]

The issue of opportunity for foreign banks to carry out their activities in the Russian Federation through branches was highly debated especially when entering the Russian Federation to the World trade organization (hereinafter only „WTO"). In the course of entering the Russian Federation to the WTO as the most important appeared the question of the country's integration into the world economy in terms of achieving a balance between effective use of banking institutions internationally and preserving the sovereignty of the national banking system. Several experts in this field emphasized the advantages and disadvantages of a massive entry of foreign capital to the banking system of the Russian Federation. Arguments for the presence of foreign capital in the Russian banking system consisted in the fact that the influx of foreign capital can be seen as an important

[23] FINMARKET.RU. Senatory zakreplili zapret na otkrytie v Rossi filialov inostrannych bankov, In: Finmarket-Novosti, 2013, available at < http://www.finmarket.ru/news/3252415/>.

[24] NOSKOVA, E. Sovet direktorov segodnja odobril pravitelstvennyj zakon, zapreshhajushhij otkryvat filialy inostrannych bankov v Rossii. In Rossijskaja gazeta, 2013, available at <https://rg.ru/2013/03/18/filial.html>.

factor in the development of the banking sector, given the fact that foreign investment provides access of modern technologies and new financial products to the banking market, improve culture of corporate governance in credit institutions, promotes competition between credit institutions and improve modern banking. Ultimately, however, outweighed the disadvantages associated with the entry of foreign capital in the Russian banking system. Between arguments against foreign capital entry belong the risk of high dependence of the development of the Russian economy on international markets, unequal conditions for foreign bank branches which can lead to the reduction of competitiveness of Russian banks, inflation risk, inefficient supervision of foreign banks branches, which could lead to destabilization of the banking system of the Russian Federation.[25] Several authors have pointed out the need to maintain control over the activities of foreign providers of financial services in the internal market. One of the main arguments consisted in the statement according which, despite the existence of advantages of functioning of foreign financial institutions in the banking system, the massive income of foreign capital may lead to increased interdependence of national economies in different countries and their higher sensitivity to the global financial crisis, strengthening of capital volatility and final destabilization of the banking system.[26] In the course of negotiations on the accession of the Russian Federation to the WTO finally outweighed the negative aspects of an influx of foreign capital to the Russian Federation and the fear of the fact that Russian banks will not be able to cope with competitive pressure. In the light of stated arguments, the exclusion of the possibility to establish branches of foreign banks in the Russian Federation took place. According to the explanatory statement to the Acts on Banks, the Act as amended is in compliance with all requirements stipulated by the WTO for the Russian Federation.

All these changes concerning banking system in the Russian Federation had also support in document called "Strategy for the development of the banking sector of the Russian Federation until 2015"(hereinafter only "Strategy") issued by the Russian government. According to the Strategy "*The banking sector during the second half of 2010 after the economic crisis, returned to a gradual development. Although the consequences of the crisis will have impact on banking system for a long time, the state of the banking system is stable. This creates conditions for further increasing the role of credit institutions in improving the efficiency and competitiveness of the Russian economy. The main content of a new stage in the development of the banking sector should be improvement of the quality of bank assets, including the expansion of banking products and services, increase of the long-term efficiency and sustainability of the business of credit institutions.*"[27] One of the main objectives to which the Strategy refers is to ensure financial stability, while at the same time the Strategy declares that the solution to the problems in the banking system will require substantial changes in the conditions of its operation and may lead to a change in its structure. In the part dedicated to licensing and regulation of foreign capital, the strategy pays attention to the issue of the participation of foreign capital in the banking system of the Russian Federation.

Participation of foreign capital in the banking system of the Russian Federation is closely connected with quotas set by legislation. The issue of quotas for the participation of foreign capital in

25 ZAVALNYJ, P. N., IGOREVIČ, R. I. Rol i mesto inostrannych bankov v bankovskoj sisteme Rossijskoj Federacii. In Science forum, 2015, available at <http://www.scienceforum.ru/2015/pdf/10056.pdf>.

26 ANATOLEVNA, I.J. Roľ innostrannogo kapitala v razvitii nacionalňoj bankovskoj sistemy RF In: Elektonnyj nauchnyj zhrunal- Sovremennye problemy nauki i obrazovanija, 2014, available at <http://www.science-education.ru/ru/article/view?id=13938>.

27 Zajavlenie Pravitelstva Rossijskoj Federacii I Centralnogo banka Rossijskoj Federacii o Strategii razvitija bankovskogo sektora Rossijskoj Federacii na period do 2015 goda

the Russian Federation is another aspect which has a significant impact on the openness of the Russian banking system. As mentioned above, the current legislation does not allow the establishment of branches of foreign banks in the Russian Federation. The possibility for entry of foreign capital to the Russian banking system in form of subsidiaries was limited by additional conditions for and also by the quota fixed for allowable amount of foreign investments in the banking system.[28] This quota was calculated as the ratio of total capital that belonged to foreign investors in credit institutions with a total share capital of credit institutions incorporated in the Russian Federation. The Central Bank of the Russian Federation after reaching the quota stopped issuing banking licenses for credit institutions with foreign investments. Similarly, in case of quota had been overrun, the Central bank of the Russian Federation had the right to veto the transfer of shares, interests of existing credit institutions in favor of foreign parties. As well as removal of the possibility of foreign banks to carry out its activities in the Russian Federation through its branches, determination of the quota for foreign capital in the Russian banking system was discussed already at the entrance of the Russian Federation to the WTO. The Russian Federation persisted on the need to determinate the quota for foreign capital. On the other hand, the Russian Federation had promised to eliminate some discriminatory requirements to subsidiaries of foreign banks.[29]

A major shift in the Russian legislation occurred in 2015, when the quota regulating the amount of foreign capital in the banking system Russian Federation was directly specified in the Act on Banks. The Central Bank of the Russian Federation declares that the changes were made in accordance with the agreements made in the course of accession of the Russian Federation to the WTO. [30] Likewise, pursuant to the explanatory statement to the Act on Banks, explicit incorporation of the quota in the law is in accordance with the Russian negotiations on the accession of the Russian Federation to the Organization for Economic Co-operation and Development (hereinafter only "OECD"). OECD requires that legislation of the Russian Federation is characterized by transparency. The requirement for legislation transparency was main reason why the quota needed to be explicitly incorporated in legislation. Under the current legislation, the maximum size of foreign capital in the total capital of credit institutions licensed to conduct banking operations is set at 50%. If the quota is exceeded, the Central Bank does not issue banking license to bank or reject to give permission for increment of basic capital of bank. The methodology of calculating the amount of foreign capital in the Russian banking system is regulated by the Central Bank of the Russian Federation in the form of announcement. The Russian Central Bank shall publish by 15 February of the current year an information what is the amount of foreign capital in the Russian banking system.[31] Despite the fact that one of the arguments in favor of reduction of impacts of foreign capital in the banking system was that foreign capital might have negative consequences for the competitiveness of Russian banks, according to several experts the low competitiveness of Russian banks is mainly caused by the presence of state ownership in the banking system. Banks continue to make up a disproportionate share of Russian financial system. Although the Russia Federation had 827 banks with a valid license on March 1, 2015, the sector is dominated by state-owned banks, particularly Sber-

28 ZALOGIN, V.I. Bankovskoje pravo, p. 87.

29 SEREJEJEVICH, M.L. Bankovskaja sistema Rossii pri vstuplenii v VTO: problemy i perspektivy.In: Politematicheskij setevoj elektronnyj nauchnyj zhurnal Kubanskogo gosudarstvennogo agrarnogo universiteta, 2012.

30 BANKI.RU :CB: Dolja inostrannogo kapitala v bankovskom sektore RF, raschitannaja po novym pravilam, — 13,44%, Banki.ru, 2015, available at http://www.banki.ru/news/lenta/?id=8685519.

31 The size of participation of foreign capital in the Russian banking system on January 1, 2016 was estimated by the Central Bank of Russian Federation in the size of 13.44%.

bank and VTB Group. Six out of the eight largest banks in terms of assets in the Russian Federation are state-controlled, and the top five held 53.7 percent of all bank assets in the Russian Federation as of March 1, 2015. The role of the state in the banking sector continues to distort the competitive environment, impeding the Russian financial sector development.[32]

5 CONCLUSION

The financial crisis and its impact on the banking system of the countries pointed out to the problems of the existence of foreign capital in the national banking systems and the close connection of these systems. At the point of bank systems analysis in the Slovak Republic, under the European Union influence on one side and from the other side the Russian banking system we are witnesses of opposite solutions. The European Union in order to solve these problems and prevent future crises has decided for the way of deeper integration and strengthening of the internal market. The banking union was created, which builds on a joint supervision mechanism as one of the solutions to eliminate the possible cause of a future financial crisis. On the other hand, the Russian Federation has decided to limit the presence of foreign capital in the Russian banking system. In terms of transparency, we can positively judge the explicit enshrining of quotas into the law of the Russian Federation, which can help to increase legal certainty. On the other side, according to several critics, the Russian Federation must face outflow of foreign capital and stated quota rather reduces the competitiveness of Russian banks. The author agrees with the premise according to which the open banking system can contribute to the stability of the banking system at the global level. This premise must be supported by assumptions that lie i) in the same or similarly set conditions to banks [33] ii) the stability of national banking systems, and iii) the effective exercise of supervision over the activities of banks. Due to the short period of time it is not possible to assess whether the more effective direction is the one chosen by the European Union or by the Russian Federation. The author is of the opinion that the analysis of these contradictory tendencies in selected banking systems and their impact on the stability of the banking system in the longer term could lead to important conclusions that may help in resolving the issue of stability of the banking system at the global level.

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[32] U.S. DEPARTMENT OF STATE. Russia Investment Climate Statement 2015, U.S. Department of State publications, 2015, available at http://www.state.gov/documents/organization/241925.pdf.

[33] Mainly in the case of countries which are not members of the European Union.

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Contact information:

JUDr. Simona Heseková, PhD.
simona.hesekova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

THEORETICAL ASPECTS OF PUBLIC ADMINISTRATION ELECTRONIC SERVICES

Jozef Andraško
Comenius University in Bratislava, Faculty of Law

Abstract: The author deals with the issue of public administration electronic services from the theoretical perspective. In particular, author is analysing all elements of the term in question. Furthermore, the author focuses on different types of categorization of public administration electronic services. Moreover, author is dealing with the definition of the term in question from the perspective of Slovak legal order.

Key words: public service, electronic service, eGovernment, public administration electronic service

INTRODUCTION

The targeted and systematic introduction of information and communication technologies (hereinafter referred to as the "ICT") into all relevant areas of social, political and economic life also influenced the public administration. The process of public administration informatization resulted in the creation of the concept called eGovernment. Such a concept can be described as an electronic form of public administration exercise in the application of ICT in the public administration processes.

There are many definitions of the term eGovernment in literature and legal documents on international and national level.[1] Most of definitions approach the eGovernment as introduction of ICT into public administration where public services and information can be provided online through the Internet. However, these definitions often avoid the description of electronic services that are provided by public authorities. Furthermore, it is possible to find opinions in favour of perception of public administration electronic services as electronic services provided within the e-commerce. The concept of e-Government has specific features that cannot be found in the e-commerce and vice versa. Therefore, it is necessary to focus on all elements of the term in question, especially from the perspective of administrative law.[2]

PUBLIC ADMINISTRATION ELECTRONIC SERVICE – DEFINITION

In order to understand the term public administration electronic service, all elements of the term in question have to be analysed separately. Firstly, we will focus on the term service. Secondly, we

[1] More on the issue of the eGovernment definition in: HEEKS, R. Implementing and Managing eGovernment: an International Text, p. 1. See also: PRINS, J.E.J. E-Government and Its Implications for Administrative Law: Regulatory Initiatives in France, Germany, Norway and the United States, p. 7.

[2] More on the issue of the eGovernment in the Slovak Republic see: SOPÚCHOVÁ, S. *Predpoklady fungovania egovernmentu v Slovenskej republike*. In QUAERE 2015, p. 659–668.

will analyse the term public service. Last but not least, we will focus on the term electronic service. Subsequently, the definition of public administration electronic service will be formulated and analysed.

Service

Kotler and Keller define the service as "*any act or performance one party can offer to another that is essentially intangible and does not result in the ownership of anything. Its production may or may not be tied to a physical product.*"[3] Authors of literature consider as characteristic features of service intangibility[4], inseparability and variability.[5] Service is intangible to the effect that it deals with certain act, in particular performance and not as a product in physical form which can be touched. Service inseparability means that the moment of providing and using of most services is the same. Quality of service is connected with its providing, mostly by interaction between consumers and service provider. Service variability means that services of one service provider distinguish from services of another service provider. Furthermore, services can change in the time.

Kotler and Keller add another characteristic element of the term service, in particular perishability. Such an element deals with the fact that services opposed to goods cannot be stored what means that the service has to be available on request.[6]

Public service

In literature occur different perspectives on the term public service.[7] Besides general definitions of the term in question it can be found also the definition of the term public service from the economic as well as from the legal point of view.

Lindgren and Jansson within comparison of public services with services offered by private sector refer to three main differences. Firstly, in the case of public service, public character is evident because public institutions' main task is to serve to the public in the way that is in compliance with public interest. Secondly, public organizations as public service providers are mostly in monopoly position because the list of public services is limited to only one provider and citizens have no other choice (e.g. welfare services). Furthermore, Lindgren and Jansson note that in the case of public services, the entity that is using specific public service cannot be perceived as the customer but rather as citizen that has a right to use service and such a right is protected by law.[8]

3 KOTLER, P. – KELLER, K.L. Marketing Management, p. 356.

4 Scupola challenges the views of the authors that the service must have an intangible character. He states that for example, information, data and knowledge services (so-called information services) may be provided in such a way that data, information and knowledge are recorded on a physical medium and may be provided as a commodity. See: SCUPOLA, A. et al. E-Services: Characteristics, Scope and Conceptual Strengths. In International Journal of E-Services and Mobile Applications, p. 2.

5 PARASURAMAN, A. et al. A Conceptual Model of Service Quality and Its Implications for Future Research. In Journal of Marketing, p. 41–50. ZEITHAML, V. A et al. Delivering Quality Service. Balancing Customer Perceptions and Expectations.

6 KOTLER, P. – KELLER, K.L. Marketing Management, p. 361.

7 The synonym of the term public service is the public administration service.

8 LINDGREN, I. – JANSSON, G. Electronic services in the public sector: A conceptual framework. In Government Information Quarterly, p. 163–172.

According to Sauter are public services considered as services that are provided:

- to public and/or in public interest,
- in unified or regulated manner,
- by entities that are in public possession,[9]

Ochrana defines public service as "*service which purpose is to satisfy public needs while creator, organizer or regulator of provided service is public administration institution.*"[10] Furthermore, Ochrana notes that as characteristic attributes of public service can be considered:

- purpose criterion of service provision is public interest and from this reason is its provision financed from public funds,
- continual character, from time perspective
- universal character, from the perspective of scope of service provision.[11]

From **economical point of view**, we could consider public services as public estate whose consumer is the public. However, according to Peková et. al. is necessary in the case of public service to emphasize that such a service can be characterized by inseparability of production and consumption with direct influence on user of service. Furthermore, public service can be characterized by impossibility of public service ownership what means that user has only right to use public service in question.[12]

From **legal point of view**, it is necessary to distinguish between public service as service relation and public service as specific service provided by public administration.[13] In connection with aforementioned, Pomahač and Vidláková define public service as being in service (civil service) and public service as useful public activity (public service).[14]

Škrobák distinguishes between public services in narrow sense and broad sense from the perspective of **public administration activity**. Public service in narrow sense can be defined as "*provision of specific real service to administrated persons what causes immediate satisfaction of certain needs of persons in question.*"[15] In the case of public services in broad sense, we can consider service in the field of administrative or organizational executions (e.g. administrative acts or other executions that are the result of certain administrative procedure).[16]

Public services can also be considered from **organizational** point of view where administering public administration entity that provides public services will be observed.[17] In this respect, Škrobák states that public services can be provided:

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9 Sauter further states that the last aspect of public service is no longer preferred in modern social states. See SAUTER, W. Public Services in EU Law, p. 11.

10 OCHRANA, F. Veřejné služby – problém vymezení pojmu a standardizace. In Standardizace veřejných služeb jako předpoklad efektivnosti rozvoje region, p. 16.

11 Ochrana later modifies the definition of public services. He states that the public service is: "*such a kind of service to which the consumer (the consumer) is the public as a social entity. Public services are produced, secured or regulated by public authorities.*"

12 PEKOVÁ, J. et al. Veřejný sektor – řízení a financování, p. 29.

13 Čebišová distinguishes between four different alternative concepts of public service. Firstly, she defines public service as a role, a public service mission – a service in the public which becomes the principle and conceptual feature of public administration. Another alternative is the understanding of public service as an object, the content of public administration activities. The term public service also refers to certain authorities or sections of the public administration. Finally, she understands the public service as a sign of a public servant and his legal status. See ČEBIŠOVÁ, T. Veřejná služba na prahu 21. století. In Acta Universitas Carolinae, p. 9–39.

14 POMAHAČ, R. – VIDLÁKOVÁ, O. Veřejná správa, p. 71, p. 208.

15 ŠKROBÁK, J. In VRABKO, M. et al. Správne právo hmotné. Všeobecná časť, p. 41.

16 See SKULOVÁ, S. Princípy dobré správy jako součást modernizace veřejné správy. In Právnik, p. 553–585.

17 More information on issue of administering public administration entities see ŠKROBÁK, J. In VRABKO, M. et al. Správne právo hmotné. Všeobecná časť, p. 11–23.

- *„directly by the state or by other public law corporation through its mechanism,*
- *the state or other public law corporation will establish separate public administration entity which ensures the provision of public services on its own,*
- *public administration entity secures the provision of public services through natural persons and legal entities of public interest.*"[18]

Škrobák also points out that in the case of public services provision, the principle on non-discrimination will be applied. The principle of non-discrimination means that persons cannot be baselessly favoured and decision making regarding provision of specific service has to be continual.[19]

In the light of aforementioned, it is obvious that perspective on the term public service is different depending on the fact in which field the term is used.

Electronic service

There are several definitions of the term electronic service in literature and documents on the international and national level. Some definitions focus on provision of service as such and infrastructure of service provision. Other definitions focus on the process of service creation and service provision.[20]

From the perspective of **service provision and its infrastructure** Javalgi et al. define electronic service as service that is provided by electronic means.[21]

Boyer a et al. define electronic services as *"interactive services that are provided on the Internet by using modern telecommunication, information and multimedia technologies."*[22]

The methodical guideline for the use of professional terms in the field of society informatization *defines the term* electronic service *as "the service provided in electronic form through ICT."*[23]

Scupola defined electronic services from the perspective of process of electronic service creation and provision as *"services that are created and provided and/or used via ICT as systems based on the Internet and mobile solutions."*[24]

In connection with electronic services categorization, Hofacker defines following three categories:

a) electronic services as a complement to services and goods in the physical world (e.g. online reservation of seat in an aircraft),
b) electronic services as a substitute for services provided in physical world (e.g. electronic auction),
c) new electronic services provided only online (e.g. online search through search engines).[25]

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18 ŠKROBÁK, J. In VRABKO, M. et al. Správne právo hmotné. Všeobecná časť p. 43–44.
19 Ibid., p. 42.
20 HOFACKER, C.F. et al. E-Services: A Synthesis and Research Agenda. In Journal of Value Chain Management, p. 13–44.
21 JAVALGI, R.G. et al. The Export of E-Services in the Age of Technology Transformation: Challenges and Implications for International Service Providers. In Journal of Services Marketing, p. 560–573.
22 BOYER, K. et al. E-services: operating strategy – a case study and a method for analyzing operational benefits. In Journal of Operations Management, p. 175.
23 MINISTERSTVO FINANCIÍ SLOVENSKEJ REPUBLIKY. Metodický pokyn na použitie odborných výrazov pre oblasť informatizácie spoločnosti, p. 15.
24 SCUPOLA, A. et al. E-Services: Characteristics, Scope and Conceptual Strengths. In International Journal of E-Services and Mobile Applications, p. 6.
25 HOFACKER, C. F. et al. E-Services: A Synthesis and Research Agenda. In Journal of Value Chain Management, p. 13–44.

In the light of aforementioned definitions, we could consider as the **main features of electronic services**:

- provision through ICT (mainly the Internet)
- direct or indirect use through ICT (mainly the Internet)
- possibility of charging by provider,
- principle of self-service – physical interaction between user and provider is not required.[26]

Regardless of different definitions and characteristics of electronic services, electronic services can be considered as services that are provided through ICT, however at the same time, procedures (within the organization that provides the service) that are intended to its provision have to be took into account.

Public administration electronic services

On the basis of aforementioned conceptual features of the term public administration electronic services we cannot satisfy with the definition of public administration services as public services that are provided through ICT (mainly the Internet).[27]

It is necessary to bear in our mind that provision of public administration electronic services is not always connected with specific output as in the case of e.g. providing primary education or treating the patient. In this respect, public administration electronic services only secure mediation of particular service through ICT (mainly the Internet).

When defining public administration electronic service, it is also necessary to take into account the **position of service user**. Such a user cannot be identified with the customer in the private sector. In this respect, user of public administration electronic services is mainly citizen that has a right to use specific public service, while principle of non-discrimination is applied.[28]

With respect to **entities that provide public administration electronic services**, they are mostly in monopoly position as in the case of public services provided in physical world. The citizen has no option to choose the provider of specific public administration electronic service. Furthermore, we could generally say that providers of these services are administering public administration entities.[29]

For purposes of this paper we can define public administration electronic services as electronic form of communication between natural persons, entrepreneurs, legal entities on the one side and public administration on the other side within use of public services through ICT (mainly the Internet).

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26 ŠPAČEK, D. eGovernment – cíle, trendy a přístupy k jeho hodnocení, p. 4–5.

27 In literature, it is possible to find also terms like eGovernment service, electronic public service, public online service, digital electronic service, and so on. These terms can be considered as synonymous with the term public administration electronic services.

28 In addition to citizens (legal status of natural persons) also natural persons entrepreneurs and legal entities can use public administration electronic services.

29 In the case of some public administration electronic services, e.g. eHealth services, it is possible to provide these services in the public sector as well as in the private sector. Examples of eHealth services are online clinical services (such as consulting with a doctor) and online health information (e.g. helping people take care of their health).

CATEGORIZATION OF PUBLIC ADMINISTRATION ELECTRONIC SERVICES

There are two types of categorization. The first categorization of public administration electronic services is based on the criterion of the interaction level between entities which are involved in the process of using and provision of these services. In order to define specific types of public administration electronic services in accordance with aforementioned criterion it is necessary to focus on **eGovernment development models**.

United nations (UN) defined eGovernment development models in 5 phases. In the first phase, public administration gets on the Internet through creation of official website. In the second phase, public administration is increasing amount of information available on the official websites (user can find e.g. legal acts or can access the database). The third phase is considered as interactive phase where user is allowed to download form, contact public administration bodies through the official e-mail. Online services become more interactive in the third phase. The fourth phase is transaction phase where user can perform transactions (e.g. payment of fees, apply for new identification card of duplicate of birth certificate). Public administration electronic services can be used 24/7. The last phase is based on the full integration of electronic services within whole public administration. This phase involves engaging society in public affairs by creating various web forums or innovative consulting applications.[30]

Authors of literature[31] created various eGovernment development models. One of the first model was created by Layne a Lee (2001) where 4 phases were defined, in particular catalogue phase, transaction phase, phase of vertical integration and phase of horizontal integration.[32] Another model was created by Silcock (2001) and was based on 6 phases, in particular phase of online publication of information, phase of official mutual transaction, phase of multipurpose portal, phase of adjustment of portal, phase of collecting common services and phase of full integration.[33] Zourdis and Thaens (2003) defined besides information phase, interaction phase, transactional phase also the last phase in which the internal structure of the public administration is transformed.[34]

Regardless of differences in the eGovernment development models outlined above, these models also have common features. These features could be summed up for the purposes of this paper in 3 phases of eGovernment development model, in particular the informative phase, the interaction phase and the transactional phase.

In connection with aforementioned eGovernment development models, its structure as well as levels of interaction between entities that are involved in this structure, we could divide public administration electronic services to the following categories:

a) **information public administration electronic services**,

30 OSN: World Public Sector Report 2003. E-Government at the crossroads, p. 139. Available at: https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/World%20Public%20Sector%20Report%20series/World%20Public%20Sector%20Report.2003.pdf.

31 More information about other analyses of eGovernment development models see CHAIKHI, L. et al. E-Government Maturity Models: A Comparative Studies. In International Journal of Software Engineering&Applications, p. 71–91.

32 See LAYNE, K. – LEE, J. Developing fully functional E-government: A four stage model. In Government Information Quarterly, p. 122–136.

33 See SILCOCK, R. What is e-government? In Parliamentary Affairs, p. 88–101.

34 ZOURIDIS, S. – THAENS, M. E-Government: Towards a Public Administration Approach. In Asian Journal of Public Administration, p. 161.

b) **communication public administration electronic services**,
c) **transaction public administration electronic services**.

Ad a) Public administration bodies as providers of public administration electronic services provide information about services through their official websites. The essence of services in question is publishing information online. Users, in particular citizens and entrepreneurs have access to information mostly anonymously what means that direct interaction is absent.

Ad b) Communication public administration electronic services also known as interactive public administration electronic services include beside information public administration electronic services also possibility to access the database of public administration bodies and searching information in such a database. Entities (e.g. citizens and public administration bodies) are interacting within these services (e.g. sending emails, requests, forms, etc.). Interactive public administration electronic services can be one-sided and two-side interactive services. In the case of one-side interactive services users can download the form, however it is necessary to send it physically (e.g. by post). Two-sided interactive services are services where users can download the form and subsequently it can be electronically sent to provider of the public administration electronic service. In the case of interactive services, particularly two-side interactive services, the service provider has to be sure who is he communicating with.

Ad c) Transaction public administration electronic services represent the highest level. These services include both information and communication public administration electronic services and moreover users can make various online transactions with the service provider. An inescapable condition for providing of such services is the ability to access services 24/7. For this reason, it is necessary for the provider of these services to create conditions within the *back-office* internal procedures and the privacy and security conditions. The provider of transactional public administration electronic services has to be sure who is he communicating with, what requires the explicit identification of the entities.[35]

The second categorization of public administration electronic service is based on the concept that public administration electronic services are **public service** that are provided through ICT, mainly via the Internet. It is necessary to point out that many public administration electronic services only mediate the provision of a specific public service in the physical world, while others are a substitute for existing public services. In this respect, we can divide public administration electronic services as:

a) public administration electronic services which mediate provision of a specific public service (e.g. request for a meeting with a representative of the self-governing region). These services only add the existing public services provided in the physical world.
b) public administration electronic services whose result of their use is a specific output (e.g. request for a new identity card). These services are adequate replacement of public services provided in the physical world.
c) public administration electronic services provided only online (search for information in public administration information systems or online certificate revocation).

[35] More on the issue of identification and authentication see ANDRAŠKO, J. Elektronický občiansky preukaz a iné spôsoby autentifikácie pri prístupe k elektronickým službám verejnej správy, In QUAERE 2017, p. 235–244.

The definition of public administration electronic services in slovak legal order

The issue of the eGovernment, especially provision of public administration electronic services is primarily regulated by A**ct no. 305/2013 Coll. on the Exercise of Public Authorities Competences in Electronic Form and on changes and amendments to certain acts** (hereinafter referred to as the "e-Government Act"). The main aim of the e-Government Act is to embody official electronic communication as a primary form of communication between persons (individuals and legal entities) and public authorities as well as between public authorities themselves.[36]

Provisions of e-Government Act apply only to cases when the decision issued is relating to rights, interests protected by law and obligations of natural persons or legal entities. Furthermore, the provisions of e-Government Act are limited to proceedings which result in issuing a decision as an individual legal act.[37]

The e-Government act defines official electronic communication and other institutes necessary for exercise of public authority in electronic form, however the definition of the term public administration electronic services is absent.

The only legal act that is defining the term public administration electronic service is A**ct no. 275/2006 Coll. on Information Systems of Public Administration** (hereinafter as the "ISPA Act"). In accordance with Section 2(1) (s) of the ISPA Act are public administration electronic services defined as *"electronic form of communication with liable parties*[38] *in the handling of submissions, notifications, access to information and their provision or public participation in the administration of public affairs".*

It is necessary to point out that it is clear from the definition of the term public administration electronic services pursuant to the ISPA Act that the term in question does not apply only to decisions relating to rights, interests protected by law and obligations. The term in question defined in the ISPA Act includes submissions, notifications, access to information and their provision as well as public participation in the administration of public affairs. It can be said that in the case of the ISPA Act definition of the term public administration electronic services, there is a wide range of acts that can be done by persons in electronic communication with liable parties.

CONCLUSIONS

The above analysis of the term public administration electronic services, especially its elements revealed some theoretical issues. It is necessary to point out that public administration electronic services have some common features as well as different features with e-commerce services. Both services are provided by ICT mainly through the Internet. However, the position of the provider and the user is different. In the case of public administration electronic services, public

[36] Official electronic communication is defined as electronic communication where the official electronic message which consists of an electronic application and official electronic documents, including attachments, is transmitted.

[37] The e-Government Act applies to public authorities. The term public authority (as institution) is broader than the term public administration authorities. More on terminology and structure of public administration authorities see ANDRAŠKO, J. – ŠURKALA, J. The concept of local self-government in the Slovak Republic. In Administrative law and process, 2015, p. 321–332. Available at: http://applaw.knu.ua/2015-2.pdf.

[38] The list of liable parties is stated in Section 3 (3) of the ISPA Act. These parties are also known as administrators of information systems of public administration.

authority that provides specific electronic service is often in monopoly position because the list of public services is limited to only one provider and citizens have no other choice (e.g. welfare services). Furthermore, public administration electronic services are provided by administering public administration entities which provide such services in public interest. In regard to the position of users, they cannot be confused with customers using e-commerce service. In contrast to e-commerce, users of electronic services provided by public authorities are mainly citizens that have a right to use specific public service, while principle of non-discrimination is applied.

One of the categorization of public administration electronic services is emphasizing the importance of public services. In this regard, public administration electronic services are public services that are provided through ICT mainly the Internet. Some of them only mediate the provision of a specific public service in the physical world, while others are a substitute for existing public services. Furthermore, new types of public services accessible only online were created.

Legal definition of the term public administration electronic services stated in the ISPA Act includes a wide range of acts that can be performed by persons in electronic communication with public administration. However, such a definition is not in compliance with the concept of exercise of public authority in electronic form as regulated in the e-Government Act. It would be appropriate to harmonize the terminology regarding to eGovernment and to avoid duplicate definitions that often overlap.

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Contact information:

JUDr. Jozef Andraško, PhD.
jozef.andrasko@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

AXIOLOGY OF HUMAN RIGHTS. ON THE PREMISES AND DETERMINANTS OF CONTEMPORARY DISCOURSE IN THE PHILOSOPHY OF INTERNATIONAL LAW

Anna Kociołek-Pęksa, Jerzy Menkes
The Main School of Fire Service, The Faculty of Civil Safety Engineering
Warsaw School of Economics, Collegium of World Economy

Abstract: Considering the pluralism of the axiological sources of human rights, we claim that it is necessary to realize that we are facing at the moment an analytic extension of both the "number" of human rights (appearance of new generations of human rights), as well as the "quantitative quality" of human rights due to newly uncovered axiological sources such as the appearance of new values or a redefinition of existing ones. In the presented context of the axiology of human rights and the axiology of their protection, it is easy to observe the axiological pluralism of the two spheres as well as numerous attempts to make the exegesis and interpretation both relative and instrumental[1] in a domestic, European, and international sphere. Attempts to limit human rights in a camouflaged manner in the jurisdiction practice of particular states are quite abundant and an axiological justification of legal solutions that would make the implementation and protection of those rights (in particular those of the third, fourth and fifth generations) ineffectual—*de facto* (not *de iure*, since from a formal and legal point of view they correspond to declared rights and, without exception, the protected ones) is the guarantee of community security and, paradoxically, the protection of other people (i.e., the protection of religious sentiments, family, public morality based usually on the rules of the dominant religion). When transposing these problematics from the state perspective to the intra- and trans-state level, we need to demonstrate that in the international law of protection of human rights, limitation of these rights may also take place as a result of extra-normative factors due to so-called "instrumental relativism"[2], applied in the function of current political interests for which intrinsic human dignity happens to be infringed. We also claim that the active factor of that critical crossing point is not faults in the law or its interpretation, nor is it faults of ethics, but rather the faults of what is going on within so-called *Realpolitik*[3].

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1 Instrumentalisation of the law has two meanings: a neutral notion, and the notion biased by judgement (political instrumentalisation). The instrumentalisation of the law can be performed by: the legislator, the interpreter, the subject applying the law and legal doctrine. Typical forms of instrumentalisation of the law are made on account of law-external and law-uncoordinated goals, or by reinterpretation of norms (especially norms-rules) or of ideological assumptions of the system. We may also distinguish instrumentalisation exerted by infringement of norms defining the system of making and applying the law (infringement of institutional values of the system).

2 This term is used by J. Zajadło. Among the kinds of limitations on human rights we count the use of torture on terrorists to extract information apt to save the lives and health of citizens of a given country or on kidnappers to draw out information on the location of the victim. ZAJADŁO, J. Uniwersalizm praw człowieka w konstytucji – bezpieczne i niebezpieczne relatywizacje. "Przegląd Sejmowy" 2007, no. 4, pp. 98, 102 and next.

3 This idea is presented in ZAJADŁO, J. Po co prawnikom filozofia prawa? Oficyna a Wolters Kluwer business, Warszawa 2008, p. 134. A distinct view is presented by M. Bothe, who in his comment on the Kosovo intervention, wrote: "When it comes to a collision between the law and ethics, then something must be wrong, whether with the law or with the ethics". BOTHE, M. In WALL, A.E. (ed.) Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies, Vol. 78, Naval Law College, Newport, Rhode Island 2002, p. 427. Quoted after J. Zajadło, therein, footnote no. 124.

Key words: international law of human rights, new generations of human rights, axiological foundation of human rights, legal philosophy of human rights protection, political philosophy

Inseparable from the axiology of human rights[4] is the identification of the human being as the subject of the law[5]. In the normative perspective, it is assumed that a human being is the subject of the law only within the range of legal subjectivity granted by legal norms[6] while his/her rights as a human are universal[7] and inalienable and cannot be in any aspect conditioned by legal subjectivity. At the same time, the nonnormative perspective assumes that a human being, an individual, is the subject of international law and the international law of human rights *per se*. The road to this axiom goes from Professor Berezowski's ideas (one who is not the subject of international law is its object, which *a contrario* led to the conclusion that a human being is the subject of the international law[8]) to as far as the conviction stemming from the experience of the "destruction" of Scelle's concept that a human being is the only subject of international law (while the state is his legal agent)[9]. According to this latter view, a human being[10] constitutes in the eyes of the state and of the legal order, an autotelic value-goal, the same as in moral philosophy, and it is a good worth pursuing, nourishing, and protecting. To avoid discussion about the justification for special treatment of a human being by the law, every legal and political concept should be based on a comprehensive but culturally neutral, axiological definition of a human being[11]. In the system of international law of human rights, a human being becomes the subject of legal protection in a way exempt from any ex-

4 Obviously, there are many concepts and definitions of human rights and some authors even attempt to formulate a multidiscipline synthesis in their definitions of human rights; for more, see WAŚKIEWICZ, H. Prawa człowieka, pojęcie, historia. "Chrześcijanin w świecie" 1978 (10, Nos. 3–4.). See also: Franciszek J. Mazurek, who formulates his own definition after a thorough analysis of the ways of understanding human rights. In his view, "(…) human rights [are] (…) all the subject rights, beyond-systemic—natural—read from the inherent dignity of a human being with its correspondent duties; which are proclaimed in Constitutions and international law, taking the form of positive laws without losing anything of their natural character of moral law, they distinguish themselves by universality, inalienability and dynamics, responding to human dignity and protect it both vertically and horizontally", MAZUREK, F.J. Godność osoby ludzkiej podstawą praw człowieka. Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego. Lublin, 2001. p. 195.

5 The legal-theoretical literature seeks an answer to the question whether the subject of the law is a human being or a natural person. For more, see CHAUVIN, T. Osoba fizyczna czy człowiek? Kilka refleksji na temat podmiotu prawa. "Principia" LXI–LXII (2015), pp. 123–139. Doi: 10.4467/20843887PI.15.007.5536. See also: CHAUVIN, T. Homo iuridicus. Człowiek jako podmiot prawa publicznego. Wydawnictwo C.H. Beck. Warszawa, 2014. A natural person is a model vision of a healthy, adult human being who expresses his will freely and consciously. See BROŻEK., B Pojęcie osoby w dyskusjach bioetycznych. In STELMACH, J. – BROŻEK, B. – SONIEWICKA, M. – ZAŁUSKI, W. Paradoksy bioetyki prawniczej. Wydawnictwo Wolters Kluwer. Warszawa, 2010, p. 52.

6 This conviction is reconstructed on two concepts: naturalistic and normative. See BOSEK, L. Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne. Wydawnictwo Sejmowe, Warszawa, 2012, pp. 271–274.

7 An array of documents produced during the UN's work and stemming from reports of the High-Level Panel from 2004, from the UN General Secretary on the 21st of March 2005, and from the World Summit of the 15th of September 2005, contain the standpoint confirming the thesis of the universal character of human rights.

8 BEREZOWSKI, C. Les sujets non souverains du droit international. Recueil de cours. Academie de droit international 1938 (III), Vol. 65, pp. 6–82, in particular pp. 14–20.

9 SCELLE, G. Manuel de droit intenational public. Paris 1948.

10 The equivalent for the word "man" in international documents on human rights is the expression "human being" or "human person", often treated as substitutes, which probably can be explained by the translation from the original languages of those texts.

11 So: BARANKIEWICZ, T. Filozoficzne uzasadnienie praw człowieka w kontekście procesu globalizacji. In STELMACH, J. (ed.). Filozofia prawa wobec globalizmu. Wydawnictwo Uniwersytetu Jagiellońskiego w Krakowie. Kraków, 2003, p. 52 and next; CHAUVIN, T. Osoba fizyczna czy człowiek? Kilka refleksji na temat podmiotu prawa. "Principia" LXI–LXII (2015), p. 128. Doi: 10.4467/20843887PI.15.007.5536.

ception[12] in the formal and legal aspect. Within competing, or even antonymic values (i.e., freedom and security), that sit at the foundation of human rights and the system of protection of those rights, it is indispensable for international law actors to maintain constant efforts aimed at the achievement, guarantee and protection of a homeostatic balance between the implementation of the values and laws in the system of protection of human rights. This homeostasis should be maintained both in relation to the axiological foundation of human rights and the legal system of their protection *in genere*, as well as with respect to particular legal institutions of protection *in specie*. Considering the pluralism of the axiological sources of human rights, it is necessary to realize that we are facing at the moment an analytic extension of both the "number" of human rights (appearance of new generations of human rights), as well as the "quantitative quality" of human rights due to newly uncovered axiological sources such as the appearance of new values or a redefinition of existing ones. In the field of philosophy of the law, and in the philosophy of international law in particular, it has been demonstrated that particular generations of human rights may be selected based on a criterion of the implementation of given ideas/values. Thus, the first generation of human rights came from the value of personal dignity and freedom, which it is supposed to implement to the greatest extent. The second generation focused on the value of equality—distributive and compensating justice. In the case of the third generation of human rights, the goal (after the end of the Cold War) was the accomplishment of the idea of solidarity[13]. The next one, shaped also in the 20th century, was the fourth generation of human rights[14] also called "new human rights"[15], which stems from the idea of tolerance for individuals belonging to defined social minorities (religious, ethnic, sexual orientation, etc.). According to Zajadło, however, we may very well distinguish a fifth generation of human rights whose source is a specifically /untraditionally comprehended human dignity. He believes that this dignity stems from the psycho-physical structure of every man as well as from biochemical and neuronal-cognitive processes taking place in the human brain. Thus, we consider the source of the fifth generation of human rights to be the findings of research on human dignity made in contemporary biojurisprudence that perceives a human being as a person[16]. The percep-

12 To indicate that these are subject rights requires for them to be distinguished from object rights. For more on that distinction in the international protection of human rights, see WAŚKIEWICZ, H. Prawa człowieka, pojęcie, historia. "Chrześcijanin w świecie" 1978, p. 14–20.

13 We are leaving aside the original, political motives of the concept of human rights of the third generation, which came from the East-West confrontation and were aimed at weakening the human rights of the first generation through the help of developing countries and UNESCO. And even though the original goal was dishonest, these rights (more for collectives than individuals) developed as complementary to human rights of the first and second generation.

14 We can encounter as well, a restricting and reductive comprehension of the fourth generation of human rights, postulated mostly by Catholic thinkers who reduce these generations of rights solely to the protection of the right to life for all human beings without any distinction, from the moment of conception to natural death (without precepting, however, the use of aggressive life-maintaining therapies). This new generation in the evolution of human rights is a response to the dynamic progress in bio-medical technologies that interfere deeper and deeper with the structure of human life at its very core. For more, see COMPAGNONI, F. Prawa człowieka. Geneza, historia i zaangażowanie chrześcijańskie. Wydawnictwo WAM. Kraków, 2000, pp. 265–270.

15 For more on that still-unrecognized new category of human rights, see CLIFFORD, B. Introduction. Fighting for a New Rights. In CLIFFORD B. (ed.). The International Struggle for New Human Rights. University of Pennsylvania Press. Philadelphia, 2009. The author describes, among others, the procedure of recognition of new law as a human right, that is, composed of four separate actions. Same, p. 4.

16 For more on the notion of "a human being" as a person and a person as a legal category, see BROŻEK., B Pojęcie osoby w dyskusjach bioetycznych. In STELMACH, J. – BROŻEK, B. – SONIEWICKA, M. – ZAŁUSKI, W. Paradoksy bioetyki prawniczej. Wydawnictwo Wolters Kluwer. Warszawa, 2010; BRECZKO, A. Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego. Wydawnictwo Temida 2. Białystok, 2011, p. 162 and next.

tion of the following generations of human rights, shows signs of paradox thinking. The essence of the third generation of the human rights was rejection of the primacy of the individual (the foundation of Western political civilization) in favor of a group-collectivity closer to the culture of the South but also complying with Catholic social teachings from before the era of John Paul II and with so-called Marxism (that is, a reflection of the party in the Soviet Union and countries of the former Eastern Bloc)[17]. Consequently, the key categories of human rights of the third generation were "peoples", "nations", and occasionally "humanity", but not the individual. It was only in the fourth generation of rights that its authors attempted, thanks to intellectual acrobatics, to combine group rights with those of individuals. Attractive packaging for those procedures came in the form of the rights of an individual belonging to a (negatively) discriminated social group, connected with the rights of that group as a whole.

In the above-presented context of the axiology of human rights and the axiology of their protection, it is easy to observe the axiological pluralism of the two spheres as well as numerous attempts to make the exegesis and interpretation both relative and instrumental[18] in a domestic, European, and international sphere. Attempts to limit human rights in a camouflaged manner in the jurisdiction practice of particular states are quite abundant and an axiological justification of legal solutions that would make the implementation and protection of those rights (in particular those of the third, fourth and fifth generations) ineffectual—*de facto* (not *de iure*, since from a formal and legal point of view they correspond to declared rights and, without exception, the protected ones) is the guarantee of community security and, paradoxically, the protection of other people (i.e., the protection of religious sentiments, family, public morality based usually on the rules of the dominant religion). When transposing these problematics from the state perspective to the intra- and trans-state level, we need to demonstrate that in the international law of protection of human rights, limitation of these rights may also take place as a result of extra-normative factors due to so-called "instrumental relativism"[19], applied in the function of current political interests for which intrinsic human dignity happens to be infringed. Therefore, it is inevitable in the given circumstances to ask an obvious question about the axiology of the legal actions in the field of the protection of human rights and common security. What would be the alternatives to legal or legitimized[20] actions given an infringement of human rights,

17 For example, in Poland, the party directed a pseudo-scientific attack on Schaff's theory (SCHAFF, A. Alienacja jako zjawisko społeczne. Wydawnictwo Książka i Wiedza. Warszawa, 1999.) through a book by Chałasiński (CHAŁASIŃSKI, J. Społeczeństwo i wychowanie, Państwowe Wydawnictwo Naukowe. Warszawa, 1969). The author pitted the well-rooted peasant class against cosmopolitan individuals—behind this "March gag", he was pointing at Jews. The attack was part of wider anti-Semitic actions.

18 Instrumentalisation of the law has two meanings: a neutral notion, and the notion biased by judgement (political instrumentalisation). The instrumentalisation of the law can be performed by: the legislator, the interpreter, the subject applying the law and legal doctrine. Typical forms of instrumentalisation of the law are made on account of law-external and law-uncoordinated goals, or by reinterpretation of norms (especially norms-rules) or of ideological assumptions of the system. We may also distinguish instrumentalisation exerted by infringement of norms defining the system of making and applying the law (infringement of institutional values of the system).

19 This term is used by J. Zajadło. Among the kinds of limitations on human rights we count the use of torture on terrorists to extract information apt to save the lives and health of citizens of a given country or on kidnappers to draw out information on the location of the victim. ZAJADŁO, J. Uniwersalizm praw człowieka w konstytucji – bezpieczne i niebezpieczne relatywizacje. "Przegląd Sejmowy" 2007, no. 4, pp. 98, 102 and next.

20 This is about the legal and axiological dimensions of these actions that assume an action that is illegal or discordant with the legal regime may be simultaneously axiologically legitimized legally and extra-legally. For more on legality and legitimisation in the law and associated ambiguities, see MENKES, J. – KOCIOŁEK-PĘKSA, A. Correlation between legitimacy and legalism—selected problems. "The Polish Review of International and European Law", PRIEL Vol. 5, No. 1 (2016).

insufficient negative opinion from the international community, or dysfunction in the decision process of the UN Security Council[21] that would be acceptable to the international community? In our quest for an answer for that question, we find a few possible solutions. "Specialists of international law, well aware of the dilemma, more and more often give the following answer: let's observe the letter of the law and put the rule of sovereignty of states and the system of common security above human rights; or, in the process of interpretation of the UN Charter and of other Conventional and usual norms, let's accept the possibility of humanitarian intervention based on international law; or else, let's take such a situation as an extreme normative exception that gives permission to incidental infringement of the abiding law; or, finally, let's break international law to conduct radical reform of it and let's make the unilateral humanitarian intervention legal"[22]. A choice of any of these options, however, would have to take into account the type of endangered or infringed value or of particular human rights. The type of threat as well as the manner and range of infringement, together with its intensity and permanency, will in a given situation determine the choice of one of the above-mentioned solutions. The adopted solution probably won't be based on moral philosophy, axiology, ethics, or philosophy of the law, but rather on the up-to-date overwhelming presence of threats and breaches following terrorist acts (with unjustified downgrading of the size of infringements related to human trafficking for instance). It will be based at best, on the philosophy of politics.

The current discourse on human rights vis–à–vis terrorism[23]—considered to be the most serious threat to the implementation of the former—is being transferred to the sphere of political philosophy, which by its nature is a normative discipline and refers to an axiology deprived of absolute character. Human rights examined in light of the science of the law, moral philosophy or ethics and faced with the axiology of terrorism become more and more defenseless as far as their axiological justification is concerned. This is the same in the case of the law in light of positivism, since it sets up a thesis about the neutral nature of the law according to which the theory of law is only descriptive and therefore doesn't aim at any formulation of an axiological justification or recommendation. What seems to be essential in this context is the question formulated by T. Gizbert-Studnicki whether indeed the positivist theories of the law are not forced to adopt (even within the so-called "inside point of view") certain assumptions belonging to political philosophy, which invokes values, and these are always involved with politics[24]. The author of this question postulates

[21] It is worth remembering that the use of force to protect human rights should be conducted according to the rules and procedure described in the UN Charter, that is, backed by a UN Security Council decision granted a priori. Nevertheless, there have been cases of the use of force to protect human rights without a positive decision by the UN Security Council, such as the NATO intervention in Kosovo, which despite it all is still considered legitimate by the international community, and successively, by the Independent International Commission on Kosovo. "The Commission acknowledges that the NATO military intervention in Kosovo was illegal but legitimate", states the report by the commission. See The Kosovo Report. Conflict, International Response, Lessons Learned, Oxford University Press, Oxford 2000, p. 4; and Menkes, J. The Kosovo situation—international law aspects. ILA Newsletter no. 13. March 2000.

[22] ZAJADŁO, J. Po co prawnikom filozofia prawa? Oficyna a Wolters Kluwer business. Warszawa, 2008, p. 104 along with the quoted bibliography.

[23] The literature on the subject increasingly is of the opinion that international terrorism is currently one of the most serious threats to human rights. STANKIEWICZ, W. Terroryzm a prawa człowieka, "Gdańskie Studia Prawnicze" 2005, Vol. 13, pp. 455 and next.

[24] The question was formulated by T. Gizbert-Studnicki in his paper: Filozofia polityczna a pozytywistyczna teoria prawa, read during the XXII Congress of Departments of Theory and Philosophy of the Law, Wrocław, September 2016. A written version of the speech has not yet been published. http://www.humanitas.edu.pl/resources/upload/dokumenty/Wydawnictwo/Roczniki%20AiP%20-%20pliki/Podzielone/Rocznik%20AiP%202016%20z%202/26.Kalisz-2016-2-480-486.pdf, (accessed: 2017. 06. 15).

regarding the positivist theory of law as a type of "minimum theory", one that fails to give answers to many of the most important philosophical and legal questions and, what is more, is incapable of elucidating the normative character of the law or constructing a satisfying theory of adjudication[25]. The link between contemporary jurisprudence in general and the discourse and dialectics of human rights in particular within the category of politics is not only a fact but also is discernable in two aspects: first, the involvement of jurisprudence in current politics makes it an instrument of a political battle, which from a scientific point of view seems neither right nor advisable (politicization of science); and second, the perception of necessary relations between the law and politics without simultaneous participation in current political conflicts, which from the point of view of external and internal integration of jurisprudence seems to be both right and advisable science of politics)[26]. A scientist (within cognitive theory based on discursive intellect and not on intuitive cognition through "experience") is practically unable to remain absolutely impartial. His lack of impartiality, however, does not imply a lack of objectivism or a release from the duty of maintaining the principle of discursive argumentation. Everyone who takes part in the debate on human rights and their protection does so within well-defined political aspects of time and place, which makes the discourse political. Also determining are the socializing processes of every participant of that discourse, coming from, for instance, empirical experience of a lack of possibilities to implement, limit, or break his or her human rights (or even, in a "lighter version", the rights of a citizen). In the axiology of human rights, the critical point is a meshing of the legal plain (discourse) with the ethical plain (discourse). The active factor of that critical crossing point is not faults in the law or its interpretation, nor is it faults of ethics, but rather the faults of what is going on within so-called *Realpolitik*[27].

In reference to the conglomeration of generations of human rights we discussed earlier, the two "youngest" generations appear to be crucial. These would be: extracted as a category of collective human rights and defined as the fourth generation, as well as the fifth due to the intensification of research in the field of biojurisprudence and neuroscience. The core meaning of fourth generation rights differs fundamentally from the core of contemporary categories (that is, from the human rights of the first and second, but also third generations). The reason for it is a shift in their focus, from the accent put on social or political entitlements or collectivity rights to the emphasis put on questions of worldviews and ethics. This category of rights will dominate the moral, ethical, legal, and political discourse as to what they really are and how to effectively ensure and protect them, and how to successfully enforce the human rights protection regime as it pertains to various groups (i.e., migrants, LGBTQ). It is to be supposed that a theoretical, philosophical, and legal-dogmatic redefinition of the values at the foundation of human rights, particularly those of the fourth and fifth generations, is inevitable. The problems at an international social and legal scale that will play the role of "detonator" of this process is the worsening crisis of mass migration, refugees, nationalism, authoritarian systems and terrorism, towards which the dialectics of human rights used un-

25 Ibidem.

26 ZAJADŁO, J. Prawoznawstwo—polityczność nauki czy nauka polityczności? XXII Congress of Departments of Theory and Philosophy of the Law, Wrocław, September 2016. A written version of the speech has not yet been published.)

27 This idea is presented in ZAJADŁO, J. Po co prawnikom filozofia prawa? Oficyna a Wolters Kluwer business, Warszawa 2008, p. 134. A distinct view is presented by M. Bothe, who in his comment on the Kosovo intervention, wrote: "When it comes to a collision between the law and ethics, then something must be wrong, whether with the law or with the ethics". WALL, A.E. (ed.) Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies, Vol. 78, Naval Law College, Newport, Rhode Island 2002, p. 427. Quoted after J. Zajadło, therein, footnote no. 124.

til now are no longer adequate for the political, legal, and social reality, but also dysfunctional in their emptiness and repetitiveness of outdated and ill-fitting diagnoses and conclusions, and—as we have seen—remedial means. The fifth generation of rights, in turn, will largely depend on the real influence discoveries made in neuroscience and biojurisprudence will have on other branches of law and other scientific disciplines, especially in political science, security science, and philosophy *sensu largo*.

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Contact information:

Dr. Anna Kociołek-Pęksa
apeksa@dgsp.edu.pl
The Main School of Fire Service in Warsaw, The Faculty of Civil Safety Engineering
ul. Słowackiego 52/54
01-629 Warsaw
Poland

prof. Jerzy Menkes
jmenkes@sgh.waw.pl
Warsaw School of Economics, Collegium of World Economy
al. Niepodległości 162
02-554 Warsaw
Poland

DISCUSSION AND UNDERSTANDING OF LAW IN 20TH CENTURY

Jarmila Chovancová
Comenius University in Bratislava, Faculty of Law

Abstract: Dominant discussion is understanding law and morality which represents neverending story. The article analyzes positive law in 20th century represented by H.L. A Hart and natural law development by L.L. Fuller and R. Alexy. Twentieth century can be called a period during which natural law has been shifted towards more positivism within the natural law. Positive law can be understood as a doctrine based on the Bentham's utilitarism which didn't accept other normative systems to be involved into concept of law. Prominent representatives of this theory have completely excluded moral content of the legal standards and they consider these to be irrelevant for the validity of the law. According to them evaluating standards through moral criteria is not appropriate because this brings chaos into the jural thinking.

Keywords: rules, principles, iusnaturalism, iuspositivism, utilitarism, legal standards, morality, law, justice, norms, rule, inner morality, morality of aspiration, normative system.

1 INTRODUCTION

In the past, most of the jural theorists accepted and realized the importance of both natural as well as positive law.

If we have a look into past we can see that a confrontation between IUS-naturalism and IUS-positivism had a sinusoid tendency, nevertheless since 19th century and most of all since 20th century there has been a tendency towards the positive law.

Twentieth century can be called a period during which the IUS-Naturalism has been shifted towards more positivism within the natural law. Jural Positivism can be understood as a doctrine based on the Bentham's utilitarianism which did not accept other normative systems to be involved into the concept of law. Prominent representatives of this theory have completely excluded moral content of the legal standards and they consider these to be irrelevant for the validity of the law. According to them evaluating standards through moral criteria is not appropriate because this brings chaos into the jural thinking.

2 RADBRUCH'S FORMULA

Due to the common circumstances which had occurred after the World War II we have been facing a reminiscence of the natural law by Gustav Radbruch, namely the state of so called "unjust/unlawful law" (unrichtiges Recht). Because in the 19th century there had been the jural positivism which prevailed, this period brought formally valid law, however this was insufficient in its content. Nazi

legislation misinterpreted natural law in order this to reflect their purposes. Therefore the issue of necessary minimum moral content of the law[1] was vivified. Similarly, also German constitutional judges adopted a Decree of so called "emanation" of super-positive principles of the democratic constitutionalism and fundamental rights into the system of the positive law. Certainly it must be noted that after Germany became unified the judges has again reanimated Radbruch's formula in the case of shooting on the East German borders[2]

At the end of the World War II the most compromised German jural philosophers had to stay interim silent within the Western occupation zones whereby others needed more time to cope with the past. This led to more tensions between experts within official garniture, team of the German jural philosophy after the WWII. Only Gustav Radbruch had represented and kept continuity with the pre-Hitler period in the West Germany. Inhumanity of positive law and legislation of Germany during the WWII had affected Radbruch to incline to the IUS-Naturalism concept though he had preferred jural positivism before. Radbruch came to the outcome upon which he confirmed an existence of legal principles which prevails the positive law. He calls them positive eventually sensible law and any law contradicting to this sensible law becomes null and void, invalid. Conflict between positive law and justice is resolved in „Radbruch formula", derived from the article Legal injustice and super-law which states: *„Should the injustice of the positive law reach such a level that by the positive law guaranteed legal certainty has no relevance compared with this injustice, in such a case the wrongful, unjust law must retreat in favour of justice"*.[3] This situation occurs only in the case if the contradiction between positive law and injustice is unbearable. Radbruch accepts validity though this positive law is „wrongful, unlawful and purposeless in its content".[4] According to him the positive law is to be preferred nevertheless if *„laws knowingly and advisedly deny the will of Justice for example they arbitrarily assign and/or refuse human rights then these laws lack validity, then people are not obliged to obey them and then also lawyers must find a courage to deny their jural character"*.[5] He herewith express that in the case of maximum unjust law we cannot refer this to law.

Radbruch's Post-War philosophy he formed hurriedly and only fragmentarily had minor effect on next major systems of natural law. Thesis on *„matter nature"* Radbruch tried to restore has had more significant effect later when Post-War war of natural law was reduced and law theoreticians shifted their attention from high philosophy towards issues related with the executing law in practice. However it is undeniable it was Radbruch who during the post-war disintegration restored major jural and legal thinking in Germany and helped to direct that towards the IUS-naturalism.[6]

3 H.L.A. HART AND HIS SYSTEM OF VALID LAWS

An Oxford Professor of the Theory of Law **Herbert Lionel Adolphus Hart** was a remarkable proponent of Positivism and according to him the system of valid laws had been established on the

1 HRDINA, I. A. – MASOPOUST, Z. Chrestomatie ke studiu filozofie práva, p. 331.

2 PŘIBÁŇ, J. Lesk a bída právního pozitivismu (online). Jiné právo, dostupné na http://inepravo.blogspot.com/2010/08/iiri-priban-lesk-bida-pravniho.html

3 VALENT, T. – CHOVANCOVÁ, J. a kol. Texty z dejín právnej filozofie, p. 235.

4 HÖLLENDER, P. Filosofie práva, p. 19.

5 RADBRUCH, G. Zákonné bezpráví a nezákonné právo, cit. podľa HRDINA, I. A. – MASOPOUST, Z. Chrestomatie ke studiu filosofie práva, p. 332.

6 KLABOUCH, J. Západoevropská právní filozofie ve 2. polovine 20. století.

statements of exact sciences. Obviously, he did not prefer natural law by positive law creation and in addition he deemed that to be irreconcilable with positive law. Hart was a proponent of a Theory of minimum content of natural law in the laws. He explained reasons for creating this Theory in his work "the Concept of Law" as follows: *„General argument simply will be that without such a content the law and morality could not support minimum goal of surviving people have by associating with other people. Should such a content be missing people would have no reason to willingly adhere to any rules"*.[7] He referred to reasons of minimal common content of morality and law for example in the case of human vulnerability. That is a basis for legal standards and norms restricting use of violence or limitation of sources which are the basis for the legal regulations of various forms of ownership. According to Hart there is not a rule within a natural law according to which it would be possible e.g. to make decision whether we should put ban on selling knives to juveniles or whether certain resources should be solely owned by the State. Weight of such decision is solely in hands of legislators and/or judge courts.[8] Hart in his works attempted to analyze law and legal system. For Hart the relation between morality and law had been based on interpretation of importance of law existence.[9]

4 L.L.FULLER AND HIS UNDERSTANDING OF A FUNCTION OF LAW

In the second half of the twentieth century an Anglo-Saxon philosopher **Lon Luvois Fuller** had significantly contributed to the development of the IUS-Naturalism. Apart from Hart he does not define law independently on reasons due to which people accept and obey laws. Each social system must, according to Fuller, contain Eight key moral principles representing requirements of legality. In his "Morality of Law" Fuller states that a function of law is human behaviour to be subordinated to rules and that law must respect certain general criteria and principles. Morality of law is not a metaphysical base of the law but its internal issue enabling law's functionality within the society. Such issues are for example universality and stability of rights, clear and non-contradictory laws, their promulgating, ban on their retroactivity. However creating and applying law is a practical skill and therefore these issues are not absolute dogmas but there are most of all matter of compromise and choice of least harmful solution. From this reason it is sometimes better to change bad law rather than forcing its permanency. Not all laws can be completely universal and in some cases it is even inevitable to accept an retroactive law in order to eliminate flagrant injustice e.g. racial confiscations of property.[10]

Fuller in his Morality of Law describes a story of an imaginary ruler – Rex who annuls and voids all laws with the objective to provide his nation with good law. However step by step he made eight mistakes which are to be avoided by Fuller's requirements. These eight mistakes refer to:

1. Inability to come to rules, i.e. each case is resolved ad hoc,
2. Inaccessibility of rules for an aggrieved party,

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7 HART, H. L. A. Pojem práva, p. 192.

8 PRIBÁŇ, J. Lesk a bída právního pozitivismu (online), Jiné právo, dostupné na http://inepravo.blogspot.com/2010/08/iiri-priban-lesk-bida-pravniho.html

9 CHOVANCOVÁ, J. Vízia filozofie v treťom tisícročí a základné zásady právneho myslenia u H. L. A. Harta a L. L. Fullera, In Acta Facultatis luridicae Universitatis Comenianae, p. 49.

10 PRIBÁŇ, J. Lesk a bída právního pozitivismu (online), Jiné právo, dostupné na http://inepravo.blogspot.com/2010/08/iiri-priban-lesk-bida-pravniho.html

3. Misusing of retroactive legislation,
4. Incomprehensible rules,
5. Contradictory rules,
6. Inability to fulfil the rules,
7. Frequent changes in rules,
8. Inability to achieve consent between promulgated rules and their application in practice.[11]

Under Inner Morality Fuller understands aforementioned eight principles based on natural law upon which human behaviour is subordinated to rules. He refers to them as to procedural natural law in wider perspective and based on this principle he wants to create a system of rules regulating human behaviour.

Those eight mistakes can be solved, eliminated by eight requirements according to which legislation is to be established. These are: universality, promulgating of laws, minimum of retroactive laws, clarity of laws, eliminating contradictions in laws, laws cannot require impossible, stability, compliance between official procedure and proclaimed rule. Should these criteria be met we can speak about aspiration for perfection in legality.[12]

In his work Fuller justifies IUS-Naturalism in connection with creating laws and with legality. According to him the Law is *„purposeful activity subordinating human behaviour to rules"*. Fuller introduced terms like morality of duty, morality of aspiration or inner and outer morality. Morality of duties is where subject of law must behave somehow because he must adhere to rules and morality of aspiration is where "forcing to duties ends and where the challenge for nobility begins". Ergo morality of aspiration includes morality of duties too.[13]

Inner Morality is Morality of Aspiration and there are eight desiderates related with good legislation. It is a prerequisite for rules to be set up either righteous or unrighteous. Difference between righteous and unrighteous can be recognized according to what is ethical and moral in the situation we are just in. Inner Morality is present when whole moral life of the individual has not been depleted. There is also so called "Joint Zone" for both Moralities in which Man applies Marginal Use Principle represented by the economical calculation whether it is worth to struggle for nobility or he will be satisfied with meeting his own obligations.[14]

According to Fuller law can be understood as an activity upon which human behaviour is subordinated to rules. He was convinced that where there is no law there is no justice in spite of the fact that he knew that inner Morality of the legislator himself does not guarantee the justice. Hart refuted this by statement that Act of Law itself cannot protect anybody against heavy injustice.

5 R. M. DWORKIN AND HIS THEORY OF LAW PRINCIPLES

Ronald Myles Dworkin is nowadays deemed to be the greatest legal philosopher alive. He is an author of some works which affected legal philosophy such as Taking Rights Seriously, A Matter of Principle and Law's Empire.

11 FULLER, L.L. Morálka práva, pp. 41–42.
12 FULLER, L.L. Morálka práva, p. 44.
13 ŠMÍD: Lon L. Fuller. Morálka práva. Distance, Revue pro kritické myšlení, 2007.
14 FULLER, L.L. Morálka práva, p. 46.

In his work Taking Rights Seriously he deals with the theory of law principles in which he states a new argument for discussion about IUS-positivism and IUS-Naturalism. Dworkin divides constitutional standards standing behind the authority into rules, principles and policies whereby principle is more universal than a rule and it serves for Justice. Another difference we can see in a different role by the legal argumentation. Policy is aimed at objectives that are to be achieved and it is never legal, jural but usually economical, social or political. According to Hart the Law can be recognized thanks to the *rule of recognition, through* which it bypasses other standards. According to Hart the Law is everything that passes all tests and meets all criteria of the *rule of recognition,* which must be accepted as a postulate. Dworkin defines this as *„Jurisprudence behind a law*" and he refuses this stating that from this point of view the Jurisprudence/Law is viewed as a set of rules. Hart gives an example – a simple test: „Law is anything promulgated by the Queen in the Parliament". However, test can be more complex and criteria are then ranked in hierarchy. An US Constitution can then be an example of such a more complex test. Nevertheless, Dworkin protests against this positivistic method because this test justifies separation of law and morality. He casts doubts upon this since by such test it is always possible to get morality separated from the law. He also casts doubts upon common admitting of principles as Joseph Raz does. He states that by solving difficult cases it is inevitable to consider principles as being a part of the law.

In his work Dworkin distinguishes between principles and rules by the means of judicial cases. At the end of his statement he presents their dissimilarity:

„Both sets of standards relate to particular resolutions on legal duties under certain circumstances, however they differ in the character of the Directive they provide. Rules shall be applied in the form All or Nothing. If there are circumstances the rule deals with than the rule is either valid and then must be accepted an answer given by this rule or it is invalid and it provides nothing for decision to be made… However this is not how Principles work… neither those which are alike the rules don't bring legal consequences which occur automatically should they meet the determined conditions.[15]

Difference is in the application of rules when standard is either valid or invalid in the particular situation but this cannot be applied for principles. Principles are certain directions which shall be taken into consideration if they are important for legal, jural conclusion to be made. Dworkin therefore states the second difference resulting from the importance of principles. Should there be contradiction between principles the more important principle shall prevail the less important one which however will still keep its importance. This cannot be applied by the conflict of rules which ought not to be based on the importance factor because only one standard, norm can be valid.

By Dworkin we can see that his theories of rights concentrate on individual rights. Purpose of the *Taking Rights Seriously* is also to explain an origin of these rights and their place in the legal system. His "idea of individual rights" is not purely abstract and this is what makes it different from older, traditional theories of natural rights.

According to Dworkin in so called hard cases lawyers use standards which are not serving like rules but function in different manner. Suitable cases are principles, policies and other types of standards. Principle is a standard that is to be adhered not because it helps to achieve or ensure some economical, political or social situations as being considered eligible, but because it is required by Justice, Virtue or other dimension of Morality.[16]

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15 DWORKIN, R. Když se práva berou vážně, p. 46-47.

16 OSINA, P. Teorie právních principů Ronalda Dworkina. In Acta Universitatis Palackianae Olomucensis.

Dworkin advocates an opinion that even by „hard cases" there is only one correct answer to disputable issue construed by the case and that the judge is obliged to discover, detect it by following the legal standards. His decision can be considered to be legally righteous depending on whether the judge discovers and reveals rights existing under legal system principles whereby these principles shall include requirements of justice and virtue. There is an implicit Dworkin's emphasizing that inherent part of judicial cogitation by complicated cases are moral principles. There is not a rule by the means of which it would be possible to separate legal principles from moral ones and Dworkin therefore refuses law to be separated from morality.

By hard cases an ideal judge must determine whether predicated law exists in the legal system or not. Forasmuch as a judge is obliged to find out the Parties' rights also if there is no clear legal rule for the specific case the judge must then refer to argumentation of principles not having form of the legal rules which are not expressing subjective preferences of the judge. Revealing these principles is therefore the issue requested by moral background.

Dworkin states that courts should decide upon principles and not upon their own procedure. This applies to standards forming thesis concerning what judge courts should do as well as descriptive thesis about what courts really do. Principles mostly differ from courts own procedures. Principle defines and protects individual's rights whereby own procedure of the court determines collective objectives. Objectives are preferred areas the society tends to take care of e.g. clean environment, active trade balance, effective transportation system etc.

Rights are individual's claims functioning as triumphs over the collective objectives. If for example we state that everybody has right to freedom of speech then according to Dworkin we consider freedom of speech cannot be breached even if such a breach would be in favour of collective objectives that are to be applied or in favour of society's general wealth.

However this does not mean that these are absolute rights. Rights same as principles which define them are considered to be a weight determining the rate in which trumps prevail the judge's own considerations.[17]

6 ROBERT ALEXY AND VALIDITY OF LAW

Among current IUS-Naturalists we shall take note of Robert Alexy.

Robert Alexy was inspired first of all by Radbruch. His most famous work was published in 1992 under the name: Begriff und Geltung des Rechts (Term and Validity of Law), in which he advocates non-Positivism. Although Alexy is a legal philosopher he emphasizes law shall not remain only philosophers' contemplating but law shall be also executed in practice, i.e. except legal philosophy he also deals with public law, especially constitutional one.[18]

Alexy in his work confirms Radbruch's theory and goes into its depth; he makes it a centre of his theory of according to which law which is extremely unjust/unrighteous is not a law and judge should not apply it. This can be recognized by considering the rightness which depends on relation between morality and law because requirement of rightness „breaches positivistic term of law and opens it to morality". Alexy does herewith confirm that natural law prevails the positive one. He

[17] OSINAP, P. Teorie právních principů Ronalda Dworkina. In Acta Universitatis Palackianae Olomucensis.
[18] WINTR, J. Říše principů.

agrees with Dworkin who advocates opinion that judge should always apply natural law, so called one right answer. Alexy however stated that this theory can be applied only for few cases.

Alexy also deals with profound logic character of legal principles and he uses adjusted Dworkin's theory to explain legal system of current continental constitutionalism. According to Alexy there is only either content or qualitative difference which results from different logical structure. Alexy presents some samples of weak distinguishing according to:

1. Their origin,
2. Explicitness of value content,
3. Moral content or relation to the idea of law,
4. Relation to the highest law,
5. Importance for legislation,
6. Certainties of their knowing,
7. Universal validity or presence in various legislations.

As a sample of significant difference he states following:

– Whether there are reasons for standards or whether standards are standards themselves,
– According to the subject of matter – whether there are rules of argumentation or rules of behaviour[19]

Alexy also deals with theory of legal principles that he then uses to defend constitutionalism as a legal system based on value order given by the constitution guaranteed human rights and freedoms and their protecting by constitutional judicature. Both by Alexy as well as by Dworkin the key issue of critics is their strict legalism. Alexy constructs model of legal system based both on legal standards as well as legal principles. This system is based on three structure components. The first components expresses so called collision law *(Terms and Conditions under which principle which prevails other principle, create factual base of the standard which declares legal consequences of the prevailing principle,)*. Second component is the principle of proportionality by the means of which certain collisions between principles are solved *(The higher rate of not-fulfilling or limitations of the principle, the more important must be the fulfilment of other principle)*. *Additional* component are prima-facie preferences among particular principles. System must also include procedure ensuring rationality.

Alexy's theory draws most of all from decision-making practice of Federal Constitutional Court and therefore he considers the balancing of principle of decision-making rights assigned to the democratically legitimated legislator with material constitutional principles to be the key issue. Alexy comes to a conclusion that constitutionalism as a legal system enables the highest rate of common sense application. Alexy's credit is in the fact that he transferred Dworkin's theory into the continental legal system as he had deeper analyzed matters of legal principles and used these matters for theoretical issues of legal principles in protecting human rights and decisions made by constitutional courts.

Natural law can be considered from two points of view, namely in objective perspective as a law independent from the State. In this view it represents sum total of legal principles and/or general legal standards with significant value importance. From subjective perspective the natural law is deemed to be mostly as requirement on possible behaviour that is justified on the value basis. Under the Natural law we also understand one universal, invariable and eternal law that is common for all people. Its content and form have changed during time nevertheless basic ideas such as justice, virtue and morality remained their significant part.

[19] WINTR, J. Charakteristické princípy práva a právnich odvětví.

7 CONCLUSION

Discussion between Hart and Fuller lasted a whole decade and it has been mentioned in every English textbook of legal theory. Later Hart presented an opinion that era of classic positivism has ended and in the legal theory it has been replaced by on value based explanation of law referring to revolutionary heritage of civil and human rights. The most important issue within his polemic with Fuller however is the universal knowledge that in current time neither positivistic legalism with its idea of law as political order or will nor metaphysical natural law theories according to which each law must be subordinated to eternal truths of natural law. Dispute between natural and positive law can be only led by the means of social sciences and not by speculative philosophy or moral dogmatists.

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Contact information:

doc. PhDr. Jarmila Chovancová, CSc.
jarmila.chovancova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

CAUSING DEATH BY NEGLIGENCE WHILE REVERSING IN A CAR PARK: APPLYING THE PRINCIPLE OF LIMITED SECURITY IN TRAFFIC[1]

Andrej Beleš, Jakub Ľorko
Comenius University in Bratislava, Faculty od Law

Abstract: The authors of this article based on a specific case, which is an example of the hypertrophic application of criminal repression, present an analysis of the issue of fault by negligence, especially the issue of existence and demonstration of the subjective aspect of negligence. Attention is also paid to the principle of limited security in traffic, the essence of which is the fact that a person who relies on adherence to the rules by others does not necessarily act in negligence.

Key words: negligence, traffic offences, the principle of limited reliance.

1 INTRODUCTION

Criminal liability, in contrast to administrative liability, is always based solely on guilt, as the original focus on primary (primitive) criminal law solely on the criminal outcome has been overcome by historical developments[2]. In case of fault in negligence, it is necessary to examine the fulfilment of the objective criterion – the possibility and the obligation to foresee the relevant criminal consequences resulting from specific regulations: traffic rules, technical standards, or the level of caution generally required from every person – as well as the subjective criterion – with the emphasis on how the situation was perceived by the person and with regard to the person's abilities, skills, options, and so on. Negligent traffic offences can be generically called "offences of decent people". It is essential to test the fulfilment of the subjective and objective criteria at the same time in each individual case. The concept of negligence is also closely linked to the principle of limited security, in this case in the field of traffic, according to which it is permissible to rely on the assumption that the others adhere to the rules. In such a case, there can be no reliance on inappropriate reasons.

In May 2016, the Senate of the Constitutional Court of the Czech Republic (hereinafter as the Constitutional Court) reversed[3] the resolution of the Supreme Court of the Czech Republic[4] (hereinafter as the Supreme Court), refusing the appeal of the sentenced by finding a violation of the right to judicial and other legal protection under Section 36 (1) of the Charter of Fundamental Rights and

1 The contribution was processed within the VEGA project "Assessment of the implementation and future development of the sanction mechanism after 10 years of criminal effectiveness codes in the SR" ("Hodnotenie implementácie a budúceho vývoja sankčného mechanizmu po 10 rokoch účinnosti trestných kódexov v SR") awarded by the Scientific Grant Agency of the Ministry of Education, Science, Research and Sports of the Slovak Republic and the Slovak Academy of Sciences.

2 KALLAB, J. Crime and Punishment. Reflections on the Basics of Criminal Law, p. 8.

3 Findings of the Constitutional Court of the Czech Republic, File no. III. ÚS 2065/15 of 31 May 2016.

4 Resolution of the Supreme Court of the Czech Republic, File no. 8 Tdo 125/2015 of 25 March 2015.

Freedoms[5], which states that everyone can claim their rights in a fair and independent trial. At the constitutional level, the complainant sought redress of the litigation of a fair trial, which the general tribunals should have committed by recognizing the guilty party and imposing the sentence on him, without a sufficiently clear and proven guilt of the complainant.

2 FACTS

The Regional Court of second instance in Ostrava and the Supreme Court defined the act as follows. On June 24, 2012 at around 4:30 pm in Havířov-Podlesí, in the car park in front of a shopping center in the residential area, the accused, as a driver of a passenger car, began to reverse from the parking place at the time when the mother failed to pay enough attention to the one-year-old injured person under Section 31(1) and (2) of the Family Act[6], the accused failed to act with due care while reversing, resulting in a collision with the minor child, who was run over by the wheel of the driver's car, causing the child injuries in the form of brain and brain stem contusions, which is an injury incompatible with life, as a result of which the minor died at the scene of the accident. According to the courts, the accused by his actions violated the provisions of Section 24 (2, 3), Section 4 a), Section 5 (1d), or Section 39 (5) of the Act on Road Traffic[7]. We can summarize the other substantive facts of the first instance and the appelate courts as follows: The minor victim (after being pulled out of the baby carriage) was in close proximity to his mother and the grandmother, who stood by the side of their motor vehicle that was parked as the first in a row at the entrance to the shopping center. Both the mother and the grandmother were watching the minor, who was moving in their immediate proximity. The vehicle of the accused was parked as the third vehicle in the same row. The accused saw the two women talking to each other while standing by their car and also noticed both the minor victim and his sibling. According to his testimony, witness testimony, investigative trial, and expert evidence, at the time when the accused was passing the women and the injured, the child occurred in the space between the side of the vehicle, the baby carriage, the mother and the grandmother. The accused was reversing away from the mother and the grandmother. The collision of the vehicle with the child occurred at the time when the mother was putting her purse in her bag, and the grandmother turned around towards her second grandson coming towards her and began to talk to him, at which time none of the women had visual control over the minor victim. None of the present had seen, and this fact could not have been determined even by evidence, how the minor got to the point of the collision. According to expert evidence, the accused was reversing his vehicle at a speed comparable to that of a slow walk.

5 Resolution no. 2/1993 Coll. of the Czech National Council Presidium on the Declaration of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic. In the conditions of the Slovak Republic this document is declared by the Constitutional Act no. 23/1991 Coll., which sets forth the Charter of Fundamental Rights and Freedoms. This law is also part of the Constitution of the Slovak Republic no. 460/1992 Coll., Section 46.

6 Act no. 94/ 1963 Coll. The Family Act, as amended. The regulation was in force until 31 December 2013. As of 1 January 2014, the provisions of Section 858 and 865 et. seq. of Act no. 89/2012 Coll. Civil Code, as amended, apply accordingly.

7 Act no. 361/2000 Coll. on Road Traffic and on amendments to certain laws, as amended (hereinafter as the Road Traffic Act).

2.1 Argumentation to the detriment of the accused

The crime of negligent death under Section 149 (1) of the Criminal Law [8] or 143 (1) of the Czech Criminal Law[9], in the case of traffic offences, presupposes that the offender has violated the traffic regulations, and this violation is causally related to the fatal consequence that occurred in the accident. The general courts have found that the accused has violated the general driver's duty not to endanger life and health, to adapt his driving to his own abilities and surroundings, or to pay increased attention to the protection of children under Section 4 a) [10] and Section 5 (1d)[11] of the Road Traffic Act, which according to the Slovak Road Traffic Act[12] corresponds to the obligation pursuant Section 3 (2a)[13] and Section 4 (1e)[14] of this law. In addition, the general courts blamed the accussed for violating specific obligations: the duty not to endager others when reversing, or the duty to ensure that reversing is carried out by a competent and properly instructed person, if circumstances require, as well as the duty to pay increased attention to pedestrains in a residential area under Section 24 (2, 3)[15] and Section 39 (5)[16] of the Czech Road Traffic Act, which in the Slovak law corresponds to Section 22 (2, 3)[17] and Section 59 (3)[18] of the Road Traffic Act.

The accused has seen the minor victim standing by his mother and grandmother (and it is not clear if he has also seen his sibling), on the basis of which the courts had proven that the accused knew that the minors were present in the car park, and that he was in residential area (according to the traffic signs around which he had to pass when driving his vehicle), and yet failed to obey the requirement of taking increased caution when reversing and caution of pedestrians in general, especially children. When the accused walked past the women and the child to his car, he saw that the mother and the grandmother were talking to each other, which he should have judged as the

8 Act no. 300/2005 Coll. Criminal Code, as amended.

9 Act no. 40/2009 Coll. Criminal Code, as amended.

10 "*When engaged in road traffic, everyone is obliged a) to behave with care and diligence so as not to endanger the life, health or property of others or their own, to harm the environment or to endanger the life of animals, to adapt one's behavior, in particular, to the building and traffic conditions of road infrastructure, weather conditions, road traffic situation, one's abilities and state of health…*"

11 "*In addition to the obligations set forth in Section 4, the driver is also obliged… d) to pay particular attention to children, persons with reduced mobility and orientation, to persons with severe disability and to animals, to take into account vehicles transporting children, beginner drivers or persons with severe disability marked according to the implementing legal regulation as well as any training vehicle marked according to a specific legal regulation…*"

12 Act no. 8/2009 Coll. on Road Traffic and on amendments to certain laws, as amended.

13 "*A road user is also obliged to: a) act in a disciplined and reasoned manner in such a way as not to endanger the safety or fluency of the road traffic, while obliged to adapt his behavior in particular to the technical condition of the road, traffic situation, weather conditions and his abilities…*"

14 "*The driver is obliged… to pay increased attention to cyclists and pedestrians, especially children, to persons with disabilities, especially to persons using a white stick and the elderly…*"

15 "*When reversing, the driver must not endanger other road users… If circumstances require, in particular insufficient view, the driver must ensure safe turning or reversing with the assistance of a competent and properly informed person.*"

16 *"In a residential area and pedestrian zone, the driver may drive at a speed of not more than 20 km/h. In doing so, he must take increased caution of pedestrians, who he must not endanger, and stop the vehicle, if necessary. Parking is only allowed in places marked as car parks.*"

17 "*When reversing, the driver must not endanger other road users… If circumstances require, in particular insufficient view, the driver must ensure safe rotation or reverse with the assistance of a competent and properly informed person.*"

18 "*In the residential area, pedestrian zone and school zone, the driver may drive at a speed of no more than 20 km h^{-1}. In doing so, he must take increased caution of pedestrians, who he must not endanger. If necessary, the driver is required to stop the vehicle. In the residential area and the pedestrian zone, parking of motor vehicles is prohibited unless the traffic sign specifies otherwise. In the school zone, it is possible to park in a school zone, if it does not restrict the movement of pedestrians.*"

fact that women failed to pay enough attention to the child and consequently he should have taken increased caution of that child. Although the mother and even the grandmother can be blamed for violating their obligation of parental responsibility, which was also one of the causes of the outcome, however, it cannot be said that their violation was the only cause of the accident as it would not have led to the death of the child, the primary cause being the violation of obligations by the accused. Based on the movement of the children in the car park, the fact that it was in a residential area, and the fact that the women were talking to each other, the accused should and could have been aware that a one-year-old child could appear behind his vehicle during reversing, which he might have not noticed because of his limited view from the driver's position and the age and height of the child.

The Supreme Court, on the basis of the above (knowledge of the presence of children and lack of supervision over them and reliance on the absence of a collision), concludes that conscious negligence is the form of the fault. We add that such a conclusion could be supported by part of the older case-law, according to which: firstly[19], the driver must expect spontaneous behaviour of children and their inability to understand the pedestrians' obligations, so if convinced otherwise, he relies on the absence of criminally relevant consequences without reasonable justification; secondly[20]: the driver must always assume the unpredictability of childrens' behavior, and therefore the possibility of them running into the roadway of a vehicle, even if the child is with an adult who does not adequately restrict the free movement of the child – if the driver assumes otherwise, he relies on the faultless course of events without reasonable justification.

Conscious negligence is based on the ability to recognize and assess the risk of a harmful outcome, while the offender incorrectly assesses this risk by imagining an obstacle to the occurrence of the outcome (i.e. fails to recognize the risk of the outcome) – a circumstance that should prevent the outcome and which, under other circumstances, would indeed be able to prevent it. The driver must be aware that considering his limited view of the space behind his vehicle when reversing, the other road users may be at risk, wheras the law (Section 24 (2) of the Czech Road Traffic Act, Section 22 (2) of the Slovak Road Traffic Act) reminds him of it and specifically imposes an obligation on him to avoid such a threat. In particular, it is necessary to take special caution of children, which is the general duty of the driver, even more importantly when reversing (Section 5 (1d) of the Czech Road Traffic Act, Section 4 (1e) of the Slovak Road Traffic Act). In the following paragraph, the legislator also extends the duty not to endanger life and health of others by imposing on the driver to ensure safe reversing with the assistance of a competent and properly instructed person if the circumstances of the traffic situation so require. These obligations are further reinforced by the obligation to take increased caution of pedestrians in a residential area, to which the car park in question belongs, and which the driver must have noticed when passing the relevant traffic signs, and thus had an obligation to respect it. The Supreme Court concludes that if the driver cannot see the entire area behind his vehicle and can assume that someone may appear in that area, yet begins to reverse without any warning

[19] Decision of the Supreme Court of the Slovak Socialist Republic, file no. 3 TZ 59/70: "*The driver of a motor vehicle must bear in mind the fact that, unlike adults, children often act spontaneously and are unable to understand pedestrians' obligations in accordance with the relevant regulations, so the drivber cannot always rely on the fact that a minor will behave according to that regulations, but on the contrary, must predict that a child may at any time run into the roadway of the vehicle.*"

[20] Decision of the Supreme Court of the Czechoslovak Socialist Republic, File no. 3 TZ 29/72: "*In the case of children, the driver must always assume that they can suddenly change their behavior on or near the road by entering or running into the roadway of a vehicle, even if the child is with an adult and free movement of the child is not sufficiently restricted by that adult.*

signal or without the help of a competent or properly informed person, in principle, he is liable for the consequence. Expressed in other words: if the driver cannot properly check the area behind his vehicle and can assume that someone may appear behind it, according to the Supreme Court, such driver is obliged to use a warning signal – sound a horn – or to instruct a competent and instructed person to direct him when reversing. In the present case, the Supreme Court has concluded that the driver was able to anticipate further developments from the fact that he saw the one-year-old child standing between two people who were talking to each other. The Supreme Court also supports the argument by decision RJ 19/1987, according to which the driver of a crane, if he does not have sufficient view of the space behind his vehicle, even though he has not seen any person to move nearby, is obliged to ensure safe reversing by means of an assistant [21]. By means of a *fortiori* argument, the court adds that the same applies even more when the accused saw women with a child close to his vehicle (several metres away, one parking place away) and the women were talking to each other.

2.2 Argumentation in favour of the accused

There is no doubt that there is a causal link between the actions of the accused – reversing a motor vehicle in the car park – and the consequences – the death of the minor victim. However, the development of this causal link (or the resulting consequence) must be at least grossly covered by a fault, in this case at least in the form of unconscious/inadvertent negligence[22]. The causal developments and consequences unforeseeable by the offender are not included in the fault and the accused is not liable for these consequences (effects).

When the accused walked from the exit of the shopping center to his car, he saw the following situation: the minor victim stood in the confined space between the vehicle, a baby carriage and the

[21] R 19/1987: "*In the inhabited part of a town, which includes family houses, where the movement of persons in the road cannot be ruled out, the driver of a crane is obliged to ensure safe reversing with the assistance of a competent and properly instructed person if he decides to reverse and does not have sufficient view behind the vehicle (Section 19 (2) of Decree no. 100/1975 Coll., as amended). This is also the case when the driver has not seen any person in or near the road before or after entering the vehicle.*" It is clear from the reasoning of the Decision that the obligation to ensure safe reversing by means of an assistant is given when there is a remote danger to the life and health of the other road traffic participants. In the respective case, it was a crane, which the driver tried to turn several times in the inhabited part of a town, which included family houses, during a standard working day afternoon, when movement of people returning from work is very likely, including the elderly and children. In the case of a lorry reversing with the assistance of a properly instructed person, there is also another older decision of the Supreme Court of the Czechoslovak Socialist Republic, file no. 7 Tz 26/71: "*It is a violation of an important obligation…, if the lorry driver fails to ensure safe reversing with the assistance of a competent and properly instructed person and reverses at inappropriate speed without proper view.*" Same as Decision R 40/1978.

[22] See case-law R 20/1981: "*Conviction must include all the features characterizing the objective side of the offense, i.e. also the causal relationship between the offender's conduct and the consequences of the offence. In case of negligence, the offender must have at least imagined that such a causal relationship may develop. The causal course unpredictable by the offender is therefore not included in the fault and the offender is not liable for the consequence that thus arises.*" The driver was driving his lorry despite of reduced view because of fogging and icing on the glass. Because of the reduced view, he did not see the cyclist whom he had knocked down. The cyclist was unconscious for a few days in the hospital, after having gained consciousness on the bed, he made a clumsy motion, as a result of which he fell from his bed and died. There was a causal link between the offender's conduct and the death of the injured person (secondary), but it was not covered by the fault, because the offender could not and was not obliged to imagine that such an event would happen in the hospital (undisciplined patient, error of the medical staff), that therefore is not liable for the death of the injured. Similarly, in Decision R 21/1981: "*The death of the victim (Section 224 of the Criminal Code) is in causal relation to the perpetrator's conduct even if it has occurred as a result of a failure of the blood circulation, partly due to an accident caused by the offender, partly due to the hardening of arteries in the elderly. Criminal liability of the offender for this outcome depends on whether or not the outcome and causal course leading to the outcome are covered by the offender's fault.*"

two adult women under whom supervision the minor was. Subsequently, when the accused got in his vehicle, he started the engine and began reversing – at a speed of a slow walk in the direction away from the standing women, the situation was very different: the mother was loading her shopping to her vehicle, the grandmother was talking with the older sibling of the minor victim, who was just coming towards her. However, the accused did not perceive these facts and could not even perceive them because the women had lost control of the child only when he was sat in the car and started reversing. The mandatory rate of precaution must be assessed not only from an objective but also from a subjective point of view – considering the specific traffic situation that the driver perceives and the degree of cautiousness he is able to exercise in that particular case[23]. If such a situation – the obvious violation of parental duties, i.e. not paying attention by both the mother and the grandmother – would persist all the time, that is, at the time when the accused walked past the women and children, the question of his fault would be indisputable since the driver would not only have an obligation, but also the real possibility of anticipating the occurrence of a collision situation, i.e. a threat or violation of the interest protected by the criminal law. The court thus deduced the fault of the accused of the fact that he perceived the women talking to each other and a one-year-old child, who stood by them, on the basis of which he did not foresee that the child could leave them and subsequently failed not adapt his conduct as a driver of the vehicle. However, we believe that it is highly questionable that such a sequence of events could be predicted from the situation perceived by the driver. In that regard, it can be noted that the *in dubio reo* principle, based on the principle of the presumption of innocence, also applies to the question of fault and, **in the present case, the fault is dubious at the very least**. Equally important is the fact that the accused has no longer noticed the behavior of the mother and the grandmother, which has had a real impact on the further course of events: the mother loading her shopping in the car and the grandmother paying attention to the other child coming towards her. However, the driver failed to perceive it and even could not perceive it, and therefore could not know that his actions were aimed at causing a criminally relevant consequence.

If we would infer from the opinion of the court, then the fact that two adults, who stand in a car park and watch a child, are talking to each other, is a reason for any driver in their vicinity to refrain from reversing or to ensure that reversing is carried out with the assistance of a properly instructed person or a reason for a driver to use a warning signal (sound a horn). Even a state officer from the Supreme Public Prosecutor's Office in his statement on the appeal[24] said that thus formulated requirement was exaggerated and unfeasible in standard civil life. We completely agree with that opinion as it is hard to imagine that a person leaving a shopping center and loading a car with a shopping, who notices adults with a child standing nearby, is to look for an "assistant" to show him/her directions when reversing, or to ask any passers-by to do so, if no other passengers are present in the vehicle with the driver. The Constitutional Court also agrees and points out that the driver of a passenger car cannot be subject to the same requirements as the driver of a crane, and that controlling a reversing crane is much more complicated and risky and that the invisible

[23] See Czech case-law R 43/2002 (Decision of the Supreme Court of the Czech Republic, file no. 3 Tz 182/2001): "*When assessing the circumstances that the driver can or cannot predict, it is necessary to assess a specific traffic situation. From the point of view of negligence, this means that, in addition to the degree of mandatory cautiousness imposed by road traffic rules, there is also a subjective definition relating to the degree of cautiousness that the driver is capable of in a particular case. The fault in negligence can only be charged if the obligation and the possibility of foreseeing a violation or threat of interest protected by the Criminal Code are given simultaneously.*"

[24] Part of the Ruling of the Supreme Court of the Czech Republic, file no. 8 Tdo 125/2015 of 25 March 2015.

space behind the crane is much larger than that of a passenger car. In addition, we point out that **when determining the obligation of ensuring that reversing is carried out with the assistance of a properly instructed person**, Section 22 (3) of the Slovak Road Traffic Act and Section 24 (3) of the Czech Road Traffic Act contain a **phrase "if circumstances so require", which means that this obligation does not arise every time when reversing, but only under exceptional circumstances, if the safery of other persons so requires. Therefore, we consider the argument in this case-law (R 19/1987) to be inappropriate.** We add that even the related, earlier decision of 1971[25], although it does not indicate that it is necessary to reverse with the assistance of an instructed person only if the circumstances so require, we consider it irrelevant in this case, since it applies to reversing of a lorry.

Moreover, if we would accept the Supreme Court's argument, this obligation could arise in a very large number of cases of reversing because the driver (if he does not have the so-called reverse camera, where the obligation to have a vehicle equipped with a reverse camera cannot be inferred from any generally binding legal regulation and, at the same time, such an obligation would be inappropriate and unfeasible) is never able to see the entire space behind his/her vehicle, whereby for such an obligation to arise, it would be enough that a driver reverses in a car park where he/she is not alone, but there are adults with a child nearby. Such a situation loses the character of exceptionality and the related need to ensure that reversing is carried out by the help of an assistant, and thereby such interpretation can be regarded as contradictory to the original intentions of the legislator.

This applies, although it concerns a residential area where children are allowed to play in the road, the driver is required to pay increased attention to pedestrian who he must not endandger[26]. The driver fulfilled this legally required obligation by the manner of his driving: reversing at a speed comparable to slow human pace, away from standing people, into a space which he could reasonable believe was free of people. The fact that it concerns a residential area does not make it an above mentioned exceptional circumstance that would justify reversing solely with the assistance of an instructed person; such a requirement is inappropriate even if considering that the participants were present in a residential area.

With regard to the fact that children are allowed to play in the road in a residential area, it should be noted, however, that teleological interpretation may lead to the conclusion that it concerns older children, not one-year-olds, who are not competent to take part in road traffic if unaccompanied. We believe that this teleological interpretation is based on the fact that one-year-old children, who have barely learned to walk, are not even expected to make social contacts with groups of peers who tend to play in the road on a standard basis.

The Road Traffic Act does not exactly specify the age limit reaching which a child becomes fit to be uncompanied, without supervision of a responsible road traffic participants. Even the specific provisions on pedestrians[27] fail to address this issue. Child's age is only mentioned in relation to a person under the age of 10 riding a bicycle – such a person may ride a bicycle on the road solely if accompanied by a person aged 15 and over (with the exeption of field trails, forest paths, cycle routes and residential areas)[28]. Assessment of the ability to act as an independent pedestrian and road traffic participant without accompaniment or supervision of an older person will thus depend on the child's intellectual development, abilities and basic knowledge of interactions between in-

25 See note no. 19.

26 Provisions of Section 59(1, 3) of the Slovak Road Traffic Act; or Section 39 (3, 5) of the Czech Road Traffic Act.

27 Provisions of Section 52 et seq. of the Road Traffic Act.

28 Provisions of Section 55 (4) of the Road Traffic Act.

dividual road traffic participants and the resulting risks to life and health in a particular situation. The question is whether a one-year-old child can be left alone without supervision, even on a footpath, if there is a movement of vehicles or cyclists close by. However, even on a footpath (without close movement of vehicles and cyclists), there are dangers for a one-year-old child, such as risks of collisions with special categories of pedestrians, like wheelchair users, scooter users, skaters, skateboarders (or Segway users, although not explicitly stated by the law) [29], whose movement can mean a serious danger to a one-year-old child without supervision. **It is even less (argument *a fortiori*) likely and possible to expect that a one-year-old child moving in a car park between cars could be intellectually developed enough and know the rules and risks related to the movement in such a place, even though it is a residential area.** Another factor that we consider necessary to take into account is that even if other road users are reasonably intellectually developed, know the rules and risks and pay increased attention to pedestrians, given the body proportions of a one-year-old child (body height of 75 cm), there is an increased risk of "overlooking" such a child, especially by the driver of a passenger car. It follows that a one-year-old child cannot be an independent road user, even if it is a residential area. In addition, it should be added that in the present case there was no situation where children would play in the road and the incoming driver would perceive such a situation, but the sudden departure of the child from the parent and the subsequent collision with a reversing car, which equally excludes the argument of playing in the road.

One-year-old children can therefore engage in interactions with other traffic participants only under the supervision and control of an older person who controls or guides the child. The driver is thus not obliged to anticipate unpredictable reactions of a one-year-old child, but **can assume that the child is controlled and guided by the supervising person.** The supervising person is not specifically determined by the Road Traffic Act, but the Family Law.

The key argument in favour of the accused may be considered the fact that **the so-called principle of limited security in traffic** is applicable in the present case. This principle of legal science[30], or case-law[31], results from the Slovak and Czech system of laws, but it is not expressed in a legal form, in contrast with, e.g. the Austrian Road Traffic Act [32], which, in Section 3 stipulates that road use requires constant caution and due diligence, regardless of which, **each road traffic participant may rely on other persons to comply with the relevant regulations governing the road traffic, except**

[29] See the definition of a pedestrian unde Section 2 (2f) of the Road Traffic Act. Similarly, a pedestrian is also defined under the Czech Road Traffic Act (Section 2 (j)), but this definition, unlike the definition in the Slovakian provisions, does not include persons riding scooters considered by the Czech legislator as cyclists (Section 57 (2), second sentence of the Road Traffic Act), since the movement on a scooter is technically similar to cycling, which results in an increased risk of collision with "ordinary" pedestrians. For this category of pedestrians, one-year-old children on footpaths without supervision must be regarded as dangerous (and so independent movement of such children is excluded).

[30] See BURDA, E. Section 149 and Section 158. In BURDA, E. – ČENTÉŠ, J. – KOLESÁR, J. – ZÁHORA, J. et al. Criminal Law. Special Section. Commentary. II Volume, p. 73 and 158.

[31] R 43/1982: "*A driver of a vehicle, who has a right of way, is not obliged to change direction or speed, if there is no indication that there is a risk of a collision with a vehicle whose driver is obliged to give right of way to the oncoming vehicle. The driver has this obligation and the obligation to prevent a collision of vehicles only if he/she recognizes in time and at a sufficient distance that the driver of the other vehicle who is to give way, fails to meet this obligation or clearly acts in such a way that he/she will fail to do so. If the driver responds incorrectly to a dangerous situation caused by another road user who violates the traffic rules, and as a result the driver fails to prevent a traffic accident, albeit he/she could have prevented the accident if responding correctly, the driver could be liable for the accident only if he/she is at fault by choosing incorrect solution of the traffic situation. Even if the driver causes the situation by incorrect response and by contributory negligence, in general, the driver's action cannot be considered as a violation of an important duty…*"

[32] Straßenverkehrsordnung (StVO).

when it comes to children, blind people, or other groups of people whose behaviors suggests that they are unable to understand the risks of road traffic and adapt their behaviour accordingly. The principle of limited security may also apply in other areas of life than in traffic – e.g. in sports, where contact of persons comes into consideration (e.g. skiing) – **in general, wherever to achieve a socially beneficial state or outcome, the acting person should not be obliged to assume violation of another person's duties**[33].

The principle of the so-called limited security in traffic therefore means that a road user can rely on other road users to comply with road traffic rules unless the opposite results from the specific situation. Traditionally, it can mean a situation where a pedestrian who suddenly enters the road in front of an oncoming car on red light, which the driver cannot or is not obliged to predict; or when the driver suddenly changes direction of his vehicle and collides with the parallelly moving vehicle, which consequently causes a criminally relevant effect. Of course, in some cases, it is possible to attribute secondary negligence to the road user in the form of an inappropriate response to the situation – a response to a violation of rules by another traffic participant[34]. A violation of rules by another road user does not in principle excuse the driver if he/she himself violated the rules [35]. In the present case, it was not the violation of duties on the part of the child itself because, as we said above, such a child cannot be considered an independent road traffic participant, whether on a footpath or on the road, even if present in a residential area; but it was a violation of the duties of the child supervisors. Concerning the possible implication of the secondary fault of the driver with regard to his reaction, it can be stated that the car driver, considering the situation and the rapid sequence of events, did not have the chance to learn about the violation of duties by the child supervisors, only from the fact that the women were talking together, which did not really suggest such a violation. Consequently, his "unresponsive reaction", i.e. not refraining from reversing, cannot be seen as negligence. Also, the principle of limited security in traffic can be expressed in other words as follows: if a road traffic participant has reasonable grounds to rely on compliance by other participants. And if he/she relies on them, while another participant fails to perform his or her duties, i.e. violates the rules, resulting in the violation of an interest protected by the Criminal Code, it is not possible to attribute the guilt of conscious (but also unconscious) negligence to the relying party. By concluding the opposite, the Supreme Court of the Czech Republic was fundamentally wrong. The driver, due to the close presence of the mother and the grandmother, was not obliged to anticipate the unpredictable and unavoidable conduct of the injured [36]. **If we would apply this principle in the form as it is explicitly stated by the Austrian Road Traffic Act, regardless of the special regard to children, the driver did not see the child being alone, but under supervision of two adult women. Consequently, the driver had a reasonable ground to rely on the fact that the child, supervised by the mother and grandmother, will not unpredictably run into the space behind his reversing car, and that the mother and grandmother of the child will meet their obli-**

[33] See BURGSTALLER, M., SCHÜTZ, H. Section 6, marg. no. 52. In HÖPFEL, F. – RATZ, E. et al. Wiener Kommenar StGB, Manz'sche Verlags- und Unversitätsbuchhandlung, available at: rdb.at, cited on 22 June 2017.

[34] See ŠÁMAL, P. Section 143. In ŠÁMAL, P. et al. Criminal Code I. Sections 1–139. Commentary, p. 1504.

[35] BURDA, E. Section 158. In: BURDA, E. – ČENTÉŠ, J. – KOLESÁR, J. – ZÁHORA, J. et. al. Criminal Law. Special Section. Commentary. Volume II, p. 158.

[36] Also see Decision R 2858/1927: "*… The driver is not liable for an accident caused by unpredictable and unavoidable conduct of the injured*". In the case of this case-law, instead of the concept of the injured, it is required that the wider concept of the victim is used, which also includes the relatives of the injured person. This applies to the injured as the primary victim, as well as the relatives of the injured as the secondary victims – the mother and the grandmother, who had an obligation to supervise the child, whereas the violation of this obligation was unpredictable.

gations under the family law[37]**.** In this regard, it is necessary to add that the conditions for negligent fault of the minor's mother were met, at least in the form of unconscious negligence, both in terms of objective element (violation of the duty to care for a child so as not to endanger the health or life of the child), as well as subjective element.

3 CONCLUSION

The Supreme Court of the Czech Republic stated in the respective decision that if the driver does not have sufficient knowledge of the space behind his/her vehicle and can assume that someone moves to that space, he or she has the obligation to give a warning signal or to arrange reversing by means of an instructed person, failing which he is liable for the consequences by negligence. However, such a requirement is exaggerated and unfeasible in the standard life. It is not possible to automatically apply the requirements for truck driving to the driving of a passenger car, as it is hardly imaginable that drivers in a car park at a shopping center, would sound their horns or look for assistants to show them directions when reversing. In addition, it is questionable whether the driver's knowledge of the fact that a child can move to the space behind a reversing vehicle can only be deduced from the fact that the driver has seen that the persons supervising the child are talking to each other. Indeed, it is imperative to also judge the negligence on the basis of a subjective point of view – how the situation appeared to the driver and how much caution he was able to use in that situation. The in *dubio for reo* principle, based on the principle of the presumption of innocence, also applies to questions of fault, and in this situation, the fault is dubious at the very least. From this point of view, it appears that the ground for the decision of the Supreme Court of the Czech Republic is the wish to punish the driver regardless of legal arguments.

The key argument in favour of the accused is the application of the principle of limited reliance in traffic, whereby each participant may rely on other participants to follow the rules; or if the driver relies on it, it is not a reliance on inappropriate reasons. Since a one-year-old child is not an independent road user (even in a residential area), the driver could rely on compliance with the rules by the child's supervisors. However, the principle of limited reliance also has other wider application, not just in the field of traffic. It can be applied in sports or in other areas of life in which, when a desired result is to be achieved, it is necessary to "disburden" the accused person of assuming another person's violation of duties.

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[37] See provisions of Section 28 (1a) of Act no. 36/2005 Coll. on Family Law, as amended; or Section 858 of Act no. 89/2012 Coll. The Civil Code, as amended.

Contact information:

JUDr. Andrej Beleš
andrej.beles@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

JUDr. Jakub Ľorko, PhD.
jakub.lorko@flaw.uniba.sk

Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

LAND PROTECTION AND LAND CARE IN SLOVAK REPUBLIC

Martin Dufala, Lenka Dufalová, Jana Šmelková
Comenius University in Bratislava, Faculty of Law

Abstract: The land as a part of the environment is in a special position. It is a part of the environment and also it is a productive resource. This determines the legislation relating to the land. The article deals with the current legislation regarding land as well as with the issue of the constitutional protection of land, for example the rules of acquisition of agricultural land in constitution.

Key words: land, environment, ownership, transfer, protection

INTRODUCTION

Paper analyses legal regulation of land protection which has specific position as it is one of the components of the environment and natural resource, but at the same time it has economic and productive potential; it is subject to ownership of natural persons and legal entities and serves as a place for realization of many human activities.

This special position also significantly affects legislation regulating land care and ownership of land. Therefore we can conclude that the land regulation is inconsistent and regulates the social relations in two levels:

a) protection of land as a component of the environment,
b) regulation of ownership and other relations to the land.

Transfer of ownership to the land is covered by special legal regime in the form of constitutional protection and specific statutory restrictions. Topic of the paper is actual due to the amendment to the Act no. 460/1992 Coll. Constitution of the Slovak Republic (hereinafter "Constitution") by which special protection of agricultural land, forest land and food security of the state was established by the Constitution.

It is very demanding to deal with legislation regulating all aspects of the protection, use and ownership of the land. Within the scope of this paper it is impossible to cover all the legislation, therefore we have focused on the selected ecological and economic aspects of land protection and land ownership governed in particular by the following legislation:

- Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended,
- Act no. 220/2004 Coll. on the protection and use of agricultural land and amending Act no. 245/2003 Coll. on integrated pollution prevention and control and amending certain laws, as amended,
- Act no. 140/2014 Coll. on acquisition of ownership of agricultural land, as amended,
- Act no. 202/1995 Coll. The foreign exchange act and the act amending and supplementing Act of the Slovak National Council no. 372/1990 Coll. on infringements, as amended,
- Act no. 543/2002 Coll. on Nature and Landscape Protection, as amended,

- Act no. 326/2005 Coll. on Forests, as amended,
- Act no. 364/2004 Coll. on Water, as amended,
- Act no. 79/2915 Coll. on Waste, as amended,
- Act no. 39/2013 Coll. Act on Integrated Pollution Prevention and Control, as amended.

LAND AS A COMPONENT OF THE ENVIRONMENT AND ITS PROTECTION

Until May 31st, 2017 protection of land in the Constitution was regulated by the general protection of the environment, in particular by means of Article 4 and Article 44. Article 4 refers to the exclusive ownership of some components of the environment, resp. of natural resources, and stipulates special water protection. Article 44 also regulates right to favourable environment, a general duty to protect and enhance the environment, as well as the role of the state in ensuring environmentally friendly use of natural resources, ecological balance, effective environmental care and protection of selected plant and animal species. With effect from June 1st, 2017 special protection of land has been stated in the Constitution, not only as a component of the environment but also with some particularities in relation to the acquisition of its ownership. Chapter 3 of the paper analyses constitutional land protection.

Further legislation on the land protection as a component of the environment is based on Article 44 para. 6 of the Constitution, according to which further details on the rights and obligations stated in Article 44 of the Constitution are governed by a special legal acts.

Land as a component of environment is part of a specific territory of different categories and different types which are protected by a relatively wide legislation. This may be regarded as the first lack of legal regulation, i.e. inconsistency and large amount of land protection legislation as a component of the environment. Legislation regarding land protection and land care can be divided into two groups:

1. legal acts regulating different categories of territory with the land as a part of these territories – mainly Act on Nature and Landscape Protection, Act on Water, Act on Forests and Act on the protection and use of agricultural land,
2. legal acts regulating land protection against sources of danger or damage – mainly Act on integrated pollution prevention and control, Act on Waste, Act no. 44/1988 Coll. on the protection and utilization of mineral resources (The Mining Act), Act no. 188/2003 Coll. on Application of Sludge and Bottom Sediments into the Land and on amendment of Act no. 223/2001 Coll. on Waste and Act No 136/2000 Coll. on fertilizers.

Act on Nature and Landscape Protection

The legislation on nature and landscape protection contributes to land protection mainly by territorial protection, which is part of the special nature and landscape protection. Special protection is more stringent than general protection of nature and landscape as it represents a sum of over-standard rules that apply in relation to exceptional and unrepeatable components of the environment.[1]

[1] CEPEK., B. et al. Environmentálne právo. Všeobecná a osobitná časť, p. 261.

Territorial protection means the protection of nature and landscape in the territory of the Slovak Republic or its part. The territorial protection specifies five levels of protection.[2] The Act states prohibition of activities for individual levels of protection and the scope of restrictions and prohibitions increases with an increasing level of protection. Under the Act, certain types of activities may be carried out only with the approval of the competent nature protection authority.

The Nature and Landscape Protection Act contributes to the protection of the territory by designation of protected areas and their protective zones, including, for example, national parks, protected landscape areas, nature reserves, protected bird areas and others[3]. The relationship between levels of protection and protected areas is important for the protection of the territory. First level of protection applies in the territory of the Slovak Republic, unless the Act on Nature and Landscape Protection provides otherwise. The first level of protection is governed by the general nature and landscape protection provisions included in the part two of the Act. At the same time, the Act determines what level of protection is intended for a particular type of protected area, e.g. in the territory of the nature reserve and the national nature reserve the fourth or fifth degree of protection applies.

The Nature and Landscape Protection Act by designation of different types of protected areas, their protective zones and levels of protection, in which the influence of humans on a given territory is regulated by the prohibition or restriction of certain activities, also contributes to the protection of the land located in these protected areas.

Act on Water

The primary role of the Water Act is the multiple protection of surface water and groundwater, including ecosystems. However, these waters do not exist independently of the territory, resp. of the land substrate from which they are pumped. This is also obvious from the definition of groundwater, which is characterized as all water which is below the surface of the ground in the saturation zone and in direct contact with the land or subsoil[4]. Therefore, the protection of water is ensured by the protection of certain parts of the territories, the protection of which significantly contributes to the quality and safety of the water and, at the same time, to the protection of the land in that territory.

Within the protection of water regulations and water resources stated in the fifth part of the Water Act, protected water areas, protective zones of water resources, sensitive zones and vulnerable zones are declared. Furthermore, the protection of water from nitrate pollution from agricultural sources and the rules for waste water discharge into surface waters and groundwater are regulated in this part of the Act.

Territory, which, by its natural conditions, constitutes a significant natural accumulation of water, may government designate as a protected water area[5]. In the protected water area it is only possible to plan and carry out any activity if the protection of surface water and groundwater is guaranteed. The Water Act also enumerates activities which are prohibited to carry out in the protected water area.

2 § 11 of the Act on Nature and Landscape Protection.
3 § 17 and following of the Act on Nature and Landscape Protection.
4 § 3 para. 3 of Water Act.
5 § 31 of Water Act.

Pursuant to the Water Act, water resources are defined as water in the bodies of surface water and in the bodies of groundwater used for water abstraction for drinking-water or available for water supplement of population of more than 50 persons, or allowing for the water abstraction for such a purpose in the amount more than 10 m^3 a day as an average in their original condition or after their regulation. In order to protect capacity, quality and health of the water resources used, state water administration authority will determine the protective zones on the basis of the opinion of the health protection authority. The protective zones of water resources are divided into:

(a) protective zone of the 1st level – it serves to protect water resource in the immediate vicinity of the water abstraction point or the capture facility,
(b) protective zone of the 2nd level – it serves to protect the water resource from being at risk from distant locations,
c) protective zone of the 3rd level – the authority of the state water administration may determine it in exceptional cases to increase the protection of the water supply.

Limits and method of protection, in particular prohibitions or restrictions of activities that harm or threaten the quantity and quality of water or the health of the water in the water resource, shall be determined in the decision on the designation of protective zones of the water resource.

Criteria for sensitive areas identification and waters in vulnerable areas are set out in Annex no. 3 and Annex no. 4 of the Water Act.

The water protection legislation illustrates how the protection of the various components of the environment is relevant, in this case water and land. Quality or possible pollution and damage to water can significantly affect condition of land and vice versa.

Act on Forests

Within the environment, forest is an important and complex ecosystem formed by a forest land plot with a forest vegetation and factors of its air environment, plant species, animal species and land with its hydrological and air regime. The Forest Act defines, inter alia, forest land plots and their protection, and its purpose is to preserve, enhance and protect forests as a component of the environment and the country's natural resources to fulfil their irreplaceable functions.

The protection of forest land plots is primarily provided by the fact that forest land plots can be primarily used to fulfil functions of forests (whether productive or non-productive). For other purposes, they may only be used on the basis of a decision of the competent state administration forestry authority that may decides about its temporary or permanent exemption from the functions of forests or about restrictions on the use of forest functions on them. Where appropriate, the prior opinion of the competent state administration authorities is required. The exemption or limitation of use can only take place in inevitable and justified cases. The legal entity or natural person who applied to exempt the forest land plot is obliged to compensate for the loss of non-productive functions of the forest, "levy".

The protection of forests and forest lands is also ensured by the designation of so called protective forests and special purpose forests where the management is limited. The Forest Act establishes an obligation for the forest owner to protect the forest, especially in the form of preventive measures in order to prevent forest damage and protective and defensive measures against damages caused by harmful facts.

Forests form a large part of the territory of the Slovak Republic, therefore the protection of forests and forest land plots contributes significantly to the protection of the land, which falls under the legal regime of forest land.

Act on the Protection and Use of Agricultural Land

The subject of this Act is agricultural land, which is characterized as a productively potential land registered in real estate cadastre as arable land, hop fields, vineyards, fruit orchards, gardens and permanent grasslands. The Act provides for the protection of the characteristics and functions of agricultural land, ensuring its sustainable management and agricultural use, protection of its environmental functions, as well as the protection of its areas from unauthorized use for non-agricultural purposes.

Regarding protection of agricultural land, the Act sets out principles of sustainable use and management. It is the responsibility of the owner to ensure proper management of agricultural land, i.e. implementation of agro-technical measures for protection and preservation of qualitative features and functions. If the land plots are not cultivated, the land owner it is required to prevent the occurrence of weeds.[6] Furthermore, the owner is obliged to take measures to protect the land against negative phenomena, which are in particular degradation, erosion, compaction and protection of agricultural land against harmful substances.

Since agricultural land area extent is limited and by the use for other purposes it is diminishing, the Act on the Protection and Use of Agricultural Land regulates the principles of the protection of agricultural land for non-agricultural use. Also, as in the case of forest land exemptions, it is true that agricultural land can be used for construction purposes and other non-agricultural purposes only in inevitable cases and to a reasonable extent. Exemption for non-agricultural purposes is possible only on the basis of an exemption decision. The decision is issued by the authority responsible for the protection of agricultural land in which responsibility the agricultural land proposed for removal is situated. Removal may be permanent or temporary (up to 10 years). In the decision, the authority for the protection of agricultural land shall determine the conditions for exemption, such as the recultivation of the temporarily exempted agricultural land or the payment of the levy for permanent withdrawal or temporary withdrawal of the highest quality agricultural land.

Agricultural land, in addition to its protection, enjoys some specific protection also in relation to the acquisition of its property, which is discussed in the second chapter of the paper.

Act on Integrated Pollution Prevention and Control

Integrated pollution prevention and control is a set of measures to prevent environmental pollution, reduce emissions into air, water and land, reduce waste generation, and to recover and dispose of waste in order to achieve a high overall level of environmental protection[7]. Integrated authorisation is then a procedure that allows, in a coordinated manner, the conditions for the implementation of activities in existing facilities and in new facilities in order to guarantee the effective integrated protection of environmental components. Thus, when authorising certain industrial activities, the protection of several components of the environment, including land, is addressed in one procedure.

6 KOŠIČIAROVÁ, S. et al. Právo životného prostredia, p. 429.

7 § 2 (a) of Act on Integrated Pollution Prevention and Control.

Integrated authorization results in integrated permission. It is a decision which entitles the operator to carry out an activity in the operation or its part and which determines the conditions for carrying out activities in the operation. This decision also provides for conditions to ensure the protection of land against pollution or damage from such industrial activities.

The requirements for the periodic monitoring of the land in relation to dangerous substances which may be found at the place of operation are also set out in the conditions for the operation of these activities. At the same time, the competent authority shall determine the measures to be taken after termination of activities. This may be, for example, revitalization of the land.

Act on Waste

Within the framework of the waste management legislation, the legislation on landfilling and on responsibility for illegal waste placement is relevant in relation to land.

Landfill is a site with a waste disposal installation where waste is permanently deposited onto or into land[8]. The Act establishes obligations of landfill operators, in particular close, reclaim, monitor and to eliminate the adverse situations and impacts that they become aware of while monitoring the landfill.

Considerable damage to the environment, and therefore to the land, may be caused by waste that is located elsewhere than it is designated for. § 15 of the Waste Act deals with the procedure for identifying person responsible for illegal waste placement and the process of recovering or disposing of such waste in order to prevent the leak of various substances into the land, water and other components of the environment.

LAND AS SUBJECT TO OWNERSHIP AND ITS PROTECTION

The basic legal Act directly related to the possibility of agricultural land acquisition is Act no. 140/2014 Coll. on acquisition of ownership of agricultural land. This Act regulates the transfer of agricultural land and the competence of specific bodies operating in this area.

Agricultural land plot is legally defined as an agricultural land or land built up with a construction for agricultural purposes until June 24, 1991.[9] However, this does not include specific types of agricultural land such as:

a) gardens regardless of their location;
b) a land plot in a municipality 's built-up area regardless of its type;
c) a land plot outside the municipality 's built-up area if:
   – it is intended for other than agricultural use;
   – the possibility of its agricultural use is limited by separate regulations;
   – its acreage is less than 2,000 m²;
d) it is adjacent to the construction, together with which it creates one functional whole.

[8] § 5 para. 5 of Act on Waste.
[9] § 1, 2 of Act no. 140/2014 Coll. on acquisition of ownership of agricultural land.

Regarding the acquisition of ownership, agricultural land as a subject to legal protection is subject to a special regime. For the purposes of the herein before mentioned law, transfer of ownership may be done by:

- a conditional conveyance
- a voluntary conveyance
- transfer for the purposes of the enforcement of lien
- transfer for the purposes of the enforcement of the security transfer of right.

In each case of transfer, legislator refers to the Civil Code and its specific provision. Therefor it can be assumed that agricultural land cannot be the subject of a transfer under other legislation, e.g. under the Commercial Code, where the transfer of real estate would otherwise be considered as a contract for the purchase of the leased item or a contract on sale of an enterprise.[10]

However, restrictions regarding the use of specific types of contract shall not apply in cases of exchange of agricultural land under the Civil Code (barter contract), as this acquisition of ownership is not governed by this legal act. Exchange of land plot pursuant to Section 611 of the Civil Code represents separate option for the transfer of ownership, provided that exchanged land plots are comparable – the difference in their value is not more than 10%. Furthermore, the Act and conditions for the acquisition of ownership do not apply to:

- voluntary conveyance of the ownership under the Act no. 229/1991 Coll. on Regulation of Ownership Relations to Land and Other Agricultural Property, as amended and under the Act no. 503/2003 Coll. on Restitution of Ownership of Land and on the Change and Amendment to Slovak National Council Act no. 180/1995 Coll. On Certain Measures for Land Ownership Arrangements, as amended,
- special cases of ownership transfer such as: land exchange, purchase of land and the pre-emption of the state under the Act no. 543/2002 Coll. on Nature and Landscape Protection, as amended, sale of land by the Slovak Property Fund under Regulation of the Government of the Slovak Republic no. 238/2010 Coll. stipulating Details on Terms of Rent, Sale, Exchange and Acquirement of Immovable Property by the Slovak Property Fund,
- land consolidations under Act no. 330/1991 Coll. on Land Consolidation, Arrangement of Land Ownership, Land Registries, the Land Fund, and Land Parcel Associations, as amended,
- transfer of ownership by expropriation in public interest e.g. under the Act no. 50/1976 Coll. on land-use planning and building order (the Building Act) as amended or under the Act no. 129/1996 Coll. on some measures to accelerate the preparation of highways and roads construction for motor vehicles, as amended.

The procedure of ownership transfer regarding these forms of transfer the of agricultural land is very specific under the Act. The land owner is entitled to transfer the land plot to a person carrying out agricultural production as a business for at least three years in the municipality, where the agricultural land is located or to a co-owner of an agricultural land plot, a close person or a relative person under the Civil Code. In these cases, the transfer takes place without the need for a special procedure.

Special conditions regarding conditional and voluntary conveyance verified by the competent District Office are:

1. an offer to transfer the land plot shall be published in the Register of published offers on transfer of agricultural land the website of the Ministry of Agriculture and Rural Development of the SR and on the official board of the municipality at least for a period of 15 days,

[10] Under § 409 of the Act no. 513/1991 Coll. Commercial Code, real estate cannot be transferred by the purchase contract.

2. acquirer must meet following conditions: permanent residence or registered office in the territory of the Slovak Republic for at least 10 years and carrying out agricultural production as a business for at least three years,
3. preference is given as follows: at first place is applicant from the municipality where the agricultural land plot is registered, second place belongs to the acquirer from the municipality adjacent to the municipality in which the agricultural land plot is located and the third place belongs to the acquirer regardless of the place of business,
4. possibility to extend the offer of transfer to subjects fulfilling the aforementioned assumptions, regardless of the place of business, subsidiary – following a request for taking by persons from the adjacent municipality,
5. possibility to extend the offer of transfer to subjects who have permanent residence (or registered office) in the territory of the Slovak Republic for at least 10 years after the expiry of 6 months period with no effect,
6. obligation to record the interest in the acquisition of ownership of the offered land in the Register,
7. obligation to identify acquirer interested in land plot transfer who has preliminary agreed to enter into contract with the transferee in the register.

Agricultural production as a prerequisite for being an acquirer of the land is fulfilled when it is carried out as a business or as a dependent work. Even the obligation of at least three years of operation does not apply to young farmers[11] who, however, may not rent, sell or donate the land for three years from acquiring the ownership of the agricultural land.[12]

Before the conclusion of the specific contract for the transfer of ownership, the acquirer has the obligation to ask competent District Office to issue a certificate on fulfilment of the requirements to be subject to land transfer. However, the acquirer may ask municipality to issue a confirmation provided that acquirer is not subject to special transfer. The Act states that even land plots that are not agricultural land plots under the legislation cannot be transferred without confirmation of a special character. If land plot is to be transferred after the expiry of stated period with no effect, it is the acquirer's obligation to provide confirmation of the permanent residence.[13]

Under the Act specific subjects may not acquire an agricultural land: state, state citizen, natural person with permanent residence or legal entity with registered office in the state whose legislation does not allow citizens of the Slovak Republic, natural persons with permanent residence in the Slovak Republic or legal entities with registered office in the Slovak Republic acquire ownership of the agricultural land plot; this does not apply to inheritance of agricultural land plot. Exception to the restriction are member states of the European Union, the European Economic Area, Switzerland and to the states, the international treaty of which provides so, and the Slovak Republic is bound by it as well.[14]

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11 Young farmer is a person who is less than 40 at the moment of submitting the application, possesses adequate occupational skills and competence and is setting up for the first time in an agricultural holding as head of the holding – Article 2 par. 1 (n) of the Regulation of the European Parliament and of the Council (EU) no. 1305/2014 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation no. 1698/2005.

12 § 4 of the Act No.140/2014 Coll. on acquisition of ownership of agricultural land.

13 § 6 of the Act No.140/2014 Coll. on acquisition of ownership of agricultural land.

14 § 7 of the Act No.140/2014 Coll. on acquisition of ownership of agricultural land.

CONSTITUTIONAL LAND PROTECTION

After joining the European Union on May 1st, 2004 Slovak Republic applied moratorium on sale of agricultural land to foreigners – natural persons for a period of seven years, valid until April 30th, 2011. However, in January 2011, the moratorium on the purchase of agricultural land by foreigners was extended by another three years, t. j. until April 30th, 2014.

From June 1st, 2014, there is valid and effective Act no. 140/2014 Coll. on acquisition of ownership of agricultural land under which the owner or other person entitled to transfer ownership of an agricultural land may sell an agricultural land in the ownership of:

a) a person carrying out agricultural production in the municipality, where the agricultural land is located,
b) a person entitled to acquire ownership of an agricultural land and carrying out agricultural production as a business in the municipality adjacent to the municipality in which transferred agricultural land is located,
c) a person regardless of his permanent residence or registered office and regardless of whether he is natural or legal person.

Regarding the Act, a following question has arisen: from the point of view of the constitutional protection of property rights (in particular one of its components – *ius diponendi* with the subject of ownership), isn't it a disproportionate interference with ownership?

On May 26th, 2016, a request from the European Commission was addressed to the Slovak Republic to amend the national legislation on the possibility of acquiring land in the Slovak Republic by foreigners. The same request was presented in the other four EU Member States: Bulgaria, Lithuania, Latvia and Hungary. According to the European Commission changes in the land acquisition legislation was necessary because national legislation infringes the free movement of capital and the freedom of establishment.

As an answer, the Slovak Republic has provided a promise of changes in legislation and its alignment with the European Commission's request. But, for example, Hungary considered the European Commission's request as an interference in its internal affairs and refused to change the legislation. The European Commission's response has been a motion sent to The Court of Justice of the European Union on the restriction of the free movement of capital and hence on obstacles for cross-border investors in agriculture.

Ultimately, approach of the Slovak Republic was essentially the opposite to its previous statement. As a result, an amendment to the Constitution which introduced a special protection of the land was adopted. This amendment is based on the requirement to extend the obligation of the state to pay particular attention to the protection of agricultural land and forest land and the promotion of rural life. In addition, a new separate paragraph has been added to the Constitution, which establishes the definition of land (agricultural and forestry) and establishes the obligation of the state to preserve the land, including its productive status for future generations. The land is defined as a non-renewable natural resource, i.e. it cannot be confused with the term goods[15].

The amendment to the Constitution regarded its three provisions. In Article 20 para. 2, which provides for certain restrictions on the ownership right, the restriction of the exercise of the right of

[15] See General part of the Explanatory Statement to the Constitutional Act no. 137/2017 Coll., amending the Constitution of the Slovak Republic no. 460/1992 Coll. as amended.

ownership has been amended also for food security. Article 44 para. 4 was amended by the obligation of the state to pay particular attention to the protection of agricultural land and forest land. Article 44 contains a new paragraph 5, which defines agricultural land and forest land as non-renewable natural resources, which enjoy special protection of the state and society.

CONCLUSION

Based on the above, it can be stated that the legislation on land care and its protection is very extensive and inconsistent, which is justifiable by the existence of several legal regimes of land use as part of a certain territory. A specific area, which should also take into account the environmental aspects of land protection and use, is the regulation governing the acquisition of land ownership. Even in this case, it is important to know what kind of land it is.

Effective from June 1st, 2017 a significant change to the land legislation has been done. By an amendment to the Constitution a special land protection was introduced to Slovak legislation. Following the specific protection of water in Article 4 para. 2 of the Constitution we have special protection of other component of the environmental. However, this component has a specific status because it is also a productive factor and a subject of private ownership. This change results in some interference or restriction of ownership of agricultural land and forest land, which may raise questions about the compatibility of this legislation with EU law. Arguments put forward by the authors of new legislation are based on the exception to the prohibition of restrictions on the free movement of capital under Article 65 of the Treaty on the Functioning of the European Union[16], according to which Member States may take restricting the free movement of capital if they are justified on grounds of public policy or public security. Therefore, it will be interesting and necessary to see how the European Commission, possibly other EU bodies, will react to the Slovak legislation.

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Zákon č. 543/2002 Z. z. o ochrane prírody a krajiny

Zákon č. 326/2005 Z. z. o lesoch

Zákon č. 364/2004 Z. z. o vodách

[16] Available at: http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX%3A12012E%2FTXT, cited on: 15. 11. 2017.

Zákon č. 79/2015 Z. z. o odpadoch

Zákon č. 513/1991 Zb. obchodný zákonník

Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1305/2013 zo 17. decembra 2013 o podpore rozvoja vidieka prostredníctvom Európskeho poľnohospodárskeho fondu pre rozvoj vidieka (EPFRV) a o zrušení nariadenia Rady (ES) č. 1698/2005 (Ú. v. EÚ L 347, 20. 12. 2013) v platnom znení.)

Všeobecná časť Dôvodovej správy k ústavnému zákonu č. 137/2017 Z. z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov

Zmluva o fungovaní Európskej únie (Konsolidované znenie)

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Contact information:

Mgr. Martin Dufala, PhD.
martin.dufala@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

Mgr. Lenka Dufalová, PhD.
lenka.dufalova@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

Mgr. Jana Šmelková, PhD.
jana.smelkova@flaw.uniba.sk

Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

ATTEMPT TO INCREASE THE TRANSPARENCY

Rastislav Munk
Comenius University, Faculty of Law

Abstract: The author deals with problems related to the Amendment to the Freedom of Information Act in the Slovak Republic in this article. In the introduction, the author assesses the legal regulation of the use of the right to information in the Slovak Republic. Subsequently, the author discusses the legal regulation of the use of the right to information in the Slovak Republic and expresses its attitude towards the legal regulation of the use of the right to information in the Slovak Republic, underlining the possibility of adopting legislative changes. It is also concerned with the Amendment to the Freedom of Information Act and with the practical problems associated with the right to information.

Key words: the right to information, Amendment to the Freedom of Information Act, problems in application practice

INTRODUCTION

In the Slovak Republic, not only the law enforcement in the field of public administration, but also the law enforcement, in general, is currently a frequently solved subject in the legal theory, legal practice, and general public. In our opinion, the main reason is that the issue of law application and of its enforceability is being more important than the issue of the law creation itself. During the first years after the establishment of the independent Slovak Republic, the greater emphasis was placed on the change of the legal system and the establishment of a democratic country legal order system. Nowadays, when a democratic legal system has already been established in the Slovak Republic, there are emerging deficiencies in the field of law application, which can result in „the unenforceability of the law „.

Currently, the issue of the law on information is also a very topical issue in the Slovak Republic. This is evidenced by several amendments to the Act no. 211/2000 Coll. on Free Access to Information and on amendment of some Acts (hereinafter referred to as the „Freedom of Information Act „), the Civil Code, which has been made in recent years. Let us say that these amendments exist as a result of the constantly increasing democratization of society and result of the increased interest of society in public sector.

The topicality of this issue is highlighted by the fact that the Slovak Republic is currently undergoing a major reform of the Freedom of Information Act, which stems from the need to increase the transparency in public administration. The amendment to the Freedom of Information Act[1] was prepared by the Ministry of Justice of the Slovak Republic (hereinafter referred to as "the Ministry")

[1] The Act amending Act no. 211/2000 Coll. on the Free Access to Information and on the amendment of some Acts (Freedom of Information Act), as amended, and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on court fees and the fee for an extract from the criminal record as amended.

which, subsequently, after the text of amendment to the Freedom of Information Act was prepared, initiated an inter-ministerial commentary procedure[2].

The interest of the professional and general public in increasing the transparency in public administration is huge in the Slovak Republic, which has been reflected in the high number of comments on the amendment to the Freedom of Information Act received in the inter-ministerial commentary procedure. In the inter-ministerial comment procedure, the number of collective comments[3] received on the amendment to the Freedom of Information Act is 15 and the number of ordinary comments raised on the amendment to the Freedom of Information Act is 776.

The number of collective comments and the number of ordinary comments made on the amendment to the law in the inter-ministerial commentary procedure say about great interest in the forthcoming amendment to the Freedom of Information Act. However, on the other hand, these high numbers also set out questions whether the attempts for a major amendment to the Freedom of Information Act, which comes from the need to increase the transparency in public administration, is prepared good enough to meet stated goal.

ATTEMPT TO INCREASE THE TRANSPARENCY

The amendment to the Freedom of Information Act was prepared by the Ministry of Justice of the Slovak Republic as a draft law amending and supplementing the Act no. 211/2000 Coll. on Free Access to Information and on amendments of some Acts (Freedom of Information Act), as amended and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on Court fees and the fee for extracting from a criminal record as amended (hereinafter referred to as „the draft law"). After the text of the amendment to the Freedom of Information Act was prepared, the Ministry initiated an inter-ministerial commentary procedure.

The draft law was prepared by the government and it involves two fundamental tasks:

1. "The Government of the Slovak Republic will consistently apply the principles of open government to create a space for citizen participation in public policy making as well as principles of transparency in public administration decision-making processes and thereby, the Government of the Slovak Republic will create better opportunities for increasing the scope for public control and narrowing the scope for corruption." [4]
2 "The Government of the Slovak Republic will endorse the international initiative of the Partnership for Open Government and support the application of the principles of open government. By achieving these goals, the Government of the Slovak Republic will raise the standards of

[2] Inter-ministerial commentary procedure – legislative process no. LP/2017/678.

[3] Art. 1, Paragraph 7 of the Legislative Rules of the Government of the Slovak Republic, cit. *"The contradictory proceedings with the public representative may take place if the presenter fails to accept the comments made by a larger number of people from the public and at the same time, the public representative's mandate to represent a public is part of this comment (hereinafter referred to as" mass comment"). The contradictory procedure with a public representative always takes place if the presenter has failed to accommodate a massive comment shared by at least 500 people. If a mass comment has been applied electronically via the portal, the list of people expressing a massive comment may be sent to the presenter in a manner other than via the portal."*

[4] Reasoning Report – general part.

public administration transparency and public use of the information available to the public administration."[5]

The draft law itself, however, also brings confusion and the possibility of a varied interpretation, which will cause application problems in practice. In the end, it will not only increase the transparency but, on the contrary, it will also increase the public's mistrust of public administration.

First of all, we state that the interpretation of the concept of information, for the purposes of the Freedom of Information Act, was only doctrinal for the whole period of its existence, and there was no definition of the concept of information in the Slovak legal order. Therefore, this concept was not always accepted uniformly by the case law or the decision-making practice of the administrative authorities. We consider this as appropriate to define the concept of information legally. The draft law itself defines information as the content recorded on any material medium, in particular, the content of a written record in the paper form, the content of a written record stored in electronic form or the content of a recording in a sound, visual or audio-visual form.[6] We appreciate this effort very positively since it is a concept which determines the very content of the Freedom of Information Act.

However, on the other hand, we do not consider such a legal definition to be appropriate for several reasons. First of all, it is necessary to state that the Freedom of Information Act does not already contain a definition of information for the purposes of re-use of information in Section 21 b paragraph 2 of the Freedom of Information Act. In this context, we propose to align the definition of the term "information" with the definition of this term as it is stated in Section 21 b paragraph 2 of the Freedom of Information Act, at least in one of its content meaning, as this may lead to further interpretation problems in practice.

Furthermore, within the context of a positively defined concept of information in the draft law, which by its scope corresponds to the amendment of Section 3 paragraph 3 of the Act of the Czech Republic no. 106/1999 Coll. on free access to information as well as to Directive 2003/98/EC, we recommend introducing an exception for a computer program, also because of the provisions of Sections 87 to 89 of the Copyright Act no. 185/2015 Coll. Legislation of the Act of the Czech Republic no. 106/1999 Coll. on free access to information, as well as Directive 2003/98/EC, define the information in the same way as a draft law, however, they exclude a computer program from the concept of information.

In this context, we propose to introduce a negative definition of the term information as part of the content definition and legal definition of the term. We also suggest that in addition to the computer program, the negative definition of the term information also include interpretative opinions, analyzes, reports, expert opinions, political opinions, forecasts and interpretations of legislation. The draft law modifies this group confusedly. The phrase "access to information does not apply to" is indefinite. At one point, it is said that the law will not govern the provision of interpretative opinions, analyzes, reports, expert opinions, political opinions, forecasts and interpretations of legislation, however, in another place it is stated that in case of such information, it is necessary to issue a decision on non-disclosure of information pursuant to Section 18 paragraph 2 of the Freedom of Information Act since the information is not available. In our opinion, the Freedom of Information Act should not apply to the above mentioned category of information (opinions, law interpretations, etc.), which the obliged person does not have at the time of application received. We propose to

[5] Reasoning Report – general part.

[6] The draft law – point 8.

modify the wording of that provision so as to make it clear that the information does not fall within the scope of the law. Therefore, if applications relate to such information, we cannot proceed under the Freedom of Information Act.

In this case, we suggest that the legislator, when creating a negative definition of the term information, i.e. for the purposes of the Freedom of Information Act, does not consider as information the interpretations of legal norms, opinions, statements and legal opinions, evaluation reports and integrated databases in any electronic form, inquiries to generate new information, i.e. also information which a mandatory entity would have to create for a specific request from the applicant.

Another fundamental issue addressed and introduced by the draft law is the accusation in the matter of a mandatory contract publication. In this regard, I appreciate the effort to grasp this issue, since from the long-term perspective we have pointed to the fact that the Freedom of Information Act has established a new institute of the mandatory published contract, and by means of Section 47a of the Civil Code set up the moment of entry into force of the mandatory published contract. The question remains as to how to proceed if a mandatory published contract was concluded and entered into force, however, was never published. What is more, on the basis of such contract concluded but not published there has been its performance. The draft law seeks to answer this question, however, not very clearly and appropriately.

The draft law modifies, cit. "(1) If deeds are performed on the basis of a mandatory published contract, which has not yet entered into force, or if it is performed on the basis of a mandatory published contract for which it was decided that it was not concluded, based on the legal action the court may be required to decide that deeds were performed on the basis of a mandatory published contract that has not yet entered into force, or that deeds are performed on the basis of a mandatory published contract for which it was decided that it was not concluded. (2) Under paragraph 1, a legal action may also be required when liable entity is making a claim for a property benefits obtained by performing a mandatory published contract which has not yet entered into force or when liable entity is making a claim for a property benefits obtained by performing a mandatory published contract for which it was decided that it was not concluded." [7]

First of all, it should be noted that this issue is partly solved in the legal order by means of a prosecution. The legal regulation in Section 5aa should be formally included in the amendment to the Act no. 40/1964 Coll. The Civil Code, as amended since it is a matter of legal relations between entities, i.e. a natural person and/or a private legal person. Furthermore, a legal regulation relating to Section 5ab should be formally incorporated into the amendment to Act no. 60/2015 Coll. The Civil Proceedings Code for Adversarial Proceedings, as amended. This will ensure better transparency and effectiveness of the legislation.

Secondly, we also object to the content of the proposed legislation and we do not find it as appropriate. If enforcement is based on an ineffective or void contract, the current legislation already in its current wording gives the legally authorized entities the necessary effective tools to enforce the right to issue the unjust enrichment in court. Defining other legally authorized entities in relation to the right to sue an unlawful enrichment in favour of a third party (the liable person) or to bring a legal action does not address the fundamental problem of the fulfilment (or non-fulfilment) of obligations by the liable persons. This fundamental problem cannot be solved by business entities indirect penalizing, which involves at least bearing the considerable costs of judicial and preliminary judicial

[7] The draft law – point 25.

proceedings if they are not obliged to publish the contract and properly perform their contractual obligations. Moreover, the right to bring an action for a declaration that it has been performed without a legal basis creates a legally unintentional nonsense situation. It is not clear what the real effects and the applicability of such court decisions are expected. In such case, the courts will decide disputes where the judgment itself will lack any direct applicability (it will not be applicable as an enforceable title). Such action will uselessly burden the state budget, as well as the business entities, which are not responsible for the existing situation at all. Thus, the proposed legislation can create nonsense legal disputes. The timely or continuous provision of performance under the mandatory published contracts is usually the benefit for the liable entity. It is unacceptable that in such cases the business operators, which are trying to prevent the potential impacts associated with late performance or discontinuance of performance are indirectly penalized. The proposed amendment is contrary to the requirement of proportionality when not taking into account such situations but applying the same approach to speculative conduct by the liable persons, as well as to proceedings which are justified by the decisive circumstances. Compliance with liable persons' obligations should be ensured by instruments directly applicable to such liable persons and by appropriate control.

In this regard, we also draw attention to the fact that the proposed wording of the provision of Section 5aa says that it is limited to the possibility of bringing an action by the liable party, The Supreme Audit Office of the Slovak Republic, the Prosecutor General of the Slovak Republic, and the Government Office of the Slovak Republic, while ignoring the possibility of bringing the accusation by the second contracting party that has the mandatory published contract concluded. Obviously, this does not follow the constitutional principle of access of second contracting party to the relevant judicial instance in case of legitimate protection of its rights, or of the protected interest arising from a mandatory contract.

Another major problem which can cause problems in practice and which gives the possibility for liable persons not to provide requested information to the applicant asking for disclosure of information is the fact that the draft law gives the possibility for a liable person to postpone the request for information if he/she cannot make the information available to the applicant in the required form. This is clearly not an appropriate solution contributing to transparency. Moreover, we consider this fact a step backward compared to the current legislation. Under the applicable law, if the information cannot be made available in the form specified by the applicant, the liable entity and the applicant shall agree on another way of accessing information.[8] We consider the current legislation appropriate since the purpose of the information disclosure process is to provide the information to the applicant and the liable person should seek the way to make the information available rather than postpone the formal request of the applicant and not disclose the information, unless the information can be made available in the requested form. Under any circumstances, the new law in this point does not meet the objective set out in the introduction to this article, i.e. increasing transparency and openness of governance. On the contrary, this shift simplifies the procedure and responsibilities of obligated persons, however, in the field of public administration, it is not always necessary to take into account the efficiency and simplification of procedures. In the field of public administration, the fulfilment of a right to information, which is guaranteed by the constitution, has to be at the forefront.

For these reasons, we disagree with the possibility of postponing the application due to reasons that the applicant does not reply within the prescribed time limit to the liable person's notification of

[8] Section 16, paragraph 1, second sentence of the Freedom of Information Act.

the proposal for (other) possible ways of making the information available and to leave only the possibility of disclosing information in a way that places the least burden on the liable person or to leave current legislation. In case of keeping an alternative, it is likely that the obligated persons will regularly postpone the requests. The possibility of postponing the application can be considered in case of explicit denial of the proposed (substitutable) way of information disclosure by the liable party.

Last but not least, we would like to draw attention to the draft legislation, especially in the part of reimbursement of costs, i.e. if the information disclosure requires more than 200 photocopies or new scans of multi-page documents, the obligated person, with the exception of a municipality, which is not a city, can also require a fee of 5 cents for each additional scanned document. The preceding sentence shall also apply if the applicant requests within 21 working days to make information available and the disclosure of which requires the production of more than 200 photocopies or document scans together.[9]

The proposed legislation in the law itself sets the limits, as well as a specific price for photocopying or scanning. We consider this legislation to be inappropriate. The Freedom of Information Act itself has already governed the reimbursement of material costs associated with making the copies, obtaining technical media, and sending information to the applicants, while referring to the Decree of the Ministry of Finance of the Slovak Republic no. 481/2000 Coll. on details of reimbursement of the cost related to disclosure of information. This decree has not been amended or modified since its adoption, and we find it very simple, however, in the light of the above, we consider the current legislation to be more appropriate. Anyway, we express the need to amend the Decree of the Ministry of Finance of the Slovak Republic no. 481/2000 Coll. on details of reimbursement of the cost related to disclosure of information

CONCLUSION

The paper focuses on a major amendment to the Freedom of Information Act, which comes from the need for increasing the transparency in public administration. The amendment to the Act on Freedom of Information was prepared by the Ministry of Justice of the Slovak Republic. Consequently, after the own text of the amendment to the Freedom of Information Act was prepared; an inter-ministerial commentary procedure was initiated.

The need to amend the Freedom of Information Act is also evident from the interest of the professional public, as well as the general public in increasing the transparency in public administration. This strong interest is evidenced by the number of comments on the amendment to the Freedom of Information Act raised in the inter-ministerial commentary procedure.

The fundamental objective of amending the Freedom of Information Act is to increase the transparency of decision-making processes in public administration and to improve public use of information available to the public administration.

The draft law itself, however, also brings confusion and the possibility of a varied interpretations, which will cause application problems in practice. In the end, it will not only increase the transparency but, on the contrary, it will also increase the public's mistrust of public administration.

[9] The draft law – point 67.

Instead of looking for the material nature of the right to information and making information available to increase the transparency, the draft law brings excessive formalism, confusing legislation, and ease of decision for obligated persons.

Bibliography:

the Act no. 211/2000 Coll. on Free Access to Information and on amendment of some Acts

the Act no. 106/1999 Coll. on Free Access to Information and on amendment of some Acts

the Copyright Act no. 185/2015 Coll.

the Act no. 40/1964 Coll. The Civil Code

the Decree of the Ministry of Finance of the Slovak Republic no. 481/2000 Coll. on details of reimbursement of the cost related to disclosure of information

the draft law amending and supplementing the Act no. 211/2000 Coll. on Free Access to Information and on amendments of some Acts (Freedom of Information Act), as amended and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on Court fees and the fee for extracting from a criminal record as amended

Reasoning Report – general part

Reasoning Report – specific part

Legislative rules of the Government of the Slovak Republic approved by resolution of the Government of the Slovak Republic of 4 May 2016 no. 164 as amended by the resolution of the Government of the Slovak Republic of 28 September 2016 no. 441

Contact information:

Mgr. Rastislav Munk, PhD.
rastislav.munk@yahoo.com
Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic

REPORT

REPORT FROM THE INTERNATIONAL SCIENTIFIC CONFERENCE „NEW LEGISLATION ON THE ADMINISTRATIVE PUNISHMENT"

Ľudovít Máčaj, Matúš Mesarčík
Comenius University in Bratislava, Faculty of Law

On the 10th November, 2017 department of Administrative and Environmental Law of Comenius University in Bratislava, Faculty of Law organized international scientific conference held in the premises of the aforementioned faculty in the context of potential adoption of new legislation of the administrative punishment. The conference represents final outcome of the Department with regard to the project VEGA n. 1/0136/15 named "Legislation concerning Administrative punishment." Participants presented their submissions focusing on a timely and suggestive topic.

The conference was held under the auspices of doc. JUDr. Mária Srebalová, PhD. from the Faculty of Law of Comenius University in Bratislava, who was substituted by JUDr. Matej Horvat, PhD. due to her absence. The event was opened by the speech delivered by JUDr. Matej Horvat who welcomed honored guests and especially appreciated the internationality of the platform.

The introductory lecture was given by prof. JUDr. Katarína Tóthová, DrSc., who outlined the general aspects of the administrative punishment and specifically analyzed the institute of the objective deadline with regard to settling of administrative offenses. Then the floor was taken by JUDr. Stanislav Kadečka, PhD. from the Faculty of Law of Masaryk University in Brno. Dr. Kadečka highlighted application problems from the Czech Republic in the context of circumstances excluding the illegality and the extinction of liability for administrative offenses. The opening session of the conference was concluded by JUDr. Tibor Seman, PhD. from the Law Faculty of Pavol Jozef Šafárik University in Košice, who evaluated selected institutes of the future legal regulation of administrative offenses and mentioned selected semantic and linguistic issues concerning the potential legislation.

Second session of the conference focused on aspects of the administrative punishment in the area of the Environmental law. The session was opened by Mgr. Martin Dufala, PhD., pointing out issues of a municipal waste management and legislation and categorization of related administrative offenses. Mgr. Ľudovít Máčaj analyzed the level of the current legislation on administrative punishment for unauthorized soil management and protection. At the end of this section concerning environmental law Mgr. Lucia Čerňanová dealt with a very current and interesting topic of environmental burdens, which she also approached taking into account cases from practice.

The afternoon program was opened by the Head of the Department of Administrative and Environmental Law of the Faculty of Law of the Comenius University in Bratislava, prof. JUDr. Marián Vrabko, CSc. with his contribution about the possibilities of developing sanctions in the administrative punishment and the prospects for future legislation. The session continued by the submission delivered by doc. Mgr. Ján Škrobák, PhD., who presented his considerations *de lege ferenda* regarding the principle of material truth and the amount of fines in the administrative punishment. The conclusion of the section was provided by Mgr. Marianna Džačková with her presentation focusing on application problems in practice related to the application of the principles of criminal law in proceedings on administrative offenses sanctioned by the Council for Broadcasting and Retransmission.

The final session was opened by doc. JUDr. Juraj Vačok, PhD. with a unique lecture on the material and political circumstances and the methodology of the approach to the new legislation on the administrative punishment. Subsequently, Mgr. Ján Brož from the Faculty of Law at Masaryk University in Brno presented his submission on the criteria for the imposition of the administrative penalties. Mgr. Matúš Mesarčík, LL.M. delivered a few considerations on the effectiveness and suitability of administrative sanctions in the area of personal data protection, emphasizing the debate on other sanctions than administrative fines and criminal sanctions. The last section of the conference was concluded by JUDr. Matej Horvat, PhD. with his interpretation of the principle of binding law in the new law on administrative punishment.

The conference has been enormously enriching in terms of academic exchange of views and views with high relevance to potential future legislation governing the issue. Hopefully, events of a similar quality will be held at the Faculty of Law of Comenius University in Bratislava in the near future.

Contact information:

Mgr. Ľudovít Máčaj
ludovit.macaj@flaw.uniba.sk
Comenius University in Bratislava, Faculty of Law

Mgr. Matúš Mesarčík, LL.M.
matus.mesarcik@flaw.uniba.sk

Comenius University in Bratislava, Faculty of Law
Šafárikovo nám. č. 6
P. O. BOX 313
810 00 Bratislava
Slovak Republic