

NR

3(50) DWUMIESIĘCZNIK

# PRAWO I WIEŹ LAW & SOCIAL BONDS





NR

50

CZASOPISMO NAUKOWE POŚWIĘCONE PRAWU I BADANIOM SPOŁECZNYM  
JOURNAL IN LEGAL AND SOCIAL STUDIES

# LAW & SOCIAL BONDS

---



ROK XIII / NUMER 3 (50)

VOL. 13 / NO. 3 (50)

LAW AND SOCIAL BONDS IS INCLUDED IN:

SCOPUS

EUROPEAN REFERENCE INDEX FOR THE HUMANITIES AND SOCIAL SCIENCES (ERIH PLUS)  
THE CENTRAL EUROPEAN JOURNAL OF SOCIAL SCIENCES AND HUMANITIES



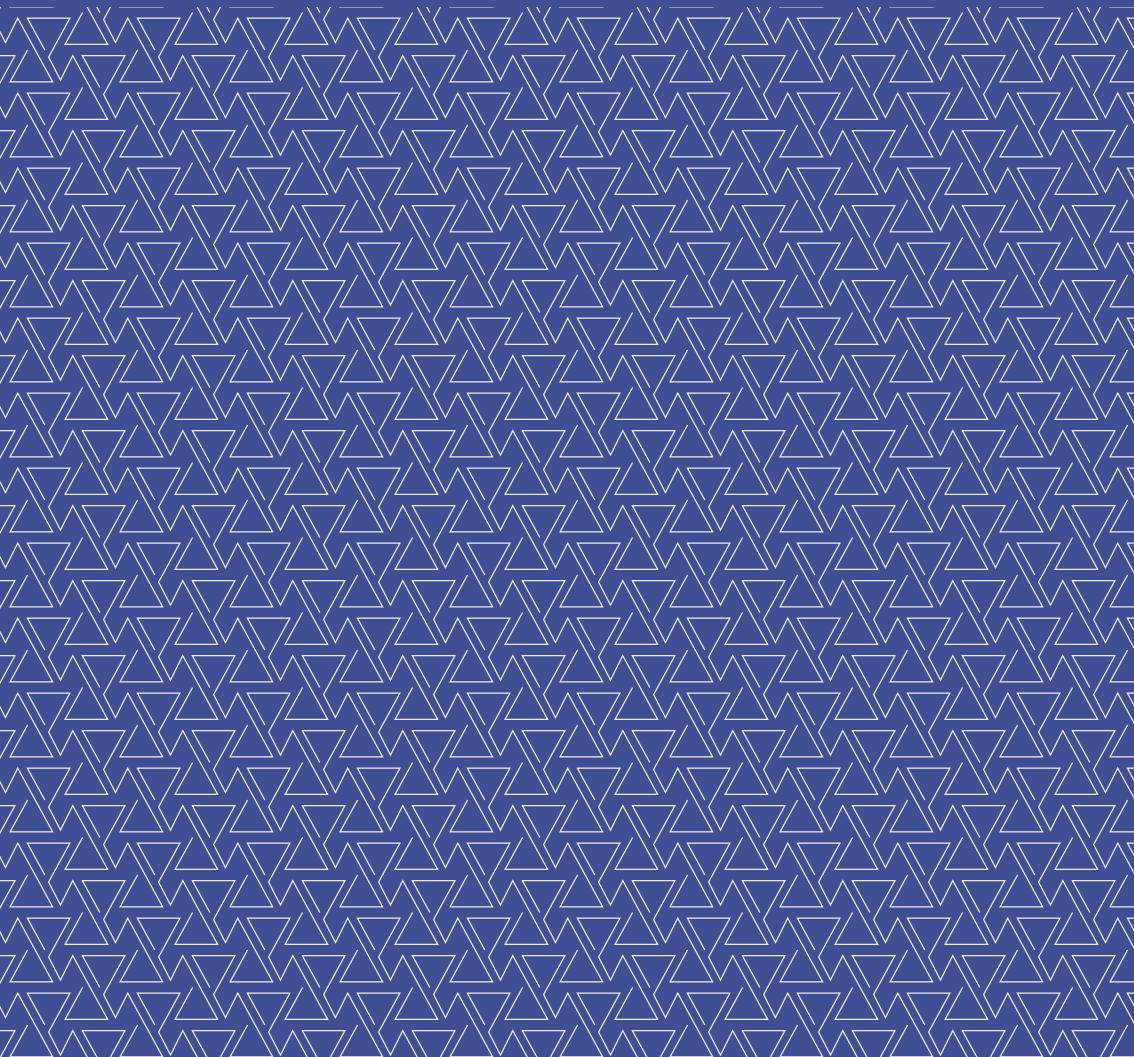
# Spis treści

## artykuły

7	<b>BRONISŁAW SITEK</b> <i>O jaką demokrację walczymy? Kilka uwag o demokracji na tle historycznoprawnym</i>	
23	<b>NATIA CHITASHVILI, IRAKLI BURDULI</b> <i>Paradigmatic Models of Mediation, Mandatory Eclectics or a Direct Decision</i>	
61	<b>LESZEK MITRUS</b> <i>Rights of Workers with Disabilities under EU Law Following Ratification of UN Convention on the Rights of Persons with Disabilities</i>	
81	<b>RAFAŁ CZACHOR</b> <i>Współpraca Sądu Konstytucyjnego Federacji Rosyjskiej z Europejskim Trybunałem Praw Człowieka w latach 1998–2022</i>	
103	<b>KRZYSZTOF KACZMAREK,</b> <b>MIROŚLAW KARPIUK, CLAUDIO MELCHIOR</b> <i>A Holistic Approach to Cybersecurity and Data Protection in the Age of Artificial Intelligence and Big Data</i>	
123	<b>AHMAD KHALIL, S. ANANDHA KRISHNA RAJ</b> <i>Development and Deployment of Autonomous Weapon Systems: Comprehensive Analysis of International Humanitarian Law</i>	
157	<b>IWONA GREDKA-LIGARSKA</b> <i>In Search of Adequate Principles for AI Civil Liability</i>	
191	<b>URSZULA NOWICKA</b> <i>Pomiędzy tradycją a prawem. Sytuacja hinduskich kobiet w Indiach</i>	
209	<b>JYOTI SINGH</b> <i>Uniform Civil Code, Legal Pluralism and Inheritance Rights of Tribal Indian Women</i>	
233	<b>NATALIA PLISZKA</b> <i>Ochrona interesu dewelopera przez prawo odstąpienia od umowy deweloperskiej i modyfikację stosunku umownego na podstawie klauzuli <i>rebus sic stantibus</i></i>	
255	<b>KAMRI AHMAD</b> <i>Child Exploitation within the Illicit Narcotics Trade, as Described by Doen Pleger</i>	
275	<b>LIDIJA PALIUKH, OKSANA KALUZHNA</b> <i>Cooperation Between Law Enforcement Agencies of Ukraine and The Republic of Poland in Countering Criminal Election Offenses During Ukrainian External Voting, Committed Outside the Diplomatic Institutions of Ukraine in Post-War Conditions</i>	
295	<b>IRYNA KOZAK-BALANIUK, IHOR KOZAK</b> <i>The Crime of Genocide as Exemplified by the Holodomor and the Russian Military Aggression Against Ukraine</i>	
315	<b>SZYMON BOGUCKI</b> <i>Decyzja polityczna jako pozakonstytucyjny instrument ochrony państwa – wizja Carla Schmitta</i>	
329	<b>MICHAŁ GRUDECKI</b> <i>Prawnokarna ocena prób samobójczych</i>	
355	<b>KATARÍNA IŽOVÁ, LUDVÍK JURÍČEK, KATEŘINA BOČKOVÁ, DAVID ANTHONY PROCHÁZKA</b> <i>Analysis of the Effectiveness of Prevention Programmes Aimed at Eradicating Juvenile Delinquency in Slovakia: Comparative Study of Different Approaches within Criminological and Pedagogical Methods</i>	
383	<b>NATALIA KHOMA, IHOR VDOVYCHYN</b> <i>The System of Factors Determining the Prevention and Counteraction of Corruption in Estonia</i>	
407	<b>TOMASZ BĄKOWSKI</b> <i>Lokalizacja instalacji odnawialnego źródła energii na podstawie decyzji o warunkach zabudowy</i>	
421	<b>BEATA BARAN-WESOŁOWSKA</b> <i>Model organizacyjno-podmiotowy wojskowego postępowania dyscyplinarnego w perspektywie ustawy o obronie Ojczyzny</i>	
433	<b>RENATA KUSIAK-WINTER</b> <i>Badanie związków polityki i prawa jako przedmiot nauki administracji</i>	

<b>449</b>	<b>BARTOSZ NOWAKOWSKI</b> <i>Polityka państwa dotycząca dostępu osób cywilnych do broni w kontekście wojny na Ukrainie i pandemii Covid-19</i>	<b>487</b>	<b>PETRO KORNIEIEV, TOMASZ BRZEZICKI</b> <i>Monetary Public Levies in Poland and Ukraine: the Comparative Analysis</i>
<b>469</b>	<b>KRZYSZTOF CZARNECKI, JACEK WANTOCHEKOWSKI</b> <i>Polish Film Institute: Legal Status, Organisation and Tasks</i>	<b>503</b>	<b>MARTYNA ŁASZEWSKA-HELLRIEGEL, CHRISTOPH-ERIC MECKE</b> <i>Kobiety w procesie cz. I. Kobiety przed sądem</i>

# artykuły





BRONISŁAW SITEK

# O jaką demokrację walczymy? Kilka uwag o demokracji na tle historycznoprawnym

**What Kind of Democracy Are We Fighting For?  
Some Remarks on Democracy in the Historical and Legal Context**

The history of democracy is primarily associated with ancient Greece and the Roman Republic. To this day, it is believed that democracy is the rule of the people. Since antiquity, new legal or institutional solutions have been introduced to ensure a certain status quo in the prevailing balance of political forces, guaranteeing the stability of the state and society. It is not uncommon for demands to save democracy to have been and still be made. An example of this was the recent elections in Poland, when the then-opposition went to the polls under the slogan of saving democracy. Few of the voters, or even the politicians who proclaimed these slogans, thought about what kind of democracy they were fighting for. Was democracy really threatened? And what is democracy? In this paper, a legal-historical analysis allows us to conclude that, due to social, political, and technological changes, the most optimal democracy today is constitutional liberalism, i.e., a form of government rather than a stability of procedures or institutions.

**SŁOWA KLUCZOWE:** demokracja,  
liberalizm konstytucyjny,  
demokracja ateńska, demokracja  
republikańska

**KEYWORDS:** democracy,  
constitutional liberalism, Athenian  
democracy, republican democracy

**BRONISŁAW SITEK**, profesor nauk prawnych, Uniwersytet SWPS,  
ORCID – oooo-ooo2-7365-6954, e-mail: bronislaw.sitek@gmail.com

## 1 | Wstęp

Pojęcie „demokracja” jest dość często używanym w narracji politycznej, w doniesieniach prasowych, w dyskusjach publicznych i prywatnych, a w końcu pojęcie to jest przedmiotem licznych opracowań naukowych z zakresu prawa, socjologii, psychologii społecznej, historyków czy nawet teologów. Analizując tylko побieżnie te wszystkie okoliczności stosowania terminu „demokracja” rodzi się pytanie o to, czy interloktorzy i słuchacze mają pojęcie, o czym jest mowa oraz o jaką demokrację im chodzi? Już na wstępie należy zaznaczyć, że nie istnieje tylko jeden rodzaj demokracji, lecz należ mówić o wielu koncepcjach czy pomysłach na to jak ma ona wyglądać. Stąd każda taka koncepcja demokracji jest dookreślana jakimś przymiotnikiem, m.in. ludowa, liberalna, narodowa, socjalistyczna, katolicka czy nawet totalitarna<sup>[1]</sup>.

W ramach doktryny liberalnej prawa konstytucyjnego od dłuższego czasu toczy się dyskusja nad istotą demokracji wiążąc ją z ideologią liberalną opartą na takich wartościach jak wolność i równość. Stąd samo określenie „liberalizm” czy „liberal” nierzadko w dyskusjach jest używany jako zwrot retoryczny w celu samookreślenia czy pozycjonowania rozmówcy. Tym samym termin „liberalizm” podobnie jak i słowo „demokracja” może nabierać tak pejoratywnego jak i pozytywnego wydźwięku wraz z emocjonalnym zaangażowaniem osób uczestniczących w dyskusji<sup>[2]</sup>.

W doktrynie prawa konstytucyjnego od dawna można spotkać się z krytyką współczesnej demokracji jako formy ustroju czy też systemu politycznego<sup>[3]</sup>. W polskiej doktrynie politycznej i konstytucyjnej mówi się

<sup>1</sup> Nawet w ramach nurtu myśli liberalnej mówi się o demoliberalizmie, socliberalizmie czy nawet o demokracji liberalnej. Każda z tych demokracji podejmuje próbę przeniknięcia do wszystkich sfer życia społecznego i człowieka, a więc nie tylko politykę, ale również prawo, gospodarkę, kulturę, wychowanie czy kształcenie. Zob. Henryk Kiereś, „Jaka demokracja?” *Człowiek w kulturze*, 20 (2008): 17–32. W literaturze światowej pisze się również o demokracji totalitarnej. Zob. Erik Cohen, Nachman Ben-Yehuda, „Counter-Cultural Movements and Totalitarian Democracy” *Sociological Inquiry*, 4 (1987): 372–393.

<sup>2</sup> Damian Maziarz, „Dlatego powinniśmy nazywać siebie chrześcijanami – recenzja” *Roczniki Filozoficzne*, nr 1 (2015): 193–200.

<sup>3</sup> Paul Blokker, „Populism as a constitutional project” *International Journal of Constitutional Law*, nr 2 (2019): 536–553; Radosław Markowski, *Demokracja i demokratyczne innowacje. Z teorią w praktykę* (Warszawa: Instytut Obywatelski, 2014), 161–170; Kim Lane Schepppele, „The Opportunism of Populists and the Defense of

---

o demokracji bezpośredniej, która również jest trudna do jednoznacznego zdefiniowania<sup>[4]</sup>.

Z racji różnorodności i nieostrości pojęcie „demokracja” w narracji publicznej nie jest ono definiowane, lecz jedynie używane nominalnie w celu osiągnięcia określonego efektu politycznego, społecznego czy ideologicznego. O takim instrumentalnym traktowaniu słowa „demokracja” dowodzą również ostatnie wybory parlamentarne, czy dokładniej kampania wyborcza jaka miała miejsce w Polsce we wrześniu i październiku 2023 roku. Jeszcze wcześniej, w dniu 4 czerwca 2023 r., została zorganizowana ogromna manifestacja w obronie demokracji, w której według różnych danych mogło wziąć udział nawet ok. 0,5 mln uczestników<sup>[5]</sup>. Podstawowe pytanie jakie w tym kontekście się jawi dotyczy tego, czy uczestnicy tego wydarzenia byli świadomi o jaką demokrację walczą? Albo też, w jaki sposób ta demokracja była łamana przez ówczesny rząd, jak twierdzili opozycyjni liderzy? Pomimo, że nie spotkałem się z badaniami socjologicznymi poziomu świadomości uczestników celu tej demonstracji, o którą walczą, można jednak *a priori* założyć, że większość uczestników tego wydarzenia zapytana o rozumienie pojęcia demokracja nie byłaby w stanie udzielić jakiekolwiek sensownej odpowiedzi.

Przedmiotem mojego opracowania jest analiza pojęcia „demokracja” z punktu widzenia nie tylko leksykalnego, ale przede wszystkim z punktu widzenia historycznego, doktrynalnego i prawnego. Celem tego badania jest analiza prawdziwości twierdzenia, według którego nie istnieje jednolita koncepcja demokracji, między innymi ze względu na permanentną jej ewolucję. Właśnie ta ewolucja, jest charakterystyczną cechą wpisaną w jej istotę. Dynamika rozwoju koncepcji demokracji, a tym samym i ustroju zwanego demokracją może być odczytywana przez zwolenników stabilizacji systemu demokratycznego, jako przejaw jej łamania przez rządzących. Wszelkie zmiany np. procedur stanowienia prawa, organizacji sądownictwa, zasad naboru na stanowiska publiczne mogą być odczytywane jako zamach na demokrację i praworządność. Nie można też nie zauważyć,

---

Constitutional Liberalism” *German Law Journal*, 3(2019): 316; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998).

<sup>4</sup> Marcin Rachwał, „Demokracja bezpośrednią w Polsce – fikcja czy rzeczywistość?” *Przegląd Politologiczny*, 9 (2010): 103-114.

<sup>5</sup> Podczas tego marszu, wielu polityków nawoływało do obrony demokracji. Zob. Sebastian Klauziński, Michał Danielewski, *Marsz 4 czerwca. Co najmniej 380 tys. w Warszawie. OKO.press*, 4 czerwca 2023. <https://oko.press/marsz-4-czerwca-warszawa-tusk-opozycja>. [dostęp: 3.06.2023].

że w Polsce, ale również w Unii Europejskiej dochodzi do zawłaszczenia pojęcia „demokracja” i treści jakie się za nim kryją przez zwolenników jednej opcji politycznej czy ideologicznej, zwłaszcza przez zwolenników demokracji liberalno-lewicowej odmawiając tym samym demokratyzmu zwolennikom myśli konserwatywnej czy narodowej.

Przyjęte założenia wyjściowe niniejszego opracowania wymagają spojrzenie na zachodzące zmiany w pojmoniowaniu demokracji już w starożytnych Atenach i republike rzymskiej, a także na pojmoniowanie demokracji we współczesnej doktrynie, w prawie międzynarodowym i prawie polskim.

## 2 | Demokracja Ateńska – ideał demokracji?

W wielu współczesnych publikacjach wskazuje się jako ideał ustroju politycznego na demokrację ateńską. Trzeba jednak zdawać sobie sprawę z tego, że ostateczny kształt tej demokracji powstawał na przestrzeni kilku wieków w wyniku ciągłych reform ustrojowych wprowadzonych kolejno m.in. przez Solona (594 przed Chr.), Klajstenesa (508-507 przed Chr.), Peryklesa (451-429 przed Chr.) i Demostenesa (355-233 przed Chr.)<sup>[6]</sup>. Powyższe reformy są dowodem na to, że należy mówić o dynamicznym procesie rozwoju demokracji ateńskiej, nie zaś o jednym, stabilnym jej modelu. Można jednak wskazać na pewne charakterystyczne cechy tego ustroju, które były efektem właśnie tego wielowiekowego procesu jego rozkwitu.

Wśród charakterystycznych cech demokracji ateńskiej na pierwszym miejscu znajduje się instytucja zgromadzenia ludowego, będąca formą demokracji bezpośredniej, to jest możliwość udziału wszystkich pełnoprawnych obywateli w podejmowaniu najważniejszych decyzji dla państwa poprzez głosowanie, a także możliwość publicznego przemawiania. Zgromadzenia ludowe odbywały się w miejscowościach publicznych (agora). Uchwały podejmowane były większością głosów, a ich treść ostatecznie była kształtowana wskutek publicznych dyskusji na gromadzeniach ludowych. Uprawnienie do publicznego przemawiania posiadali wszyscy obywatele,

<sup>6</sup> Wojciech Ziętara, „Demokracja ateńska a demokracja współczesna” *Krakowskie Studia Małopolskie*, 16 (2011): 236; Robion Osborne, *Athens and Athenian democracy* (Cambridge: Cambridge University Press 2010), 25 n.; P.J. Rhodes, Rhodes P.J., „Athenian Democracy After 403 BC” *The Classical Journal*, 4 (1980): 305-323.

w praktyce jednak głos zabierali znani mówcy, zwani demagogami. Udział uprawnionych obywateli w zgromadzaniu był dobrowolny, niemniej aktywność obywateli w tym zakresie była dość wysoka<sup>[7]</sup>. Warto jednak zauważać, że uprawnienia tego nie posiadały kobiety, a także niewolnicy, obcokrajowcy i dzieci, co wydaje się w tym ostatnim przypadku oczywiste i usprawiedliwione czynnikami obiektywnymi.

Drugą cechą charakterystyczną dla demokracji ateńskiej była równość wszystkich obywateli. Każdy zatem obywatel mógł ubiegać się o zaszczyty i godności, zwłaszcza w zakresie urzędów. Takie rozwiązańe było efektem uznania, że pełnoprawni obywatel mający uprawnienia do udziału w zgromadzeniach ludowych są nie tylko równi i wolni, a więc sami decydują o swoim losie, również w zakresie pełnienia funkcji publicznych. Nie miało tutaj zatem znaczenia to, czy ubiegający się o urząd ma wiedzę i odpowiednie przygotowanie. Stąd też na urzędy publiczne mogły zostać wybrane osoby niekompetentne. Nie można jedna z tego powodu negatywnie oceniać ówczesną demokrację, bowiem mówcami na zgromadzeniach ludowych najczęściej były osoby dobrze przygotowane, które ukończyły szkoły retorskie, posiadały znajomość dialektyki, gramatyki, a także matematyki, astronomii, historii czy poezji. Często mieli oni pogłębioną wiedzę o stanie państwa<sup>[8]</sup>. Urzędy mogły być piastowane tylko przez jedną kadencję.

Warto też zwrócić uwagę na fakt, że kształt demokracji ateńskiej był negatywnie oceniany już przez znanych myślicieli starożytności. Sokrates krytykował ustrój ateński za możliwość losowania stanowisk. Przyczynała takie rozwiązańe do sytuacji na statku znajdującym się na wzburzonym morzu, na którym stery są powierzone marynarzowi wybranemu w drodze losowania, a więc osobie przypadkowej i to z wysokim rachunkiem prawdopodobieństwa osobie nie przygotowanej. Stąd Sokrates postulował wprowadzenia powszechnej edukacji obywateli w celu ratowania właśnie demokracji<sup>[9]</sup>. Krytykę demokracji ateńskiej prowadził również Platon. Według tego filozofa demokracja oparta na zbyt szeroko pojmowanej wolności staje się ustrojem, podstawę którego stanowi biedota i osoby słabo przygotowane do pełnienia publicznych urzędów. Gdy wszystko wolno

<sup>7</sup> Ibidem, 237.

<sup>8</sup> Edward Karolczuk, „Sprzeczności w funkcjonowaniu demokracji ateńskiej” *Sztuka i Dokumentacja*, 16 (2017): 29-47.

<sup>9</sup> Ibidem, s 240. Lucyna Chmielowska, „Filozofia polityczna Sokratesa” *Prace Naukowe Akademii im. Jana Długosza w Częstochowie. Res Politicae*, t. III (2009): 7-31; Hannah Arendt, *Polityka jako obietnica*, tłum. Wojciech Madej, Mieczysław Godyń (Warszawa: Prószyński i S-ka, 2005), 39-40.

obywatelom, demokracja zamienia się w anarchię, a następnie w dyktaturę demagogów czy stosując współczesny język, populistów<sup>[10]</sup>. Podobnie zresztą myślał Arystoteles, według którego anarchia jest przestrzenią bez prawa, bez stałych reguł. Pod wpływem demagogów lud z łatwością zmienia uchwały, występuje przeciwko elitom społecznym. Stąd Arystoteles odrzucał demokrację jako taką, sam stworzył modelu ustroju mieszanego określany jako politeja<sup>[11]</sup>.

Podsumowując można stwierdzić, że demokracja ateńska realizowała zasadę isonomii, czyli równości politycznej i prawnej obywateli, oraz isokratii, czyli równości dostępu do władzy. Natomiast nie była realizowana zasada isegorii czyli równości wypowiedzi i inicjowania działań. Nie można też Grekom przypisać znajomości zasad praworządności, czyli centralnej pozycji prawa w państwie<sup>[12]</sup>. Tym samym nie można stawić znaku równości pomiędzy demokracją ateńską a współczesnymi koncepcjami demokracji<sup>[13]</sup>.

### 3 | Demokracja republiki rzymskiej

Nieco odmienna jest historia rozwoju ustroju republiki rzymskiej. Moim zdaniem urząd republiki rzymskiej nie może być określony jako jedna z form demokracji. Był to bowiem raczej urząd demokracji republikańskiej, który również przechodził bardzo wiele zmian na przestrzeni pięciu wieku istnienia. Cechą charakterystyczną tej formy ustroju była silna władza konserwatywnej, wspierana przez zgromadzeniami ludowymi, a czasem z senatem zdobywającym coraz silniejszą pozycję ustrojową. Nie można też mówić

<sup>10</sup> Miroslav Řádek, „State and Democracy in the Philosophy of Plato and Aristotle” *University Review*, 2 (2020): 37-40; Stella Lange, „Plato and Democracy” *The Classical Journal*, 8 (1939): 480-486.

<sup>11</sup> David Polansky, „Populism and Democratic Conflict: An Aristotelian View” *The Review of Politics*, 2 (2023): 207-224; Justyna Miklaszewska, „Dwie koncepcje demokracji”, [w:] Wielkość i piękno filozofii. Księga pamiątkowa ku czci prof. Władysława Stróżewskiego, red. Józef Lipiec, Sebastian Kołodziejczyk (Kraków: „Collegium Columbinum”, 2003), 249-264. Znacznie więcej było krytyków demokracji ateńskiej, m.in. Ksenofonta czy Pseud-Ksenofonta. Zob. Mateusz Nieć, „O tzw. autorytaryzmie demokracji attyckiej” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji*, 79 (2009): 145-171.

<sup>12</sup> Nieć, „O tzw. autorytaryzmie demokracji attyckiej”, 159.

<sup>13</sup> Ziętara, „Demokracja ateńska a demokracja współczesna”, 236-248.

o równym dostępie obywateli do urzędów publicznych. Z racji specyfiki ówczesnej władzy, zwłaszcza nieodpłatności oraz potrzeby wniesienia przez kandydata na urząd publiczny dość wysokiego zabezpieczenia finansowego, to o urzędy publiczne ubiegały się wyłącznie osoby majątkowe<sup>[14]</sup>, podobnie jak jest to obecnie w systemie politycznym Stanów Zjednoczonych<sup>[15]</sup>.

Niewątpliwie podobieństwo ustroju republiki rzymskiej do demokracji ateńskiej znajduje się w strukturze społecznej. Pełny udział w publicznej debacie podczas zgromadzeń ludowych (*comitia*) mieli wyłącznie pełnoprawni obywatele, a więc z wyłączeniem kobiet, niewolników, dzieci i obcokrajowców (*peregrines*). Trzeba jednak pamiętać, że pierwotne społeczeństwo rzymskie w okresie republiki dzieliło się na dwie grupy, tj. patrycjuszy i plebejuszy. Patrycjusze mieli pełnię praw obywatelskich, w tym uprawnienia do udziału w zgromadzeniach ludowych oraz obejmowania urzędów publicznych, zwłaszcza urzędu konsula czy pretora. Drugą grupę stanowili plebejusze, którzy wykonywali prace służebne i początkowo byli wykluczeni w tych uprawnieniach. W wyniku konfliktu pomiędzy patrycjuszami a plebejuszami jaki miał miejsce w V wieku przed Chr. doszło do stworzenia urzędów plebejskich z trybunem plebejskim na czele oraz do powołania do życia zgromadzenia plebejskiego (*concilia plebis*). Podczas tych zgromadzeń pierwotnie podejmowano ustawy (*plebiscitum*) wiążące tylko plebejuszy. Jednak od plebiscytu z 287 r. przed Chr. lex Hosrtensia ustawy plebejskie zaczęły obowiązywać również patrycjuszy. Tym samym doszło do zrównania się w uprawnieniach publicznych obu grup społecznych.

Podstawą ustroju republiki rzymskiej były zgromadzenia ludowe, a później również plebejskie. Podstawową formą działalności zgromadzeń

<sup>14</sup> Wnoszone określone kwoty przez kandydata na urząd publiczny (*magistratus*) były wpłacane do kasy miejskiej. Na koniec sprawowanego urzędu robiony był audyt jakimi ów urzędnik dysponował będąc na urzędzie, a brakujące środki pokrywano z owego zabezpieczania. Takie rozwiązania stosowano do urzędników mających władzę określającą jako *imperium*, a więc konsul czy pretor. W okresie pryncypatu praktyka ta zachowała się w prawie municipalnym. Takie zabezpieczenia w firmie gotówkowej jak i niegotówkowej (np. hipoteki, musieli ustanowić m.in. duumwiowie. Zob. Bronisław Sitek, „Organy Władzy w «municipium Irni». Ze studiów nad prawem municipalnym w Starożytnym Rzymie” *Journal of Modern Science*, nr 1 (2005): 21-42.

<sup>15</sup> Więcej o finansowaniu kampanii wyborczej w wyborach prezydenckich w Stanach Zjednoczonych zob. Bogdan Mucha, „Mechanizm finansowania prezydenckich kampanii wyborczych w Stanach Zjednoczonych Ameryki” *Krakowskie Studia Międzynarodowe*, 3 (2008): 115-135.

ludowych była dyskusja i głosowanie nad tekstami ustaw. Początkowo głosowania były jawne przez podniesienie ręki, co umożliwiało kontrolowanie głosowania przez osoby wpływowie i zamożne. Jednak od czasów *leges Tabellariae* wprowadzono głosowania tajne i zbudowano system wyborczy, który jest pierwowzorem dla współczesnego systemu wyborczego<sup>[16]</sup>. Mianowicie wybory opierają się na takich zasadach jak równość, tajność, bezpośrednią i powszechność.

Znaczące dla zrozumienia myśli politycznej Rzymian i istoty demokracji republikańskiej antycznego Rzymu jest wyjaśnienie zdarzeń jakie miały miejsce w końcu tego okresu. Otóż w I w. przed Chr. miała miejsce wojna domowa pomiędzy zwolennikami republiki, czyli optymatami, których przedstawicielem był m.in. Cyceron, a przeciwnikami, czy może trafniej będzie użycie określenia zwolennikami daleko idących zmian ustrojowych, których przedstawicielem był m.in. Juliusz Cezar. Rozwój terytorialny i ekonomicznych imperium rzymskiego był tak dalece zaawansowany, że ustroj republikański stał się niewydolny. Wielu zatem uważało, że nie wystarczą reformy ustroju republikańskiego, lecz konieczna jest zmiana ustroju na silne jednowładztwo bez kadencyjne<sup>[17]</sup>. Ostatecznie zwyciężyła opcja popularów, co niewątpliwi przyczyniło się do zachowania państwo-wości, porządku publicznego i dynamicznego rozwoju gospodarczego.

## 4 | Demokracja w prawie międzynarodowym i prawie Unii Europejskiej

Po doświadczeniach drugiej wojny światowej i dwóch systemów totalitarnych, dla których człowiek nie był wartością, lecz jedynie jednostką, powrócono do idei praw człowieka, w celu spisania praw podstawowych

<sup>16</sup> Bronisław Sitek, „Decreta decurionum. Postanowienia rady miejskiej w świętej lex Irnitana”, [w:] *Leges sapere. Studia i prace dedykowane profesorowi Januszowi Sondlowi w pięćdziesiątą rocznicę pracy naukowej* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2008), 509–525. Nicola Demetrio Luisi, „Sul problema delle tabelle di voto nelle. Votazioni legislative: contributo all’interpretazione di Cic. Ad Att. 1.14.5” *Index*, 23(1995): 419 n.

<sup>17</sup> Bronisław Sitek, *Actiones populares w prawie rzymskim na przełomie republiki i pryncypatu* (Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 1999), 20–32.

w aktach prawa międzynarodowego. Jednym z tych praw jest prawo człowieka do bezpiecznego i sprawiedliwego pokoju. Potępiając ustroje totalitarne takie jak faszyzm czy komunizm uznano, że jedynie ustroj demokratyczny może zagwarantować poszanowanie praw człowieka. Stąd w art. 29 ust. 2 Powszechniej Deklaracji Praw człowieka z 1948 r. stwierdzono, że poszanowanie praw i wolności człowieka może być realizowane w demokratycznym społeczeństwie. Tutaj ustawodawca międzynarodowy odniósł się nie tylko do ustroju politycznego, lecz przede wszystkim do organizacji społeczeństwa, która winna być oparta na takich zasadach jak równość i wolność<sup>[18]</sup>.

Koncepcja społeczeństwa demokratycznego pięciokrotnie została przywołana w Konwencji o ochronie Praw Człowieka i Podstawowych Wolności z 1950 r., dokument Rady Europy. Pojęcie „społeczeństwo demokratyczne” zostało zastosowane w różnych kontekstach i tak w art. 6 – prawo do sądu, w art. 8 ust. 2 – ograniczanie prawa do poszanowania życia prywatnego i rodzinnego, w art. 9 ust. 2 – ograniczenie prawa człowieka do wolności myśli, sumienia i wyznania, w art. 10 ust. 2 – ograniczanie prawa wolności wyrażania opinii i w końcu w art. 11 ust. 2 – ograniczanie prawa do swobodnego, pokojowego zgromadzania się oraz do swobodnego stowarzyszania się. Jak widać z przytaczanych przepisów autorzy tej konwencji założyli, że człowieka jest wolny, a jego wolność w różnych zakresach może być ograniczana w społeczeństwie demokratycznym tylko wyjątkowo ze względu na interesy bezpieczeństwa państwowego lub publicznego<sup>[19]</sup>.

Pojęcie „społeczeństwo demokratyczne” występuje również w innych aktach prawa międzynarodowego. Między innymi w Amerykańskiej Konwencji Praw człowieka z 1969 r., w art. 15 – prawo do spokojnego gromadzenia się, art. 16 – prawo do zrzeszania się i w art. 22 ust 2 – ograniczanie praw o których jest mowa w art. 15 i 16 może mieć miejsce wyłącznie zgodnie z prawem i w zakresie koniecznym w społeczeństwie demokratycznym dla zapobieżenia przestępstwu bądź dla ochrony bezpieczeństwa państwowego i publicznego oraz porządku publicznego i moralności.

Ważnym obszarem działania Unii Europejskiej jest aktywność na polu ochrony i promowania praw człowieka, pokoju, pojednania i demokracji.

<sup>18</sup> Julia Jaskólska, „Treść Powszechniej Deklaracji Praw Człowieka” *Człowiek w kulturze*, 11 (1998): 49–97.

<sup>19</sup> Katarzyna Witkowska-Chrzczonowicz, Piotr Chrzczonowicz, „Wybrane problemy zapewnienia skutecznej ochrony praw podstawowych w Unii Europejskiej po wejściu w życie Traktatu z Lizbony” *Studia z Zakresu Nauk Prawnoustrojowych*, 2(2012): 35.

W uznaniu za zasługi na tym polu 12.10.2012 r. UE została nagrodzona Pokojową Nagrodą Nobla. Promowanie przez UE społeczeństwa demokratycznego jest uzupełnieniem działań w dziedzinie praw człowieka. W dniu 17 listopada 2009 r. Rada UE przyjęła konkluzję w sprawie wspierania demokracji w stosunkach zewnętrznych, uwzględniając specyfikę każdego kraju. W listopadzie 2012 r. UE i jej państwa członkowskie powołały do życia inicjatywę Drużyna Europy na rzecz demokracji. Celem tej inicjatywy jest promowanie demokracji. W tym celu zostały stworzone również instrumenty finansowe wspierające tę inicjatywę<sup>[20]</sup>.

Obecnie należy mówić o demokracji ponadnarodowej, czyli takiej która nie jest przypisana do konkretnego państwa. Ten rodzaj demokracji występuje w międzynarodowych strukturach lepiej zorganizowanych, jaką jest niewątpliwie Unii Europejskiej. Cechą charakterystyczną tej demokracji jest brak własnego *demos*. Ten rodzaj demokracji jest tworem wielokomponentowym, nowe formy procesów i rozwiązań demokratycznych. Niewątpliwie demokracja ponadnarodowa jest wspierana ponadnarodowy porządek prawnny. Podstawą demokracji ponadnarodowej nie jest zatem *demos*, lecz procesy demokratyzacyjne, które budują i napędzają rozwiązań demokratyczne<sup>[21]</sup>.

## 5 | Jak demokracja?

Analiza historyczna ustrojów starożytnych Aten i republiki rzymskiej oraz analiza tekstów prawa międzynarodowego oraz działań Unii Europejskiej pokazuje, że nie można mówić o jednym modelu demokracji. Poza pewnymi cechami typowymi dla wszystkich modeli demokracji, jak równość ludzi czy wolność indywidualna, istnieje wiele specyficznych cech różniących między sobą poszczególne modele demokracji, te historyczne i te współczesne.

Współcześnie mówi się o dominującej formie liberalizmu konstytucyjnego (*constitutional liberalism*), który różni się od liberalnego

<sup>20</sup> Artur Szmigelski, „Prawa człowieka i demokracja w centrum działań zewnętrznych Unii Europejskiej. Dylematy prawne i polityczne” *Przegląd Zachodni*, nr 1 (2016): 7–22; Rasma Kaskina, *Promowanie demokracji i obserwacja wyborów*. <https://www.europarl.europa.eu/factsheets/pl/sheet/166/promowanie-demokracji-i-obserwacja-wyborow> [dostęp: 4.06.2024].

<sup>21</sup> Janusz Ruszkowski, „Demokracja ponadnarodowa w Unii Europejskiej. Wstępna analiza teoretyczna” *Rocznik Integracji Europejskiej*, 9 (2015): 17–37.

konstytucjonalizmu (*liberal constitutionalism*). Liberalizm konstytucyjny stoi na straży osobistej suwerenności każdego człowieka, zaś liberalny konstytucjonalizm strzeże wolności jednostki do ochrony wartości konstytucyjnych. Liberalizm konstytucyjny jest to zatem forma rządów nie zaś trybu wyboru rządu. W tym systemie chodzi o ochronę autonomii i godności jednostki przed przymusem, niezależnie od źródła jego pochodzenia, którym może być aparat państwy, religia czy też samo społeczeństwo, np. kulturowo ugruntowane schematy zachowań czy ubioru. Należy jedna zwrócić uwagę na to, że w doktrynie dostrzega się dość rozbieżne interpretacje koncepcji liberalizmu konstytucyjnego. Jednak pomimo tych różnych koncepcji liberalizmu konstytucyjnego jego zwolennicy dostrzegają przewagę tej koncepcji nad koncepcjami i systemami politycznymi i ustrojowymi określonymi jako nieliberalne, populistyczne czy autorytarne<sup>[22]</sup>. Według Michela Rosenfelda koncepcja liberalizmu konstytucyjnego obecnie najlepiej wypełnia pragnienia demokracji. Odejście od trzymania się ścisłych ram prawa wyborczego czy procedur pozwala rządowi na lepsze osiągnięcie sprawiedliwości we współczesnym zglobalizowanym i pluralistycznym społeczeństwie. Niewątpliwie liberalny konstytucjonalizm poprzez sztywne trzymanie się procedur oraz chęci powrotu do danego modelu demokracji z lat nawet dziewięćdziesiątych poniósł porażkę. Stał się niewydolny w skutecznym stawianiu czoła nowym wyzwaniom naszych czasów, czasów społeczeństwa informacyjnego budowanego w oparciu o najnowsze urządzenia technoinformatyczne, społeczeństwa wirtualnego i wielokulturowego<sup>[23]</sup>. System demokratyczny nie powinien też ograniczać się tylko do zaspakajania krótkotrwałych indywidualistycznych interesów konsumentów, lecz do tworzenia reprezentatywnej grupy obywateli i ekspertów z różnych środowisk zapewniając tym samy możliwość inkluzywnej demokratycznej debaty, pozwalającej na edukację obywateli i stymulowanie świadomości złożoności kwestii społecznych<sup>[24]</sup>.

Powracając do dyskursu nad kształtem demokracji w Polsce należy się odnieść do postanowień zwartych w Konstytucji RP oraz do wybranych ustaw i poglądów doktryny. Już w preambule do Konstytucji RP polski

<sup>22</sup> S. Canduzzi, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Time of Rising Populism and Illiberalism*, Athena 4.1(2024), s. 138.

<sup>23</sup> Michel Rosenfeld, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism* (Oxford: Oxford University Press, 2022).

<sup>24</sup> Amanda Machin, „Democracy, Agony, and Rupture: A Critique of Climate Citizens’ Assemblies” *Politische Vierteljahrsschrift*, 4 (2023): 845-864.

ustorojodawca stwierdza, że to Naród Polski jest uprawniony do suwerennego i demokratycznego stanowienia o Jej losie. Przyjmuje się, że preambuły spełniają funkcje narzędzi niestanowczych, raczej wspierają narzędzia stanowcze zasadniczego aktu prawnego. To jednak, co jest ważne w tym sformułowaniu, to to, że Naród Polski jest suwerenem, a więc źródłem władzy. Zatem musimy zobaczyć co ustrojodawca stanowi o demokracji w tekście konstytucji<sup>[25]</sup>.

W art. 2 ustrojodawca stanowi o tym, że Rzeczpospolita Polska jest demokratycznym państwem prawa. Z kolei w art. 11 ust. 1 Konstytucji RP postanowiono, że partie polityczne poprzez swoich członków mogą wpływać na kształtowanie się polityki państwa stosując metody demokratyczne. W art. 28 Ustawy Zasadniczej znalazła się bardzo ważny przepis dotyczący Sił Zbrojnych. Otóż Siły Zbroje winny zachować neutralność w sprawach politycznych oraz podlegają cywilnej i demokratycznej kontroli.

W świetle analizy przepisów Konstytucji RP można stwierdzić, że polski ustrojodawca określił ustrój w Polsce jako demokrację przedstawicielską z elementami demokracji bezpośredniej, tj. referendum i obywatelskiej inicjatywy prawodawczej<sup>[26]</sup>. Zatem te dwa rodzaje demokracji nie są różnorzędne, bowiem demokracja bezpośrednią ma jedynie charakter subsydiarny w stosunku do demokracji przedstawicielskiej. Takie usytuowanie obu rodzajów demokracji względem siebie niewątpliwie wynika z faktu obszerności zadań jakie stoją przed organami państwa powiązanymi z rozległością terytorialną państwa, liczby ludności, problemów społecznych, gospodarczych czy politycznych. Nie jest zatem w praktyce możliwe, aby suweren, czyli Naród Polski, rozwiązywałaby wszystkie te problemy. Kwestie te zatem rozwiązywane są przez przedstawicieli wybranych przez suwerena w wyborach bezpośrednich, równych, tajnych i powszechnych<sup>[27]</sup>.

<sup>25</sup> Piotr Tuleja, „Komentarz do Preambuły”, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, red. Piotr Tuleja (Warszawa: Wolters Kluwer, 2019), 22; Tomasz Giszbert-Studnicki, *Język prawy z perspektywy socjolingwistycznej* (Kraków: Państwowe Wydawnictwo Naukowe, 1986), 63.

<sup>26</sup> Do from wykonywania demokracji bezpośrednią zalicza się również uznają również plebiscyt, obywatelską inicjatywę konstytucyjną i ustawodawczą, zgromadzenie ludowe, weto ludowe i konsultacje społeczne. Zob. Krzysztof Skotnicki, „Instytucje sprawowania władzy przez suwerena w świetle Konstytucji RP” *Gdańskie Studia Prawnicze* 59(2023), 23; Piotr Tuleja, *Uwaga do art. 4*, [w:] *Konstytucja Rzeczypospolitej Polskiej*, red. Piotr Tuleja (Warszawa: Wolters Kluwer, 2019), 39.

<sup>27</sup> Krzysztof Skotnicki, *Instytucje sprawowania władzy*, 23-24. (22-36); Anna Rytel-Warzocha, „Zasada demokracji bezpośrednią na tle poglądów nauki prawa

Słabością polskiej demokracji bezpośredniej jest tzw. wolny mandat posła. Poseł wybrany przez wyborców, nie jest związany ich poglądami czy żądaniami. Poseł może zatem brać udział w procesie legislacyjnym sprzecznym z interesami swoich wyborców<sup>[28]</sup>. Rodzi się zatem pytania o to, komu posłem służy, suwerenowi czy może grupom interesów politycznych, ideologicznych czy gospodarczych?

## 6 Wnioski

Przeprowadzona powyżej analiza prawnohistoryczna rozwoju ustroju jakim jest demokracja pokazuje, że nie można mówić o jednej formie demokracji. Ta forma ustroju miała swoją specyfikę w antycznych Atenach czy w republice Rzymskiej. Cechą charakterystyczną obu form demokracji była zmienność procedur i instytucji stosownie do zachodzących zmian społecznych, politycznych czy ekonomicznych.

Współcześnie demokracja nierzadko jest rozumiana jako stałość raz przyjętych procedur czy utworzonych instytucji. Przy tej okazji różne opcje polityczne dążą do zawłaszczenia pojęcia demokracja wskakując, że zostały zmienione przez legalnie wyborną władzę właśnie procedury i należy powrócić do tego co było kilka lat temu. Tymczasem ze względu na zachodzące zmiany, w szczególności powodowane rozwojem technologicznym i sztucznej inteligencji, konieczne jest ciągłe dostosowywanie procedur i instytucji publicznych do nowych sytuacji. Stąd amerykański konstytucjonalista Michel Rosenfeld twierdzi, że współcześnie należy mówić o liberalizmie konstytucyjnym (*constitutional liberalism*), który różni się od liberalnego konstytucjonalizmu (*liberal constitutionalism*). Liberazlizm konstytucyjny jest formą rządów nie zaś. Trybem wyborów tego rządu. Wszelkie procedury w liberalizmie konstytucyjnym mają charakter wspomagający wykonywanie władzy.

konstytucyjnego i praktyki ustrojowej 25 lat obowiązywania Konstytucji” Państwo i Prawo, z. 10 (2022): 57–58.

<sup>28</sup> Robert Kropiwnicki, *Pozycja ustrojowa posła w Polsce. Stan obecny i perspektywy* (Toruń: Adam Marszałek, 2024), 28 n.

## Bibliografia

- Arendt Hannah, *Polityka jako obietnica*, tłum. Wojciech Madej, Mieczysław Godyń. Warszawa: Prószyński i S-ka, 2005.
- Blokker Paul, „Populism as a constitutional project” *International Journal of Constitutional Law*, nr 2 (2019): 536-553.
- Canduzzi S., *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Time of Rising Populism and Illiberalism*, Athena 4.1(2024), s. 136-156.
- Chmielowska Lucyna, „Filozofia polityczna Sokratesa” *Prace Naukowe Akademii im. Jana Długosza w Częstochowie. Res Politicae*, t. III (2009): 7-31.
- Cohen Eerik, Nachman Ben-Yehuda, „Counter-Cultural Movements and Totalitarian Democracy” *Sociological Inquiry*, 4 (1987): 372-393.
- Gizbert-Studnicki Tomasz, *Język prawy z perspektywy socjolingwistycznej*. Kraków: Państwowe Wydawnictwo Naukowe, 1986.
- Jaskólska Julia, „Treść Powszechniej Deklaracji Praw Człowieka” *Człowiek w kulturze*, 11 (1998): 49-97.
- Karolczuk Edward, „Sprzeczności w funkcjonowaniu demokracji ateńskiej” *Sztuka i Dokumentacja*, 16 (2017): 29-47.
- Kaskina Rasma, *Promowanie demokracji i obserwacja wyborów*. <https://www.europarl.europa.eu/factsheets/pl/sheet/166/promowanie-demokracji-i-obserwacja-wyborow>.
- Kiereś Henryk, „Jaka demokracja?” *Człowiek w kulturze*, 20 (2008): 17-32.
- Klauziński Sebastian, Michał Danielewski, *Marsz 4 czerwca. Co najmniej 380 tys. w Warszawie*. OKO.press, 4 czerwca 2023. <https://oko.press/marsz-4-czerwca-warszawa-tusk-opozycja>.
- Kropiwnicki Robert, *Pozycja ustrojowa posła w Polsce. Stan obecny i perspektywy*, Toruń: Adam Marszałek, 2024.
- Lange Stella, „Plato and Democracy” *The Classical Journal*, 8 (1939): 480-486.
- Luisi Nicola Demetrio, „Sul problema delle tabelle di voto nelle Votazioni legislative: contributo all'interpretazione di Cic. Ad Att. 1.14.5” *Index*, 23 (1995): 419-452.
- Machin Amanda, „Democracy, Agony, and Rupture: A Critique of Climate Citizens’ Assemblies” *Politische Vierteljahresschrift*, 4 (2023): 845-864.
- Markowski Radosław, *Demokracja i demokratyczne innowacje. Z teorią w praktykę*. Warszawa: Instytut Obywatelski, 2014.
- Maziarz Damian, „Dlatego powinniśmy nazywać siebie chrześcijanami – recenzja” *Roczniki Filozoficzne*, nr 1 (2015): 193-200.
- Miklaszewska Justyna, „Dwie koncepcje demokracji”, [w:] *Wielkość i piękno filozofii. Księga pamiątkowa ku czci prof. Władysława Stróżewskiego*, red. Józef Lipiec, Sebastian Kołodziejczyk. 249-264. Kraków: „Collegium Columbinum”, 2003.

- Mucha Bogdan, „Mechanizm finansowania prezydenckich kampanii wyborczych w Stanach Zjednoczonych Ameryki” *Krakowskie Studia Międzynarodowe*, 3 (2008): 115-135.
- Nieć Mateusz, „O tzw. autorytaryzmie demokracji attyckiej” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji*, 79 (2009): 145-171.
- Osborne Robin, *Athens and Athenian democracy*, Cambridge: Cambridge University Press 2010.
- Polansky David, „Populism and Democratic Conflict: An Aristotelian View” *The Review of Politics*, 2 (2023): 207-224.
- Rachwał Marcin, „Demokracja bezpośrednia w Polsce – fikcja czy rzeczywistość?” *Przegląd Politologiczny*, 9 (2010): 103-114.
- Řádek Miroslav, „State and Democracy in the Philosophy of Plato and Aristotle” *University Review*, 2 (2020): 37-40.
- Rhodes PJ., „Athenian Democracy After 403 BC” *The Classical Journal*, 4 (1980): 305-323.
- Rosenfeld Michel, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism*, Oxford: Oxford University Press, 2022.
- Ruszkowski Janusz, „Demokracja ponadnarodowa w Unii Europejskiej. Wstępna analiza teoretyczna” *Rocznik Integracji Europejskiej*, 9 (2015): 17-37.
- Rytel-Warzocha Anna, „Zasada demokracji bezpośredni na tle poglądów nauki prawa konstytucyjnego i praktyki ustrojowej 25 lat obowiązywania Konstytucji Państwa i Prawa, z. 10 (2022): 54-73.
- Sandel Michael J., *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1998.
- Scheppelle Kim Lane, „The Opportunism of Populists and the Defense of Constitutional Liberalism” *German Law Journal*, 3(2019): 314-331.
- Sitek Bronisław, *Actiones populares w prawie rzymskim na przełomie republiki i pryncypatu*. Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 1999.
- Sitek Bronisław, „Decreta decurionum. Postanowienia rady miejskiej w świetle lex Irnitana”, [w:] *Leges sapere. Studia i prace dedykowane profesorowi Januszowi Sondlowi w pięćdziesiątą rocznicę pracy naukowej*. 509-525. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2008.
- Sitek Bronisław, „Organy Władzy w «municipium Irni». Ze studiów nad prawem municipalnym w Starożytnym Rzymie” *Journal of Modern Science*, nr 1 (2005): 21-42.
- Skotnicki Krzysztof, „Instytucje sprawowania władzy przez suwerena w świetle Konstytucji RP” *Gdańskie Studia Prawnicze*, 59 (2023): 22-36.

Szmigielski Artur, „Prawa człowieka i demokracja w centrum działań zewnętrznych Unii Europejskiej. Dylematy prawne i polityczne” *Przegląd Zachodni*, nr 1 (2016): 7-22.

Tuleja Piotr, „Komentarz do Preambuły”, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, red. Piotr Tuleja. Warszawa: Wolters Kluwer, 2019.

Tuleja Piotr, „Uwaga do art. 4”, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, red. Piotr Tuleja, Warszawa: Wolters Kluwer, 2019.

Witkowska-Chrzczonowicz Katarzyna, Piotr Chrzączonowicz, „Wybrane problemy zapewnienia skutecznej ochrony praw podstawowych w Unii Europejskiej po wejściu w życie Traktatu z Lizbony” *Studia z Zakresu Nauk Prawnoustrojowych*, 2(2012): 33-46.

Ziętara Wojciech, „Demokracja ateńska a demokracja współczesna” *Krakowskie Studia Małopolskie*, 16 (2011): 236-248.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

# Paradigmatic Models of Mediation, Mandatory Eclectics or a Direct Decision

## Abstract

The paper conceptually reviews the paradigmatic models of mediation to understand the professional role of a mediator and the scope of ethical obligations. The description of each model presents the corresponding action of a mediator and the standard of intervention in the process, and examines their effectiveness in achieving the goals of mediation. In this regard, the paper examines the content of a mediator's ethical obligations and potential dilemmas in different mediation models that may be associated with a mediator's direct and uniform choice of a particular mediation model. The paper emphasises the importance of a mediator's competence for the proper functioning of a process and, at the same time, analyses the need for a strict demarcation from the professional role of an attorney, which is essential for the ethical execution of a mediator's role.

**KEYWORDS:** evaluative mediation, facilitative mediation, transformative mediation, styles of mediation, self-determination, informed consent.

**NATIA CHITASHVILI**, associate professor, Tbilisi State University,  
ORCID – 0000-0002-5050-0711, e-mail: Natia.chitashvili@tsu.ge

**IRAKLI BURDULI**, full professor, Tbilisi State University,  
ORCID – 0000-0002-1547-4001, e-mail: irakli.burduli@tsu.ge

# 1 | Introduction

Supporting the principle of party autonomy<sup>[1]</sup>, achieving essentially fair outcomes for the parties, and ensuring procedural fairness is a fundamental obligation of a mediator. However, the measurement of the scope of these principles and the methods for maintaining the balance between them differ according to philosophical and ideological perceptions of mediation and understanding of human nature, as well as mediation models. Mediation models are distinguished based on “the differentiated understanding of the professional purpose and the mediator’s role, considering which values are of priority in the process”<sup>[2]</sup>. Mediation models are classified through different ideological approaches and perceptions of professional ethics, which leads to a variety of conclusions and ethical recommendations.

In the mediation process narrow and wide approaches to problem analysis may be applied,<sup>[3]</sup> however, they lead to radically different consequences. The narrow approach, often referred to as distributive mediation, is where parties share limited resources, specifically disputed property, without identifying the additional resources to be exchanged. Hence, as one party receives a certain part through negotiations, the other will get less by the same amount. In this case, the agreement is achieved by compromise and waiving a certain part of assets. Accordingly, this type of mediation, which

<sup>1</sup> Klaus Hopt, Felix Steffek, *Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013), 135, 190; Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization* (Singapore: Springer, 2023), 114; Dan Simon, Rara West, eds. *Self-Determination in Mediation, The Art and Science of Mirrors and Lights* (Lan Ham, Maryland: Rowman & Littlefield Publishers, 2022), 4. On the universal recognition of party autonomy in the legal settings of EU member states (and not only), see: Martin Schauer, Bea Verschraegen, eds. *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l’Académie Internationale de Droit Comparé* (The Netherlands: Springer, 2017), 220. Marian Roberts, *Mediation in Family Disputes, Principles of Practice* (London and New York: Routledge, Taylor and Francis Group, 2014), 163; Nadja Alexander, *International and Comparative Mediation Legal Perspectives* (Netherlands: Kluwer Law International, 2009), 345; Nancy Dubler, Carol Liebman, *Bioethics Mediation, A Guide to Shaping Shared Solutions* (Nashville, Tennessee: Vanderbilt University Press, 2011), 12.

<sup>2</sup> Omer Shapira, „Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics” *Pepperdine Dispute Resolution Law Journal*, No. 2 (2008): 244.

<sup>3</sup> Leonard Riskin, „Mediator Orientations, Strategies and Techniques“ *Alternatives to the High Cost of Litigation*, No. 9 (1994): 111.

is only limited to sharing/dividing the disputed properties, is closer to a court settlement, where the parties give up a certain part of their demand and recognise the claim. Such mediation does not examine the additional opportunities, and resources for exchange and does not fully serve the achievement of the parties' wider interests. In most cases, this approach leads to a dead end, as the process takes on a semblance of trading, without seeking alternative resources for the actual interests of the parties and the corresponding satisfaction of a claim. The distributive mediation technically excludes a win-win principle, as the agreement is achieved through renouncing counter-demands and not by actualising wider interests.

The mediator, who starts a process with a wide orientation, a comprehensive approach towards understanding the core of the problem and the conflict, goes beyond the narrow aspects of a legal dispute and determines the mutual, covered interests of the parties. Often, in the mediation process, the identification of parties' interests (their own, as well as the opponent's) is achieved through self-determination. This leads the parties to cooperate and seek for inter-beneficial outcome. Such a setting explains the advantage of mediation over classic negotiations, where the neutral third party does not participate. More precisely, during direct negotiations, the parties often find themselves in a dead-end, as they are focused on the exchange of positions. At the same time, during the mediation process, a mediator obtains confidential information in the format of individual meetings with the parties, identifies their needs, and common interests, and leads the negotiations towards the direction of materialisation of these shared interests. With the help of a mediator, after transforming a conflict, the perspective of the materialisation of interests leads the parties to willingly reach an agreement.

Laurence Boulle distinguishes four paradigmatic models of mediation – problem-solving, facilitative, therapeutic and evaluative models<sup>[4]</sup>. „The mentioned models emphasise the diversity of a mediation practice and the reality, that the aims and values of mediation are determined by the model selected by a mediator based on the demands or expectations of parties. Classification of these models also highlights that there is no consensus among practitioners on the best model”<sup>[5]</sup>.

<sup>4</sup> Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths: Lexis-Nexis, 2011), 43-47.

<sup>5</sup> Bobette Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making” *Ethics in Alternative Dispute Resolution*, No 1 (2017-2018): 69.

For the problem-solving model, mediators choose to support positional negotiation. Their intervention is aimed at moving the parties from fixed positions towards a compromise, a mediator's effort is focused on the initial positions and demands of the parties. The fundamental value of the said process is compromise and effectiveness<sup>[6]</sup>. In given circumstances, values such as party engagement and empowerment are not prioritised or seen as necessary<sup>[7]</sup>. The problem-solving model of mediation becomes similar to litigation without a judge, where the roots of conflict, interests and needs are not explored, self-determination does not take place, nor does the multiplication of exchange resources and benefits and the creation of new values – the parties settle, similar to court proceedings, within their claims.

The conceptual reason why the parties may not reach a settlement in the courtroom but may be able to find a creative solution in court mediation (another service of the court) is that in mediation there are opportunities to explore the best interests of the parties, their self-determination, expression, understanding, regulation of emotions and transformation of conflict into cooperation. Hence, where the mediation is carried out through the methodological approaches of the dispute resolution model, it cannot have a tangible advantage over court settlement. Moreover, it will be unjustifiable to pass the case over to the mandatory court mediation when the parties have been unable to reach a settlement within the scope of their claims. Therefore, the court's expectation, while passing the case over to mediation is that instead of positioning in negotiations, the true interests of the parties will be explored and negotiations will be based on the methodological approach to solve the conflict with the help of a mediator.

In the *facilitative model*, a mediator's effort is focused on enhancing communication and conducting an effective negotiation. In this case, mediation concentrates on the interests and needs of parties, rather than their positions, rights and obligations<sup>[8]</sup>. The foundations of the Facilitative Model are interest-based integrated negotiation, full engagement of the parties and application of active listening methods, so that the result achieved is

---

<sup>6</sup> Ibidem, citing: Boulle, *Mediation: Principles, Process, Practice*, 63, ff.

<sup>7</sup> Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making”, 70.

<sup>8</sup> Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making”, 70 citing: Boulle, *Mediation: Principles, Process, Practice*, 44.

creative, and meets the legal and non-legal interests of the parties<sup>[9]</sup>. The said model recognises the prioritisation of interests over rights and the need for recognition and validation of emotions and visions<sup>[10]</sup>. Conflicts of interpersonal character<sup>[11]</sup> require less evaluative and more facilitative, or even more, transformational approach to conflict<sup>[12]</sup>. The cornerstone of transformative mediation is the orientation of the parties to each other's perspectives<sup>[13]</sup>, supporting the mutual recognition of each other's visions and empowering the parties to reach an autonomous decision. In the conceptual understanding of transformative mediation, offering readily answers and opinions to the parties weakens them and their roles<sup>[14]</sup>. The purpose of transformative mediation is to transform the conflict and recover the relationship between the parties<sup>[15]</sup>.

In the therapeutic mediation model, a mediator applies professional therapeutic methods and focuses on the relationship between the parties. In this conceptual scheme, the agreement is not the goal of mediation. The process aims to explore the root causes of the conflict, to restore the relationship and to ensure the recognition and emotional satisfaction of the parties. The model strives to terminate the conflict between the parties, which, eventually, in most cases, leads to a solution to the conflict

<sup>9</sup> Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making”, 70; *Mediation in International Commercial and Investment Disputes*, ed. Catharine Titi, Katia Fach Gómez (Oxford: Oxford University Press, 2019), 72.

<sup>10</sup> Boulle, *Mediation: Principles, Practice*, 63.

<sup>11</sup> People dispute vs legal dispute, see: Zena Zumeta, „A Facilitative Mediator Responds” *Journal of Dispute Resolution*, No. 2 (2000): 337.

<sup>12</sup> Ibidem. Transformative mediation stands close to the purpose and methodology of Facilitative Mediation. In this regard see: Alan Stitt, *Mediation Practical Guide* (United Kingdom: Taylor & Francis, 2016), 5; *The Negotiator’s Fieldbook, The Desk Reference for the Experienced Negotiator*, ed. Andrea Kupfer Schneider, Christopher Honeyman (Washington, DC: ABA Section of Dispute Resolution, 2006), 596; Robert Baruch Bush, Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (United States of America: Jossey-Bass, 2005), 1-304; Simon and West, *Self-Determination in Mediation, The Art and Science of Mirrors and Lights*, 39.

<sup>13</sup> Ronán Feehily, *International Commercial Mediation, Law and Regulation in Comparative Context* (Cambridge: Cambridge University Press, 2022), 102.

<sup>14</sup> Art Hinshaw, Andrea Kupfer Schneider, Sarah Rudolph Cole, *Discussions in Dispute Resolution, The Foundational Articles* (Oxford: Oxford University Press, 2021), 142.

<sup>15</sup> Timea Tallodi, *How Parties Experience Mediation, An Interview Study on Relationship Changes in Workplace Mediation* (Springer International Publishing, 2020), 21; Joseph Folger, Robert A. Baruch Bush, „Transformative Mediation, A Self-Assessment” *International Journal of Conflict Engagement and Resolution*, No. 1 (2014): 20-34.

and reaching an agreement<sup>[16]</sup>. This concept gives the parties a sense of productivity and empowers them in decision-making. At the same time, the process focuses on ensuring openness between the parties and building mutual acceptance<sup>[17]</sup>.

In evaluative („directional”<sup>[18]</sup>) mediation, a mediator may share with the parties his or her own professional view of the possible legal consequences of resolving the dispute through court proceedings. The aim of the process is to facilitate a solution that is assessed against the possible risks of going to court, the rights of the parties and their legal positions. Lawyers and mediators with field competencies develop an opinion in evaluative mediation on the alternatives of optimal dispute resolution and to some extent, influence the parties to consider the options while keeping the legal risks in mind<sup>[19]</sup>. In evaluative mediation, a mediator's experience and competence in legal or other fields is essential<sup>[20]</sup>, and used for the parties to explore the alternatives, which as per usual may be achieved through standard litigation<sup>[21]</sup>. The value of this process is the implementation of the legal rights of a person<sup>[22]</sup> and is mainly focused on ensuring that the agreement is achieved<sup>[23]</sup>.

It is therefore difficult to separate evaluative and facilitative mediation models, and the attempt to do so is referred to in the academic literature as a “false dichotomy”<sup>[24]</sup>. Integrated facilitative and evaluative mediation

<sup>16</sup> Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making”, 70, citing: Boulle, *Mediation: Principles, Process, Practice*, 44.

<sup>17</sup> Robert A. Baruch Bush, Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994), 89-91.

<sup>18</sup> Anna Nylund, Kaijus Ervasti, Lin Adrian, *Nordic Mediation Research* (Switzerland: Springer International Publishing, 2018), 217; Schneider, Honeyman, *The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator*, 596.

<sup>19</sup> Boulle, *Mediation: Principles, Process, Practice*, 44.

<sup>20</sup> Laurence Boulle, Miryana Nesic, *Mediation: Principles, Process* (London: Tottel, 2001), 114.

<sup>21</sup> Laurence Boulle, *Mediation: Principles, Process, Practice* (Chatswood, N.S.W.: LexisNexis Butterworths, 2005), 60.

<sup>22</sup> Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making”, 71.

<sup>23</sup> Anna Nylund, Kaijus Ervasti, Lin Adrian, *Nordic Mediation Research* (Springer International Publishing, 2019), 217.

<sup>24</sup> Jeffrey Stempel, „The Inevitability of the Eclectic: Liberating ADR from Ideology” *Journal of Dispute Resolution* 2000, No. 2 (2000): 247. See also, Dorcas

is often applied in family cases where the kids' interests are prioritised<sup>[25]</sup>. Moreover, even proponents of purely facilitative mediation recognise that even in the most facilitative cases, evaluative elements are applied and it is often impossible to determine where facilitation ends and evaluative methodology begins<sup>[26]</sup>.

## 2 | Orientational classification of mediation in facilitative and evaluative models

In 1996 Len Riskin developed the typology of conceptual approaches, models of mediation, which had a great impact on the methodological realisation of the field. This typology includes two main models – facilitative and evaluative mediation. The purpose of both models is to support achieving an agreement; however, they differ in methodological aspects<sup>[27]</sup>.

The orienting classification of mediation into facilitative and evaluative models allows for the limits of a mediator's procedural intervention, the strategy to be applied and the implementation tactics to support the parties' self-determination and ability to make informed decisions.

### 2.1. The facilitative mediation model

Facilitative mediation assumes that the parties are intelligent, that they understand their role better than a mediator or lawyers, and that they are capable of negotiating with the other party<sup>[28]</sup>. Facilitative mediation relies

Quek Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?” *Asian Journal on Mediation*, 66 (2013): 68.

<sup>25</sup> Nylund, Ervasti, Adrian, *Nordic Mediation Research*, 217-220.

<sup>26</sup> Kenneth Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement” *Loyola University Chicago Law Journal*, No. 1 (2007): 192.

<sup>27</sup> Leonard L. Riskin, „Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed”, *Harvard Negotiation Law Review*, No. 7 (1996): 8-51. See also, Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?”, 68.

<sup>28</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 111-114.

fully on the parties' ability to resolve the dispute and encourages them by using active listening techniques. Precisely through questioning skills and techniques facilitative mediator seeks to enhance parties' understanding of strong and weak legal positions and rationalising of resolution and non-resolution of the case. The facilitative mode is mainly based on negotiations that prioritise the interests of the parties<sup>[29]</sup> and serve the purpose of depersonalisation - detaching the problem from the person<sup>[30]</sup>.

„The primary function of facilitative mediation is to support enhancing the communication so that the parties are able to seek and find a mutually beneficial solution through healthy communication”<sup>[31]</sup>.

A facilitative mediator resembles a symphonic conductor, who harmonises each instrument and helps them perform, however they do not technically increase the volume of a bass or a soprano. The mediator acts as a maestro and has a little influence over the melody played with the instruments<sup>[32]</sup>.

A facilitative mediator is similar to a coach, who encourages the players to seek creative solutions and give the negotiations a collaborative spirit by adhering to the “give and take” point of view<sup>[33]</sup>.

A facilitative mediator does not evaluate the rationality or reasonableness of an offer, dictate, or indicate to the parties the consequences of reaching or not reaching an agreement. From the perspective of facilitative mediation, the evaluative approach harms the impartiality of a mediator and the party's autonomy. Moreover, the impermissibility of advising and evaluating the issues is determined by the presumption that a mediator may not possess field competence about the topic of the dispute. Where the party stubbornly stands for their unrealistic position, a facilitative mediator's attempts focus on making the party move towards rationality only through asking questions. For facilitative mediation, a mediator's deep field competence concerning the topic of dispute is not essential<sup>[34]</sup>. Moreover,

---

<sup>29</sup> Nylund, Ervasti, Adrian, *Nordic Mediation Research*, 215.

<sup>30</sup> Tallodi, *How Parties Experience Mediation, An Interview Study on Relationship Changes in Workplace Mediation*, 21.

<sup>31</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 111-114.

<sup>32</sup> Ellen Waldman, *Mediation Ethics, Cases and Commentaries* (San Francisco: Jossey-Bass, 2010), 20.

<sup>33</sup> Ethical Mediation. Advocate, Vancouver Bar Association, Vol. 79, part 6, 857.

<sup>34</sup> Waldman, *Mediation Ethics, Cases and Commentaries*, 19. See also, Riskin, „Mediator Orientations, Strategies and Techniques”, 111.

according to Riskin, „specific comprehensive competence regarding the topic of dispute may impede a facilitative mediator and lean them towards adopting the evaluative approach. Moreover, this may also hinder the search for creative alternative solutions”<sup>[35]</sup>. The said opinion of Riskin may be understood in a manner, that when a mediator has a field competence in the topic of a dispute, e.g. in jurisprudence, they might encourage a resolution, which is closer to legal resolution or judicial practice. This may overshadow the alternatives which are usually present while seeking non-legal or other types of solutions.

Despite the substantiality of Riskin’s opinion, on the other hand, the advantages of the field competence of a mediator shall be considered in terms of fulfilling the ultimate purpose of making an informed decision. A mediator’s methodological approaches are often influenced by their professional qualification, education, previous profession, and experience<sup>[36]</sup>. More precisely, even in facilitative mediation, where a neutral third person aspires to rationalise the parties’ positions through active listening techniques, for generating realistic offers, through proper use of the role of legal counsel analysing the best and worst alternatives of mediation settlement, effectively implementing the reality test, properly understanding the essence of the dispute, and hence, for asking the relevant questions to facilitate the rationalisation of legal positions, having a field competence is of immense importance for a mediator.

Professional competence concerning the subject of a claim might be crucial in obligatory judicial mediation, to which parties refer with a non-appealable ruling<sup>[37]</sup>, unlike private mediation, to which the parties refer voluntarily, based on rational and informed consent. The absence of will to negotiate often derives from the parties being submerged in the vagueness of the case, caused by exaggerated, irrational perceptions of factual and legal realities. Even when legal counsels encourage cooperation and objective legal analysis of the case, often, the clients perceive such „effort” as a „weakness”, being unqualified or even going against the client’s interests, rather than as adherence to ethical obligations of honest and rational negotiations in the mediation process. In such cases, qualified questions of a mediator with a field competence within the limits of the legal reality

<sup>35</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 114.

<sup>36</sup> For instance, former judges often tend to apply a narrow facilitative role.

<sup>37</sup> Article 1871(2) of the Civil Procedure Code of Georgia: a ruling to transfer a case to a mediator shall not be appealed.

test (depending on the legal essence of a dispute), play an important role in enhancing rational perceptions. Therefore, the presence of a mediator's field competence, along with „dangers” as discussed by Riskin, to a large extent may carry valuable advantages in terms of reaching an agreement which is informed, well-reasoned, and evaluated against the legal risks. Hence, facilitative mediation neither excludes a mediator's obligation to facilitate the objective analysis of strong and weak positions in the case, nor the implementation of the legal reality test<sup>[38]</sup> through the application of questioning techniques<sup>[39]</sup>. It is precisely in this way that a mediator with expertise in the field rationalises the parties' positions in facilitative mediation.

The importance of field competence for a mediator will be further discussed below.

### 2.1.1. The wide facilitative role

In the wide facilitative role, a mediator helps the parties determine, understand and solve their desired issues through negotiations. A mediator encourages consideration of mutual interests instead of positions, for generating alternatives and enhancing the well-being of parties in the process of analysis<sup>[40]</sup>. Although it is not essential for a mediator in the broad facilitative role to have a detailed knowledge of the legal nature of the issue, he or she must be prepared to become aware of and properly understand the legal aspects within the dynamics of the negotiation.

In the wide facilitative role, encouraging the analysis, which helps a party to comprehend the reasonability of alternatives while having the perspective of acceptance from the other party in mind, is still relevant.

In the wide facilitative role, a mediator:

- During a common session encourages the discussion of mutual interests;
- During a common session encourages the development of offers, which reflect the mutual interests of the parties;
- Does not provide evaluative recommendations, yet to support the objective risk analysis, allows the parties to present and discuss

<sup>38</sup> Bryan Clark, *Lawyers and Mediation* (Heidelberg: Springer, 2012), 159.

<sup>39</sup> Stitt, *Mediation Practical Guide*, 4.

<sup>40</sup> Jamila Chowdhury, *Gender Power and Mediation, Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge: Cambridge Scholars, 2012), 99.

their arguments, and legal perspectives during the session within the limits of feasibility.

- Leads the mediation sessions mainly with the direct involvement of the parties, recognises the importance of the rule of law in mediation, but assists the parties to identify individual, subjective standards of fairness within the limits of the law and to reflect them in the agreement.
- Focusing on the interests frees the parties from the limited approaches as developed in legal claims and transports them to the platform for actualising versatile and wide interests<sup>[41]</sup>.

### 2.1.2. A narrow facilitative role

A mediator in a narrow facilitative role strives to provide the parties with realistic perceptions of their legal circumstances, yet, permitted techniques are largely different from the evaluative role. In this case, a mediator does not directly evaluate the issues, does not provide a possible prognosis of court decisions, does not provide the parties with possible outcomes in the form of specific alternatives, and therefore does not influence the parties by supporting their acceptance of particular options. A mediator, by mainly asking questions, encourages the parties to analyse the consequences of not reaching an agreement and the strong and weak positions in the case. During individual sessions, a mediator supports the consideration of provided offers by the parties, along with seeking innovative alternatives.

The corresponding questions for a mediator's narrow facilitative role are as follows:

- How do you assess the strong and weak points of your case? What is your opinion on the strong and weak positions of the other party in the court?
- Should the case proceed to court, what would be the best, the worst and the most probable alternative to mediation settlement? How, and what thought process brought you to this conclusion? Have you considered other aspects?
- How long will the litigation continue?

---

<sup>41</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 112.

- What might be the material, emotional and reputational costs associated with the litigation?<sup>[42]</sup>

## 2.2. The evaluative mediation model

An evaluative mediator assumes that the parties expect the mediator to guide them towards a reasonable basis for resolving the dispute, which may include legal, industrial and technological aspects. To carry out this role, from the parties' point of view, a mediator requires proper professional training, field qualification, experience and objectivity<sup>[43]</sup>. Fundamental starting postulate of evaluative mediation is that a party is only capable of making an informed decision when they are fully informed on the best (BATNA) and the worst (WATNA) alternatives of the mediation settlement. The conceptual notion of evaluative mediation is that possessing information on the possible outcomes of litigation does not limit, but rather encourages the principle of party autonomy. It is impossible to have a discourse on the expression of a free and autonomous will in the context of limited access to information on legal risks. In the United States of America, in judicial mediation and mediation with legal counsel, the evaluative role became an integral part of a mediator's repertoire<sup>[44]</sup>. Moreover, many scholars and practitioners consider that a mediator's evaluative role may largely promote the self-determination of parties and making informed decisions<sup>[45]</sup>. In contrast, through facilitative mediation, a mediator's words

<sup>42</sup> Ibidem.

<sup>43</sup> Ibidem, 111.

<sup>44</sup> Maureen Laflin, „Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators” *Notre Dame Journal of Law, Ethics & Public Policy*, No. 1 (2000): 486. Robert A. Baruch Bush, „Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field” *Pepperdine Dispute Resolution Law Journal*, No. 1 (2002): 122.

<sup>45</sup> Rachael Field, Jonathan Crowe, *Mediation Ethics, From Theory to Practice* (Cheltenham: Edward Elgar Publishing, 2020), 32; Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, 40; Jacqueline Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making” *Notre Dame Law Review*, 74 (1999): 797. James Stark, „The Ethics of Mediation Evaluation: Some Troublesome Questions And Tentative Proposals, from an Evaluative Lawyer Mediator” *South Texas Law Review*, 38 (1997): 795. James Stark, „Preliminary Reflections on the Establishment of a Mediation

---

may impact the parties to such an extent, that they might change their priorities and preferences in values. According to proponents of the facilitative mediation model, a mediator's evaluation tends to take away from, rather than promote, the self-determination of the parties.

Therefore, the ultimate purpose of the evaluative and facilitative models of mediation is to encourage self-determination, but their methodological approaches and the tactical functions applicable to a mediator differ in terms of the permissibility of sharing evaluations and opinions<sup>[46]</sup>.

The evaluative role is adopted when the parties to mediation do not have experience in negotiations and face substantial obstacles in achieving an agreement in their dispute<sup>[47]</sup>, the dispute is of a legal character<sup>[48]</sup> or might require special technical knowledge, when a mediator might have expertise<sup>[49]</sup>. The need for evaluative mediation might have the parties, who do not possess experience and legal education<sup>[50]</sup> on how to initiate negotiations and explore the key issues in a manner which will result in a mutually acceptable agreement based on common interests. „Evaluative mediation may be more effective when the parties have irrational perceptions of legal and objective realities. The proponents of the evaluative model believe that the evaluative role does not entail that a neutral third person dictates the path leading to dispute resolution, but rather that the parties based their negotiations on objective bases”<sup>[51]</sup>. Hence, the evaluative role of

---

Clinic” *Clinical Law Review*, 2 (1996): 487. The selection of an evaluative mediator by parties and lawyers serves the enhancement of party autonomy and self-determination. See: Donald Weckstein, „In Praise of Party Empowerment And of Mediator Activism” *Willamette Law Review*, 33 (1997): 526; John Feerick et al., „Standards of Professional Conduct in Alternative Dispute Resolution” *Journal of Dispute Resolution*, No. 1 (1995): 101-102 (The evaluative role enhances party self-determination); Robert Moberly, „Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?” *South Texas Law Review*, 38 (1997): 772 (Criticises the failure to take the evaluative role. The principle of self-determination entails that a mediator is obliged to evaluate, where it comes from the parties’ will and they require it)

<sup>46</sup> Waldman, *Mediation Ethics, Cases and Commentaries*, 21.

<sup>47</sup> Michael Moffitt, Andrea Kupfer Schneider, *Examples & Explanations: Dispute Resolution* (United States: Aspen Publishers, 2011), 86-87.

<sup>48</sup> Field, Crowe, *Mediation Ethics, From Theory to Practice*, 29.

<sup>49</sup> Stitt, *Mediation Practical Guide*, 3.

<sup>50</sup> Jacqueline Nolan-Haley, „Court Mediation and the Search for Justice through Law” *Washington University Law Review*, No. 1 (1996): 65-66.

<sup>51</sup> Abraham Ordover, Andrea Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution* (Boulder: National Institute for Trial Advocacy, 2014), 129.

a mediator can be substantial in regulating the circumstances of a similar environment. Evaluative mediators can also assist competent negotiators, in overcoming contradictory issues, which seem unsolvable at a glance and which impede ongoing negotiations<sup>[52]</sup>.

Evaluative mediators use private, individual sessions and explore the real interests of one party without the presence of another. By applying the questioning techniques, a mediator determines the needs of the parties and their desired results (self-determination<sup>[53]</sup>). After a mediator has a complete understanding of the key interests of all the parties, they develop the terms, which correspond to all the interests at the negotiation table and through the method of direct action will demonstrate the utility of these terms for all the participants (naturally, with full recognition of the party autonomy<sup>[54]</sup>). It is incorrect to perceive the mediator's role as one where they impose values and opinions onto the parties. On the contrary, a mediator works delicately, recognises and respects the values of the parties and assists them in developing such terms, which accumulate the needs of all the engaged parties. Therefore, negotiating parties which require a mediator's lead in substantive issues, in terms of developing agreement dynamics acceptable for all the parties, largely appreciate the role of an evaluative mediator, *inter alia* their intervention in the content<sup>[55]</sup>.

The parties who choose evaluative mediation carefully select a mediator who has expertise and is able to help the parties adapt and develop the necessary terms based on their interests. Moreover, the parties are always free to disagree with the mediator's opinions and autonomously develop and elaborate desired terms of an agreement<sup>[56]</sup>.

The difference between the facilitative and evaluative models of mediation is highlighted while applying the reality test. For instance, during a facilitative mediation, a mediator would have asked the lawyer: From your experience, would you be able to say that the court would have considered this action admissible? In evaluative mediation, a mediator would have defined

---

<sup>52</sup> James Freund, *Anatomy of a Mediation: a Dealmaker's Distinctive approach to Resolving Dollar Disputes and other Commercial Conflicts* (New York: Practising Law Institute, 2012), 57-65.

<sup>53</sup> The insertion of the author.

<sup>54</sup> The insertion of the author.

<sup>55</sup> The emphasis is provided by the author.

<sup>56</sup> Charles Craver, „The Use of Mediation to Resolve Community Disputes, Washington University Journal of Law & Policy” *New Directions in Community Lawyering Social Entrepreneurship, and Dispute Resolution*, 48 (2015): 237.

---

to the lawyer: You understand, that the court would have never deemed this type of claim as permissible<sup>[57]</sup>.

The evaluative mediation model has been criticised in academic literature, due to its inconsistency with the mediator's professional ethics<sup>[58]</sup>. According to practising scholars, the issue is highly polarised<sup>[59]</sup>. When a mediator assesses legal or factual circumstances, three fundamental principles of mediation are challenged<sup>[60]</sup>: the principle of self-determination (party autonomy), and the neutrality and impartiality of a mediator<sup>[61]</sup>. This changes the mediation perspective „dramatically”<sup>[62]</sup><sup>[63]</sup>. As per practising scholars, expressing an opinion regarding the possible court decision is an inadmissible compromise for the neutrality principle of a mediator<sup>[64]</sup>. As per scholars, mediation is closer to non-mandatory arbitration<sup>[65]</sup> or pre-court Early Neutral Evaluation (ENE)<sup>[66]</sup>, which are inherently different dispute resolution processes. It is especially concerning that during mediation the parties move into a specific mindset, making efforts to earn the benevolence of the evaluator in „a competitive climate”<sup>[67]</sup> and „win” the case by assessing the evidence. The parties strive to convince the neutral third person by confrontational and argumentative approaches<sup>[68]</sup>.

---

<sup>57</sup> Ordover, Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution*, 169.

<sup>58</sup> Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?”, 68; Joel Lee, Marcus Tao Shien Lim, *Contemporary Issues In Mediation* (Singapore: World Scientific Publishing Company, 2016), 35.

<sup>59</sup> Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?”, 75.

<sup>60</sup> Schneider, Honeyman, *The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator*, 596.

<sup>61</sup> Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement”, 198; Murray Levin, „The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion” *Ohio State Journal on Dispute Resolution*, Vol. XVI (2001): 294.

<sup>62</sup> Ibidem.

<sup>63</sup> Diksha Munjal, „Tug of War: Evaluative versus Facilitative Mediator” *Pretoria Student Law Review*, 6 (2012): 72.

<sup>64</sup> Lela Love, „The Top Ten Reasons Why Mediators Should Not Evaluate” *Florida State University Review*, No. 4 (1997): 939.

<sup>65</sup> Stitt, *Mediation Practical Guide*, 3.

<sup>66</sup> Early Neutral Evaluation.

<sup>67</sup> Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?”, 68.

<sup>68</sup> Munjal, „Tug of War: Evaluative versus Facilitative Mediator”, 73.

Eventually, the focus is not on creative solutions, but on a purely legal justification, which devalues the achievements of mediation.

According to the opponents of evaluative mediation, the experience of the institutionalisation of arbitration must be considered too. It emerged as the alternative to litigation, however, it transformed into a competitive process. Allowing evaluative mediation might bring along negative effects in terms of forming a competitive process. To ensure high-quality mediation, as well as maintain it as a safe process for the parties and the mediator, it must remain in its initial form of a facilitative model<sup>[69]</sup>. It is obvious, that the facilitative mediation model safeguards a mediator from ethical violations, and self-determination and party autonomy principles from ethical compromises. Hence, evaluative mediation to support the informed decision-making by the parties may be substituted by the reality test, which can be more effective in resolving the dispute than predicting a court decision<sup>[70]</sup>.

### 2.2.1. The wide evaluative role

A mediator with a wide evaluative role strives that the parties realistically understand their factual and legal circumstances and available options. Yet, the conceptual-tactical perception to achieve this objective is different. A mediator prioritises the interests of the parties over their positions, develops the terms of mediation settlement and similar to parties, points out their own opinion on the case circumstances. In this case, a mediator fundamentally studies the case materials, litigation documents, and evidence. The techniques used in this role are as follows:

- Defining to the parties the expression of party interests as one of the objectives of mediation.
- Encouraging the direct engagement of the parties (physical persons or organisation representatives) in the mediation process and actively involving them in the negotiation and decision-making process.
- Exploring the interests, needs, and long-term plans of the parties.
- Examining the true interests of the parties, presenting them and requesting their recognition and confirmation by the parties

<sup>69</sup> Ibidem, 79.

<sup>70</sup> Ordover, Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution*, 130.

---

(For instance: As I see it, considering the reputational risks, timely and confidential resolution of the dispute is in your interest, is this so?)

In the wide evaluative role, a mediator presumes the possible decision of the court for the orientation and gives relevant recommendations to the parties. However, in this role, the mediator does not support compromising, distributive offers, but rather points out the alternatives, which introduce much wider interests and needs of the parties<sup>[71]</sup>. In a narrow facilitative role, the mediator would have encouraged the mutual exchange of pure monetary claims identified at the initial stage, the mutual compromise within the limited scope of the area identified in the court dispute; Using a broad evaluative role, the mediator promotes the interest of the parties in future cooperation, the initiation and realisation of alternatives and comparative advantages for future partnership, together with the parties' agreement on narrow monetary/legal claims<sup>[72]</sup>.

### 2.2.2. The narrow evaluative role

For a mediator of a narrow evaluative role, it is a crucial strategy to assist the parties in assessing the strong and weak points of their case and foresee the likely decision of the court<sup>[73]</sup>. In this role, a mediator studies the litigation materials, claim and response, the proofs provided by the parties, etc. In this role, the following techniques may be used:

- Supporting the acceptance of the agreement and individual offers.
- Supporting the compromising agreement based on the positions through encouraging the mutual compromise from the parties.
- Orientational analysis of a court decision and likely costs<sup>[74]</sup>.
- Convincing the parties in the evaluation provided by the mediator.

---

<sup>71</sup> Hinshaw, Schneider, Cole, *Discussions in Dispute Resolution, The Foundational Articles*, 179.

<sup>72</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 112-113.

<sup>73</sup> Hinshaw, Schneider, Cole, *Discussions in Dispute Resolution, The Foundational Articles*, 178-179.

<sup>74</sup> Dorothy Della Noce, „Evaluative Mediation: In Search of Practice Competencies” *Conflict Resolution Quarterly*, 27 (2009): 209.

- Direct evaluation of the strong and weak positions of each party (mainly during the individual sessions<sup>[75]</sup>) and efforts to convince the parties<sup>[76]</sup>.

### 3

## The importance of the field competence for a mediator – an impeding factor or an advantage?

The skills for working on the notion of a dispute take a significant place in the system of a mediator's professional competencies<sup>[77]</sup>. The said competence entails systematic comprehension of the content of a dispute and determination of the issues to be discussed, dynamically leading the negotiations towards an agreement through managing mutual interests, encouraging creative and innovative solutions, rightly incorporating and utilising the role of legal counsel in the objective assessment of the legal perspective, provision of prognosis on BATNA, WATNA and the most probable outcome in arbitration or courts, scoping of the negotiation area, and promote informed decision-making by the parties, supporting the fulfilment of the terms and their implementation, effective application of the reality test, etc. Precisely in terms of effective work on the dispute content the issue of the importance of a mediator's competence – how impeding or advantageous can it be in a case for a mediator to have a knowledge in a specific field, technology or industry.

Mediation is recognised as a process which is often used by legal counsel not only to reach a settlement, but at least to analyse the legal positions and risks of both parties in relation to each other and to determine or choose an appropriate dispute resolution procedure. Considering that in the confidential mediation process, the lawyers of the parties often present and discuss legal evidence that they have not yet presented in court, it allows the lawyers representing in said mediation to objectively assess the risks

<sup>75</sup> Ibidem, 208.

<sup>76</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 112.

<sup>77</sup> „Competency Framework for Mediators” approved by the executive board of LEPL „The Mediators Association of Georgia” (November, 2021).

---

of the case being taken to arbitration or court, to process the weak legal positions of both parties in the case, and from this perspective to determine the total reasonableness and comparative advantage of mediation settlement or litigation in terms of realisation of legal interests and not only.

Hence, mediation is a perfect forum for objective legal analysis along with analysing non-legal interests. Scrupulous lawyers do not advise their clients to choose competitive legal processes unless they have clear evidence of their legal advantage and an obvious perspective of the case being decided in their favour either in arbitration or in court. Hence, the lawyers, who focus on interests often consider mediation as a safe mechanism for „legal self-determination” and a good safeguard against risks. It is precisely here that the lawyers decide whether the case should be decided within the contextual control of the parties and their autonomy within the framework of the freedom to determine the terms of the contract, or whether it is justified to rely on a third person as a decision-maker.

The value of mediation often corresponds to the safeguarded legal risks. In addition, there is the incomplete predictability of the law and the absence of uniform judicial practice in the relevant legal order concerning a separate legal issue. In terms of mutual adjustment of legal issues, a mediation process is safer than direct negotiations, as the safety of the information exchange is ensured by confidentiality guarantees and the legally mandated inadmissibility of revealed confidential information in courts and arbitration tribunals.

Hence, besides other advantages of mediation in terms of values, such as termination of conflict between the parties, recovery of the relationships, and wide range of opportunities for actualising non-legal interests<sup>[78]</sup>, even from the narrow perspective of legal interests, referring to mediation is reasonable also in terms of rational and objective analysis of legal circumstances.

Along with various other advantages, if mediation is a good foundation even for legal analysis, what part does a mediator's competence take in terms of supporting the objective assessment process of legal risks? Is it possible that in addition to legal competence, another field-specific knowledge might be required? Would it be possible to replace the need for this competence with a third person - an expert in mediation - who would ensure an objective analysis of the data and make expert recommendations?

---

<sup>78</sup> Titi, Gómez, *Mediation in International Commercial and Investment Disputes*, 109.

A mediator's field competence is crucial for a mediator when the parties require evaluative mediation, to ensure they (a mediator) perform their duties impartially and in line with the self-determination principle. Therefore, having knowledge in a specific domain is essential when mediators point such out while presenting themselves and performing duties which require the existence of the said qualification<sup>[79]</sup>.

A mediator's field competence determines the quality of the process, the effectiveness in working on the content of the dispute, establishing the mediator's authority and building the parties' trust, bringing the lawyers into a cooperative format and effectively applying the reality test through relevant questioning techniques. For instance, if a mediator by questioning techniques leads the parties to consider the legal risks, which have not been indicated in a claim or a response, and the party representatives have not thought about them, this will substantially facilitate reaching an agreement while having these risks in mind and understanding the reasonableness of a settlement.

For example, a mediator in labour disputes asks an employer the following questions: Should the parties not achieve an agreement, hypothetically, what mechanisms can the parties refer to, theoretically assuming, to radicalise and dramatise the dispute? Is there a risk of transforming an individual dispute into a collective one? Do you believe, from your organisation's point of view, there is a possibility of the potential realisation of the said risk? Is there a risk that the Labour Inspection Service might take interest in the dispute? What are the material and reputational consequences that could be caused by the involvement of the Service in the examination of the matter? In inheritance disputes, a mediator may ask a party representative - should the other party's property rights be deemed legitimate on the part of a property, is there a risk that they demand compensation for damages caused by non-use of the property throughout the years? How these damages can be calculated? Etc. What are the risks in litigation of your case and what is the burden of proof? Have you thought about other challenges? Have you researched uniform judicial practice, which would substantiate your opinion?

Therefore, if a mediator is a facilitator and catalyst for foreseeing the risks of non-agreement, which leads to the rationalisation of the perception of the legal and objective reality by the radically positioned parties, should

<sup>79</sup> Omer Shapira, *A Theory of Mediator's Ethics, Foundations, Rationale and Application* (Cambridge: Cambridge University Press, 2016), 174-175.

it not be admitted that the sectoral competence related to the subject of the dispute is the key to this role? A mediator is a person who moves lawyers from radical and competitive positions to a cooperative and constructive format, where they no longer need to protect their professional egos and present their skills to the client in a competitive setting (since the ethics of representation in mediation requires cooperation, not competition). Precisely the cooperation of the lawyers and the facilitation of a mediator form a rational and reasonable path to the solution of a problem. Correctly asked questions and inquired problems can substantially change the parties' perceptions about the possible legal outcomes of the case in the court. For the correct identification of the problem and risks, the presence of field knowledge is an essential precondition.

If the lawyers are so conflicted that they are unable to analyse the risks rationally in a collaborative format, it is still possible for a mediator to facilitate such analysis during individual sessions. Thus, considering the polarised and hostile environment, the presence of qualified legal counsel in the process is often insufficient for risk assessment and systematic analysis. From this viewpoint, the role of a mediator in promoting risk assessment is essential.

There is an opinion, that the presence of a field qualification of a mediator may hinder the process of seeking a creative solution<sup>[80]</sup>. This might happen when a mediator, e.g. with a legal education, stays narrowly focused on legal aspects. In similar situations, having field-specific knowledge may truly impede the purpose of seeking a creative outcome. Yet, when the mediator, along with the targeted use of knowledge in the domain, can expand the scope of negotiations and the perspective on the disputed issue, brings the non-legal interests of the parties, alternative resources and additional goods for exchange into the negotiation space, helps the parties in creating values and the transforming the conflict, the mediator's field competence is not a limiting factor. It becomes a great comparative advantage compared to colleagues who do not hold such qualifications. In such cases, a mediator's competence in the domain will be demonstrated as an advantage in terms of facilitating the rational decision-making process and possessing crucial skills for the reality test.

According to Article 4.2 of the „Professional Ethics Code of Mediators” of the Mediators Association of Georgia, a mediator ensures a balance between willingly solving a dispute and duly leading the process. This

---

<sup>80</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 114.

stipulation entails a mediator's direct obligation, that the principle of the willingness of the party shall be matched with the implementation of all the necessary measures, which empowers the opportunities for the parties to make informed decisions: applying the reality test, ensuring the direct involvement of parties in the process, supporting the obtaining of additional professional consultation from experts<sup>[81]</sup>, effective use of the role of lawyers for supporting objective and rational assessment of legal perspective of the case, sharing the necessary knowledge to the parties, should they require such, while adhering to the principle of impartiality, etc. It is unimaginable to duly manage the process without providing the necessary conditions for the parties to make informed, reasoned and realistic decisions and an agreement reached in the absence of such circumstances harms the principle of willingness, as it is never the product of the party's free, reasoned and autonomous will.

## 4 | The importance of substantive fairness and the ethical scope of sharing professional information for parties in evaluative and facilitative mediation models

For determining the scope of a mediator's competence, the following chapter will focus only on a facet of a mediator's complex systemic obligation to inform, which concerns the request submitted by the party to the mediator with sectoral competence regarding the analysis of the strong and weak legal points of the case, what should be the obvious recommendation of the Code of Ethics, the best practice of professional ethics for preventing negligent infringement<sup>[82]</sup>.

The content of substantive fairness differs between evaluative and facilitative mediation models. In facilitative mediation, the fairness of a mediation agreement entails whatever derives from the free will of the

<sup>81</sup> Clark, *Lawyers and Mediation*, 159.

<sup>82</sup> Lela Love, John Cooley, „The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary” *Ohio State Journal on Dispute Resolution*, No. 1 (2005): 46.

---

parties (justice from below) and not what is mandated by the law (justice from high)<sup>[83]</sup>. Here, the meaning of fairness is mainly contextual and is determined by individual features of a specific relationship or a conflict. In facilitative mediation, the parties moralise the law into the mediation agreement upon their free will, whereas the scope or the quality of reflecting the legal stipulations do not singlehandedly determine the fairness of an agreement<sup>[84]</sup>.

In evaluative mediation, since the mediator has competence in the subject matter of the dispute, they attach considerable importance to legal norms and regulations, engineering, economic or consumer practices in developing the content of the mediation agreement, thus recognising the moral power of these norms in the mediation process. Thus, for evaluative mediation, legal or industrial norms are not only strategic mechanisms of the process (e.g. for applying the reality test), but rather authoritative targets, which bring in a social value system and an understanding of social justice into the realm of agreement<sup>[85]</sup>.

Sharing legal information to the parties may take the form of legal consultation, which is imperatively prohibited by legislation in certain states of the USA, whereas it is permitted in others. Distinguishing legal information from a legal consultation is often complicated. For example informing the parties about the current legislation and judicial decisions may fall within the scope of legal information. Whereas when providing the documents or citing them takes the form of defining their meanings, this shall be considered as the application of law to the circumstances and shall be qualified as a legal consultation or advice.

Some mediators avoid providing legal information in order to avoid any ethical norms. It is safer to encourage getting consultation from professional lawyers or even engage them in the mediation process<sup>[86]</sup>. Where the party refuses to get legal consultation and as per Article 3.3 of the Professional Ethics Code of Mediators requests from the mediator to provide such information, the issue arises of whether a mediator is entitled to reject such request. According to the definition of the mentioned norm of the Code of Ethics, sharing knowledge and information concerning

---

<sup>83</sup> Jonathan Hyman, Lela Love, „If Portia Were a Mediator: An Inquiry into Justice in Mediation” *Clinical Law Review* (2002): 157.

<sup>84</sup> Waldman, *Mediation Ethics, Cases and Commentaries*, 21.

<sup>85</sup> Ibidem.

<sup>86</sup> Ibidem, 101.

the case in compliance with the principle of impartiality is the mediator's right and not an obligation. Moreover, it depends on whether the mediator has relevant competence and knowledge of legal practice, which is not a mandatory requirement for starting in the mediator's profession. In order to avoid unfounded expectations on the part of the parties that the mediator will provide advice, it is essential that it is agreed before the start of the mediation (e.g. during the information meeting) whether the mediator will play a facilitating role<sup>[87]</sup> or, if the parties so wish, conduct an evaluative mediation<sup>[88]</sup>.

This issue has such a significant impact on the mediator's scope of action and intervention in the substance of a dispute that it is essential to agree every detail with the parties in advance. The issue of a mediator's competence is an important criterion that guides the parties/legal representatives during the selection stage of the mediator. It is at this stage that they should agree on whether they can have and to what extent they can expect the mediator to share professional-legal knowledge and experience.

According to the Standards of Ethics and Professional Responsibility for Certified Mediators in the State of Virginia, a mediator must explain to the parties the mediator's role and their style, the methodological approach the mediator will use in the process. The parties should be allowed to express their expectations regarding the approach to managing mediation. The parties and the mediator should put in writing in the pre-mediation agreement which approach and mediation style they agree to use<sup>[89]</sup>.

For instance, Florida Rules for Certified & Court-Appointed Mediators<sup>[90]</sup> stipulates that referring to court litigation or consequential results of

---

<sup>87</sup> Cyril Chern, *The Commercial Mediator's Handbook* (New York: Informa Law from Routledge, 2015), 35.

<sup>88</sup> On the obligation to explain the role of a mediator see: Article 8.1. of the Law of Georgia „On Mediation” (the explanation must take place before the initiation of mediation); Also see, Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases (California Rules of Court), 2007, Revised January 1, 2013, rule 3.857 (c) (3), (d) (relevant explanations shall be provided to the parties before launching mediation or during the first session); Mediators Ethics Guidelines, JAMS Mediation, Arbitration, ADR Services, Seq. I.

<sup>89</sup> Standards of Ethics and Professional Responsibility for Certified Mediators, Adopted by the Judicial Council of Virginia April 5, 2011 Effective Date: July 1, 2011, Standard §D (a)(b).

<sup>90</sup> Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building.

a mediation agreement is a mediator's right, not his obligation. However, a mediator has a direct duty to explain to the parties the importance of understanding the possible consequences of agreement or non-agreement and to encourage them, if they wish, to seek further information from the professionals<sup>[91]</sup>.

The Florida Rules for Certified & Court-Appointed Mediators contain detailed rules regarding the exchange of professional knowledge and experience<sup>[92]</sup>. It is important to cite some of the rules:

#### RULE 10.370 ADVICE, OPINIONS, OR INFORMATION

- (a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
- (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
- (c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defence. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

It is noteworthy to cite the official Committee Notes on the rules: „The lawyer-mediators should explain the risks of proceeding without independent counsel and advise the parties to consult counsel during the course of the mediation and before signing any settlement agreement that he might prepare for them. The primary role of the mediator is to facilitate

<sup>91</sup> Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building, 10.370 Commentary.

<sup>92</sup> Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building.

a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavour by providing relevant information or helping the parties obtain such information from other sources. A mediator may also raise issues and discuss the strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties evaluate resolution options and draft settlement proposals. In providing these services, however, the mediator must maintain impartiality and avoid any activity which would have the effect of overriding the parties' rights of self-determination.

While mediators may call upon their own qualifications and experience to supply information and options, the parties must be allowed to freely decide upon any agreement. Mediators shall not utilise their opinions to decide any aspect of the dispute or to coerce the parties or their representatives to accept any resolution option”<sup>[93]</sup>.

The Standards of Ethics and Professional Responsibility for Certified Mediators in the State of Virginia is distinguished by a uniquely high standard of informing the parties about the mediator's role. The rules dictate, that the explanation of the mediator's role be reflected, on the one hand, in the pre-mediation agreement between the mediator and the parties, as well as in the mediator's opening speech. Violating this obligation by a mediator leads to the annulment of the agreement. Thus, as per the said standards, a mediator shall explain the four legal principles:

1. The mediator does not provide legal advice;
2. Any mediated agreement may affect the legal rights of the parties;
3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so;
4. Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement<sup>[94]</sup>.

---

<sup>93</sup> Committee Notes 2000 Revision (previously Committee Note to 1992 adoption of former rule 10.090), Florida Bar Committee on Professional Ethics, formal opinion 86-8 at 1239.

<sup>94</sup> Standards of Ethics and Professional Responsibility for Certified Mediators, Adopted by the Judicial Council of Virginia April 5, 2011, Effective Date: July 1, 2011, Standard §D 2 (a) (1-4).

The Tennessee Supreme Court Rules<sup>[95]</sup> prohibit a mediator from giving legal advice to the parties.<sup>[96]</sup> The mediator is not entitled to offer the parties a firm position on what decision a court will make, although they are allowed to outline the expected results of the case and offer the parties a personal opinion regarding the plausibility of the claim and response.

The Rules of Conduct for Mediators of the California Court Mediation Program for Civil Disputes stipulates that a mediator must explain to the parties before the proceeding, or at the latest, during the first session, that they will not provide legal representation or any other professional services to any party, except as an impartial mediator. The mediator must explain as well that, adhering to the principle of impartiality and self-determination, they will be entitled to share certain information and opinions with the parties within the scope of his competence, within the limits of their qualifications and experience<sup>[97]</sup>.

Rule 2.4. of ABA Model Rules of Professional Conduct<sup>[98]</sup> provides: A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and the lawyer's role as one who represents a client.

It is of fundamental importance in mediation that the scope of a mediator's role and procedural intervention is agreed in the course of facilitating substantive fairness. During the mediation process, a dilemma may arise regarding the principles of party autonomy, informed choice, substantive fairness and the neutrality of a mediator.

Hence, the issue of what is a mediator's role and responsibility, when the parties make decisions in the circumstances of incorrect, incomplete or imprecise information, is substantive. Is it possible to say, that in given circumstances the parties realise the principle of autonomy, while the

---

<sup>95</sup> Tennessee Supreme Court Rules, Rule 31, seq. 10 (b)3, 2007, As amended through October 26, 2021. <https://casetext.com/rule/tennessee-court-rules/tennessee-rules-of-the-supreme-court/rule-31-alternative-dispute-resolution-mediation/general-provisions-applicable-to-all-rule-31-mediators/section-10-obligations-of-rule-31-mediators>.

<sup>96</sup> Irakli Kandashvili, *Mediation* (Tbilisi: Cezanne, 2022), 197 (in Georgian).

<sup>97</sup> Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases (California Rules of Court), 2007, Revised January 1, 2013, rule 3.857 (d).

<sup>98</sup> ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates, 1983, Rule 2.4. Lawyer Serving as Third-Party Neutral.

opportunity to make an informed decision is a substantively forming element of the principle of self-determination? How should the principle of party sovereignty be balanced against the most general requirements of fairness? How does a mediation agreement correspond to the rights of third persons, who do not participate in the mediation process?

While it is true, that a mediator is obliged to encourage the parties to receive consultation from other professionals (among them, lawyers), the dilemma is exacerbated when the parties are strictly against using the procedural right to make an informed decision. Or when the consultation is unqualified and/or without any ground serves to convince a party in futile guarantees of winning the case in court. In such circumstances, is a mediator entitled to supply the relevant information?

According to the Model Standards of Conduct for Mediators<sup>[99]</sup> of the USA a mediator cannot personally ensure that each party has made a free and informed choice to reach certain decisions, but a mediator should, where appropriate, make the parties aware of the importance of consulting other professionals to help them make informed choices.. Similarly, as per Article 4.3 of the Professional Ethics Code of Mediators, facilitating the principle of self-determination entails that the parties should be allowed to willingly make informed decisions on procedural issues of mediation, as well as its content. Moreover, a mediator is obliged to neither ensure that the parties make willing and informed decisions nor to continue mediations, where they believe that proceeding further is unreasonable and unjustifiable. Pursuant to Article 4.5., a mediator is entitled to encourage parties as needed and receive advice, including from independent professionals.

In this case, the objective of reaching an informed decision does not justify the provision of legal advice to one or both parties, since the provision of advice transforms the mediator's role into that of a lawyer and thus exceeds the limits of the professional ethics of a neutral third party. According to the Model Standards of Conduct for Mediators<sup>[100]</sup>, the role

<sup>99</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard I am (2). The act was adopted in 1994 by three associations - American Arbitration Association, American Bar Association and Association for Conflict Resolution. In 2005, the same organisations amended the act to align it with mediation practice.

<sup>100</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard VI (5) The act was adopted in 1994 by three associations - American Arbitration Association, American Bar Association and Association for Conflict Resolution. In 2005, the same organisations amended the act to align it with mediation practice.

---

of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Often, parties exaggerate their chances in litigation, either positively or negatively<sup>[101]</sup>. Lawyers prefer to discuss the dispute with an evaluative mediator who will help their client to rationalise legal risk<sup>[102]</sup>, as the parties often see it as a weakness or lack of qualification when lawyers point out legal risks. Supplying the party with legal information and analysis of how it affects the validity of the legal position is a standard part of a lawyer's job description. Mixing the role of a mediator and the role of another profession is problematic from an ethical point of view. A mediator may provide information that the mediator is qualified by training or experience to provide, in the course of which adhering to the principle of impartiality is obligatory<sup>[103]</sup>.

In the field of alternative dispute resolution, scholars researching the issue of consent encounter a scientific swamp, which is characterised by complexity and difficulty, which is revealed in the presence of different viewpoints, contradictory or silent ethics codes, and different definitions and rules<sup>[104]</sup>. For example there is a widely ongoing discourse on the topic of whether or not *pro se*<sup>[105]</sup> parties to the judicial mediation should be informed about their (legal) rights<sup>[106]</sup> before encouraging them to reach a mediation agreement, to what extent should the parties get information regarding confidentiality and its scope<sup>[107]</sup>, the mediation process and the

---

<sup>101</sup> Waldman, *Mediation Ethics, Cases and Commentaries*, 115.

<sup>102</sup> Stitt, *Mediation Practical Guide*, 3.

<sup>103</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard VI A (5).

<sup>104</sup> Love, Cooley, „The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary”, 45. Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making”, 797; Samuel Imperati, „Alternative Dispute Resolution Symposium Issue: Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation” *Willamette Law Review*, 33 (1997): 2-7.

<sup>105</sup> A party without a legal representative.

<sup>106</sup> Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making”, 834-838.

<sup>107</sup> Article 10.6 of the Law of Georgia „On Mediation”: Before the initiation of mediation, a mediator shall be obliged to inform the parties about the obligation to maintain confidentiality and the scope of confidentiality. It is important that regardless of the numerous exemptions to the principle and the legal nature of

rights of a mediator, their qualification<sup>[108]</sup>, mandate/role<sup>[109]</sup>, as the Law of Georgia „On Mediation” and the Professional Ethics Code of Mediators the right to make an informed decision covers the phases of the mediation process, its procedures and its outcome<sup>[110]</sup>.

## 5 | Synthesis of methodological approaches and the selection of a Georgian institutional model

Despite the different typologies of a mediator's role, mediation models are transitional in the course of negotiation dynamics and no straight line can be drawn. Therefore, a neutral third person may take different roles

---

the issue, a mediator is obliged to explain the mentioned issue to the parties as clearly and comprehensively as possible.

<sup>108</sup> In the state of Minnesota, mediators who receive remuneration for the mediation service, are obliged to supply the written information on their qualifications to the parties. The written explanation shall include the information on the mediator's education, training and field experience. Violation of this rule is a criminal offence. Minn. Statutes § 572.37, Presentation of Mediator to Public (2004); Minnesota Civil Mediation Act; For the critique on the criminal responsibility for violating the said rule see: James Richard Coben, Peter Thompson, „The Haghghi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota” *Hamline Journal of Public Law & Policy*, 20 (1999): 299-324.

<sup>109</sup> Article 8.1 of the Law of Georgia „On Mediation”: Before the initiation of mediation, a mediator shall explain to the parties the principles of conducting the mediation, the role of a mediator, the rights of the parties, including the right of participation in the mediation process through the representatives, the obligations of the parties, the possible outcomes of mediation and the procedure of enforcement of an agreement resulting from mediation drawn up by the parties as a result of reaching an agreement, as well as the procedure and conditions of payment of remuneration of a mediator.

<sup>110</sup> Article 8.9 of the Law of Georgia „On Mediation”: A mediator shall assist the parties in reaching an agreement for the purpose of settlement of a dispute, taking into consideration the principle of free, independent and informed decision-making by the parties in relation to the mediation process and the final outcomes of mediation. A mediator shall have the right to make a decision by himself/herself on a dispute between the parties. According to Article 4.3 of the Professional Ethics Code of Mediators facilitating the principle of self-determination entails that the

as needed throughout the different stages of negotiations. For instance, a mediator who has a narrow approach to the essence of the problem might take a wide evaluative or a facilitative stance, examining the interests of the parties, should they feel that legal framing of the dispute or distributive leading brought the negotiations to the dead-end<sup>[111]</sup>. It should be mentioned that transfer from a narrow approach to a wide one focused on the exploration of interests, may be overdue as it might be impossible to return from the dead-end and neutralise the radicalism. In addition, the parties might not tolerate the transfer to a new methodology of negotiations and this may lead to them losing hope and terminating the process. Thus, it is safer to choose the approach of comprehensive exploration of interests, as it brings in wider resources for exchange, which on its part, reduces the risks of non-agreement and dead-ends.

Generally, mediators of wide conceptual approaches can move onto the narrow approach more easily, than vice versa. In the same manner, it is easier for evaluative mediators to take the facilitative role, rather than for facilitative mediators to take up evaluative orientation [...] However, when a wide facilitative mediator finds that it is impossible to achieve reasonable cooperation of parties, as an ultimate remedy, the mediator might adopt a wide evaluative role. Generally, being an effective mediator entails being flexible and able to enter into different roles as course and dynamics of negotiations and the needs of the parties require<sup>[112]</sup>.

It is difficult for the party to decide what type of a mediator they need for their dispute, especially when the parties have wrong expectations on the notion of mediation at the initial stage. When lawyers, who are focused on litigation, select a mediator who is expected to bring them closer to judicial decision, these legal representatives put more trust in a neutral third person with a narrow evaluative role (more often, such persons are former judges), as this mediation model is characterised by significant simplicity. However, the said lawyers do not take into account the substantial deficiencies of this model. E.g. a straight focus on legal positions might overshadow the opportunities for interest-based negotiations and creative solutions. Hence, it is

---

parties should be allowed to willingly make informed decisions on procedural issues of mediation, as well as its content.

<sup>111</sup> Riskin, „Mediator Orientations, Strategies and Techniques”, 114.

<sup>112</sup> Ibidem.

reasonable to select a mediator, who possesses skills of navigating through different models and adapting to the parties' needs<sup>[113]</sup>.

The Professional Ethics Code of Mediators of the Mediators Association of Georgia prioritises autonomous development of the terms of agreements by the parties and prohibits the provision of professional or legal advice, which forms a relationship between a party and a mediator into a lawyer-client relationship.

As per the Professional Ethics Code of Mediators of the Mediators Association of Georgia, a mediator shall not evaluate the alternative agreements and circumstances of the case, unless it is specifically requested by the parties. More precisely, according to Article 3.3. of the code, a mediator should encourage the parties to utilise their resources and independently develop the terms of the agreement. However, Article 8.10 of the Law of Georgia „On Mediation” allows the mediator to propose the terms of the agreement with the consent of the parties: upon the consent of the parties, a mediator may propose to the parties the conditions of an agreement resulting from mediation, taking into consideration their interests and their positions stated during the mediation process.

According to Article 3.3 of the Professional Ethics Code of Mediators, a mediator shall not, beyond their competence, give professional or legal advice to the parties, and shall not evaluate the alternative agreements and circumstances of the case, unless it is specifically requested by the parties. A mediator is entitled to share with the parties their knowledge and information related to the case while adhering to the principle of impartiality. Hence, the Professional Ethics Code of Mediators provides foundations for facilitative, and when parties require – evaluative mediation. The most important ethical threshold which must remain formidable even in evaluative mediation is that while sharing any type of information or knowledge with the parties, the mediator shall remain impartial. More precisely, such information-sharing must not entail elements of consultation for one or another party. A mediator must not in any case supply legal advice<sup>[114]</sup>, or legal consultation, otherwise it will put any of the parties in a legally advantageous position and overall, will be considered a legal service. This violates

---

<sup>113</sup> Ibidem.

<sup>114</sup> Murray Russel, *The Mediation Handbook, Effective Strategies for Litigators* (Denver Colorado: Bradford Publishing Company, 2011), 195.

the principle of neutrality of a mediator and leads to a transformation of the functions of a lawyer-mediator into those of a legal representative<sup>[115]</sup>.

## 6 | Conclusion

Despite the dichotomy of the mediation models discussed in the paper, there is no vivid demarcation between mediation models. Considering the peculiarities of each case and the negotiation dynamics, within the scope of mediation of a private legal dispute, methodological application of different mediation styles may become necessary, and even more – it may happen so during the course of one mediation or a single session<sup>[116]</sup>. „An ideal mediator must be flexible enough to refer to the most corresponding orientation, strategy and techniques of mediation, keeping in mind the needs of the participants of negotiations”<sup>[117]</sup>. „Eclectic nature” and integrated use of paradigmatic models of mediation is the key to a successful future of mediation<sup>[118]</sup>. In this context, Article 3.3 of the Professional Ethics Code of Mediators of Georgia must be defined in a manner, that when requested by the parties, sharing professional information while adhering to the principle of impartiality shall be deemed ethical. However, even when the parties request, it shall be imperatively prohibited to supply the parties with professional advice or consultation<sup>[119]</sup>. For lawyer mediators this clearly means a prohibition on giving legal advice<sup>[120]</sup>.

<sup>115</sup> Washington State Bar Association Advisory Opinion №2223.

<sup>116</sup> Dwight Golann, „Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case, *Journal of Dispute Resolution*” *University of Missouri School of Law Scholarship Repository*, No. 1 (2000): 42. See also, Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement”, 192.

<sup>117</sup> Riskin, „Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed”, 35–36.

<sup>118</sup> Stempel, „The Inevitability of the Eclectic: Liberating ADR from Ideology”, 275. Charles Pou, „Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality” *Journal of Dispute Resolution* 2004, No. 2 (2004): 303–354.

<sup>119</sup> On clarifying distinctions between information and advice see: James Alfini, „Evaluative versus Facilitative Mediation: A Discussion” *Florida State University Law Review*, No. 4 (1997): 926.

<sup>120</sup> Levin, „The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion”, 294.

## Bibliography

- Alexander Nadja, *International and Comparative Mediation Legal Perspectives*. Netherlands: Kluwer Law International, 2009.
- Alfini James, „Evaluative versus Facilitative Mediation: A Discussion” *Florida State University Law Review*, No. 4 (1997): 926. <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1447&context=lr>.
- Anderson Dorcas Quek, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?” *Asian Journal on Mediation*, (2013): 68. <https://ssrn.com/abstract=2889142>.
- Boulle Laurence, *Mediation: Principles, Process, Practice*. Chatswood, N.S.W: Lexis Nexis Butterworths, 2005.
- Boulle Laurence, Miryana Nesic, *Mediation: Principles, Process*. London: Tottel, 2001.
- Boulle, Laurence, *Mediation: Principles, Process, Practice*. Butterworths: Lexis Nexis, 2011.
- Bush Robert Baruch, „Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field” *Pepperdine Dispute Resolution Law Journal*, No. 1 (2002):122. <https://digitalcommons.pepperdine.edu/drlj/vol3/iss1/6>.
- Bush Robert Baruch, Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.
- Bush, Robert Baruch, Folger, Joseph, *The Promise of Mediation: The Transformative Approach to Conflict*. United States of Amerika: Jossey-Bass, 2005.
- Chern Cyril, *The Commercial Mediator's Handbook*. New York: Informa Law from Routledge, 2015.
- Chowdhury Jamila, *Gender Power and Mediation, Evaluative Mediation to Challenge the Power of Social Discourses*. Cambridge: Cambridge Scholars, 2012.
- Chowdhury Jamila, *Gender Power and Mediation, Evaluative Mediation to Challenge the Power of Social Discourses*. Cambridge: Cambridge Scholars, 2012.
- Clark Bryan, *Lawyers and Mediation*. Heidelberg: Springer, 2012.
- Coben James Richard, Peter Thompson, „The Haghghi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota” *Hamline Journal of Public Law & Policy*, 20 (1999): 299-324. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1723301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723301).
- Craver Charles, „The Use of Mediation to Resolve Community Disputes, Washington University Journal of Law & Policy” *New Directions in Community Lawyering Social Entrepreneurship, and Dispute Resolution*, 48 (2015): 237. [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol48/iss1/13](https://openscholarship.wustl.edu/law_journal_law_policy/vol48/iss1/13).

- Dubler Nancy, Carol Liebman, *Bioethics Mediation, A Guide to Shaping Shared Solutions*. Nashville: Vanderbilt University Press, 2011.
- Ethical Mediation, Advocate, Vancouver Bar Association, Vol. 79, part 6, 857.
- Feehily Ronán, *International Commercial Mediation, Law and Regulation in Comparative Context*. Cambridge: Cambridge University Press, 2022.
- Feerick, John et al., „Standards of Professional Conduct in Alternative Dispute Resolution” *Journal of Dispute Resolution*, No. 1 (1995): 101-102.
- Field Rachael, Jonathan Crowe, *Mediation Ethics, From Theory to Practice*. Cheltenham: Edward Elgar Publishing, 2020.
- Folger Joseph, Robert A. Baruch Bush, „Transformative Mediation, A self-assessment” *International Journal of Conflict Engagement and Resolution*, No.1 (2014): 20-34.
- Freund James, *Anatomy of a Mediation: a Dealmaker’s Distinctive approach to Resolving Dollar Disputes and other Commercial Conflicts*. New York: Practising Law Institute, 2012.
- General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l’Académie Internationale de Droit Comparé*. ed. Schauer Martin, Bea Verschraegen. The Netherlands: Springer, 2017.
- Golann Dwight, „Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case, Journal of Dispute Resolution” *University of Missouri School of Law Scholarship Repository*, No. 1 (2000): 42. <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1047&context=jdr>.
- Hinshaw Art, Andrea Kupfer Schneider, Sarah Rudolph Cole, *Discussions in Dispute Resolution. The Foundational Articles*. Oxford: Oxford University Press, 2021.
- Hopt Klaus, Felix Steffek, *Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, 2013.
- Hyman Jonathan, Lela Love, „If Portia Were a Mediator: An Inquiry into Justice in Mediation” *Clinical Law Review*, (2002): 157. <https://www.pgpmediation.com/wp-content/uploads/2015/05/If-Portia-Were-a-Mediator-9-Clinical-L-Rev-157.pdf>.
- Imperati Samuel, „Alternative Dispute Resolution Symposium Issue: Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation” *Willamette Law Review*, (1997): 2-7. <https://www2.mediate.com/ICM/docs/Willamette%20Law%20Review%20Excerpt.pdf>.
- Kandashvili Irakli, *Mediation*. Tbilisi: Cezanne, 2022 (in Georgian).
- Laflin Maureen, „Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators” *Notre Dame Journal of Law, Ethics & Public Policy*, No. 1 (2000): 486. <https://scholarship.law.nd.edu/ndjlepp/vol14/iss1/14>.

- Lee Joel, Marcus Tao Shien Lim, *Contemporary Issues In Mediation*. Singapore: World Scientific Publishing Company, 2016.
- Levin Murray, „The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion” *Ohio State Journal on Dispute Resolution*, Vol. XVI (2001): 267-296. <https://core.ac.uk/download/pdf/159560678.pdf>.
- Love Lela, „The Top Ten Reasons Why Mediators Should Not Evaluate” *Florida State University Review*, No. 4 (1997): 939. <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1448&context=lr>.
- Love Lela, John Cooley, „The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary” *Ohio State Journal on Dispute Resolution*, No. 1 (2005): 45-46.
- Mediation in International Commercial and Investment Disputes*, ed. Catharine Titi Katia Fach Gómez. Oxford: Oxford University Press, 2019.
- Moberly Robert, „Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?” *South Texas Law Review*, 38 (1997): 772.
- Moffitt Michael, Andrea Kupfer Schneider, *Examples & Explanations: Dispute Resolution*. United States: Aspen Publishers, 2011.
- Munjal Diksha, „Tug of War: Evaluative versus Facilitative Mediator” *Pretoria Student Law Review*, 6 (2012): 72-73, 79. <https://upjournals.up.ac.za/index.php/pslr/article/view/2137/2022>.
- Noce Dorothy Della, „Evaluative Mediation: In Search of Practice Competencies” *Conflict Resolution Quarterly*, 27 (2009): 139, 208-209. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2263813](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263813).
- Nolan-Haley Jacqueline, „Court Mediation and the Search for Justice through Law” *Washington University Law Review*, No. 1 (1996): 65-66.
- Nolan-Haley Jacqueline, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making” *Notre Dame Law Review*, 74 (1999): 797, 834-838. [https://ir.lawnet.fordham.edu/faculty\\_scholarship/274/](https://ir.lawnet.fordham.edu/faculty_scholarship/274/).
- Nylund Anna, Kaijus Ervasti, Lin Adrian, *Nordic Mediation Research*. Switzerland: Springer International Publishing, 2019.
- Ordover Abraham, Andrea Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution*. Boulder: National Institute for Trial Advocacy, 2014.
- Pou Charles, „Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality” *Journal of Dispute Resolution*, No. 2 (2004): 303-354. <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1470&context=jdr>.
- Riskin Leonard, „Mediator Orientations, Strategies and Techniques” *Alternatives to the High Cost of Litigation*, No. 9 (1994): 111-114. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1506704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1506704).

- Riskin Leonard, „Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” *Harvard Negotiation Law Review*, No. 7 (1996): 8-51, 35-36. <http://scholarship.law.ufl.edu/facultypub/668>.
- Roberts Kenneth, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement” *Loyola University Chicago Law Journal*, No. 1 (2007): 192, 198.
- Roberts Marian, *Mediation in Family Disputes, Principles of Practice*. London-New York: Routledge-Taylor and Francis Group, 2014.
- Russel Murray, *The Mediation Handbook, Effective Strategies for Litigators*. Denver Colorado: Bradford Publishing Company, 2011.
- Santos Hugo Luz dos, *Towards a Four-Tiered Model of Mediation Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization*. Singapore: Springer, 2023.
- Self-Determination in Mediation, The Art and Science of Mirrors and Lights*. ed. Dan Simon, Rara West. Lan Ham: Rowman & Littlefield Publishers, 2022.
- Shapira Omer, „Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics” *Pepperdine Dispute Resolution Law Journal*, No. 2 (2008): 244.
- Shapira Omer, *A Theory of Mediator’s Ethics, Foundations, Rationale and Application*. Cambridge: Cambridge University Press, 2016.
- Stark James, „Preliminary Reflections on the Establishment of a Mediation Clinic” *Clinical Law Review*, 2 (1996): 487. [https://digitalcommons.lib.uconn.edu/law\\_papers/166](https://digitalcommons.lib.uconn.edu/law_papers/166).
- Stark James, „The Ethics of Mediation Evaluation: Some Troublesome Questions And Tentative Proposals, from an Evaluative Lawyer Mediator” *South Texas Law Review*, 38 (1997): 795. [https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1198&context=law\\_papers](https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1198&context=law_papers).
- Stempel Jeffrey, „The Inevitability of the Eclectic: Liberating ADR from Ideology” *Journal of Dispute Resolution*, No. 2 (2000): 247, 275. <https://scholars.law.unlv.edu/facpub/217>.
- Stitt Alan, *Mediation Practical Guide*. United Kingdom: Taylor & Francis, 2016.
- Tallodi Timea, *How Parties Experience Mediation, An Interview Study on Relationship Changes in Workplace Mediation*. Springer International Publishing, 2020.
- The Negotiator’s Fieldbook, The Desk Reference for the Experienced Negotiator*, ed. Schneider Andrea Kupfer, Christopher Honeyman. Washington, DC: ABA Section of Dispute Resolution, 2006.
- Waldman Ellen, *Mediation Ethics, Cases and Commentaries*. San Francisco: Jossey-Bass, 2010.

Weckstein Donald, „In Praise of Party Empowerment And of Mediator Activism”  
*Willamette Law Review*, 33 (1997): 526.

Wolski Bobette, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making” *Ethics in Alternative Dispute Resolution*, No. 1 (2017-2018): 69, 70, 71.

Zena Zumeta, „A Facilitative Mediator Responds” *Journal of Dispute Resolution*, No. 2 (2000): 337. <https://scholarship.law.missouri.edu/jdr/vol2000/iss2/8>.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

# Rights of Workers with Disabilities under EU Law Following Ratification of UN Convention on the Rights of Persons with Disabilities

## Abstract

The objective of this elaboration is to analyze the influence of the UN Convention on the Rights of Persons with Disabilities on EU regulations concerning the status of workers with disabilities. The author presents the EU legal framework on disability, including the EU Charter of Fundamental Rights and Directive 2000/78 on equal treatment in employment, as well as those provisions of the UN Convention that pertain to the prohibition of discrimination, accessibility, and the right to work. In light of the aforementioned considerations, the author proceeds to analyze the influence of the UN Convention on the EU Court of Justice case law with regard to the notion of disability and reasonable accommodations under EU law.

**KEYWORDS:** disability, UN Convention on the Rights of Persons with Disabilities, EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, prohibition of discrimination based on disability, reasonable accommodations, accessibility

**LESZEK MITRUS**, full professor, Jagiellonian University in Kraków,  
ORCID – 0000-0002-1308-7358, e-mail: leszek.mitrus@uj.edu.pl

## 1 | Preliminary observations

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the UN Convention) is the first international human rights treaty to which the European Union itself is a party. The UN Convention is broadly concerned with the labour and employment rights of persons with disabilities, while EU labour law has only limited provisions on the status of workers with disabilities. However, it should be emphasised that in recent decades there has been a significant shift towards the recognition of human social rights by the European Union. The purpose of this paper is to analyse the influence of the UN Convention on EU regulations concerning the status of workers with disabilities.

## 2 | European Union regulations on workers with disabilities

With regard to disability, the material scope of the European Union law is narrow. In accordance with Art. 9 of the Treaty on the Functioning of the European Union<sup>[1]</sup> (hereinafter: TFEU), in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. It goes without saying that persons with disabilities are particularly vulnerable to social exclusion.

Pursuant Art. 10 TFEU, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 19(1) TFEU expressly provides that, without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age

<sup>1</sup> Official Journal C 326, 26.10.2012 p. 1.

or sexual orientation. The European Union thus has legislative powers to combat discrimination based on disability<sup>[2]</sup>.

The preamble to the EU Charter of Fundamental Rights states that<sup>[3]</sup> the Union is founded on the indivisible, and universal values of human dignity, freedom, equality and solidarity. It also places the individual at heart of its activities, and intends to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter. The right to human dignity is the basis and source of fundamental social rights, and in particular of rights at work, and labour rights are an essential part of human dignity<sup>[4]</sup>. Human dignity thus provides the theoretical basis for regulating the status of persons with disabilities. From the perspective of labour law, the realisation of human dignity requires that persons with disabilities should be given the opportunity to participate in the labour market as far as possible. In other words, they should enjoy the right to work. Therefore, they should have access to employment opportunities and working conditions appropriate to their state of health. Such a presumption implies far-reaching obligations for national legislators, in particular with regard to incentives for employers to recruit people with disabilities, as well as with regard to reasonable accommodation of the situation of people with disabilities in the workplace (see below).

Under Art. 21(1) EUCFR item 1, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Moreover, Art. 26 EUCFR explicitly refers to the integration of persons with disabilities. According to this provision, the Union recognises and respects the right of persons with disabilities to benefit from

<sup>2</sup> For further analysis see Justyna Maliszewska-Nienartowicz, „Niepełnosprawność”, [in:] *System prawa Unii Europejskiej*, Vol. VI, *Prawo antydyskryminacyjne*, ed. Justyna Maliszewska-Nienartowicz (Warszawa: Wolters Kluwer, 2020), 384 and following, Marcin Wujczyk, „Zasady równego traktowania i zakazu dyskryminacji”, [in:] *System prawa pracy*, Vol. X, *Międzynarodowe publiczne prawo pracy. Standardy europejskie*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2020), 458 and following.

<sup>3</sup> OJ C 326, 26.10.2012, p. 391.

<sup>4</sup> Barbara Kresal, „Article 1 – Human Dignity”, [in:] *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, Melanie Schmitt (Oxford, London-New York-New Delhi-Sydney: Hart Publishing, 2019), 206.

measures designed to ensure their independence, social and occupational integration and participation in the life of the community. These two provisions of the EU Charter relating to disability are closely linked<sup>[5]</sup>. The Court of Justice of the European Union (hereinafter: CJEU) considers that Article 26 EUCFR may be relied upon to interpret and review the legality of European Union legislative acts implementing the principle of integration of persons with disabilities set out in that Article. The Court of Justice of the European Union (hereinafter: CJEU) considers that Article 26 EUCFR may be relied upon to interpret and review the legality of European Union legislative acts implementing the principle of integration of persons with disabilities set out in that Article<sup>[6]</sup>.

Moreover, principle 17 of the European Pillar of Social Rights<sup>[7]</sup> makes it clear that persons with disabilities have the right to income support that ensures their living in dignity, services that enable them to participate in the labour market and in society and a work environment adapted to their needs.

At the level of EU secondary legislation, we should emphasize the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>[8]</sup>. Article 1 of the Directive states that its purpose is to establish a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Directive 2000/78 is a specific expression, in the field it covers, of the general principle of non-discrimination now enshrined in Article 21 of the EUCFR<sup>[9]</sup>.

The preamble to Directive 2000/78 emphasises that the provision of measures to accommodate the needs of disabled people in the workplace plays an important role in combating discrimination on the grounds of disability

<sup>5</sup> Niklas Bruun, „Articles 20 and 21 – Equality and Non-Discrimination”, [in:] *The Charter of Fundamental Rights*, 385.

<sup>6</sup> Judgment of 22.5.2014, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, ECLI:EU:C:2014:350, paragraph 74; judgment of 21.10.2021, C-824/19, TC, UB v. Komisija za zashtita ot diskriminatsia, ECLI:EU:C:2021:862, paragraph 64.

<sup>7</sup> 2017/C 428/09.

<sup>8</sup> OJ L 303, 2.12.2000, p. 16.

<sup>9</sup> Judgment of 26.01.2021, C-16/19, VL v. Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, EU:C:2021:64, paragraph 33. See also Leszek Mitrus, „Koncepcja zakazu dyskryminacji w prawie pracy Unii Europejskiej”, [in:] *Różne oblicza dyskryminacji w zatrudnieniu*, ed. Joseph Roger Carby-Hall, Zbigniew Góral, Aneta Tyc (Warszawa: Wolters Kluwer, 2021), 99 and following.

(recital 16). Furthermore, the Directive does not require the recruitment, promotion, retention in employment or training of a person who is not competent, able and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for persons with disabilities (recital 17).

Pursuant Art. 2(2)(ii) of Directive 2000/78 as regards persons with a particular disability, the employer or any person or organisation to whom the Directive applies is obliged, in accordance with national law, to take appropriate measures, in line with the principles contained in Article 5, to eliminate disadvantages resulting from such provision, criterion or practice. According to Art. 3(4) of the Directive, Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

In accordance with Art. 5 of the Directive, reasonable accommodation shall be provided to ensure compliance with the principle of equal treatment for persons with disabilities. This means that employers shall take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or vocational training, unless such measures would impose a disproportionate burden on the employer. This burden is not disproportionate if it is sufficiently remedied by existing measures under the disability policy of the Member State concerned. In other words, employers are obliged to take measures to adapt working conditions to the needs of people with disabilities<sup>[10]</sup>.

In summary, the prohibition of discrimination requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified. Less favourable treatment on the grounds of disability is therefore unlawful. However, disability is a specific prohibited ground of differentiation. In order to ensure equal treatment in employment relations, it is essential to take measures to introduce certain advantages for

<sup>10</sup> Justyna Maliszewska-Nienartowicz, „Unijna koncepcja racjonalnych usprawnień dla osób z niepełnosprawnościami” *Praca i Zabezpieczenie Społeczne*, 11 (2022): 21 and following; Magdalena Palusziewicz, „Racjonalne usprawnienia jako środek wspierania aktywności zawodowej osób z niepełnosprawnościami w świetle orzecznictwa sądowego”, [in:] *Studia z zakresu prawa pracy i polityki społecznej*, ed. Krzysztof. W Baran, Vol. XXX (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2023), 387 and following

people with disabilities. This is why Directive 2000/78 explicitly requires that workers with disabilities should be provided with reasonable accommodation in the workplace. However, EU law does not refer directly to the concept of accessibility.

### 3

## United Nations Convention on the Right of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly on 13 December 2006 and entered into force on 3 May 2008. Its preamble emphasises, *inter alia*, the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need to ensure their full enjoyment by persons with disabilities without discrimination. It also recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that impede their full and effective participation in society on an equal basis with others. According to Art. 1, the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

Article 3 indicates the principles of the UN Convention. They are:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;

- 
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

From the perspective of this paper, we should remember that non-discrimination and accessibility are cornerstones of the UN Convention. In my opinion, from a theoretical point of view, the scope of labour and employment rights of persons with disabilities should be understood broadly. In other words, persons with disabilities who enter into an employment contract should – as far as possible – enjoy the rights that are granted to persons without disabilities, e.g. the right to form and join trade unions, the right to a safe and healthy working environment, protection against unfair dismissal, and so on. Clearly, there is no way to ensure full equality between workers with disabilities and workers without disabilities. Therefore, international, European and national law requires legislators to establish a framework for reasonable accommodation in the workplace for people with disabilities.

Article 5 of the Convention is devoted to equality and non-discrimination. Under this provision, States Parties recognise that all persons are equal before and under the law and are entitled without discrimination to equal protection and equal benefit of the law (item 1). States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds (item 2). In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (item 3)<sup>[11]</sup>. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the Convention (item 4). Moreover, there should be no doubt that equality of opportunity, as set out in Art. 3e of the Convention, is of particular importance for the status of persons with disabilities in the labour market and their opportunities for employment.

---

<sup>11</sup> Article 2 of the Convention provides that „reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 9 of the UN Convention expressly refers to accessibility. The scope of this provision is indeed broad. According to Art. 9(1) states that, in order to enable persons with disabilities to live independently and to participate fully in all aspects of life, States Parties shall take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transport, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, in both urban and rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, *inter alia*: a) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; and b) information, communications and other services, including electronic services and emergency services. For the purposes of the present analysis, it should be emphasised that the UN Convention explicitly requires that accessibility includes the identification and removal of barriers to accessibility in the workplace. As a socio-economic norm, it becomes a key element of implementing equality. The duty to make reasonable adjustments and the obligations stipulated in this provision is the means to achieve the goal in a new right to accessibility<sup>[12]</sup>. Consequently, national legislation should impose specific obligations on employers with regard to the conditions of employment of workers with disabilities. It has also been emphasised that reasonable accommodation is an individual mechanism, whereas accessibility is comprehensive and general in nature. Reasonable accommodation should be effectively implemented *ad casum* by both public and private entities. In contrast, accessibility aims at comprehensive actions that should be undertaken by the states in order to safeguard barrier-free environment for persons with disabilities<sup>[13]</sup>.

The right to work is one of the fundamental human rights. Article 27 of the UN Convention expressly regulates work and employment of persons with disabilities<sup>[14]</sup>. According to Art. 27(1), States Parties recognize the right

<sup>12</sup> Katarzyna Roszewska, „Accessibility – One of the Human Rights or the Means of Their Implementation” *Prawo i Więź*, nr 3(2021): 167; idem, „The Development of the Right to Access as a Part of Human Rights” *Prawo i Więź*, nr 3(2023): 436.

<sup>13</sup> Hanna Markiewicz-Hoyda, „Prawna analiza koncepcji dostępności (accessibility)” *Państwo i Prawo*, 3 (2022): 117.

<sup>14</sup> For further analysis see Magdalena Paluszkiewicz, *Wolność pracy osób z niepełnosprawnościami jako wartość prawnie chroniona* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2019), 119 and following.

of persons with disabilities to work on an equal basis with others, including the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall protect and promote the realization of the right to work, including for those who acquire a disability in the course of employment, by taking appropriate measures, including legislation. Pursuant to Art. 27(2), States Parties shall ensure that persons with disabilities are not held in slavery or servitude and are protected, on an equal basis with others, from forced or compulsory labour.

The UN Convention requires that measures taken at the national level should, i.a. prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment; protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, (including equal opportunities and equal remuneration for work of equal value, as well as safe and healthy working conditions); ensure that persons with disabilities are able to exercise their labour and trade union rights; enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; promote employment opportunities and career advancement for persons with disabilities in the labour market; promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business; employ persons with disabilities in the public sector; promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; ensure that reasonable accommodation is provided to persons with disabilities in the workplace; promote the acquisition by persons with disabilities of work experience in the open labour market; as well as promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

Thus, the UN Convention refers broadly to the labour and employment rights of persons with disabilities. The material scope of UN Convention concerning workers with disabilities is comprehensive and much broader than the scope of European Union regulations on that category of individuals. It should be noted, however, that the provisions of the UN Convention are not self-executing and that legislative action by the parties to the UN Convention is necessary to ensure their effectiveness<sup>[15]</sup>. The duty to protect

---

<sup>15</sup> See also art. 4 of the UN Convention.

and promote the realisation of the right to work of persons with disabilities has been entrusted to both the European Union and its Member States (see next section).

## 4 | The ratification of the UN Convention by the European Union

Pursuant to Art. 1(1) of Council Decision 2010/48 of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, the aforementioned Convention was approved on behalf of the Community subject to a reservation in respect of Article 27(1) thereof. The preamble to the Decision states that the UN Convention constitutes a relevant and effective pillar for the promotion and protection of the rights of persons with disabilities within the European Union, to which both the Community and its Member States attach the greatest importance (recital 4). Both the Community and its Member States have competence in the areas covered by the UN Convention. The Community and the Member States should therefore become Parties to the Convention so that, in situations of mixed competence, they can together fulfil the obligations and exercise the rights conferred by the Convention in a coherent manner (Recital 7)<sup>[16]</sup>.

The reservation submitted by the European Union refers to Art. 27(1) of the Convention „Work and employment”. In accordance with Directive 2000/78, Member States may, where appropriate, enter their own reservations to Article 27(1) of the Convention on the Protection of Persons with Disabilities to the extent that Article 3(4) of the said Directive confers on them the right to exclude from the scope of the Directive non-discrimination on the grounds of disability in relation to employment in the armed forces. Therefore, the Community concluded the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.

<sup>16</sup> For further analysis see Tomasz Dubowski, „The European Union and the UN Convention on the Rights of Persons with Disabilities. Selected Institutional Aspects of Implementation” *Białostockie Studia Prawnicze*, No. 4 (2018): 171 and following.

Upon ratification, the UN Convention on the Rights of Persons with Disabilities became part of European Union law. The CJEU clarified that the UN Convention does not create directly enforceable rights. According to the ECJ, the provisions of the Convention are not unconditional and sufficiently precise in terms of their content and therefore do not have direct effect in EU law<sup>[17]</sup>. However, according to settled case-law, the UN Convention must be taken into account when interpreting the provisions of Directive 2000/78 (sections 5 and 6 below).

## 5 | The concept of disability under EU law

We should mention the importance of the UN Convention for the understanding of the concept of „disability”. Recital (e) of the Preamble to the UN Convention emphasises that disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that prevent their full and effective participation in society on an equal basis with others. According to Art. 1 of the UN Convention, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. In contrast, the Directive 2000/78 does not define what is meant by „disability”.

In opinion of the CJEU, it follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question. As is clear from Art. 1, the purpose of Directive 2000/78 is to establish a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, in the field of employment and occupation. In the light of that objective, the concept of disability within the

<sup>17</sup> Judgment of 18.03.2014, C-363/12, Z v. A Government Department, ECLI:EU:C:2014:159, paragraph 90.

meaning of Directive 2000/78 must be given an autonomous and uniform interpretation. That concept must be understood as referring to a limitation resulting, in particular, from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life<sup>[18]</sup>.

The ratification of the UN Convention on the Rights of Persons with Disabilities has had a direct impact on the interpretation of the concept of disability. In subsequent case law, the CJEU has held that the concept of disability must be understood as referring to a limitation resulting in particular from physical, mental or psychological impairments which, in combination with various barriers, may hinder the full and effective participation of the person concerned in working life on an equal footing with other workers. It also follows from Article 1(2) of the UN Convention that the physical, mental or psychological impairments must be „longterm”<sup>[19]</sup>. In slightly different wording this approach has been reiterated by the CJEU in subsequent rulings<sup>[20]</sup>.

It has been suggested in the literature that a „medical” model assumes that disability results from individual impairment. In contrast, a „social” model sees disability as caused by barriers that arise from the interaction between the individual impairment and the environment (which includes physical infrastructure, work organisation and social attitudes). This shifts the focus away from the medical circumstances of the individual and towards the social barriers that have created a disadvantage<sup>[21]</sup>. We should conclude that the ratification of the UN Convention has contributed

<sup>18</sup> Judgment of 11.07.2006, C-13/05, Sonia Chacon Navas v. Eurest Colectividades SA, ECLI:EU:C:2006:456, paragraphs 40-43.

<sup>19</sup> Judgment of 11.04.2013, Joined Cases C-335/11 and C-337/11 HK Danmark v. Dansk almennytigt Boliggelskab and HK Danmark v. Dansk Arbejdsgiverforening, ECLI:EU:C:2013:222, paragraphs 38-39. Moreover, the CJEU has held that a disability does not necessarily imply complete exclusion from work or professional life (paragraph 43).

<sup>20</sup> E.g. judgment of 11 September 2019, C-397/18, DW v. Nobel Plastiques Ibérica, EU:C:2019:703, paragraph 42; judgment of 10.02.2022, C-485/20, XX v. H.R. Rail, ECLI:EU:C:2022:85, paragraph 34: according to settled case-law, the concept of „disability” must be understood as referring to a limitation of capacity which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

<sup>21</sup> Marc Bell, Anne Numhauser-Henning, „Equal Treatment”, [in:] European Labour Law, ed. Jaspers Teun, Pennings Frans, Peters Saskia (Cambridge: Intersentia, 2019), 147.

significantly to the acceptance of the social model of disability under Directive 2000/78<sup>[22]</sup>.

## 6 | Reasonable accommodations under EU law

Furthermore, we should emphasise the issue of reasonable accommodation, as provided for in Art. 5 of Directive 2000/78, as well as art. 2 and art. 5 of the UN Convention.

The CJEU has ruled that the concept of „reasonable accommodation” in Directive 2000/78 must be interpreted broadly as referring to the removal of the various barriers which prevent the full and effective participation of persons with disabilities in working life on an equal basis with other workers. Furthermore, recital 20 provides a non-exhaustive list of reasonable accommodation measures of a physical, organisational or educational nature. Such an obligation is also enshrined in the United Nations Convention, the provisions of which may be invoked for the purposes of interpreting the provisions of Directive 2000/78, so that the latter must be interpreted as far as possible in a manner consistent with the said Convention<sup>[23]</sup>.

One of the recent requests for a preliminary ruling concerned the compatibility of excluding a blind person from performing duties as a juror in criminal proceedings, with regard to the provisions of the Directive 2000/78, the UN Convention and the EU Charter of Fundamental Rights. The Court held that Art. 5 of Directive 2000/78, read in the light of recitals 20 and 21 of its preamble, employers must take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment, unless such measures would impose a disproportionate burden on the employer<sup>[24]</sup>. This obligation must be read in the light of Art. 26 of the Charter, which

<sup>22</sup> For further analysis see Maliszewska-Nienartowicz, „Niepełnosprawność”, 395 and following; Michał Skóra, „Ewolucja pojęcia niepełnosprawności w unijnym i polskim prawie pracy” *Białostockie Studia Prawnicze*, No. 2 (2021): 190 and following.

<sup>23</sup> Judgment of 15.07.2021, C795/19 XX v. Tartu Vangla, ECLI:EU:C:2021:606, paras. 48-49.

<sup>24</sup> Judgment of 21.10.2021, C-824/19, TC, UB v. Komisia za zashtita ot diskriminatsia, ECLI:EU:C:2021:862, paragraph 54.

lays down the principle of the integration of persons with disabilities so that they may benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. Such an obligation is also enshrined in the United Nations Convention, the provisions of which may be used to interpret the provisions of Directive 2000/78, so that the latter must be interpreted, as far as possible, in a manner consistent with that Convention. However, Art. 5(3) of the UN Convention provides that, in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. Moreover, Art. 5(3) of the UN Convention has the overarching purpose of promoting the equality of persons with disabilities and eliminating discrimination, as reflected in Art. 27 of the Convention, which recognises their right to work on an equal basis with others, in particular the opportunity to gain a living by performing work freely chosen or accepted in a labour market and in a work environment that is open, inclusive and accessible to persons with disabilities. In the present case, the applicant has been excluded from any participation in criminal proceedings, regardless of the issues involved, and without any investigation into whether reasonable accommodation, such as material, personal or organisational assistance, could be offered to her. Moreover, subject to the finding of the referring court, that measure appears to go beyond what is necessary, since it is clear from the reference for a preliminary ruling that, following the introduction of the electronic assignment of jurors in August 2016, the applicant participated in that capacity in the assessment of numerous criminal cases. Therefore, Art. 2(2)(a) and Art. 4(1) of Directive 2000/78, read in the light of Articles 21 and 26 of the Charter and the United Nations Convention, must be interpreted as precluding the total deprivation of a blind person of any possibility of performing the duties of juror in criminal proceedings<sup>[25]</sup>.

The CJEU has also confirmed that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention Article 2(3) of the UN Convention. This provides that discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation. According to Art. 5 of Directive 2000/78, reasonable accommodation must be provided to ensure compliance with the principle of equal treatment for persons with disabilities. Therefore, the

<sup>25</sup> Judgment of 21.10.2021, C-824/19, TC, UB v. Komisia za zashtita ot diskriminatsia, ECLI:EU:C:2021:862, paragraphs 58–64.

employer must take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or vocational training, unless such measures would impose a disproportionate burden on the employer. Article 5 of the Directive, read in the light of Article 2(4) of the UN Convention, provides a broad definition of reasonable accommodation. The adaptation of the ‘workplace’ (recital 20 of the preamble to Directive 2000/78) should be understood as meaning that this adaptation should be made as a matter of priority, taking into account other measures which make it possible to adapt the working environment for the disabled person in order to enable him or her to participate fully and effectively in working life on an equal basis with other workers. These measures may include the implementation by the employer of measures to enable the person to remain in employment, such as redeployment to another job<sup>[26]</sup>.

Therefore, where a worker becomes permanently incapable of remaining in his or her job as a result of the onset of a disability, reassignment to another job may constitute an appropriate measure in the context of reasonable accommodation within the meaning of Art. 5 of Directive 2000/78. This interpretation is consistent with the concept of reasonable accommodation, which must be understood as referring to the removal of the various barriers that prevent persons with disabilities from participating fully and effectively in working life on an equal footing with other workers. It should be noted that Art. 5 of Directive 2000/78 does not oblige an employer to take measures that would impose a ‘disproportionate burden’ on him. In any event, the possibility of reassigning a disabled person to another job is only available if there is at least one vacancy that the worker concerned is capable of performing<sup>[27]</sup>.

In other words, the reassignment to another position can be considered a reasonable accommodation for a disabled worker if such a job is available in the company and the worker has the relevant skills and qualifications. The analysis of the recent CJEU decisions leads to the conclusion that the ratification of the UN Convention has contributed to a broad and flexible understanding of „reasonable accommodation” under EU law. In any case, the refusal of such accommodation by the employer requires a thorough

<sup>26</sup> Judgment of 10.02.2022, C-485/20, XX v. H.R. Rail, ECLI:EU:C:2022:85, paragraphs 38-41.

<sup>27</sup> Judgment of 10.02.2022, C-485/20, XX v. H.R. Rail, ECLI:EU:C:2022:85, paragraphs 43-48.

analysis and Art. 5 of Directive 2000/78 should be interpreted in accordance with the UN Convention and the EU Charter of Fundamental Rights<sup>[28]</sup>.

## 7

## Assessment of compatibility of EU regulations on workers with disabilities with the UN Convention

The European Union is obliged to inform periodically the UN Committee on the Rights of Persons with Disabilities about the measures taken to implement the said UN Convention. In 2022, the UN Committee made public the list of issues prior to the submission of the second and third periodic reports of the European Union<sup>[29]</sup>. The UN Committee required information i.a. on measures taken to conduct a cross-cutting, comprehensive review of EU legislation to ensure full harmonization with UN Convention, and also on measures in place to ensure effective implementation and enforcement of EU legislation relevant to persons with disabilities by Member States, including in areas such as victims' rights or employment. With regard to equality and non-discrimination (Article 5 of the Convention), the UN Committee requested, inter alia, information on measures taken to adopt the proposed horizontal directive on equal treatment<sup>[30]</sup>, including information on the current status of the adoption process, the main obstacles and the prospects and envisaged timeframe for its adoption. The UN Committee required also information on measures taken by the European Union to recognize multiply and intersectional forms of discrimination faced by persons with disabilities and to provide access to remedies in case of discrimination.

With regard to work and employment rights (Art. 25 of the Convention), the information provided by the European Union should refer, inter alia, to

<sup>28</sup> Maliszewska-Nienartowicz, „Unijna koncepcja”, 27; Magdalena Paluszkiwicz, „Reasonable Accommodation as Means of Ensuring Access to Work for Persons with Disabilities in the Polish Legal System” *Prawo i Więź*, No. (2023): 451 and following.

<sup>29</sup> CRPD/C/EU/QPR/2-3, 20 April 2022.

<sup>30</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 26 June 2019, 2008/0140(COD).

measures taken to address inequalities affecting women with disabilities in employment, including efforts to promote their access to the open labour market and to ensure that education and vocational training are accessible to them; measures to protect the rights of persons with disabilities under the Adequate Minimum Wage Directive, including persons in sheltered workshops; and also measures to protect persons with disabilities from discrimination by the use of artificial intelligence in recruitment, selection, promotion and termination of employment decisions.

In this context, it should be emphasised that the conformity of EU legislation on persons with disabilities with the UN Convention is regularly assessed. The European Union and its Member States are obliged to ensure full harmonisation of their legislation with the provisions of the UN Convention. This obligation should trigger further efforts and legislative measures to introduce higher standards of protection for workers with disabilities. Union of Equality. Strategy for the Rights of Persons with Disabilities 2021-2030<sup>[31]</sup> provides a framework for such activities. It aims to improve the lives of people with disabilities over the next decade. Section 4.2. „Developing new skills for new jobs” underlines that having the right skills and qualifications is a prerequisite for accessing and succeeding in the labour market. Member States are responsible to adapt education and training policies to the needs of persons with disabilities in a manner consistent with the UN Convention. Section 4.3. „Fostering access to quality and sustainable jobs” says that participation in employment is the best way to ensure economic autonomy and social inclusion. Section 4.4. „Consolidating social protection systems” emphasizes that alongside fair employment, adequate social protection, including retirement schemes, is an essential prerequisite to ensure an adequate income for a decent standard of living of persons with disabilities and their families. In general terms, section 9.1. „Strengthening the EU Framework under UNCPRD” provides that as party to UN Convention the EU had to set up a framework in order to promote, protect and monitor implementation of the Convention.

---

<sup>31</sup> Brussels, 3.3.2021 – COM(2021) 101 final.

## 8 | Concluding remarks

Pursuant to the UN Convention, persons with disabilities have the same rights as everyone else. This instrument of international law also marked a breakthrough in setting minimum standards for the rights of persons with disabilities. The Convention introduced a new paradigm of disability, a new concept of equality, a new definition of non-discrimination and new protection tools, but it did not create new or unique rights for persons with disabilities. Lack of accessibility can constitute discrimination against persons with disabilities. The European Union has an obligation to protect the rights of persons with disabilities in matters within its competence. There is therefore scope for the UN Convention to have a significant future impact in promoting the right to work of persons with disabilities within the European Union and in adapting employment conditions to their needs. The UN Convention provides an appropriate legal framework for improving the situation of persons with disabilities, while Member States are required to implement and enforce international and European standards for the protection of persons with disabilities at work (the latter is outside the scope of this paper).

## Bibliography

- Marc Bell, Anne Numhauser-Henning, „Equal Treatment”, [in:] *European Labour Law*, ed. Jaspers Teun, Pennings Frans, Peters Saskia. 131-200. Cambridge: Intersentia, 2019.
- Bruun Niklas, „Articles 20 and 21 – Equality and Non-Discrimination”, [in:] *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, Melanie Schmitt. 383-399. Oxford, London-New York-New Delhi-Sydney: Hart Publishing, 2019.
- Dubowski Tomasz, „The European Union and the UN Convention on the Rights of Persons with Disabilities. Selected Institutional Aspects of Implementation” *Białostockie Studia Prawnicze*, No. 4 (2018): 169-186.
- Kresal Barbara, „Article 1 – Human Dignity”, [in:] *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, Melanie Schmitt. 191-207. Oxford, London-New York-New Delhi-Sydney: Hart Publishing, 2019.

- Maliszewska-Nienartowicz Justyna, „Niepełnosprawność”, [in:] *System prawa Unii Europejskiej*, Vol. VI, *Prawo antydyskryminacyjne*, ed. Justyna Maliszewska-Nienartowicz. 384-413. Warszawa: Wolters Kluwer, 2020.
- Maliszewska-Nienartowicz Justyna, „Unijna koncepcja racjonalnych usprawnień dla osób z niepełnosprawnościami” *Praca i Zabezpieczenie Społeczne*, 11 (2022): 21-29.
- Markiewicz-Hoya Hanna, „Prawna analiza koncepcji dostępności (accessibility)” *Państwo i Prawo*, 3 (2022): 110-124.
- Mitrus Leszek, „Koncepcja zakazu dyskryminacji w prawie pracy Unii Europejskiej”, [in:] *Różne oblicza dyskryminacji w zatrudnieniu*, ed. Joseph Roger Carby-Hall, Zbigniew Góral, Aneta Tyc. 91-132. Warszawa: Wolters Kluiwer, 2021.
- Palusziewicz Magdalena, „Racjonalne usprawnienia jako środek wspierania aktywności zawodowej osób z niepełnosprawnościami w świetle orzecznictwa sądowego”, [in:] *Studia z zakresu prawa pracy i polityki społecznej*, ed. Krzysztof W Baran, Vol. XXX. 387-403. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2023.
- Palusziewicz Magdalena, „Reasonable Accommodation as Means of Ensuring Access to Work for Persons with Disabilities in the Polish Legal System” *Prawo i Więź*, No. (2023): 447-469.
- Palusziewicz Magdalena, *Wolność pracy osób z niepełnosprawnościami jako wartość prawnie chroniona*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2019.
- Roszewska Katarzyna, „Accessibility – One of the Human Rights or the Means of Their Implementation” *Prawo i Więź*, nr 3(2021): 158-176.
- Roszewska, Katarzyna, „The Development of the Right to Access as a Part of Human Rights” *Prawo i Więź*, nr 3(2023): 431-446.
- Skórka Michał, „Ewolucja pojęcia niepełnosprawności w unijnym i polskim prawie pracy” *Białostockie Studia Prawnicze*, No. 2 (2021): 189-200.
- Wojczyk Marcin, „Zasady równego traktowania i zakazu dyskryminacji”, [in:] *System prawa pracy*, t. X, *Międzynarodowe publiczne prawo pracy. Standardy europejskie*, ed. Krzysztof W. Baran. 450-504. Warszawa: Wolters Kluwer, 2020.





RAFAŁ CZACHOR

# Współpraca Sądu Konstytucyjnego Federacji Rosyjskiej z Europejskim Trybunałem Praw Człowieka w latach 1998-2022

## Cooperation Between the Constitutional Court of the Russian Federation and the European Court of Human Rights in 1998-2022

The following paper aims to highlight two periods of cooperation between the Russian Constitutional Court and the European Court of Human Rights. Special attention is paid to the legal mechanisms adopted by the Constitutional Court in order not to implement the decisions of the European Court. The Constitutional Court of Russia expressed the thesis that international treaties and decisions of the international court are subordinate to the Constitution in the hierarchy of sources of law. This was subsequently confirmed by the amendments to the Law on the Constitutional Court and the Constitution of Russia. In 2022, Russia lost its membership in the Council of Europe and abandoned the European legal order. There is no doubt that in the Russian Federation the status of international treaties, including the European Convention on Human Rights, depends on the political situation in the country and the attitude of the Russian authorities to cooperation with the international community.

**SŁOWA KLUCZOWE:** Europejski Trybunał Praw Człowieka, Europejska konwencja praw człowieka, prawa człowieka w Rosji, sądownictwo konstytucyjne w Rosji, rosyjska doktryna prawa

**KEYWORDS:** European Court of Human Rights, European Convention of Human Rights, human rights in Russia, constitutional judiciary in Russia, Russian doctrine of law

**RAFAŁ CZACHOR**, doktor habilitowany nauk prawnych, profesor Krakowskiej Akademii im. Andrzeja Frycza Modrzewskiego, ORCID – oooo-ooo2-5929-9719, e-mail: rczachor@afm.edu.pl

## 1 | Wstęp

Międzynarodowa ochrona praw człowieka, obok prawnomiedzynarodowych regulacji bezpieczeństwa, jest kluczowym elementem współczesnego porządku prawnego. Użycie siły przez Federację Rosyjską (dalej: FR) przeciwko Ukrainie w 2022 roku w następstwie czego została ona pozbawiona członkostwa w Radzie Europy, przestała być stroną Europejskiej konwencji o ochronie praw człowieka z 1950 roku<sup>[1]</sup> (dalej: Konwencja) i przestała uznawać jurysdykcję Europejskiego Trybunału Praw Człowieka (dalej: ETPCz) stanowi końcowy moment w trwającym od przynajmniej kilkunastu lat odejściu FR od tegoż porządku. To szczególnie ważne, albowiem Konwencja jest jedynym efektywnym „instrumentem konstytucyjnym” ogólnoeuropejskiego porządku publicznego. W związku z powyższym zasadnym jest dokonanie krytycznej retrospekcji odnośnie do rezultatów dotychczasowej współpracy Sądu Konstytucyjnego FR (dalej: SK FR), z ETPCz. Problem ten jest wart uwagi, bowiem w Europie narasta kryzys praw człowieka i podważanie legitymacji ETPCz<sup>[2]</sup>. Tezą poniższego artykułu jest twierdzenie o istnieniu dwóch okresów w przedmiotowej kwestii i stopniowe przejście od współpracy i życzliwego podejścia rosyjskiej judykatywy do działalności orzeczniczej ETPCz do konfrontacji, „suwerenizacji” sądownictwa FR poprzez podważanie przez skuteczności orzeczeń ETPCz oraz jego kompetencji do wskazywania środków prawnnych sprzecznych z treścią Konstytucji FR z 1993 roku<sup>[3]</sup>. Szczególną uwagę zwrócono na przełomowe zmiany w ustawodawstwie FR, precedensowe orzeczenia SK FR, nadto przywołyano poglądy rosyjskiej doktryny prawa w danej materii.

<sup>1</sup> Dz. U. 1993 r., Nr 61 poz. 284.

<sup>2</sup> Adam Wiśniewski, „Europejski Trybunał Praw Człowieka trybunałem konstytucyjnym Europy?” *Prawo i Więź*, nr 4 (2020): 322.

<sup>3</sup> *Konstytucja Federacji Rosyjskiej z 1993 roku*, wstęp Adam Bosiacki, tłum. Andrzej Kubik (Warszawa: Wydawnictwo Sejmowe, 2000).

## 2 | Okoliczności uzyskania przez FR członkostwa w Radzie Europy i przystąpienia do Konwencji

Od powstania w 1991 roku do końca pierwszej dekady XXI wieku władze FR podejmowały kroki na rzecz zbliżenia z Zachodem, m.in. poprzez wzmożony udział w obrocie prawnym międzynarodowym oraz reformy w prawie krajowym. W styczniu 1992 roku FR otrzymała status gościa specjalnego w Zgromadzeniu Parlamentarnym Rady Europy, zaś formalny wniosek o członkostwo w niej został zgłoszony w maju 1992 roku.

Przyjęta w 1993 roku konstytucja FR zawiera katalog wolności i praw zgodny z międzynarodowymi standardami oraz oddaje ówczesną wolę dastosowania państwa rosyjskiego do warunków demokratyzacji i ochrony praw człowieka<sup>[4]</sup>. Projekt tej konstytucji został poddany ekspertyzie Komisji Weneckiej, co miało przyspieszyć akcesję FR w skład Rady Europy. W szczególności w art. 17 ustawy zasadniczej zagwarantowano wolności i prawa zgodnie z zasadami i normami prawa międzynarodowego, art. 55 statuuje niedopuszczalność ograniczenia ogólnie uznanych wolności i praw niewymienionych w konstytucji, zaś art. 46 ust. 1 i 3 konstytucji stypulują prawo ochrony interesu prawnego obywateli FR przed organami sądownictwa międzynarodowego. Doktryna przyjmuje stanowisko głoszące, iż konstytucja FR wpisuje się we współczesną koncepcję demokratycznego konstytucjonalizmu, u którego podstaw leżą wartości niezbywalności i niepodzielności wolności i praw człowieka.

Ze złożeniem wniosku o członkostwo w Radzie Europy FR władze FR wiążą istotne nadzieje o charakterze cywilizacyjno-politycznym. W styczniu 1995 roku wskazywano, że:

przystąpienie FR do Rady Europy będzie mieć historyczne znaczenie. Pojawiają się nowe ważne przesłanki kształtowania się Wielkiej Europy ze wspólną przestrzenią prawną, społeczną, kulturową. Przekształcenie Rady Europy w organizację ogólnoeuropejską pozwoli bronić wspólnych wartości [...] Nasze dążenie do pełnoprawnego członkostwa wynika z dążenia do

<sup>4</sup> Jerzy Kowalski, *Konstytucja Federacji Rosyjskiej a rosyjska i europejska tradycja konstytucyjna* (Warszawa-Poznań: Polskie Wydawnictwo Prawnicze, 2009), 96.

budowy w Rosji państwa prawa, wzmacnienia demokracji i rzeczywistego zapewnienia praw człowieka<sup>[5]</sup>.

W lutym 1995 roku rozpatrywanie wniosku FR o członkostwo w Radzie Europy zostało wstrzymane przez Zgromadzenie Parlamentarne w związku z działaniami zbrojnymi w Czeczenii. Wznowienie rozpatrywania wniosku nastąpiło w końcu września 1995 roku. Ostatecznie 8 lutego 1996 roku Komitet Ministrów Rady Europy na mocy rezolucji 2(96) zaprosił FR do przystąpienia do tejże organizacji. 21 lutego 1996 roku została przyjęta ustawa o przystąpieniu FR do Statutu Rady Europy. Członkiem Rady Europy i stroną Europejskiej Karty Praw Człowieka FR została 28 lutego 1996 roku. Wkrótce po wstąpieniu FR do organizacji w rosyjskiej literaturze naukowej dominował pogląd akceptujący tę decyzję, wskazujący, iż „EKPCz jest dla Rosji szczególnie ważna ze względu na długi okres totalitaryzmu i możliwość powrotu do przeszłości”<sup>[6]</sup>, daje jej „historyczną szansę na zbliżenie z pozostałą częścią Europy, możliwość większego wpływu na procesy ogólnoeuropejskie oraz dodatkowy potencjał dokonania reform wewnętrznych”<sup>[7]</sup>. W dyskursie europejskim obecny był pogląd przeciwny, wskazujący, że Rada Europy tą decyzją zachwiała swój system wartości, kierując się „mieszanką geopolitycznego pragmatyzmu i demokratycznych nadziei”<sup>[8]</sup>.

Wkrótce po przystąpieniu do Rady Europy FR rozpoczęła uczestnictwo w różnych jej gremiach, a w szczególności w grupie ekspertów oceniających zgodność rosyjskiego prawodawstwa i praktyki orzeczniczej w odniesieniu do europejskich standardów. Na podstawie badań grupy, w 1996 roku

<sup>5</sup> *Implementaciya reshenij Evropejskogo Suda po pravam cheloveka v rossijskoj pravovoij sisteme: konsepcii, pravovye podhody i praktika obespecheniya*, red. Vladimir V. Lazarev (Institut Zakonodatelstva i sravnitel'nogo pravoveddeniya: Moskva, 2020), 54.

<sup>6</sup> Vladimir A. Kartashkin, „Rossiya i Evropeiskaya konvensiya o zashchite praw cheloveka i osnovnyh svobod” *Moskovskiy zhurnal mezhdunarodnogo prava*, nr 3 (1996): 24.

<sup>7</sup> Mark L. Entin, „Politiko-pravovye posledstviya vstupleniya Rossii v Sovet Evropy” *Moskovskiy zhurnal mezhdunarodnogo prava*, nr 3 (1996): 110; Anatoliy Kovler, „Russia: European Convention on Human Rights in Russia: Fifteen years after”, [w:] *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, red. Iulia Motoc, Ineta Ziemele (Cambridge: Cambridge University Press, 2016), 351.

<sup>8</sup> Jean Pierre Massias, *Russia and the Council of Europe: Ten Years Wasted* (Paris: Institut Francais des Relations Internationales, 2007), 6.

---

Zgromadzenie Parlamentarne Rady Europy przyjęło rezolucję zawierającą rekomendacje dla władz FR<sup>[9]</sup>. Ogólne rekomendacje zawierały m.in.:

- a. rezygnację z używania w zakresie polityki zagranicznej koncepcji „bliskiej zagranicy” i posługiwanego się koncepcją stref wpływów geopolitycznych;
- b. dokonanie głębszej reformy systemu prawa w taki sposób, by było zgodne ze standardami Rady Europy;
- c. skrupulatne przestrzeganie zobowiązań prawnomiedzynarodowych, w szczególności odnośnie do konfliktów zbrojnych na własnym terytorium.

Szczegółowe rekomendacje dotyczyły m.in.:

- a. przyjęcia nowych kodeksów: karnego, postępowania karnego i karnego wykonawczego, ustaw o prokuraturze, regulujących wolność słowa, zgromadzeń i wyznania, rzeczniku praw obywatelskich;
- b. pociągnięcia do odpowiedzialności karnej osób odpowiedzialnych za łamanie praw człowieka w Czeczenii;
- c. ratyfikacji w ciągu roku Konwencji i protokołów do niej, w tym protokoły nr 6 dotyczącego kary śmierci;
- d. przystąpienie w ciągu roku do: Europejskiej konwencji o zakazie stosowania tortur oraz innego okrutnego, nieludzkiego lub poniżającego traktowania i karania, Konwencji ramowej o ochronie mniejszości narodowych, Europejskiej Karty Samorządu Terytorialnego oraz Europejskiej karty języków regionalnych lub mniejszościowych<sup>[10]</sup>.

---

<sup>9</sup> The Compatibility of Russia Federation Law with the Requirements of the European Convention on Human Rights, Res 8470/193(1996).

<sup>10</sup> Ibidem.

## 3

## Lata 1998-2010: życzliwa współpraca SK FR z ETPCz

Pełnowartościowym członkiem Rady Europy FR została w związku z przyjęciem 30 marca 1998 roku ustawy o ratyfikacji Konwencji i protokołów dodatkowych do niej<sup>[11]</sup>. FR ratyfikowała Konwencję o ochronie praw człowieka i podstawowych wolności, uznając od 5 maja 1998 roku jurysdykcję ETPCz w przedmiocie wykładni i stosowania tejże konwencji w przypadku naruszenia jej przepisów przez FR. Pojawiły się przesłanki do odwoływania się do Konwencji w celu zapewnienia skuteczności jej przepisów oraz przepisów towarzyszących jej protokołów i wykonywania orzeczeń ETPCz.

Okres trwający do końca pierwszej dekady XXI wieku przyjęło się oceniać jako czas wzmacniania pozytywnego stosunku do Konwencji i ETPCz<sup>[12]</sup>. Rosyjskie sądy uznawały i nie podważały obligatoryjności orzeczeń ETPCz<sup>[13]</sup>. Kształtował się konstytucyjny model relacji pomiędzy prawem krajowym a zobowiązaniemi wynikającymi z Konwencji w oparciu o zasadę priorytetu tej ostatniej, co potwierdzała linia orzecznica SK FR<sup>[14]</sup>. W latach 1998-2010 wielokrotnie odwoływał się on nie tylko do postanowień Konwencji, lecz także m.in. Powszechnej deklaracji praw człowieka, Międzynarodowego paktu praw obywatelskich i politycznych i innych przyjętych przez FR zobowiązań międzynarodowych<sup>[15]</sup>. Od początku swojej działalności SK FR aktywnie uczestniczył w zapewnieniu skuteczności norm prawnomiedzynarodowych w działalności sądownictwa rosyjskiego w szczególności poprzez dostosowanie prawa

<sup>11</sup> W 1998 r. FR ratyfikowała protokoły nr 1, 2, 4, 7, 9, 10 (obecnie nieobowiązuje) i 11. Podpisane nieratyfikowane przez FR są protokoły nr 6, 12 i 14.

<sup>12</sup> M.in. Sergei Marochkin, „ECtHR and the Russian Constitutional Court: duet or duel”, [w:] *Russia and the European Court of Human Rights The Strasbourg Effect*, red. Lauri Mälksoo, Wolfgang Benedek (Cambridge: Cambridge University Press 2017), 93-124.

<sup>13</sup> Orzeczenie Plenum Sądu Najwyższego FR z 10.10.2003 r. N5, *Byulleten Verhovnogo Suda RF*, nr 12 (2003), 11-15.

<sup>14</sup> *Implementaciya reshenij*, 199-200.

<sup>15</sup> M.in. orzeczenie SK FR z dn. 2.02.1996 r., N4-P. <https://www.garant.ru/products/ipo/prime/doc/1205319/> [dostęp: 6.03.2022]; Orzeczenie SK FR z dn. 25.01.2001 r., N1-P <https://base.garant.ru/12121969/?ysclid=lotbpyxgkh> [dostęp: 6.03.2022]; Orzeczenie SK FR z dn. 5.02.2007 r., N2-P <https://base.garant.ru/12151912/> [dostęp: 6.03.2022].

krajowego do przepisów Konwencji<sup>[16]</sup>. Tym samym jednym z celów rosyjskiego sądownictwa konstytucyjnego było zapewnienie możliwości stosowania aktów międzynarodowego prawa prawa człowieka i ich wykonalności. SK FR konsekwentnie uzasadniał priorytet norm Konwencji nad normami prawa krajowego, dokonywał wykładni prawa krajowego w odniesieniu do aksjologii Konwencji, a tym samym konstytucjonalizował standardy ETPCz<sup>[17]</sup>. W rosyjskiej praktyce orzeczniczej oraz w doktrynie powszechnym poglądem było przekonanie o pozytywnym znaczeniu Konwencji. Nie podnoszono możliwości zaistnienia konfliktu w stanowiskach ETPCz i sądów krajowych. SK FR skłonny był nie wyrażać bezpośrednio stanowiska odmiennego od ETPCz. Ponadto przez długi czas nie podejmowano problemu stosunku tegoż sądu do Konwencji i związania jej treścią. W lutym 2010 roku SK FR stwierdził, że w przedmiotowej kwestii winien działać na podstawie art. 74 ustawy federalnej o sądzie konstytucyjnym<sup>[18]</sup>, zgodnie z którym treść i znaczenie aktu prawnego rozpatrywane jest w odniesieniu do jego miejsca w systemie źródeł prawa, w tym do miejsca międzynarodowych umów FR, które stanowią część jej porządku prawnego (art. 15 ust. 4 konstytucji FR). Do 2010 roku SK FR do przepisów Konwencji odwoływał się głównie w związku z problemami jej stosowania, a nie podważając obowiązek wykonywania orzeczeń ETPCz.

Istotnym wydarzeniem było przyjęcie przez ETPCz w styczniu 2009 roku orzeczenia pilotażowego w sprawie Burdov przeciwko Rosji (nr 2)<sup>[19]</sup>, w którym na podstawie prawie 200 orzeczeń sądów rosyjskich w podobnych sprawach ETPCz stwierdził brak w FR właściwego mechanizmu kontroli wykonywania wyroków krajowych sądów powszechnych oraz systemowy problem ich niewykonywania. Rosyjski prawodawca dokonał nowelizacji aktów prawnych zgodnie z orzeczeniem ETPCz, jednak współpraca rosyjskiej judykatywy z ETPCz stopniowo ustępowała miejsca narastającej niechęci ze strony władz FR. Trend ten w pełni wpisywał się w realizowaną przez władze FR doktrynę „suwerennej demokracji”<sup>[20]</sup>.

<sup>16</sup> *Implementaciya reshenij*, 204.

<sup>17</sup> W oprócz wyżej wymienionych: Orzeczenie SK FR z 26.02.2010 r., N4-P <https://www.garant.ru/products/ipo/prime/doc/12073661/> [dostęp: 6.03.2022].

<sup>18</sup> Federalna ustawa konstytucyjna N1-FKZ z dn. 21 lipca 1994 r. <https://base.garant.ru/10101207/> [dostęp: 1.03.2022]

<sup>19</sup> Burdov v. Russia (no. 2), 33509/04.

<sup>20</sup> Rafał Czachor, „«Suwerenna demokracja»: geneza, treść, krytyka współczesnej rosyjskiej myśli polityczno-prawnej” *Studia nad Autorytaryzmem i Totalityzmem*, nr 3 (2020): 47-69.

## 4 | Lata 2010-2022: narastająca konfrontacja pomiędzy SK FR a ETPCz

Od roku 2010 trwało pogorszenie stosunków pomiędzy FR a Radą Europy (w tym ETPCz) jest wynikiem procesów. Poniżej odnotowane zostaną główne zdarzenia prawne wpływające na ograniczenie współpracy FR z ETPCz, lecz należy pamiętać o ich politycznym kontekście. W szczególności znaczenie miała aneksja Krymu i faktyczna okupacja wschodnich obwodów Ukrainy rozpoczęta w 2014 roku, wskazywana jako moment, po którym nie było możliwości odwrotu<sup>[21]</sup>. Pociągnęła ona za sobą uchwałę Zgromadzenia Parlamentarnego Rady Europy, które zawiesiło delegację FR w prawach członka<sup>[22]</sup>. W odpowiedzi FR przestała wpłacać składki członkowskie, co z kolei spowodowało określone trudności finansowe Rady Europy. Ponadto ETPCz wydawał orzeczenia odnośnie do przypadków łamania praw człowieka w trakcie wojny czeczeńskiej i tzw. operacji antyterrorystycznych na Kaukazie Północnym, co również spotykało się z nieprzychylnymi reakcjami w FR.

Bezpośrednio w kwestii współpracy SK FR z ETPCz wskazać należy, iż od 2010 w FR zaczęto poddawać w wątpliwość konieczność bezwzględnego wykonywania orzeczeń ETPCz, a w szczególności dostosowywania rosyjskiego prawodawstwa do standardów Rady Europy. Stanowisko władz FR względem ETPCz zaostrzały kolejne wyroki zapadające w sprawach, które niekiedy nie dotyczyły FR bezpośrednio:

- a. Kononow przeciwko Łotwie z 17 maja 2010 roku<sup>[23]</sup>, w którym ETPCz uznał, że Łotwa miała prawo skazać radzieckiego partyzanta Wasilija Kononowa za śmierć cywili w czasie II wojny światowej. Wyrok ten, choć bezpośrednio nie dotyczył FR spowodował w niej duży rezonans

<sup>21</sup> Petra Roter, „Russia in the Council of Europe: Participation à la carte”, [w:] *Russia and the European Court of Human Rights: The Strasbourg Effect*, red. Lauri Mälksoo, Wolfgang Benedek (Cambridge: Cambridge University Press, 2017), 47.

<sup>22</sup> Resolution 1990 (2014) of the Parliamentary Assembly of the Council of Europe. Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20882&lang=en> [dostęp: 6.03.2022].

<sup>23</sup> Kononov v. Latvia, 36376/04. <https://hudoc.echr.coe.int/eng?i=001-98669> [dostęp: 6.03.2022].

społeczny i głosy, że „radziecki partyzant został w swym statusie zrównany z nazistowskimi zbrodniarzami”<sup>[24]</sup>.

- b. Catan i inni przeciwko Mołdawii i Rosji z 19 października 2012 roku<sup>[25]</sup>, w którym ETPCz uznał odpowiedzialność Rosji za zakaz używania alfabetu łacińskiego w rumuńskojęzycznych (mołdawskojęzycznych) szkołach i warunki odbywania kary pozbawienia wolności na terytorium nieuznanego podmiotu (tzw. parapaństwa), jakim jest Naddniestrze.
- c. Markin przeciwko Rosji z 7 października 2010 roku<sup>[26]</sup>, w którym ETPCz wydał wyrok w sprawie Konstantina Markina, oficera Sił Zbrojnych FR.K. Markin chciał skorzystać z 3-letniego urlopu wychowawczego, co nie zostało mu umożliwione ze względu na przepis stanowiący, że z tego typu urlopu w przypadku Sił Zbrojnych FR korzystać mogą jedynie kobiety. Po wyczerpaniu krajowej ścieżki (Sąd Konstytucyjny FR odmówił skargi konstytucyjnej), Markin skierował skargę do ETPCz, powołując się na art. 14 w związku z art. 8 Konwencji. ETPCz zgodził się ze stanowiskiem, że Markin doświadczył dyskryminacji, „genderowych uprzedzeń” i nie znalazł „rozumnych i obiektywnych” argumentów, by mężczyźni służący w armii nie mogli korzystać z urlopu wychowawczego. Sprawa ta po raz pierwszy sprowokowała rozpatrzenie przez SK FR możliwości kolizji stanowisk organów sądownictwa krajowego i międzynarodowego. Wcześniej SK FR podkreślał jednomyślność pozycji i ewentualnie konieczność dostosowania się do pozycji ETPCz<sup>[27]</sup>.
- d. Anczugow i Gładkow przeciwko Rosji z 4 lipca 2013 roku<sup>[28]</sup>, w którym ETPCz poddał krytyce treść art. 32 Konstytucji FR i uznał, że pozbawienie czynnego prawa wyborczego wszystkich osób odbywających karę pozbawienia wolności jest sprzeczne z art. 3 Protokołu 1 do Konwencji i nie spełnia warunku proporcjonalności kary. ETPCz

<sup>24</sup> Anastasiia Kirilenko, *Resheniya Njurnberga – pod somnenie?*. <https://www.svoboda.org/a/1735679.html> [dostęp: 6.03.2022].

<sup>25</sup> Catan and Others v. the Republic of Moldova and Russia, 43370/04, 18454/06, 8252/05. <https://hudoc.echr.coe.int/fre?i=002-7212> [dostęp: 6.03.2022].

<sup>26</sup> Konstantin Markin v. Russia, 30078/06. <https://hudoc.echr.coe.int/fre?i=002-1091> [dostęp: 6.03.2022].

<sup>27</sup> Por.: Anatoliy I. Kovler, „Sootnoshenie evropeyskogo konvencionnogo i nacinal'nogo konstitucionnogo prava – obostrenie problemy (prichiny i sledstviya)” *Rossijskij jezhegodnik Evropejskoy konvencii po pravam cheloveka*, nr 1 (2015): 19-65.

<sup>28</sup> Anchugov and Gladkov v. Russia, 11157/04 15162/05. <https://hudoc.echr.coe.int/fre?i=001-122260> [dostęp: 6.03.2022].

orzekł, iż niezbędne jest dokonanie takich zmian w rosyjskim prawodawstwie, które umożliwią osobom odbywającym karę pozbawienia wolności korzystanie z prawa wyborczego<sup>[29]</sup>.

- e. Jukos przeciwko Rosji z 31 lipca 2014 roku<sup>[30]</sup>, w którym ETPCz uznał naruszenie przez władze FR prawa własności i art. 1 protokołu nr 1 do Konwencji i nakazał wypłatę odszkodowania o równowartości przekraczającej kwotę 1,8 mld euro.

Ogółem w powyższych sprawach SK FR konstatował, że krajowe sądowictwo konstytucyjne stało się przedmiotem kontroli ze strony ETPCz, na co władze FR nie wyrażały zgody. Ponadto wskazywano, że w poszczególnych sprawach ETPCz istotnie narusza interes prawny FR, co winno spotkać się z właściwą reakcją.

## 5 Reakcja SK FR na sporne orzeczenia ETPCz

W kontekście zgłaszonej przez władze FR kolizji interesów z omówionymi wyżej wyrokami ETPCz rosyjska judykatywa i doktryna podniosła zagadnienie obligatoryjności wykonania aktów ETPCz w perspektywie hierarchii norm prawa krajowego i międzynarodowego. Wcześniej zagadnienie charakteru prawnego orzeczeń sądów międzynarodowych w zakresie praw człowieka nie było przedmiotem wzmożonej uwagi, zaś konstytucyjny model implementacji przepisów Konwencji dotyczył wyłącznie kwestii zgodności aktów prawnych i opierał się na prymacie standardów europejskich względem ustawodawstwa krajowego. Stanowisko SK FR opierało się na zapewnieniu równoczesnego stosowania przepisów Konwencji i krajowych, bądź wykładni prawa krajowego w zgodzie z treścią Konwencji<sup>[31]</sup>. W obliczu konfrontacji SK FR z ETPCz pod umownym hasłem „suwerenizacji” rosyjskiego sądownictwa zostało wydanych kilka istotnych wyroków SK FR, dwukrotnie nowelizowano ustawę o SK FR (4 czerwca 2014 roku i 14

<sup>29</sup> Nota bene zbieżne w części faktycznej i merytorycznej orzeczenie ETPCz w sprawie Hirst przeciwko Zjednoczonemu Królestwu spowodowało głosy o potrzebie wyjścia przez nie spod jurysdykcji ETPCz. Wiśniewski, 337.

<sup>30</sup> OAO Neftyanaya Kompaniya Yukos v. Russia, 14902/04. <https://hudoc.echr.coe.int/fre?i=001-145730> [dostęp: 6.03.2022].

<sup>31</sup> Implementaciya reshenij, 215.

grudnia 2015 roku), raz konstytucję FR<sup>[32]</sup>. Ogółem ich treść nadaje SK FR rolę ostatniej instancji, która ma na celu ochronę „narodowej tożsamości konstytucyjnej”<sup>[33]</sup> i określić „stopień gotowości”<sup>[34]</sup> rosyjskiego porządku prawnego do recepcji poszczególnych norm prawa międzynarodowego<sup>[35]</sup>.

Precedens w tym zakresie stanowiło orzeczenie SK FR z 6 grudnia 2013 roku<sup>[36]</sup>, odnoszące się do sprawy Markowa, w którym dopuszczono możliwość zaistnienia kolizji krajowych i konwencyjnych standardów ochrony praw człowieka i wskazano konieczność „szczególnego podejścia” w przedmiocie wykonania wyroków ETPCz będących źródłem przedmiotowych kolizji. Sąd zaznaczył, że w przypadku konieczności rewizji orzeczenia sądu krajowego na podstawie zapadłego wyroku ETPCz niezbędne jest zwrócenie się do SK FR, który kompetentny jest w kwestii określenia konstytucyjnych sposobów jego wykonania. Tym samym wykluczono możliwość decydowania sądów powszechnych w przedmiocie kolizji krajowych i europejskich unormowania praw człowieka. Powyższe orzeczenie stało się podstawą uchwalonej 4 czerwca 2014 roku, odnoszącej możliwości stosowania aktów ETPCz, które kolidowałyby z prawem krajowym, nowelizacji ustawy federalnej o SK FR<sup>[37]</sup>. Sąd ten uzyskał prawo kontroli, w trybie abstrakcyjnym i konkretnym, konstytucyjności przepisów prawa, których stosowanie zostałoby uznane przez ETPCz jako niezgodne z Konwencją. Uwzględniając ówczesną sytuację polityczną odnotować należy, iż SK FR podkreślił nie tylko nadzwędność konstytucji względem Konwencji, ale także swoją nadzwędną rolę w procesie wykładni podstawowych praw i wolności obywateli FR. Jednocześnie sąd ten nie podniósł kwestii ewentualnego wycofania się z Konwencji i nieuznawania jurysdykcji ETPCz,

<sup>32</sup> Federalna ustawa konstytucyjna z 4.06.2014 r., N9-FKZ. <https://base.garant.ru/70669668/> [dostęp: 6.03.2022]; Federalna ustawa konstytucyjna z 14.12.2015 r. N7-FKZ. <https://base.garant.ru/71278766/> [dostęp: 6.03.2022].

<sup>33</sup> Tak w orzeczeniu SK FR z dn. 19.04.2016 r. N12-P. <https://www.garant.ru/products/ipo/prime/doc/71282182/> [dostęp: 12.03.2022].

<sup>34</sup> Tak w orzeczeniu SK FR z dn. 14.07.2015 r. N21-P. <https://www.garant.ru/products/ipo/prime/doc/71033584/> [dostęp: 12.03.2022].

<sup>35</sup> Grigoriy Vaypan, „Trudno byt’ bogom: Konstitucionnyi Sud Rossii i ego pervoe delo o vozmozhnosti ispolneniya postanovleniya Europejskogo Suda po pravam cheloveka” *Sravnitelnoe konstitutionne obozrenie*, nr 4 (2016): 108.

<sup>36</sup> Orzeczenie SK FR z dn. 6.12.2013 r. N27-P. <https://www.garant.ru/products/ipo/prime/doc/70428892/> [dostęp: 12.03.2022].

<sup>37</sup> Federalna ustawa konstytucyjna z dn. 4.06.2014 r. N9-FKZ. <https://base.garant.ru/70669668/> [dostęp: 12.03.2022].

opowiadając się za dalszym uczestnictwem w tworzeniu zrównoważonej europejskiej praktyki w przedmiocie ochrony praw i wolności.

Z kolei orzeczenie SK FR z 14 lipca 2015 roku<sup>[38]</sup> odnośnie do sprawy Anczugow i Gładkow przeciwko Rosji zawierało wnioski dotyczące konstytucyjnego mechanizmu wykonywania aktów ETPCz i uzasadnienie ich niewykonywania w wyjątkowych sytuacjach, „gdy takie odstępstwo jest jedynym możliwym środkiem uniknięcia naruszenia podstawowych zasad i norm Konstytucji FR”. Orzeczenie to zostało przyjęte w trybie kontroli abstrakcyjnej, na wniosek grupy deputowanych Dumy Państwowej, którzy wnioskowali o stwierdzenie niekonstytucyjności: art. 1 ustawy federalnej o ratyfikacji Konwencji o ochronie praw człowieka i podstawowych wolności i protokołów do niej; art. 32 ust. 1 i 2 ustawy federalnej o umowach międzynarodowych FR oraz innych przepisów prawa procesowego administracyjnego, cywilnego i karnego, tj. przepisów konkretyzujących skutki prawne przystąpienia FR do Konwencji oraz orzeczeń ETPCz jako organu utworzonego na podstawie Konwencji. O ile w orzeczeniu z 6 grudnia 2013 roku SK FR stwierdzał, że „w ramach swoich kompetencji określa możliwe konstytucyjne środki wykonania orzeczeń ETPCz”, to w orzeczeniu z 14 lipca 2015 roku stwierdził on, że w przypadku kolizji norm konstytucyjnych z orzeczeniem ETPCz te ostatnie „nie mogą być wykonane”. Możliwość kontroli wykonalności orzeczeń ETPCz wprowadzono w odniesieniu do normatywnej wykładni konstytucji przez SK FR. Dotychczasową zdolność skargową sądów powszechnych i arbitrażowych rozciągnięto na Ministerstwo Sprawiedliwości FR, Prezydenta FR i Gabinet Ministrów FR<sup>[39]</sup>. Taka kompetencja SK FR określona została mianem „prawa na sprzeciw” i „mechanizmu powstrzymywania” ekspansji europejskich standardów ochrony praw człowieka w prawie krajowym FR<sup>[40]</sup>. Sąd zaakcentował, że taka swoista kolizja orzeczenia ETPCz z prawodawstwem krajowym nie powinna być rozpatrywana pod kątem realizacji zobowiązań państwa wynikających z przystąpienia do Konwencji, lecz pod kątem ustalenia treści aktów prawnych w celu ich jednoczesnego stosowania. SK FR sformułował trzy materialne kryteria, które wg niego mogą być wykorzystane w celu stwierdzenia zaistnienia kolizji:

<sup>38</sup> Orzeczenie SK FR z dn. 14.07.2015 r. N21-P. <https://www.garant.ru/products/ipo/prime/doc/71033584/> [dostęp: 12.03.2022].

<sup>39</sup> Ibidem.

<sup>40</sup> Implementaciya reshenij, 219.

- a. naruszenie przez orzeczenie ETPCz podstawowych zasad i norm konstytucji FR;
- b. sprzeczność orzeczenia z prawnymi międzynarodowymi zobowiązańami FR;
- c. wyższy poziom ochrony praw i wolności jednostki przez konstytucję FR niż orzeczenie ETPCz.

W przedmiotowym orzeczeniu SK FR podkreślił, że od zasady zwierzchności konstytucji nie ma odstępstw oraz potwierdził swoje prawo do decydowania o wykonalności wyroku organu sądownictwa międzynarodowego w zakresie praw człowieka. Podniósł również kwestię ewolucyjnej wykładni, wskazując, że

jeśli ETPCz w toku wykładni Konwencji nadaje użytym w niej pojęciom inne niż ich zwyczajowe znaczenie lub dokonuje wykładni wbrew przedmiotowi i celowi Konwencji, to państwo, wobec którego toczyło się postępowanie, ma prawo odmówić wykonania orzeczenia jako wykraczającego poza obowiązki dobrowolnie przez nie przyjęte w momencie ratyfikacji Konwencji<sup>[41]</sup>.

Zatem SK FR uznał, że niektóre orzeczenia ETPCz mogą mieć charakter *ultra vires*, natomiast nie wyjaśnił, jaki posiada tytuł do oceny zgodności orzecznictwa sądu międzynarodowego z prawem międzynarodowym. Powyższe zostało następnie unormowane ustawą z 14 grudnia 2015 roku nr 7-FKZ nowelizującą ustawę o SK FR<sup>[42]</sup>. Stanowi ona, że w przypadku powięczenia przez organy wątpliwości odnośnie do zgodności orzeczenia organu sądownictwa międzynarodowego w zakresie ochrony wolności i praw człowieka z przepisami konstytucji FR, wniosek o stwierdzenie konstytucyjności kierowany jest do SK FR (art. 104 ustawy o SK FR). Po przeprowadzonym postępowaniu orzeka on, że a) wykonanie danego orzeczenia jest możliwe w całości lub części, b) wykonanie danego wyroku jest niemożliwe w całości lub części.

SK FR swoją pozycję w kwestii możliwości wykonania wyroku ETPCz z 4 lipca 2013 roku w sprawie Anczugow i Gładkow przeciw Rosji rozwinął

<sup>41</sup> Orzeczenie SK FR z dn. 14.07.2015 r. N21-P. <https://www.garant.ru/products/ipo/prime/doc/71033584/> [dostęp: 12.03.2022].

<sup>42</sup> Federalna ustanowiona konstytucyjna z 14.12.2015 r. N7-FKZ. <https://base.garant.ru/71278766/> [dostęp: 12.03.2022 r.].

w orzeczeniu z 19 kwietnia 2016 roku<sup>[43]</sup>. Stwierdzono w nim, że wykonanie orzeczenia ETPCz jest niemożliwe w związku z kolizją z przepisem art. 32 ust. 3 Konstytucji FR oraz nie zgodził się z tezą ETPCz, że obowiązek taki wynika z przepisu art. 3 Protokołu 1 do Konwencji. Wskazano, że FR w momencie ratyfikacji Konwencji nie wyraziła zgody na obowiązek zmiany przepisów konstytucyjnych w przypadku stwierdzenia przez ETPCz kolizji. SK FR wyraził stanowisko, że nie może zgodzić się na ewolucyjną wykładnię art. 3 protokołu 1 do Konwencji w związku z faktem, że przy ratyfikacji tych aktów przedmiotom ochrony nadawano znaczenie odmienne od późniejszego oraz brakiem jednomyślności członków Rady Europy w tym zakresie<sup>[44]</sup>.

Odnosnie do wyroku ETPCz w sprawie Jukos przeciwko Rosji z 31 lipca 2014 roku podkreślić należy, że w orzeczeniu z 17 stycznia 2017 roku<sup>[45]</sup> SK FR nie tylko odmówił jego wykonania, ale też pokrycia kosztów sądowych. Uznał on, że możliwa jest wypłata odszkodowania, lecz nie ze Skarbu Państwa, a tylko w przypadku, gdy ujawnione zostaną dotychczas nieznane organom judykatywy aktywa Jukosu i zaspokojone zostaną roszczenia wierzycieli (w tym państwa)<sup>[46]</sup>. SK FR uzasadniał to tym, że Jukos celowo i uporczywie uchylał się od obowiązków podatkowych, a wypłata odszkodowania w tych okolicznościach byłaby sprzeczna z zasadami „równości i sprawiedliwości w stosunkach podatkowych”.

Kolejnym doniosłym krokiem na kolizyjnym kursie nie tylko pomiędzy SK FR i ETPCz a szerzej pomiędzy FR i społeczeństwem międzynarodowym była nowelizacja konstytucji FR dokonana w lipcu 2020 roku. M.in. potwierdziła ona zwierzchniość ustawy zasadniczej względem zobowiązań prawnomiędzynarodowych. SK FR zyskał konstytucyjne prawo stwierdzania konstytucyjności orzeczeń sądów międzynarodowych oraz aktów prawnych jakichkolwiek organizacji międzynarodowych, jeśli kłóciłyby się z podstawami porządku publicznego<sup>[47]</sup>.

<sup>43</sup> Orzeczenie SK FR z dn. 19.04.2016 r. N12-P. <https://www.garant.ru/products/ipo/prime/doc/71282182/> [dostęp: 12.03.2022].

<sup>44</sup> Ibidem.

<sup>45</sup> Orzeczenie SK FR z dn. 19.01.2017 r. N1-P. <https://www.garant.ru/products/ipo/prime/doc/71489998/> [dostęp: 14.03.2022].

<sup>46</sup> Ibidem.

<sup>47</sup> Rafał Czachor, „Reforma konstytucyjna w Federacji Rosyjskiej w 2020 roku” *Przegląd Prawa Konstytucyjnego*, nr 3 (2021): 261-276.

## 6

## Problem miejsca Konwencji i orzecznictwa ETPCz w systemie źródeł prawa FR

Zagadnienie wykonalności orzeczeń organów sądownictwa międzynarodowego w sytuacji możliwej ich niezgodności z konstytucją pozwanej państwa jest stosunkowo dobrze znane europejskiej judykatywie i doktrynie prawa. Ustawa zasadnicza FR wprost nie określa hierarchii źródeł prawa, aczkolwiek dominuje stanowisko, iż ratyfikowane umowy międzynarodowe zajmują miejsce po konstytucji i przed federalnymi ustawami konstytucyjnymi<sup>[48]</sup>.

Z przepisu art. 15 ust. 4 konstytucji FR wynika, że umowy międzynarodowe, których stroną jest FR, stanowią część jej systemu prawnego, a nadto wynika priorytet norm zobowiązań prawnomiedzynarodowych nad prawem krajowym. Tym samym stworzone zostały konstytucyjne podstawy zabezpieczające skuteczność przyjętych przez FR umów międzynarodowych, szczególnie związanych z ochroną wolności i praw jednostki. Inaczej ma się rzecz z powszechnie uznanymi obowiązującymi zasadami i normami prawa międzynarodowego – nie są one wymienione w przytoczonym powyżej artykule. Uczestnictwo FR w organizacjach międzynarodowych i przekazanie ich części kompetencji unormowane jest w art. 79 konstytucji FR. Granicę możliwości ich przekazania stanowi ograniczenie praw i wolności człowieka i obywatela oraz niezgodność z podstawami ustroju państwa (określonymi w rozdziale I konstytucji FR). Z kolei art. 17 ust. 1 konstytucji FR statuuje, że podstawowe prawa uznawane i gwarantowane są „zgodnie z ogólnie uznanymi zasadami i normami prawa międzynarodowego” i zgodnie z konstytucją FR. Art. 55 ust. 1 głosi, że „fakt wymienienia w konstytucji FR podstawowych praw i wolności nie powinien być interpretowany jako negowanie lub umniejszanie innych ogólnie uznanych praw i wolności człowieka i obywatela”.

Z powyższego nie wynika jednoznacznie, jaki walor prawnny w FR posiadają orzeczenia ETPCz. Zobowiązania wynikające z Konwencji jako prawa traktatowego mają charakter podkonstytucyjny. Możliwe jest potraktowanie tychże zobowiązań – podobnie jak i obowiązków wynikających z Powszechniej deklaracji praw człowieka – jako wynikających z „ogólnie uznanych zasad i norm prawa międzynarodowego”. Wówczas zastosowanie

<sup>48</sup> Szerzej: Magdalena Micińska-Bojarek, „Status umów międzynarodowych w rosyjskim prawie konstytucyjnym” *Przegląd Prawa Konstytucyjnego*, nr 5 (2016): 229.

znalazłby przepis art. 17 konstytucji FR stanowiący, że „uznaje się i gwarantuje prawa i wolności człowieka i obywatela zgodnie z ogólnie przyjętymi zasadami i normami prawa międzynarodowego oraz konstytucją”. Z jednej strony zabieg takie niewiele zmienia, albowiem miejsce ogólnie przyjętych zasad i norm prawa międzynarodowego w systemie źródeł prawa FR nie jest jasno określone. Z drugiej jednak przyjęcie poglądu, że art. 17 zobowiązuje FR do bezwarunkowego poszanowania praw i wolności człowieka jako ogólnie przyjętą zasadę prawa międzynarodowego nakazywałoby bezwarunkowo wykonywać obowiązki konwencyjne i orzeczenia ETPCz<sup>[49]</sup>.

Rosyjska nauka prawa nie wykształciła jednoznacznego stanowiska w przedmiocie uznania orzeczenia ETPCz za prawotwórczy precedens<sup>[50]</sup>. Odrzuca ona jednak możliwość przyjęcia *a priori*, że orzeczenia ETPCz automatycznie zyskują walor równy ogólnie uznanym normom prawa międzynarodowego w zakresie praw człowieka. Z konstytucji FR jasno wynika, że prawa i wolności człowieka mogą być ograniczone jedynie w szczególnych okolicznościach i może być to uczynione w celu ochrony dobra wspólnego oraz praw i wolności innych jednostek (art. 55 ust. 3). Z powyższym przepisem wiązać należy przepis art. 79, stanowiący, że ograniczenie praw i wolności może dotyczyć również tych, które wynikają z przyjętych przez FR zobowiązań prawniomiedzynarodowych. W świetle powyższego rosyjska doktryna znajduje uzasadnienie dla określenia w prawie krajowym granic związania się orzecznictwem sądów międzynarodowych. Nawet w takich okolicznościach niektórzy badacze twierdzą, że trwa dialog organów judykatywy, a stosunki pomiędzy SK FR a ETPCz nie są na kursie kolizyjnym<sup>[51]</sup>.

A contrario, wskazać należy, że Konstytucja FR w art. 120 statuuje niezależność sędziów i ich podległość wyłącznie konstytucji. Jednocześnie jej art. 15 zobowiązuje sędziów do poszanowania ogólnie uznanych zasad i norm prawa międzynarodowego i międzynarodowych zobowiązań FR. Ustawa federalna „O umowach międzynarodowych” z 15 lipca 1995 roku stanowi, że przyjęte przez FR umowy międzynarodowe są częścią jej porządku prawnego (art. 5), a ich postanowienia są stosowane bezpośrednio, a gdy nie jest to możliwe – przyjmowane jest odpowiednie ustawodawstwo. Odmowa wykonania

<sup>49</sup> Tak: Aleksandr Blankenagel, Iliya Levin, „V principia nelzia, no mozhno!.. Konstytucionnyi Sud Rossii i delo ob obyazatelnosti reshenij Evropejskogo Suda po pravam cheloveka” *Sravnitelnoe konstitucionne obozrenie*, nr 5 (2015): 154–155.

<sup>50</sup> *Implementaciya reshenij*, 35–36.

<sup>51</sup> Konstantin V. Aranovsky, „Uslolia soglasovaniya praktiki mezhdunarodnogo i konstitucionnogo pravosudiya” *Zhurnal konstitucionnogo pravosudia*, nr 3 (2013): 7.

wyroków ETPCz może być również rozpatrywana jako naruszenie konstytucyjnego prawa do sądowej ochrony unormowanej art. 46 konstytucji FR. Stanowisko to prowadzi do wniosku, że władze FR związane są orzecznictwem sądów międzynarodowych, a argumentacja SKFR w tej kwestii błędna<sup>[52]</sup>.

W rosyjskiej doktrynie popularny jest uwarunkowany politycznie pogląd zgodny ze stanowiskiem SK FR, że przyjęcie nadmiernie przychylnej prawu międzynarodowemu pozycji grozi interesom państwa i jego suwerenności, albowiem międzynarodowe standardy mogą być wykorzystywane w celach podważania systemu prawa i władzy publicznej<sup>[53]</sup>. Prezes SK FR Władimir Zorkin od 2010 roku zgłaszał tezę, iż sędziowie ETPCz przejawiają tendencję do coraz szerszego interpretowania przepisów Konwencji, odchodząc od wcześniej przyjętej linii orzeczniczej, „reinterpretując” własne wyroki oraz odwołując się do konstrukcji „konsensusu europejskiego”, zgodnie z którym, jeśli pewne zagadnienie było już w określony sposób rozwiązane przez większość członków Rady Europy, to pozostałe należące do niej państwa są zobowiązane do postępowania w ten sam sposób<sup>[54]</sup>. Odnośnie do wyroku w sprawie Markina, W. Zorkin stwierdził, że:

- a. ETPCz „ma prawo wskazywać państwom na błędy w prawodawstwie, lecz w tych przypadkach, gdy jego orzeczenia są w sposób oczywisty sprzeczne z ustawą zasadniczą, państwo powinno bronić swoich interesów narodowych”;
- b. „władze państwowe lepiej znają swoje społeczeństwa”, co sprawia, że lepiej potrafią ocenić interes publiczny niż organy sądownictwa międzynarodowego;
- c. „każde orzeczenie ETPCz to akt nie tylko o charakterze prawnym, lecz także politycznym. Gdy są one przyjmowane w celu ochrony praw i wolności obywateli i rozwoju państwa, Rosja zawsze będzie je bezwarunkowo wykonywać. W przypadku, gdy orzeczenia są wątpliwe z punktu widzenia treści Konwencji i bezpośrednio naruszają suwerenność, zasady konstytucyjne, Rosja ma prawo wypracować mechanizm ochrony przed takimi orzeczeniami”<sup>[55]</sup>.

<sup>52</sup> Tak m.in.: Konstantin M. Hudolej, „Konstitucionny Sud RF i ESPCZ: istoriya razvitiya otnoshenij” *Ex jure*, nr 1 (2022): 53.

<sup>53</sup> Mikhail N. Marchenko, *Istochniki prava. Uchebnoe posobie* (Moskva: Moskovski gosudarstviennyi Universitet, 2013).

<sup>54</sup> Valeriy D. Zorkin, „Predel ustupchivosti” *Rossijskaya gazeta* z dn. 29.10.2010 r.; idem, „Rossiya i Strasburg” *Rossijskaya gazeta*, 22 października 2015.

<sup>55</sup> Ibidem.

Doktryna i judykatywa rosyjska, w tym W. Zorkin, zaczęła regularnie przywoływać orzeczenie Federalnego Sądu Konstytucyjnego RFN w sprawie Görgülü przeciwko Republike Federalnej Niemiec, stwierdzając jego konstruktywność wynikającą z uznania „prymatu konstytucyjnej zasady suwerenności i nadwyżki konstytucji nad innymi aktami normatywnymi”<sup>[56]</sup>. Skutkowało to poglądem, że FR powinna pozostać pod jurysdykcją ETPCz, aczkolwiek wykonywanie jego orzeczeń musiałoby być uzależnione od ich zgodności z normami konstytucji i kontrolą na stopień „antyrosyjskości”. Potwierdzony został on w przywołanym orzeczeniu SK FR z 14 lipca 2015 roku a następnie w ustawie z dnia 15 grudnia 2015 roku. W treści orzeczenia podkreślono uznanie fundamentalnego znaczenia Konwencji i europejskiego systemu ochrony praw człowieka oraz gotowość do poszukiwania kompromisu w celu jego petryfikacji. Sąd zaznaczył jednak, że granicę takiego kompromisu będzie on określać sam, ponieważ wynikają one z treści przepisów Konstytucji FR z 1993 roku<sup>[57]</sup>. Odmienne niż w przypadku stanowiska Niemiec w sprawie Görgülü ani SK FR, ani „propaństwowa” część rosyjskiej doktryny nie podniosła, że stwierdzenie niekonstytucyjności orzeczenia nie oznaczało odmowy władz Niemiec zaspokojenia roszczeń. W przypadku FR reakcją były regularnie pojawiające się głosy przedstawicieli władz państwowych (w tym prezydenta) i doktryny poddające w wątpliwość co do sensu dalszego uznawania jurysdykcji ETPCz<sup>[58]</sup>.

## 7 | Zakończenie

Na mocy decyzji Komitetu Ministrów Rady Europy z 16 marca 2022 roku, związanej z użyciem siły przeciwko Ukrainie, FR opuściła tę organizację<sup>[59]</sup>. Ponad dwudziestoletnia współpraca FR z Radą Europy, w tym współpraca

<sup>56</sup> Kapiton A. Budaev, „O nekotoryh raznoglasiyah Evropeyskogo suda po pravam cheloveka i Konstitucionnogo suda Rossijskoj Federacii po zashhite prav i svobod grazhdan Rossii: puti ih razresheniya” *Lex Russica*, nr 12 (2017): 97–98.

<sup>57</sup> Valeriy D. Zorkin, „Konstitucionni Sud na perehodnom etape istoricheskogo razvitiya Rossii” *Zhurnal konstitucionnogo pravosudiya*, nr 4 (2016): 1–7.

<sup>58</sup> Marochkin, 112; Anton Filimonov, *ESPCh: nuzhen li on Rossii i zachem*. <https://www.garant.ru/article/565493/> [dostęp: 12.03.2022].

<sup>59</sup> Resolution on the cessation of the membership of the Russian Federation to the Council of Europe CM/Res(2022)2. [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a5da51](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a5da51) [dostęp: 16.03.2022].

SK FR z ETPCz, charakteryzowała się dwoma okresami. W pierwszym, trwającym do 2010 roku co do zasady dominowała życliwa recepcja standardów europejskich i wola dostosowania prawodawstwa FR do Konwencji. Od 2010 roku trwała tendencja przeciwna, przejawiająca się m.in. w podważaniu konstytucyjności orzeczeń ETPCz, nadto ograniczana była ochrona obywateli FR, w tym dostęp do skargi konstytucyjnej.

W świetle powyższych rozważań przychylić należy się do poglądu, że status prawny umów międzynarodowych w FR jest ściśle związany z sytuacją polityczną w tym kraju oraz woli jego władz do utrzymywania współpracy z niektórymi organizacjami międzynarodowymi (m.in. Radą Europy)<sup>[60]</sup>. SK FR orzekł, że posiada prawo do stwierdzania konstytucyjności wyroków ETPCz, zaś przepisy Konwencji winny być interpretowane w zgodzie z ustawą zasadniczą. SK FR stał na stanowisku, że orzeczenia ETPCz mogą kłócić się z interesem narodowym, podważać zasady społeczne, które są lepiej rozumiane przez judykatywę krajową. Tym samym SK FR uznał prymat interesów państwowych nad prawami człowieka.

Finalnie odnotować należy fakt, iż rosyjskie sądy odmawiały wykonywania części orzeczeń ETPCz nawet bez sankcji SK FR. Taka sytuacja miała miejsce w lutym 2021 roku, gdy odmówiono zwolnienia z więzienia opozycjonisty Aleksieja Nawalnego, czego żądał ETPCz jako środka zabezpieczającego. Spodziewać należało się niewykonania przez FR wyroków w sprawie Aleksandra Litwinienki z 2021 roku, w trwającej wciąż sprawie katastrofy malezyjskiego Boeinga 777 nad Ukrainą oraz sprawach związanych z trwającą od 2014 roku okupacją Krymu i wschodnich obwodów Ukrainy. Jeśli w momencie przystąpienia FR do Rady Europy „*„optymistyczni wierzyli, że powoli, lecz konsekwentnie będzie postępować socjalizacja Rosji”*<sup>[61]</sup>, to trwający od 2010 roku, a mający swój punkt końcowy w 2022 roku, okres udowodnił istnienie trendu zgoła odmiennego.

<sup>60</sup> Micińska-Bojarek, 235.

<sup>61</sup> Lauri Mälksoo, „Concluding Observations. Russia and European Human Rights Law: Margins of the Margin of Appreciation”, [w:] *Russia and European Human Rights Law – The Rise of the Civilizational Argument* (Leiden: Brill Nijhoff, 2014), 227.

## Bibliografia

- Aranovsky Konstantin V. „Uslovia soglasovaniya praktiki mezhdunarodnogo i konstitucionnogo pravosudiya” *Zhurnal konstitucionnogo pravosudia*, nr 3 (2013): 1-10.
- Blankenagel Aleksandr, Iliya Levin, „V principia nielzia, no mozhno!.. Konstutcionny Sud Rossii i delo ob obyazatelnosti reshenij Evropejskogo Suda po pravam cheloveka” *Sravnitelnoe konstitucionne obozrenie*, nr 5 (2015): 152-162.
- Budaev Kapiton A., „O nekotoryh raznoglasiyah Evropeyskogo suda po pravam cheloveka i Konstitucionnogo suda Rossijskoj Federacii po zashhite praw i svobod grazhdan Rossii: puti ih razresheniya” *Lex Russica*, nr 12 (2017): 95-108.
- Czachor Rafał, „Reforma konstytucyjna w Federacji Rosyjskiej w 2020 roku” *Przegląd Prawa Konstytucyjnego*, nr 3 (2021): 261-276. <https://doi.org/10.15804/pkp.2021.03.17>.
- Czachor Rafał, „„Suwerenna demokracja”: geneza, treść, krytyka współczesnej rosyjskiej myśli polityczno-prawnej” *Studia nad Autorytaryzmem i Totalitaryzmem*, t. 42, nr 3 (2020): 47-69. <https://doi.org/10.19195/2300-7249.42.3.3>.
- Entin Mark L. „Politiko-pravovye posledstviya vstupleniya Rossii v Sovet Evropy.” *Moskovskiy zhurnal mezhdunarodnogo prava*, nr 3 (1996): 97-111.
- Filimonov Anton, *ESPCh: nuzhen li on Rossii i zatem*. <https://www.garant.ru/article/565493/>.
- Hudolej Konstantin M., „Konstitucionnyj Sud RF i ESPCZ: istoriya razvitiya otnoshenij” *Ex jure*, nr 1 (2022): 48-63.
- Implementaciya reshenij Evropejskogo Suda po pravam cheloveka v rossijskoj pravovoju sisteme: koncepcii, pravovye podhody i praktika obespecheniya*, red. Vladimir V. Lazarev. Institut Zakonodatelstva i sravnitelnogo pravovedeniya: Moskva, 2020.
- Kartashkin Vladimir A., „Rossiya i Evropeiskaya konvenciya o zashhite praw cheloveka i osnovnyh svobod.” *Moskovskiy zhurnal mezhdunarodnogo prava*, nr 3 (1996): 21-27.
- Kirilenko Anastasiia. *Resheniya Njurnberga – pod somnenie?* <https://www.svoboda.org/a/1735679.html>.
- Kovler Anatoliy I., „Sootnoshenie evropejskogo konvencionnogo i nacional'nogo konstitucionnogo prava – obostrienie problemy (prichiny i sledstviya)” *Rossijskij jezhegodnik Evropejskoj konvencii po pravam cheloveka*, nr 1 (2015): 19-65.
- Kovler Anatoliy, „Russia: European Convention on Human Rights in Russia: Fifteen years after”, [w:] *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, red. Iulia Motoc, Ineta Ziemele. 351-372. Cambridge: Cambridge University Press, 2016.
- Marchenko Mikhail N., *Istochniki prava. Uchebnoe posobie*, Moskva: Moskovkiy gosudarstviennyi Universitet, 2013.

- Marochkin Sergei, „ECtHR and the Russian Constitutional Court: duet or duel”, [w:] *Russia and the European Court of Human Rights The Strasbourg Effect*, red. Lauri Mälksoo, Wolfgang Benedek. 93-124. Cambridge: Cambridge University Press 2017.
- Massias Jean Pierre, *Russia and the Council of Europe: Ten Years Wasted*. Paris: Institut Francais des Relations Internationales, 2007.
- Micińska-Bojarek Magdalena, „Status umów międzynarodowych w rosyjskim prawie konstytucyjnym.” *Przegląd Prawa Konstytucyjnego*, nr 5 (2016): 223-236. <https://doi.org/10.15804/ppk.2016.05.13>.
- Roter Petra, „Russia in the Council of Europe: Participation à la carte”, [w:] *Russia and the European Court of Human Rights: The Strasbourg Effect*, red. Lauri Mälksoo, Wolfgang Benedek. 26-56. Cambridge: Cambridge University Press, 2017.
- Vaypan Grigoriy, „Trudno byt' bogom: Konstitucionnyi Sud Rossii i ego pervoie delo o vozmozhnosti ispolneniya postanovleniya Evropejskogo Suda po pravam cheloveka.” *Sravnitelnoe konstitucionne obozrenie*, nr 4 (2016): 107-124.
- Wiśniewski Adam, „Europejski Trybunał Praw Człowieka trybunałem konstytucyjnym Europy?” *Prawo i Więź*, nr 4 (2020): 320-347. <https://doi.org/10.36128/priw.vi34.207>.
- Zorkin Valeriy D., „Predel ustupchivosti” *Rossijskaya gazeta*, 29 października 2010.
- Zorkin Valeriy D., „Rossiya i Strasburg” *Rossijskaya gazeta*, 22 października 2015.
- Zorkin Valeriy D., „Konstitucionnyi Sud na perehodnom etape istoricheskogo razvitiya Rossii” *Zhurnal konstitucionnogo pravosudiya*, nr 4 (2016): 1-7.





# A Holistic Approach to Cybersecurity and Data Protection in the Age of Artificial Intelligence and Big Data

## Abstract

With rapid technological advances, cybersecurity and personal data protection are becoming key issues that require a holistic approach. The dynamic development of artificial intelligence (AI) and big data technologies creates new opportunities for cybersecurity. At the same time, potential attack vectors are emerging. The paper highlights the relationship between cybersecurity and the protection of personal data, and points to the need for integrated action at several levels. These include the development and implementation of advanced technological solutions and education to increase users' digital literacy. The analysis shows that only by balancing the potential of modern technologies with the risks associated with the human factor is it possible to effectively protect personal data in the digital ecosystem.

**KEYWORDS:** cybersecurity, personal data protection, artificial intelligence (AI), big data, digital education

**KRZYSZTOF KACZMAREK**, PhD, Koszalin University of Technology,  
ORCID – 0000-0001-8519-1667, e-mail: krzysztof.kaczmarek@tu.koszalin.pl

**MIROSŁAW KARPIUK**, full professor, University of Warmia and Mazury in Olsztyn,  
ORCID – 000-0001-7012-8999, e-mail: miroslaw.karpiuk@uwm.edu.pl

**CLAUDIO MELCHIOR**, associate professor, University of Udine,  
ORCID – 0000-0002-6124-4717, e-mail: claudio.melchior@uniud.it

## 1 | Introduction

The current technological landscape is dominated by the rapid development and adoption of artificial intelligence (AI) technologies, as well as big data tools and platforms, which are becoming key elements in diverse sectors ranging from health to finance, education, manufacturing, security, public administration, and many others<sup>[1]</sup>. Artificial intelligence refers to computer systems capable of performing tasks that typically require human intelligence, such as speech recognition, learning, planning, reasoning and perception<sup>[2]</sup>. It can be divided into narrow AI, designed to perform a specific task, and general AI, designed to perform any intellectual task that humans could perform. The latter, however, remains largely the domain of research. Artificial intelligence is typically used to automate routine tasks, allowing institutions and organisations to improve their operational efficiency and reduce costs; to analyse large data sets, helping to identify patterns and trends that may not be obvious to humans; to support decision-making processes by providing data-based recommendations; to personalise user experiences by tailoring content, products or services to individual preferences; and in cybersecurity, where it facilitates the identification and response to threats in real time<sup>[3]</sup>.

Big data refers to data sets that are too large or complex to be processed using traditional methods. Its key characteristics include the volume, velocity and variety of data. Big data enables institutions and organisations to collect and analyse large amounts of data to gain insights into customer behaviour, market trends and other important information. This enables them to make better decisions and, as a result, achieve better business outcomes. Access to big data enables companies to experiment and innovate – which can lead to new products, services and business models – and to optimise their operations, for example by monitoring and analysing the efficiency of production processes. Big data analytics is also widely used

<sup>1</sup> Ewa Maria Włodyka, „Artificial intelligence as a potential platform for international cooperation of local governments”, [in:] *Wybrane aspekty współpracy międzynarodowej jednostek samorządu terytorialnego*, ed. Iwona Wieczorek, Anna Ostrowska, Mariusz Chrzanowski (Łódź: Publishing Press of the National Institute of Local Government, 2023), 205–206.

<sup>2</sup> Pei Wang, „On Defining Artificial Intelligence” *Journal of Artificial General Intelligence*, No. 2 (2019): 8.

<sup>3</sup> BDO Digital, *Eliminate Routine Tasks with Automation and Generative AI*, 2023.

in medicine<sup>[4]</sup>. Big data has revolutionised personal data analytics and processing, increasing the potential of their use<sup>[5]</sup>.

The integration of AI and big data offers significant benefits to organisations and societies, facilitating the understanding and processing of vast amounts of data, the automation of tasks, the personalisation of the user experience and the support of decision-making processes. However, it also poses some challenges, including those related to privacy and security. This is particularly important as technological advances provide users with increasingly sophisticated tools with a wide range of applications, the appropriate and safe use of which depends heavily on society's digital literacy. In the context of data protection, it is important to note that computer crime, including information theft, is in the vast majority of cases the result of human error rather than digital security gaps<sup>[6]</sup>. It can, therefore, be concluded that digital competencies now constitute fundamental skills along with reading, writing, mathematical and linguistic skills<sup>[7]</sup>.

As new technologies are gaining importance, cybersecurity and personal data protection are developing into key aspects requiring special attention. The importance of these issues stems from the increasing dependence of societies, economies and states on digital technologies. This leads to an increased risk of cyber-attacks, data breaches and other forms of threats to privacy and information security. Furthermore, protecting all information, including personal data, can be seen as a vital part of national security<sup>[8]</sup>. Therefore, analysing the role of cybersecurity and personal data protection in a digital society requires a holistic approach. In addition to the ICT infrastructure and the level of digital competencies in society, it is

<sup>4</sup> Sulaiman Khan, Habib Ullah Khan, Shah Nazir, „Systematic analysis of healthcare big data analytics for efficient care and disease diagnosing” *Scientific Reports*, No. 12 (2022).

<sup>5</sup> Justyna Kurek, *Bezpieczeństwo państwa w warunkach hybrydowej regulacji danych osobowych w dobie analizy Big data. Aspekty prawne, organizacyjne i systemowe* (Warsaw: ASzWoj, 2021): 126.

<sup>6</sup> Ewa Maria Włodyka, „Gotowi – do startu – start? Przyczynek do dyskusji nad gotowością jednostek samorządu terytorialnego do zapewnienia cyberbezpieczeństwa” *Cybersecurity and Law*, No. 1 (2022): 216.

<sup>7</sup> Ewa Maria Włodyka, „Dlaczego potrzebujemy e-administracji? Rozwój podstawowych umiejętności cyfrowych pracowników administracji na Pomorzu Zachodnim” *Acta Politica Polonica*, No. 2 (2021): 95.

<sup>8</sup> András Bencsik, Mirosław Karpiuk, Miroslav Kelemen, Ewa Włodyka, *Cybersecurity in the Visegrad Group Countries* (Maribor: Institute for Local Self-Government Maribor, 2023), 44.

necessary to consider a number of contextual factors, such as the security environment and the international situation.

Activities in cyberspace should be both effective and secure. It is essential to prevent threats that are disruptive to users of ICT systems and that affect the normal functioning of the state and its institutions. Proper management of cybersecurity makes it possible not only to eliminate the consequences of such threats, but also to anticipate and prevent them. Given the status of the digital state and the importance of ICT services, means of electronic communication, and the information itself, which is processed by various entities and to various extents, security in cyberspace must be adequately protected to prevent significant disruptions<sup>[9]</sup>.

This article intends to present cybersecurity and personal data protection in the context of artificial intelligence and big data. The article uses the legal dogmatic method to analyse existing cybersecurity legislation. It also analyses a holistic approach to cybersecurity, including comprehensive characteristics of technical, legal and social aspects related to the protection of personal data and information systems against cyber threats. Given the current international situation, a polemological approach has also been adopted as a necessary component of this analysis.

## 2 | Personal data and cybersecurity

For a holistic analysis of cybersecurity and personal data protection, it is necessary to define cybersecurity and personal data.

Pursuant to Article 4 (1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ UE L 119, p. 1), *personal data* means any information relating to an identified or identifiable natural person, whereby an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific

<sup>9</sup> Mirosław Karpiuk, Claudio Melchior, Urszula Soler, „Cybersecurity Management in the Public Service Sector” *Prawo i Więź*, No. 4 (2023): 10-11.

to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. In the data protection context, particular attention is paid to processing personal data, ensuring adequate levels of security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using the appropriate technical or organisational measures. Data protection regulations, such as the General Data Protection Regulation (GDPR) in the European Union, set out the rules and obligations for processing personal data<sup>[10]</sup>.

Cybersecurity is the practice which involves protecting computer systems, networks, devices and data against unauthorised access, attacks, damage or other types of digital threats. Its main objectives are to ensure the integrity, confidentiality and availability of information and to prevent cybercrime. Cybersecurity encompasses a wide range of measures, technologies, processes and practices to protect against digital threats from outside or within an organisation. To ensure cybersecurity, it is essential to protect the IT infrastructure, i.e. hardware, software, networks and data<sup>[11]</sup>. This includes physical and virtual systems. Data protection involves encrypting data, securing their transmission and storage, and strictly controlling access to data. As part of identity and access management, authentication and authorisation procedures are established to ensure that only authorised individuals have access to specific resources and information. Using tools such as firewalls, anti-virus software, and intrusion detection and prevention systems to prevent attacks protects against malware, phishing, ransomware and other threats. Educating users and building their awareness through training on best practices related to security, including secure passwords, recognition of suspicious emails and safe use of the internet, is crucial to improving overall cybersecurity. Responding to incidents by developing response plans to enable prompt identification, assessment, response, and recovery from attacks is essential for crisis management. In addition, compliance with policies and procedures ensures that cybersecurity measures comply with applicable data protection and privacy laws and industry standards.

Cybersecurity is a rapidly evolving domain which requires ongoing adaptation to new technologies, attack methods, and regulations to ensure

---

<sup>10</sup> General Data Protection Regulation (GDPR) (2016).

<sup>11</sup> Mirosław Karpiuk, Wojciech Pizło, Krzysztof Kaczmarek, „Cybersecurity Management – Current State and Directions of Change” *International Journal of Legal Studies*, No. 2 (2023): 650–651.

effective protection against the growing number and complexity of cyber threats. It should also be noted that the proper functioning of the state depends on the efficiency of strategic ICT systems<sup>[12]</sup>.

Cybersecurity is a type of security that represents one of the fundamental human needs<sup>[13]</sup>, its purpose being to offer protection against threats<sup>[14]</sup>. Pursuant to Article 2 (4) of the Act of 5 July 2018 on the National Cybersecurity System (consolidated text, Journal of Laws of 2023, item 913, as amended), cybersecurity is the resilience of information systems against actions that violate the confidentiality, integrity, availability and authenticity of processed data or related services offered by these systems.

### 3 | Identity theft

Identity theft is defined as the unauthorised acquisition and use of another person's data to gain an advantage, usually financial, or to commit fraud. This process is becoming increasingly complex and problematic to detect, especially in the digital age, with personal information being widely available and easily processed by various information technologies.

Identity theft is a serious crime that can have far-reaching consequences for its victims. It involves the unlawful use of another person's data, e.g., to take out a loan, open a bank account or purchase goods online without that person's knowledge and consent. Notably, pretending to be another person, using that person's image, other personal information or data commonly used to identify that person publicly, which results in financial or personal damage to that person, is punishable under Article 190a § 2 of the Act of 6 June 1997 – the Penal Code (consolidated text, Journal of Laws of 2024, item 17, as amended).

In the context of modern technologies, the wide availability of personal data on the internet, coupled with the development and growing use of new cyber methods and techniques, makes identity theft much easier.

<sup>12</sup> Małgorzata Czuryk, „Cybersecurity and Protection of Critical Infrastructure” *Studia Iuridica Lublinensia*, No. 5 (2023): 49.

<sup>13</sup> Mirosław Karpik, „The Provision of Safety in Water Areas: Legal Issues” *Studia Iuridica Lublinensia*, No. 2 (2022): 79.

<sup>14</sup> Mirosław Karpik, „Position of the Local Government of Commune Level in the Space of Security and Public Order” *Studia Iuridica Lublinensia*, No. 2 (2019): 28.

Cybercriminals use a variety of tools, such as phishing, to persuade victims to disclose their personal information through fake websites or email messages, malware installed automatically on end devices to steal data while remaining unnoticed by the owner, and social engineering, which involves appealing to people's feelings and trust to gain access to protected information<sup>[15]</sup>. Moreover, technological progress, including artificial intelligence and machine learning, creates new opportunities for criminals to automate the acquisition and use of stolen data. This further increases the scale and effectiveness of identity theft. Examples include algorithms analysing users' behaviour online to determine the patterns of potential targets.

The consequences of identity theft are multifaceted and can involve significant financial loss, reputational damage, and long-term legal and financial problems. Identity theft poses substantial operational and reputational risks for financial institutions and businesses. It forces them to implement advanced security systems and protocols to protect customers' data. In response to these challenges, the public and private sectors are intensifying their efforts to raise public awareness of the risk of identity theft and promoting good practices linked to digital security. This includes educating users on the importance of strong passwords, using multi-factor authentication, regularly updating software, and being cautious when sharing personal information online. Unfortunately, despite these efforts, identity theft remains one of the greatest digital security challenges. It highlights the need for ongoing security technologies development and international cooperation on information sharing and best practices to counter cybercrime.

## 4 | Cybersecurity and disinformation: a polemological dimension

The international situation is an important factor in cybersecurity. If a cyberattack is launched in a highly digitalised state, its consequences may be comparable to those of diversionary or military actions. Intensified activities in cyberspace may also indicate that a classic military action

<sup>15</sup> Daniel G. Arce, „Malware and market share” *Journal of Cybersecurity*, No. 1 (2018): 1.

is underway. This is particularly relevant in the context of the imperial policy pursued by Russia<sup>[16]</sup>. Since the Russians may be using the same databases as the Western world<sup>[17]</sup>, it appears advisable for the analyses of cybersecurity and personal data protection to also include this polemological dimension.

With the growing role of cyberspace in geopolitics, cybersecurity and disinformation operations are becoming key elements of Russia's imperial policy, with the attacks launched on Estonia in 2007<sup>[18]</sup> constituting an example. Russia uses cyberattacks and disinformation operations as strategic tools to undermine the political, economic and social structures of Western countries and other geopolitical adversaries. These threaten the integrity of information systems and undermine public trust by influencing decision-making processes and public opinion globally. Disinformation understood as deliberately disseminating false information, is used by Russia to attain its political objectives by influencing social perception and behaviour. Disinformation operations can take various forms – from fake news, through interference with social media content, to organised campaigns aimed at sowing discord and confusing society. Such activities not only threaten information security by injecting false data into public discourse but can also lead to unauthorised access to personal data and other sensitive information through social engineering techniques.

Disinformation can directly threaten the security of personal data by creating false narratives designed to trick unaware users into revealing sensitive information. Techniques such as phishing, pretexting or creation of fake websites are often based on fabricated information aimed at deceiving the victims and making them reveal confidential data. In addition, disinformation operations can undermine trust in data protection institutions, which hinders effective risk management in cybersecurity.

In response to the threats posed by disinformation, it appears necessary to adopt a multi-dimensional approach to cybersecurity. This combines technical protection measures, education, and public awareness. Key strategies include the development of tools to detect and neutralise disinformation, strengthening personal data protection through implementing strict

<sup>16</sup> Krzysztof Kaczmarek, „Dezinformacja jako czynnik ryzyka w sytuacjach kryzysowych” *Roczniki Nauk Społecznych*, No. 2 (2023): 27.

<sup>17</sup> Katarzyna Chałubińska-Jentkiewicz, „Disinformation – and what else?” *Cybersecurity and Law*, No. 2 (2021): 15–16.

<sup>18</sup> Krzysztof Kaczmarek, „Zapobieganie zagrożeniom cyfrowym na przykładzie Republiki Estońskiej i Republiki Finlandii” *Cybersecurity and Law*, No. 1 (2019): 147–148.

security protocols and privacy policies, as well as education programmes and public awareness campaigns to increase critical thinking skills and awareness of disinformation risks among society at large. Countering disinformation should be one of the priorities for entities in charge of crisis management. However, even the democratic states with strong economic and military potential do not possess efficient tools to combat disinformation, and their preventive actions are limited to information and education campaigns<sup>[19]</sup>. While there is a concept of armoured information that is resistant to disinformation<sup>[20]</sup>, it seems to be purely theoretical at the moment.

Disruptions occurring in cyberspace can compromise the functioning of society (regarding not only the performance of professional duties using cyberspace, but also communication by electronic means). They may also affect the performance of the state's duties to ensure the adequate quality of services provided, including those of strategic importance. Given the need to properly secure such services by ensuring their continuity, adequate coverage and availability, it appears necessary to take administrative action to protect them fully<sup>[21]</sup>. Responsibility for safeguarding cyberspace against threats also (if not primarily) rests with administrative authorities, which must sometimes resort to measures that cause considerable nuisance to the addressees.

Regarding cybersecurity, the adequate level of protection of ICT systems should be ensured. However, in certain cases, this may involve some restrictions on individual freedoms and rights in cyberspace which are permitted if such protection cannot be guaranteed otherwise<sup>[22]</sup>. Measures restricting human and civil liberties and rights must be diversified according to the severity of the threat. They must be proportionate to their objectives<sup>[23]</sup>.

<sup>19</sup> Krzysztof Wasilewski, „Fake News and the Europeanization of Cyberspace” *Polish Political Science Yearbook*, No. 4 (2021): 69.

<sup>20</sup> Martinas Malužinas, „Armoured Information as a Promising Concept to Reduce Disinformation – a New Element of Armoured Democracy?” *Studia i Analizy Nauk o Polityce*, No. 2 (2023): 154.

<sup>21</sup> Miroslaw Karpiuk, „Recognising an Entity as an Operator of Essential Services and Providing Cybersecurity at the National Level” *Prawo i Więź*, No. 4 (2022): 167-168.

<sup>22</sup> Małgorzata Czuryk, „Restrictions on the Exercising of Human and Civil Rights and Freedoms Due to Cybersecurity Issues” *Studia Iuridica Lublinensia*, No. 3 (2022): 34.

<sup>23</sup> Małgorzata Czuryk, „Activities of the Local Government During a State of Natural Disaster” *Studia Iuridica Lublinensia*, No. 4 (2021): 121.

## 5

## Mechanisms of man-in-the-middle attacks on public Wi-Fi networks and their impact on personal data security

The use of third-party Wi-Fi networks involves several risks to the security of personal data. This can be exploited by unauthorised persons for criminal purposes, including identity theft, financial fraud or malware distribution. Considering the increasing number of cyberattacks, it is of utmost importance for digital privacy protection to understand the mechanisms of these threats and methods to minimise them.

Man-in-the-middle (MitM) attacks are considered among the most severe threats associated with the use of external Wi-Fi networks. In a MitM scenario, the attacker inserts themselves into a two-party transaction, intercepting and potentially modifying the data exchanged by the parties. When a user connects to an unsecured Wi-Fi network, an attacker can easily intercept the transmitted data, such as passwords, credit card numbers or identity information<sup>[24]</sup>. Another threat is using fake Wi-Fi access points, known as evil twins. The attacker creates an access point with an identical or similar name to a trusted network, encouraging victims to connect. Once connected, all data sent by the user can be monitored and recorded by the attacker, making room for various types of abuse, including personal data theft<sup>[25]</sup>. However, it is worth stressing that the attacker is often a bot, which may be both controlled and created by AI.

In addition, using public Wi-Fi networks without adequate security measures can lead to malware dissemination. Attackers can exploit the weaknesses existing in network security to spread malware, which can be automatically downloaded to users' devices without them being aware of it. Malware can then lead to data theft, espionage, or even gaining complete control of the infected device.

It is, therefore, imperative to take precautions when using public Wi-Fi networks. These include trusted VPNs, that encrypt the entire network traffic, providing an extra layer of protection. In addition, logging into

<sup>24</sup> Abdulbasit A. Darem, Asma A. Alhashmi, Tareq M. Alkhaldi, Abdullah M. Alashjaee, Sultan M. Alanazi, & Shouki A. Ebad, „Cyber Threats Classifications and Countermeasures in Banking and Financial Sector” *IEEE Access*, No. 11 (2023): 125139.

<sup>25</sup> Fu-Hau Hsu, Min-Hao Wu, Yan-Ling Hwang, Chia-Hao Lee, Chuan-Sheng Wang, Ting-Cheng Chang, „WPFD: Active User-Side Detection of Evil Twins” *Applied Sciences*, No. 16 (2022): 8088.

sensitive accounts, such as online banking, should be avoided when connecting to public Wi-Fi networks. Users should also regularly update device software to protect against known vulnerabilities that malware can exploit.

## 6 | Personal data protection threats and prospects in the AI era: the perspective of the end user

In the face of dynamically developing information technologies, the issue of „the weakest link in cybersecurity”, represented by end-users, is becoming increasingly important in the personal data protection context. The development and implementation of AI and the possibilities of processing large datasets open up new digital security perspectives. At the same time, they are creating potential attack vectors that can be used by cybercriminals to compromise the privacy and security of personal data<sup>[26]</sup>.

The first area where users become the weakest link is connected with cybercriminals’ manipulating and exploiting their unawareness, using advanced AI tools to create sophisticated phishing and social engineering attacks and, with big data analytics, these attacks can be well-targeted and personalised and thus effective. Such methods, which take advantage of the users’ inadequate awareness of data protection mechanisms, highlight the need to intensify educational activities and raise the digital competencies of society. At the same time, AI and big data also offer powerful tools to protect personal data, enabling the real-time identification and neutralisation of threats. Using machine learning algorithms to monitor and analyse user behaviour and network traffic can significantly aid the early detection of potential data security breaches. However, the effectiveness of these security systems is directly related to the level of users’ familiarity with the rules of safe use of digital technologies and their willingness to implement recommended protection measures.

Scientific literature highlights the importance of user education and awareness as key elements in ensuring a high level of cybersecurity. Educational strategies should include not only disseminating knowledge about potential

<sup>26</sup> Julien Legrand, „Humans and Cybersecurity: The Weakest Link or the Best Defense?” *ISACA Journal*, No. 1 (2022).

threats, but also the shaping of appropriate attitudes and behaviours to minimise risking personal data breaches. Moreover, these strategies must be constantly updated and adapted to the rapidly evolving cyber environment.

To summarise, in the era of AI and big data, it is end users who constitute the weakest link in terms of data protection. Ensuring adequate protection calls for, on an ongoing basis, developing and implementing technologically advanced security solutions and integrated educational activities to raise users' digital awareness and competence. Such an approach balances the potential offered by modern technologies with the risks related to the human factor, thereby ensuring effective protection of personal data in the digital ecosystem.

## 7

## Education, public awareness and paradoxes

Throughout this paper, the significance of education programmes in increasing awareness and knowledge of cyber risks, as well as promoting the implementation of protective measures, has been highlighted. The active involvement of the population is crucial to achieving higher levels of cybersecurity and data protection. This is especially important in light of the increasing use of generative AI, which has the potential to create disinformation communication material at an unprecedented scale. The involvement, awareness, and practices of the population are crucial in determining the level of cybersecurity that can be achieved in a given society. However, it is important to note that achieving effective levels of awareness, and even more so, achieving behaviours and defensive measures in line with a good level of risk awareness, is a much more difficult and complex field than it may appear at first sight.

Efforts to cultivate a culture of risk awareness in society have encountered persistent challenges. This is due to the fact that safety concerns, regardless of the type of risk in question, are often seen as purely theoretical and not directly relevant to people's daily lives. For most people, risk is a general concept with little practical relevance, except during emergencies or their immediate aftermath when people's conscious attention is heightened. In the realm of cyber risks, the same general dynamic is present, but it is exacerbated by two factors: 1) the high level of abstraction of the issue and 2) the low level of widespread digital literacy. The combination of these

factors leads to considerable ambiguity or lack of clarity about the nature of the risks associated with personal data or the receipt of malicious and uninformative information. It is unclear what data is at risk and how it can be obtained. Most people are often left with unanswered questions such as the actual security level of their computer system and how to distinguish between useful and unhelpful content.

The concept that increased digital competence and awareness can enhance understanding and subsequently improve protection levels is contradicted by a set of inconsistencies identified in various research studies. These studies converge in observing what is now referred to as the „privacy paradox”<sup>[27]</sup>, i.e. the “discrepancy between the expressed concern and the actual behavior of users [...]: users claim to be very concerned about their privacy but do very little to protect their personal data”<sup>[28]</sup>.

This phenomenon pertains to individuals who express high levels of concern about privacy but do not engage in corresponding defensive behaviours. The reasons for this contradiction have been attributed to various factors, such as:

1. an overestimation of the benefits and underestimation of the costs associated with giving up privacy within a rational decision-making process<sup>[29]</sup>;
2. biases and distortions leading to a form of limited rationality in privacy-related decisions<sup>[30]</sup>;

<sup>27</sup> For a thorough literature review on this topic, please refer to: Spyros Kokolakis, „Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon” *Computers & security*, 64 (2017): 122-134.

<sup>28</sup> Susanne Barth, Menno D.T. de Jong, „The privacy paradox-Investigating discrepancies between expressed privacy concerns and actual online behaviour - A systematic literature review” *Telematics and informatics*, No. 7 (2017): 1038-1058.

<sup>29</sup> See for instance: Jeffrey Warshaw, Tara Matthews, Steve Whittaker, Chris Kau, Mateo Bengualid, Barton A. Smith, „Can an Algorithm Know the «Real You»? Understanding People’s Reactions to Hyper-personal Analytics Systems”, [in:] *Proceedings of the 33rd annual ACM conference on human factors in computing systems*, (2015), 797-806. Or: Na Wang, Bo Zhang, Bin Liu, Jin Hongxia, „Investigating effects of control and ads awareness on android users’ privacy behaviors and perceptions”, [in:] *Proceedings of the 17th international conference on human-computer interaction with mobile devices and services* (2015), 373-382.

<sup>30</sup> See for instance: Jacopo Arpetti, Marco Delmastro, „The privacy paradox: a challenge to decision theory?” *Journal of Industrial and Business Economics*, No. 4 (2021): 505-525. Or: Idris Adjerid, Eyal, Peer, Alessandro Acquisti, „Beyond the Privacy Paradox” *MIS quarterly*, No. 2 (2018): 465-488.

3. lack of IT experience and knowledge<sup>[31]</sup>;
4. factors of social influence and imitation of misbehaviour<sup>[32]</sup>;
5. a form of “illusion of control” over privacy-related behaviour<sup>[33]</sup>;  
and others.

Our research, which is in the process of being published<sup>[34]</sup>, indicates the presence of the privacy paradox even among young respondents with good digital literacy and medium-high socio-cultural status, such as university students. In addition to the issue of the privacy paradox related to data protection, these data also revealed a similar phenomenon in terms of self-perception regarding the ability to distinguish true from false news. University students express optimism in their ability to differentiate between fake and real news. However, this confidence is not supported by rigorous verification behaviour, revealing a contradiction between their perceived and actual control.

This strengthens the argument for projects aimed at raising awareness of privacy and disinformation issues. A holistic approach to cybersecurity can be achieved through such projects. However, these projects must begin by acknowledging the specific challenges of the objective and striving to:

1. enhance digital literacy and IT knowledge;
2. restore a proper understanding of the risks and benefits associated with data transfer;
3. mitigate the negative effects of social imitation on potentially harmful behaviour; and
4. promote and demonstrate best practices for data and source verification.

---

<sup>31</sup> Young Min Baek, „Solving the privacy paradox: A counter-argument experimental approach” *Computers in human behaviour*, 38 (2014): 33-42.

<sup>32</sup> Monika Taddicken, „The «privacy paradox» in the social web: The impact of privacy concerns, individual characteristics, and the perceived social relevance on different forms of self-disclosure” *Journal of computer-mediated communication*, No. 2 (2014): 248-273.

<sup>33</sup> Laura Brandimarte, Alessandro Acquisti, George Loewenstein, „Misplaced confidences: Privacy and the control paradox” *Social psychological and personality science*, No. 3 (2013): 340-347.

<sup>34</sup> Claudio Melchior, Urszula Soler, „Security of Personal Data in Cyberspace in the Opinion of Students of the University of Udine” *Cybersecurity and Law*, No. 1 (2024): 227-247.

## 8 | Conclusions

Cybersecurity and data protection are closely interrelated. The purpose of both is to protect information against unauthorised access, use, disclosure, alteration, destruction or loss. In addition, personal data are generally collected in digital form, and cybersecurity provides the technical and organisational foundations on which personal data protection is based.

In light of the analysis presented in this article, the conclusions drawn regarding a holistic approach to cybersecurity and personal data protection in the era of artificial intelligence and big data are multidimensional and point to the need for integrated action at multiple levels. Cybersecurity and personal data protection are presented as interrelated domains. They aim to protect information against diverse digital threats. The discussion presented in this article highlights that, in the face of evolving information technologies, the issue of „the weakest link”, represented by end users, is gaining importance. The development and implementation of AI and the possibilities of processing large datasets unlock new perspectives for digital security while creating potential attack vectors. These findings suggest the need not only for the continuous development and implementation of technologically advanced security solutions, but also for integrated educational activities aimed at raising users’ awareness and digital competence. Only through such an approach can the potential offered by modern technologies be balanced with the risks related to the human factor. Thus ensuring the effective protection of personal data in the digital ecosystem.

The pace of IT advancements, especially in AI and big data, should force systemic changes in personal data protection. However, in all legal systems, the victims bear the consequences of identity theft. This is particularly true when data are used to carry out financial transactions or incur debts. This reflects the complexity and global character of the problem of identity theft. Meanwhile, institutions, particularly financial ones, appear to be making insufficient efforts to implement effective ways of verifying identity and ensuring protection against fraud. This attitude may result from the fact that implementing such safeguards is not in the interest of these institutions. Unfortunately, even by educating people, raising public awareness of the risks, and using advanced tools to ensure cybersecurity and protect personal data, it is impossible to guarantee full security. Presumably, only potential legal sanctions can force financial institutions to implement appropriate solutions.

It should be noted organisations or states can use personal data to undermine societies. Furthermore, funds obtained through identity theft can be exploited by criminal or terrorist organisations. Thus, enhancing cybersecurity, personal data protection and, more generally, national security requires a holistic approach that considers some contextual factors, with education and changes to legal systems seeming to be the most relevant.

Cybersecurity is an area of national security. Nowadays, this domain of security should be given a high priority. The consequences of actions compromising cybersecurity affect not only the public space, but also the social sphere. This is why states must react quickly and decisively to cyberattacks while also seeking new protection mechanisms adequate to the threats<sup>[35]</sup>.

In the age of the information society and computerised states, where digital services are universal, cybersecurity should be a priority. It enables uninterrupted social communication, the adequate security of strategic sectors, and the performance of tasks (including public ones). Cybersecurity offers protection against threats. It also ensures the normal functioning of the state on many levels and makes it significantly easier to run a business<sup>[36]</sup>.

## Bibliography

- Adjerid Idris, Eyal Peer, Alessandro Acquisti, „Beyond the Privacy Paradox” *MIS Quarterly*, No. 2 (2018): 465-488. <https://doi.org/10.25300/MISQ/2018/14316>.
- Arce Daniel G., „Malware and market share” *Journal of Cybersecurity*, No.1 (2018): 1-6. <https://doi.org/10.1093/cybsec/tyyo10>.
- Arpetti Jacopo, Marco Delmastro, „The privacy paradox: a challenge to decision theory?” *Journal of Industrial and Business Economics*, No. 4 (2021): 505-525. <https://doi.org/10.1007/s40812-021-00192-z>.
- Baek Young Min, „Solving the privacy paradox: A counter-argument experimental approach” *Computers in human behavior*, 38 (2014): 33-42. <https://doi.org/10.1016/j.chb.2014.05.006>.

<sup>35</sup> Miroslaw Karpiuk, „Organisation of the National System of Cybersecurity: Selected Issues” *Studia Iuridica Lublinensia*, No. 2 (2021): 234. See also Miroslaw Karpiuk, Jarosław Kostrubiec. „Provincial Governor as a Body Responsible for Combating State Security Threats” *Studia Iuridica Lublinensia*, No. 1 (2024): 117-118.

<sup>36</sup> Miroslaw Karpiuk, „The Legal Status of Digital Service Providers in the Sphere of Cybersecurity” *Studia Iuridica Lublinensia*, No. 2 (2023): 190.

- Barth Susanne, Menno D.T. de Jong, „The privacy paradox–Investigating discrepancies between expressed privacy concerns and actual online behavior–A systematic literature review” *Telematics and informatics*, No. 7 (2017): 1038-1058. <https://doi.org/10.1016/j.tele.2017.04.013>.
- BDO Digital, *Eliminate Routine Tasks with Automation and Generative AI*. 2023. <https://www.bdodigital.com/insights/automation/eliminate-routine-tasks-with-automation-and-generative-ai> accessed 11 Feb. 2024.
- Bencsik András, Mirosław Karpiuk, Miroslav Kelemen, Ewa Włodyka, *Cybersecurity in the Visegrad Group Countries*. Maribor: Institute for Local Self-Government Maribor, 2023. <http://dx.doi.org/10.4335/2023.6>.
- Brandimarte Laura, Alessandro Acquisti, George Loewenstein, „Misplaced confidences: Privacy and the control paradox” *Social psychological and personality science*, No. 3 (2013): 340-347. <https://doi.org/10.1177/1948550612455931>.
- Chałubińska-Jentkiewicz Katarzyna, „Disinformation – and what else?” *Cybersecurity and Law*, No. 2 (2021): 9-19. <https://doi.org/10.35467/cal/146453>.
- Czuryk Małgorzata, „Activities of the Local Government During a State of Natural Disaster” *Studia Iuridica Lublinensia*, No. 4 (2021): 111-124. <http://dx.doi.org/10.17951/sil.2021.30.4.111-124>.
- Czuryk Małgorzata, „Cybersecurity and Protection of Critical Infrastructure” *Studia Iuridica Lublinensia*, No. 5 (2023): 43-52. <http://dx.doi.org/10.17951/sil.2023.32.5.43-52>.
- Czuryk Małgorzata, „Restrictions on the Exercising of Human and Civil Rights and Freedoms Due to Cybersecurity Issues” *Studia Iuridica Lublinensia*, No. 3 (2022): 31-43. doi: <http://dx.doi.org/10.17951/sil.2022.31.3.31-43>.
- Darem Abdulbasit A., Asma A. Alhashmi, Tareq M. Alkhaldi, Abdullah M. Alashjaee, Sultan M. Alanazi, Shouki A. Ebad, „Cyber Threats Classifications and Countermeasures in Banking and Financial Sector” *IEEE Access*, No. 11 (2023): 125138-125158. <https://doi.org/10.1109/ACCESS.2023.3327016>.
- European Commission, *What is personal data?*. [https://commission.europa.eu/law-law-topic/data-protection/reform/what-personal-data\\_en](https://commission.europa.eu/law-law-topic/data-protection/reform/what-personal-data_en) accessed 11 Feb. 2024.
- General Data Protection Regulation (GDPR) (2016). <https://gdpr-info.eu/> accessed 11 Feb. 2024.
- Hsu, Fu-Hau, Min-Hao Wu, Yan-Ling Hwang, Chia-Hao Lee, Chuan-Sheng Wang, Ting-Cheng Chang, „WPFD: Active User-Side Detection of Evil Twins” *Applied Sciences*, No. 16 (2022): 8088. <https://doi.org/10.3390/app12168088>.
- Kaczmarek Krzysztof, „Dezinformacja jako czynnik ryzyka w sytuacjach kryzysowych” *Roczniki Nauk Społecznych*, No. 2 (2023): 19-30. <https://doi.org/10.18290/rns2023.0017>.

- Kaczmarek Krzysztof, „Zapobieganie zagrożeniom cyfrowym na przykładzie Republiki Estońskiej i Republiki Finlandii” *Cybersecurity and Law*, No. 1 (2019): 143-157. <https://doi.org/10.35467/cal/133778>.
- Karpiuk Mirosław, „Recognising an Entity as an Operator of Essential Services and Providing Cybersecurity at the National Level” *Prawo i Więź*, No. 4 (2022): 166-179. <https://doi.org/10.36128/priw.vi42.524>.
- Karpiuk Mirosław, „Organisation of the National System of Cybersecurity: Selected Issues” *Studia Iuridica Lublinensia*, No. 2 (2021): 233-244. <http://dx.doi.org/10.17951/sil.2021.30.2.233-244>.
- Karpiuk Mirosław, „Position of the Local Government of Commune Level in the Space of Security and Public Order” *Studia Iuridica Lublinensia*, No. 2 (2019): 27-39. <https://doi.org/10.17951/sil.2019.28.2.27-39>.
- Karpiuk Mirosław, „The Legal Status of Digital Service Providers in the Sphere of Cybersecurity” *Studia Iuridica Lublinensia*, No. 2 (2023): 189-201. <https://doi.org/10.17951/sil.2023.32.2.189-201>.
- Karpiuk Mirosław, „The Provision of Safety in Water Areas: Legal Issues” *Studia Iuridica Lublinensia*, No. 2 (2022): 79-92. <https://doi.org/10.17951/sil.2022.31.1.79-92>.
- Karpiuk Mirosław, Jarosław Kostrubiec, „Provincial Governor as a Body Responsible for Combating State Security Threats” *Studia Iuridica Lublinensia*, No. 1 (2024): 107-122.
- Karpiuk Mirosław, Claudio Melchior, Urszula Soler, „Cybersecurity Management in the Public Service Sector” *Prawo i Więź*, No. 4, (2023): 7-27. <https://doi.org/10.36128/PRIW.VI47.751>.
- Karpiuk Mirosław, Wojciech Pizło, Krzysztof Kaczmarek, „Cybersecurity Management – Current State and Directions of Change” *International Journal of Legal Studies*, No. 2 (2023): 645-663. <http://dx.doi.org/10.5604/01.3001.0054.2880>.
- Khan Sulaiman, Habib Ullah Khan, Shah Nazir, „Systematic analysis of healthcare big data analytics for efficient care and disease diagnosing” *Scientific Reports*, No. 22377 (2022). <https://doi.org/10.1038/s41598-022-26090-5>.
- Kokolakis Spyros, „Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon” *Computers & Security*, 64 (2017): 122-134. <https://doi.org/10.1016/j.cose.2015.07.002>.
- Kurek Justyna, *Bezpieczeństwo państwa w warunkach hybrydowej regulacji danych osobowych w dobie analizy Big data. Aspekty prawne, organizacyjne i systemowe*. Warsaw: ASzWoj, 2021.
- Legrand Julien, „Humans and Cybersecurity: The Weakest Link or the Best Defense?” *ISACA Journal*, 1 (2022). <https://www.isaca.org/resources/isaca-journal/issues/2022/volume-1/humans-and-cybersecurity-the-weakest-link-or-the-best-defense>.

- Malužinas Martinas, „Armoured Information as a Promising Concept to Reduce Disinformation – a New Element of Armoured Democracy?” *Studia i Analizy Nauk o Polityce*, 2 (2023): 149-170. <http://dx.doi.org/10.31743/sanp.16411.14661>.
- Melchior Claudio, Urszula Soler, „Security of Personal Data in Cyberspace in the Opinion of Students of the University of Udine” *Cybersecurity and Law*, No. 1 (2024): 227-247.
- Taddicken Monika. „The «privacy paradox» in the social web: The impact of privacy concerns, individual characteristics, and the perceived social relevance on different forms of self-disclosure” *Journal of computer-mediated communication*, No. 2 (2014): 248-273. <https://doi.org/10.1111/jcc4.12052>.
- Wang Na, Bo Zhang, Bin Liu, Jin Hongxia, „Investigating effects of control and ads awareness on android users’ privacy behaviors and perceptions”, [in:] *Proceedings of the 17th international conference on human-computer interaction with mobile devices and services*, (2015): 373-382. <https://doi.org/10.1145/2785830.2785845>.
- Wang Pei, „On Defining Artificial Intelligence” *Journal of Artificial General Intelligence*, No. 2 (2019): 1-37. <https://doi.org/10.2478/jagi-2019-0002>.
- Warshaw Jeffrey, Tara Matthews, Steve Whittaker, Chris Kau, Mateo Bengualid, Barton A. Smith, „Can an Algorithm Know the «Real You»? Understanding People’s Reactions to Hyper-personal Analytics Systems”, [in:] *Proceedings of the 33rd annual ACM conference on human factors in computing systems*, (2015), 797-806. <https://doi.org/10.1145/2702123.2702274>.
- Wasilewski Krzysztof, „Fake News and the Europeanization of Cyberspace” *Polish Political Science Yearbook*, No. 4 (2021): 61-80. <https://doi.org/10.15804/ppsyp202153>.
- Włodyka Ewa Maria, „Artificial intelligence as a potential platform for international cooperation of local governments”, [in:] *Wybrane aspekty współpracy międzynarodowej jednostek samorządu terytorialnego*, ed. Iwona Wieczorek, Anna Ostrowska, Mariusz Chrzanowski. 201-223. Łódź: Wydawnictwo Narodowego Instytutu Samorządu Terytorialnego, 2023. <https://www.nist.gov/pl/downloadfile/15423>.
- Włodyka Ewa Maria, „Dlaczego potrzebujemy e-administracji? Rozwój podstawowych umiejętności cyfrowych pracowników administracji na Pomorzu Zachodnim” *Acta Politica Polonica*, No. 2 (2021): 89-100. <http://dx.doi.org/10.18276/ap.2021.52-08>.
- Włodyka Ewa Maria, „Gotowi – do startu – start? Przyczynek do dyskusji nad gotowością jednostek samorządu terytorialnego do zapewnienia cyberbezpieczeństwa” *Cybersecurity and Law*, No. 1 (2022): 202-219. <https://doi.org/10.35467/cal/151828>.





# Development and Deployment of Autonomous Weapon Systems: Comprehensive Analysis of International Humanitarian Law

## Abstract

This paper addresses the problem of the need to determine the legality of autonomous weapon systems (AWS) under international human law (IHL), focusing on the two targeting and weapons laws. This study emphasizes the need not to confuse these two laws in the analysis. The paper aims to clarify whether AWS could be considered illegal under IHL, taking into account the principles of distinction, proportionality and precaution. The research methodology includes an analysis of the relevant provisions of IHL and customary humanitarian law. The research design includes an examination of the potential of AWS to cause unnecessary injury or suffering and their classification as indiscriminate weapons. The paper concludes that while AWS possess autonomous decision-making capabilities, human oversight is required to prevent excessive harm.

**KEYWORDS:** Autonomous Weapon Systems, Artificial Intelligence, International Humanitarian Law, Weapons Law, Targeting Law, Martens Clause

**AHMAD KHALIL**, PhD candidate at VIT School of Law, VIT University, Chennai, Tamil Nadu, India, ORCID – 0009-0007-0615-9812, e-mail: ahmadkhalil5665@gmail.com

**S. ANANDHA KRISHNA RAJ**, Associate Professor at VIT School of Law, VIT University, Chennai, Tamil Nadu, India, ORCID – 0009-0001-0177-1689, e-mail: anandha.krishnaraj@vit.ac.in

## 1 | Introduction

New tactics, the shifting global geopolitical landscape, and technological advances are challenging preconceived notions of combat and its changing nature. Although not always welcome, a legal debate is required to control new combat technologies. Due to the extreme complexity of the technological infrastructure of AWS, it has been said that lawyers have limited relevant input to make<sup>[1]</sup>. Roboticists are the vanguard of a third wave of weaponry that fundamentally changes the dynamics of warfare<sup>[2]</sup>. Throughout history, however, the legal framework has remained central to the integration of new technologies during previous military transformations. Rather than hindering progress, its role has ensured the preservation of universal humanitarian principles enshrined in international humanitarian law and global legal norms.

The technology utilized in warfare is inherently influenced by human design and programming, rendering it incapable of being truly „unbiased”. Therefore, it must be steadily dedicated to upholding well-established international principles. Primarily, the focus is on safeguarding these standard values, which prompts thorough consideration of deploying emerging technologies. This includes assessing the need for protective protocols, determining human involvement in machine interfaces, and, most importantly, ensuring accountability for inevitable errors and violations that occur in combat situations<sup>[3]</sup>. In addition, the ability to program artificial intelligence (AI) to discriminate, adapt, take precautions, and consist of procedures that are already complex for a human fighter will be discussed.

Opinions on the legitimacy of AWS are divided into two opinions. Supporters focus on the advantages of precision, which ensures better distinction and proportionality<sup>[4]</sup>. The other party that opposes the AWS

<sup>1</sup> Henderson Ian, Patrick Keane, Joshua Liddy, „Remote and Autonomous Warfare Systems – Precautions in Attack and Individual Accountability”, [in:] *Research Handbook on Remote Warfare*, ed. Jens David Ohlin (Cheltenham: Edward Elgar Press, 2016), 24.

<sup>2</sup> Christopher Coker, „On Banning Autonomous Weapon Systems: Human Rights, Automation and the Dehumanization of Lethal Decision Making” *Future Wars*, (2015): 57-60.

<sup>3</sup> Ahmad Khalil, S. Anandha Krishna Raj, „Deployment of Autonomous Weapon Systems in the Warfare: Addressing Accountability Gaps and Reformulating International Criminal Law” *Balkan Social Science Review* 23, No. 23 (2024): 261-285.

<sup>4</sup> Crootof Rebecca, „The Killer Robots Are Here: Legal and Policy Implications” *Cardozo Law Review*, No. 5 (2015): 1837-1916.

claims that it is necessary to ban them, especially because of the problems of discrimination and proportionality, which are impossible to measure and program<sup>[5]</sup>. The real difficulty in adhering to these principles lies in the fact that they will sometimes be in complex environments, such as using AWS in urban warfare<sup>[6]</sup>.

While military experts believe that AWS ability exceeds the ability of humans to work in certain contexts, this would constitute an advantage. In addition to the fact that the development of AWS is of military importance, they can also be an effective tools on the economic level.

IHL rules always seek to limit the methods and means of warfare, both in and outside times of armed conflict. This would guarantee protection for individuals, preserve their human dignity, and respect the rights of civilians and other legally protected groups. Using AWS raises relevant legal and ethical questions regarding guarantees that the regime complies with the standards of IHL when selecting and attacking targets.

Since the beginning of discussions on AWS, scholars have researched the legality of AWS in their literature. This prompted this comprehensive analysis of the legality of AWS based on the basic pillars of IHL. Acknowledging that no legal instruments regulate AWS, particularly, does not negate its subjection to weapon law rules. The general principles on which weapons law is based govern the right to ban weapons. Normative principles are first evident in the fact that the weapon is, by its nature, not indiscriminate or causes superfluous injury or unnecessary suffering. Ensure that they are directed only at military targets to protect civilians and their objects by distinguishing them from combatants<sup>[7]</sup>. As for the use stage in combat, the weapon must be subject to the rules of the organization of hostilities or targeting law.

<sup>5</sup> Lucy Suchman, „Algorithmic Warfare and the Reinvention of Accuracy” *Critical Studies on Security*, No. 2 (2020): 175-187. <https://doi.org/10.1080/21624887.2020.1760587>.

<sup>6</sup> Peter Asaro, „Jus Nascendi. Robotic Weapons and the Martens Clause”, [in:] *Robot Law*, ed. Michael A. Froomkin, Ryan Calo, Ian Kerr, Edward Elgar (Cheltenham, 2016), 367-386. <https://doi.org/10.4337/9781783476732.00024>.

<sup>7</sup> Anderson Kenneth, Reisner Daniel, Waxman Matthew C., „Adapting the Law of Armed Conflict to Autonomous Weapon Systems” *International Law Studies*, (2014): 386-411.

## 2 | The Concept of Autonomy in Weapon Systems

Most definitions in the legal field often revolve around the idea that the word refers to a weapon system that is capable of selecting and engaging a target without the need for human intervention. Considering the importance of this definitional method, it is helpful to understand its components. A weapon is any device designed to harm, destroy, or hurt people or property<sup>[8]</sup>. Furthermore, there is no differentiation made between weapons intended to cause death or injury.

As for selecting and engaging a target, most people infer „select” as „choose among” a gathering or group<sup>[9]</sup>. Moreover, it is important to define „engage” in the military sense, which usually means fight<sup>[10]</sup>. „Engage” concerning AWS might mean at least three distinct things at various times: activation stage, operation stage, and use of force stage (killing decision), it is important to understand the last position better<sup>[11]</sup>. Therefore, using this method, the machine system selects a certain target and decides when and where to use the weapon to engage it.

The last part of the definition stipulates that the system must operate „without human intervention”<sup>[12]</sup>. It is not always evident whether humans are involved in a weapons system and, if so, to which level. The ICRC has observed that both automaticity and autonomy are systems that can choose and attack targets independently while remaining within the stipulations of their human-determined programming. Making the distinction between the two somewhat blurry<sup>[13]</sup>. This raises the question of what level of system independence is needed for the system to be thought of as functioning without human intervention.

<sup>8</sup> Taddeo Mariarosaria, Alexander Blanchard, „A Comparative Analysis of the Definitions of Autonomous Weapons”, [in:] *The 2022 Yearbook of the Digital Governance Research Group* (Cham: Springer Nature Switzerland, 2023), 57-79.

<sup>9</sup> Paul Scharre, Michael C. Horowitz, „Autonomy in Weapon Systems” *Center for a New American Security Working Paper*, (2015).

<sup>10</sup> Stephen Morillo, *What is Military History?* (Hoboken: John Wiley & Sons, 2017).

<sup>11</sup> Ankita Surabhi, *From „Killer Robots” to Autonomous Weapons Systems (AWS)*, 2019.

<sup>12</sup> Joel M. Haight, Vladislav Kecojevic, „Automation vs. human intervention: What is the best fit for the best performance?” *Process Safety Progress*, No.1 (2005): 45-51.

<sup>13</sup> „Expert Meeting: Autonomous Weapon System: Technological, Military, Legal, and Humanitarian Aspects” ICRC, (2014), 5.

The ICRC distinguished between automatic and autonomous systems in the degrees of freedom in choosing and attacking targets<sup>[14]</sup>. While some believe that the difference between automated and autonomous systems is the ability to predict them according to the environment in which they operate. The main criterion is the organized environment in which the autonomous system is operated<sup>[15]</sup>. Nevertheless, this criterion is inaccurate because AWS may be deployed in organized environments, and automated systems may be operated in organized environments.

Since prediction is a controversial matter, others believe that it is possible at the level of generality and not specificity. Predicting the destruction of a specific military target is a general and predictable task. As for the specific ones, they are the precise procedures upon which the system operates and cannot be predicted. Therefore, according to their claim, the basic criterion for distinguishing between an automated and an autonomous system is the predictability of its working procedures<sup>[16]</sup>.

It becomes clear that distinction between the two systems is a complex matter, stemming from the simplicity of the approach followed by the definition. Regardless of the disagreement, leaving the decision to a machine to decide to kill by itself is morally and legally unacceptable, so this matter must be researched, especially from the perspective of IHL. But before the legal analysis, we must explore the stage of the development of the autonomy which have reached to it in the weapon systems at the present time.

### 3 | The Current State of AWS Development

The United States (US) is at the forefront of technologically advanced countries, developing naval weapons systems (surface and subsurface) and unmanned aerial systems for various purposes. For example, as a result of cooperation between the US Department of Defense (DOD) and the

<sup>14</sup> Nurbanu Hayir, „Defining Weapon Systems with Autonomy: The Critical Functions in Theory and Practice” *Groningen Journal of International Law*, No. 2 (2022): 9.

<sup>15</sup> Christof Heyns, „Extrajudicial, Summary or Arbitrary Executions” *Security Issues in the Greater Middle East*, (2013): 183.

<sup>16</sup> Christopher M. Ford, „Autonomous Weapons and International Law” *South Carolina Law Review*, 69 (2017): 413.

Massachusetts Institute of Technology (MIT), they worked on the development of autonomous air weapon systems with the swarming features<sup>[17]</sup>. The swarming feature is formed from the initial launch of small-sized kamikaze drones<sup>[18]</sup>. These kamikazes are considered unmanned aerial systems that contain a warhead and are equipped with sensors to understand the surroundings, identify the target, and cause an explosion when it hits the target<sup>[19]</sup>.

Other nations are developing these weapon systems in addition to the US. The nEUROn military system, which has been under development since 2016, is considered the most advanced and characterized by its longevity. The system belongs to the Intelligence, Surveillance, and Reconnaissance (ISR) systems manufactured by Dassault Aviation of France<sup>[20]</sup>. Furthermore, British Aerospace focuses on developing the Taranis autonomous UAV. Simultaneously, Israel has developed an autonomous UAV called „Harpy”, and it also has an autonomous underwater anti-mine weapon called „Seagull” that is designed to carry out missions against both individual divers and submarines. In application, for example, South Korea deployed the Sentry Guard Robot-1 (SGR-1) to carry out the task of protecting the Korean Demilitarized Zone.

In 2017, the Turkish Kargu-2 autonomous attack drone was manufactured by STM (Savunma Teknolojileri Mühendislik ve Ticaret A.)<sup>[21]</sup>. Furthermore, according to the UN Report 2021, an STM Kargu with explosives was discovered and attacked Haftar’s soldiers in Libya in 2020.<sup>[22]</sup>

<sup>17</sup> Michael Hardy, „Pentagon Proves Air-Launched UAV Swarm Ability” *C4ISR-Net*, 19 August 2022. <https://www.c4isrnet.com/unmanned/uas/2016/03/15/pentagon-proves-air-launched-uav-swarm-ability/>. [accessed: 2.05.2023].

<sup>18</sup> Bitar Mohammad, Chakka Benarji, „Drone Attacks During Armed Conflict: Quest for Legality and Regulation” *International Journal of Intellectual Property Management*, No. 3/4 (2023): 97-411.

<sup>19</sup> James Drew, „USAF’s Small UAS Roadmap Calls for Swarming «kamikaze» Drones” *Flight Global*, 10 December 2019. <https://www.flightglobal.com/civil-uavs/usafs-small-uas-roadmap-calls-for-swarming-kamikaze-drones/120493.article>. [accessed: 4.05.2023].

<sup>20</sup> „Neuron Unmanned Combat Air Vehicle (UCAV) Demonstrator” *Airforce Technology*, 18 February 2020. <https://www.airforce-technology.com/projects/neuron/>. [accessed: 6.05.2023].

<sup>21</sup> „STM Kargu” *Smartencyclopedia*, 4 January 2023. <https://smartencyclopedia.org/content/stm-kargu/>. [accessed: 6.05.2023].

<sup>22</sup> Joe Hernandez, „A Military Drone with a Mind of Its Own Was Used in Combat, U.N. Says” *NPR*, 1 June 2021. <https://www.npr.org/2021/06/01/1002196245/a-u-n-report-suggests-libya-saw-the-first-battlefield-killing-by-an-autonomous-d>. [accessed: 8.05.2023].

---

Also, according to media reports, in 2020, „Kamikaze” and „Kargu-2” were deployed in Nagorno-Karabakh during the Armenia-Azerbaijan war<sup>[23]</sup>.

Contrary to the claims of HRW and opponents of the AWS ban, some believe that machines will never be able to judge emotion and intent. Technology has already demonstrated a growing capacity to read multiple facial recognition patterns more accurately. In isolation from direct physical contact, it can also determine the rate of stress using digital cameras „sensory”<sup>[24]</sup>. Similar technologies, „sensory”, are utilized to determine mental states like satisfaction and desperation in human behavior patterns<sup>[25]</sup>.

Several scholars have created methods for measuring and identifying human emotions using wireless signals and computer learning; hence, the system then uses machine learning, the „emotion classifier”, to determine a person’s mood without making physical touch<sup>[26]</sup>. Some legal experts contend that robots that detect human emotions are not a precondition for their lawful employment. Instead, they argue that it is feasible to design a set of control procedures that are readily accepted and implemented to guarantee that countries can use LAWS according to international law. A proper algorithm, in conjunction with and carried out by a correctly created system<sup>[27]</sup>, may generate a set of precautionary employment TTPs to guarantee that the militaries can use LAWS under the IHL. Therefore, you will move on to the comprehensive legal analysis of AWS from the perspective of weapons law and targeting law.

---

<sup>23</sup> Robin Forestier-Walker, „Nagorno-Karabakh: New Weapons for an Old Conflict Spell Danger” *Al Jazeera*, 13 October 2020. <https://www.aljazeera.com/features/2020/10/13/nagorno-karabakh-new-weapons-for-an-old-conflict-spell-danger>.

<sup>24</sup> Daniel J. McDuff, Javier Hernandez, Sarah Gontarek, Rosalind W. Picard, „Cogcam” *Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems*, No. 3 (2016): 4000–4004. <https://doi.org/10.1145/2858036.2858247>.

<sup>25</sup> Asaph Azaria, Asma Ghandeharioun, Akane Sano, Rosalind Picard, Natasha Jaques, Sara Taylor, *Predicting Students’ Happiness from Physiology, Phone, Mobility, and Behavioral Data*. International Conference on Affective Computing and Intelligent Interaction and workshops: [proceedings]. ACII (Conference), September 2015. <https://pubmed.ncbi.nlm.nih.gov/28515966/>.

<sup>26</sup> Charles Q. Choi, „Mood-Detecting Sensor Could Help Machines Respond to Emotions” *IEEE Spectrum*, 24 June 24 2021. <https://spectrum.ieee.org/mood-detecting-sensor-could-help-machines-respond-to-emotions>.

<sup>27</sup> Dustin A. Lewis, „Three Pathways to Secure Greater Respect for International Law Concerning War Algorithms” *Harvard Law School PILAC* (2020). <https://pilac.law.harvard.edu/three-pathways-to-secure-greater-respect-for-international-law-concerning-war-algorithms>.

## 4 | Legal examination of AWS's Development and Deployment

Undoubtedly, the current autonomy approach in AI represents greater complexity than before, as the AWS outputs are not necessarily subject to the same rules they were programmed to, although the programming greatly limits their self-decision<sup>[28]</sup>. For example, Slaughterbots, an autonomous aerial vehicle, can find and follow targets. Its system processes personal data, including images and information, on social media sites to identify and attack targets. The behaviour here is very complex, explaining to us what we referred to through pre-programming and its intertwining with independence, which explains the depth of complexity involved in understanding AWS.

Indeed, any use of any new weapon or method of warfare, such as AWS, must be subject to IHL. At a stage before use, the new weapon must be reviewed to ensure its compatibility with IHL. As for the use stage in combat, the new weapon must be subject to the rules of the organization of hostilities.

Thus, „weapons” and „means of warfare” refer to the initial question, „Is the weapon itself lawful?”, while „methods of warfare” refer to the subsequent question, „Is the manner in which the weapon is used lawful?”. Therefore, two aspects must be studied to provide a clear picture of the legitimacy of AWS. First, the weapons law, and second, the targeting law.

### 4.1. Weapons law

The IHL is considered a law that evaluates the legality of any weapon. Moreover, IHL specifies weapons prohibited in specific instruments, while those not specifically mentioned are subject to its evaluation rules. The mere use of weapons prohibited by specific instruments is a crime without regard to the consequences. Can AWS be considered illegal in itself without the need for additional legal rules under IHL?

<sup>28</sup> Jutta Weber, Lucy Suchman, „Human–Machine Autonomies”, [in:] *Autonomous Weapons Systems: Law, Ethics, Policy*, ed. Nehal Bhuta, Susanne Beck, Robin Geiß, Hin-Yan Liu, Claus Kreß (Cambridge: Cambridge University Press, 2016), 75–102.

Therefore, some argue that the difficulty of predicting the results of AWS makes it difficult to accept the idea of a ban before using them<sup>[29]</sup>. This is because the application of the principles can only be on a weapon in use. Therefore, it is important to research IHL rules, whether in treaties or international customary law, to determine the legality of AWS. This paper will subject AWS to the general principles of weapons law regulating means of warfare in the light of no specific instrument prohibiting them. To ascertain whether AWS would be deemed illegal under IHL. We will begin by clarifying the IHL's considerations regarding the legality of weapons.

Article 35 of API stated that „The right of the Parties to the conflict to choose methods or means of warfare is not unlimited”. Furthermore, the second para of the same article also confirms that „It is prohibited to employ weapons, projects and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

Some argue that most of the weapons banned under specific instruments were due to the risk posed by their use<sup>[30]</sup>. The gap relating to human decision in the stage of using the final force of deciding to kill in AWS threatens the attribution of the responsibility process in its traditional sense under the pretext of the lack of human control, judgment, or participation. Article 36 of the API states that human beings must control decisions to kill or the final-stage decision to use force.

The complexity of applying IHL rules of distinction, proportionality, and precautions results from the unpredictability of AWS outcomes in operational environments. It sheds light on a critical feature of gun law. These rules are intended to protect permissible targets that is, military objectives that is, combatants in the first place.

In a landmark Advisory Opinion issued in the Nuclear Weapons case, ICJ established the two fundamental principles that form the core of IHL<sup>[31]</sup>. The first principle, rooted in the principle of discrimination, encompasses the prohibition against directly targeting civilians and civilian objects. Additionally, it encompasses the ban on using indiscriminate weapons, defined as those incapable of distinguishing between civilian and military targets. The second principle prohibits the use of weapons that cause

---

<sup>29</sup> Maciej Zajac, „Beyond Deadlock: Low Hanging Fruit and Strict yet Achievable Options in AWS Regulation” *Journal of Ethics and Emerging Technologies*, No. 2 (2022): 1-14.

<sup>30</sup> David Turns, „Weapons in the ICRC Study on Customary International Humanitarian Law” *Journal of Conflict & Security Law*, No. 2 (2006): 201, 204.

<sup>31</sup> Nuclear weapons Advisory Opinion; Greenwood (n 4) 445-446.

unnecessary suffering to legitimate targets or unnecessarily exacerbate their suffering. This is also called the „SIRUS rule” by the ICRC, which specifies that weapons should not cause harm greater than unavoidable to achieve legitimate military objectives<sup>[32]</sup>. Furthermore, a general rule regarding the development and deployment of weapons obliges states to conduct a legal review of the weapon in question, as stipulated in Article 36 of API.

#### 4.1.1. AWS and Causing of Superfluous Injury or Unnecessary Suffering

Weapons that cause (*maux superflus*) are prohibited under both Article 35(2) API and Article 24(e) of the Hague Conventions IV. This rule has become customary over time and is present in most treaties dealing with weapons law.

Before any analytical application of the principles can be made, it must be made clear that AWS are not like other weapons. The fundamental difference between conventional weapons and AWS are the independent nature of performance, especially in the targeting decision. Moreover, the concept of AWS are to delegate the decision to use a weapon to a system that runs on AI. The difference is clear in terms of the impact and the damage that could be caused by using weapons to delegating the use of weapons to an autonomous system. From this standpoint, it cannot be said that AWS will inevitably cause certain suffering. Moreover, the notion that AWS may cause superfluous injury or unnecessary suffering cannot be accepted in all circumstances, if we take into account that AWS are a system in general.

Upon closer examination, it became clear that independence itself cannot have a direct negative consequence on the effects of use (harmful effects). Of course, there are weapons themselves that have direct effects by causing injury and suffering, therefore, questions arise about fully equipping the regime with such weapons or ammunition. The logical answer is to ban every weapon system that is equipped with munitions or weapons that, by their nature, cause superfluous injury or unnecessary suffering. AWS are not always classified as a system. When AWS are used as a weapon, this is exclusively when we want to differentiate between AWS as a system equipped with weapons or as a weapon itself<sup>[33]</sup>. It considers the possibility of the system causing acts that lead to excessive injury or

<sup>32</sup> Robin M. Coupland, „Review of the Legality of Weapons: a New Approach” *International Review of the Red Cross*, No. 835 (1999): 583.

<sup>33</sup> Liu Hin Yan, „Categorization and Legality of Autonomous and Remote Weapons Systems” *International Review of the Red Cross*, No. 886 (2012): 94.

unnecessary suffering if it is programmed to commit these acts. In this case, it is excluded to consider the type of ammunition or weapon with which the system is equipped. Such a scenario is unlikely and will not be subject to comparison for every AWS as a weapon system. However, the impact of the legal evaluation will only be on that particular case. Therefore, the legal assessment of AWS as a whole will not be affected. The aforementioned possibilities do not suffice to consider AWS as a whole unlawful in terms of causing unnecessary suffering or excessive injury. AWSs that may be considered in conflict with this principle are subject to specific scenarios that do not apply to the entire category. Therefore, the autonomy feature of AWS does not, in and of itself, cause excess injury or needless suffering.

Ultimately, the level of human oversight required over crucial functions must be adequate to guarantee that the harm from using the AWS does not surpass the anticipated military benefit. The assessment of this requirement relies on the type of ammunition utilized by the weapon system in question; thus, the fact that the actual deployment of force is orchestrated through an AI-driven process does not seem to be the determining factor.

#### 4.1.2. AWS and the Indiscriminate Weapons

Regarding the potential targeting of a military objective by an AWS, as mandated by Article 51(4)(b) of the API, it is necessary to clarify that the present technology forming the foundation of the AWS, along with anticipate technological advancements, indicates that current or near-future systems are improbable to distinguish in situations involving anti-personnel application of force effectively<sup>[34]</sup>.

Nevertheless, it would be unreasonable to overlook the potential for future advancements in the capacity of AI to distinguish between various types of objects. In addition, the development and deployment of indiscriminate AWS appear improbable, given their limited military utility<sup>[35]</sup>. Furthermore, beyond applications involving anti-personnel measures, operational systems could be considered predecessors to AWS or basic

<sup>34</sup> Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, (Directorate-General for External Policies, European Parliament, 2013), 28.

<sup>35</sup> Christopher Toscano, „«Friends of Humans»: An Argument for Developing Autonomous Weapons Systems” *Journal of National Security Law & Policy*, No. 1 (2015): 189, 206.

versions of AWS<sup>[36]</sup>. These systems can distinguish between various signs, exemplified by some of the antiarmor missiles' capacity to discern between different vehicle types<sup>[37]</sup>. It has been argued that with the advancement of new technologies, AWS can exceed the current human capacities to uphold the distinction principle<sup>[38]</sup>. Whether this assertion materializes depends on the trajectory of technological development and the specific technology integrated into the AWS. The configuration of an AWS, particularly concerning sensor technology and system intelligence, will significantly influence its capacity for distinction, as autonomy alone does not always guarantee this capability.

Nevertheless, the scenario where an AWS are unable to distinguish between civilians and combatants does not inevitably preclude its potential to be directed at a military objective under any circumstances. There remains the possibility that such AWS could still be utilized if measures are taken to minimize the possibility of encountering non-combatants during their deployment. Such mitigation may include restricting their use to certain environments<sup>[39]</sup>.

An alternative approach to implementing such precautions involves setting specific task parameters, such as selecting the operational area or regulating the degree of force employed by the AWS. In this aspect, AWS can be likened to indiscriminate weapons, as they may produce indiscriminate outputs but are not in every scenario; their impact depends on the context of their deployment. Adhering to these precautions would enable the deployment of AWS while upholding the distinction principle, even if they lack this capability. It should be noted that AWS could be used in a discriminatory manner by programming specific legitimate goals for the system to achieve, effectively directing its focus to those goals.

When examining the issue of unmanageable outputs, as stipulated in Article 51(4)(c) of the API, there seems to be nothing inherent in the autonomy of the killing decision that could be debated to result in unsupervised outputs as envisioned by this provision. It is essential to distinguish

<sup>36</sup> Rebecca Crootof, „The Killer Robots Are Here: Legal and Policy Implications” *Cardozo Law Review*, No. 36 (2015): 1837, 1842-1843.

<sup>37</sup> Brian Handy, *Royal Air Force Aircraft & Weapons (DCC(RAF))* (Publications Belmont Press, 2007), 87; Crootof, „The Killer Robots Are Here”, 1870-1871.

<sup>38</sup> Shane Reeves, William Johnson, „Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?” *The Army Lawyer*, (2014): 25, 26.

<sup>39</sup> George R. Lucas Jr., „Automated Warfare” *Stanford Law & Policy Review*, 25 (2014): 317.

between unmanageable outputs stemming from an AWS and the common direction that an AWS should be categorized as unmanageable. The notion of unmanageability concerning AWS differs from what is under Article 51(4)(c) of API. When discussing AWS, unmanageability refers to the inability of someone to directly control the actions of the system once it has been deployed. Typically, autonomy in this context refers to the precise actions of a system that are unsupervised.

This implies that the unmanageability of AWS does not suggest that the system is prone to indiscriminately targeting both combatants and civilians, as it can only operate within the limits of its programming and functioning standards and, in many instances, can likely be deactivated<sup>[40]</sup>. Therefore, unless AWS are equipped with a weapon that produces unmanageable outputs, such as prohibited weapons, it does not appear that an AWS would entail unmanageable outputs<sup>[41]</sup>.

One could argue that Cyber Attacks could be entirely unsupervised, as evidence suggests that the spread of infection by these attacks cannot always be managed as presented by Article 51(4)(c) of the API<sup>[42]</sup>. A notable instance of such a scenario was the Stuxnet worm, which spread unsupervised and indiscriminately. However, this example demonstrates that payload delivery was controlled despite the worm's unsupervised spread, targeting only its intended destination. This indicates that while the system might be uncontrolled, its outputs were controllable<sup>[43]</sup>. Moreover, it illustrates that with proper programming and task stipulations, AWS could be utilized while adhering to fundamental principles.

Therefore, in determining whether an AWS should be inherently classified as indiscriminate, it is crucial to understand that nothing is inherent in the autonomy of the killing decision that would categorize these weapon systems as indiscriminate. Instead, this designation relies on different attributes of the system. Consequently, specific AWS could potentially be

---

<sup>40</sup> Christopher Toscano, „Friends of Humans», 189. P 208.

<sup>41</sup> Jeffrey S. Thurnher, „Means and Methods of the Future: Autonomous Systems”, [in:] Targeting: the Challenges of Modern Warfare (The Hague: TMC Asser Press, 2015), 186-187.

<sup>42</sup> Ahmad Khalil, S. Anandha Krishna Raj, „Challenges to the Principle of Distinction in Cyber Warfare Navigating International Humanitarian Law Compliance” *Prawo i Więz* 49, No. 2 (2024): 109-131.

<sup>43</sup> Dinniss Heather Harrison, *Cyber Warfare and the Laws of War* (Cambridge: Cambridge University Press, 2012) 255, n 41 159.

inherently indiscriminate; nevertheless, this trait will not be a common factor of the AWS as a category; thus, not all of them could be banned.

#### 4.1.3. AWS and the Provision of „Legal Review of Weapons”

Article 36 of API establishes a crucial responsibility regarding weapons law under IHL. This obligation pertains to conducting a legal assessment of new weapons, methods, and means of warfare<sup>[44]</sup>. This assessment aims to ensure that the development, acquisition, or adoption of such weaponry aligns with the principles of IHL. Article 36 was introduced as a mechanism to tackle the challenges presented by technological advancements.

Reviewing AWS must consider the inherent features of these weapon systems. Conventional review procedures may prove insufficient in dealing with AWS owing the intricate nature and opacity of algorithms governing autonomy. Therefore, tailored measures, such as specialized software tools, have been proposed to verify the system's adherence to regulations and continuously evaluate testing and training performance<sup>[45]</sup>. While acknowledging that Article 36 reviews extend to AWS, it is essential to adapt these reviews to suit the specific characteristics of such systems.

Upon closer examination, Article 36 did not address the application of force against individuals. Rather, it mandates the establishment of national mechanisms that facilitate the testing of new weapons, following the rules and principles of IHL and other relevant international norms. Thus, when developing AWS, nations must guarantee that these emerging weapons adhere to the established regulations of weapons law, encompassing targeting law, and also comply with the rules and principles of the International Human Rights Law (IHRL) aimed at safeguarding the dignity and rights of individuals<sup>[46]</sup>. Crucially, Article 36 mandates that new weapons should be assessed against principles such as humanity. In addressing prohibitions and limitations grounded in customary and conventional weapons law, the ICRC's Guide finalizes with a brief section reserved for „Prohibitions or restrictions should adhere to principles of humanity and the dictates of public

<sup>44</sup> Additional Protocol I (API) 1977 to the Geneva Conventions 1949.

<sup>45</sup> Alec Tattersall, Damian Copeland, *Reviewing autonomous cyber capabilities* (2021), 205-257.

<sup>46</sup> David A. Ruth, Paul Nielsen, „Defense Science Board Summer Study on Autonomy (Washington: Defense Technical Information Center, 2016).

conscience” – the Martens Clause<sup>[47]</sup>. As per the humanitarian establishment, the principle of humanity, as delineated in the Martens Clause, can be used to declare a weapon illegal. Hence, if (AWS) were judged to violate these „principles of humanity and dictates of public conscience”, they would fail to meet the criteria of the legal review stipulated in Article 36 of API.

Nevertheless, the constraints and deficiencies arising from the review process are primarily contingent on how those assessments are carried out rather than on the specific technology being evaluated. In any case, AWS must undergo evaluation against the broader scope of IHL, encompassing regulations of weapons law, targeting law, and principles.

## 4.2. Targeting law

Moving to address the second aspect of regulations within IHL, which pertains to the appropriate use of force against individuals, known as targeting law. This body of regulation specifically deals with the lawful utilization of (legitimate) weapons in attacks. It emphasizes not the weapon itself but rather its wielder. Targeting law shares a common humanitarian principle with weapons law in that the parties involved in a conflict do not possess unlimited rights to attack each other. Therefore, it can be argued that both branches of IHL exhibit humanitarian characteristic as a fundamental feature. In this regard, we must initially refer to Article 48 of the API, that encloses the principle of distinction. According to this principle, parties engaged in a conflict must distinguish between protected individuals and combatants, as well as between civilian objects and military targets. It is mandatory to direct military operations against the latter only and is universally recognized as reflecting customary law, in particular, Rule 1<sup>[48]</sup>.

The distinction between weapons law and targeting law centres on who is protected: while weapons law focuses on combatants, targeting law confirms that force is directed only towards acceptable targets, thus safeguarding civilians from injury. Targeting law standards foist the rights and obligations of parties involved in a conflict when preparing and executing an „attack”. According to Article 49(1) of API, an „attack” refers to „acts

<sup>47</sup> „A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977, January 2006” IRRC, No. 864 (2006): 933.

<sup>48</sup> Customary International Humanitarian Law.

of violence against the adversary, whether in offense or defence". Hence, it is unanimous that AWS attacks fall under these norms. A vital issue to address is determining when an attack using AWS begins and its duration. One viewpoint suggests that an attack starts when the AWS select a target (narrow view). At the same time, another argues that it begins when AWS are activated (broad view). As the definition of „attack” affects the applicability of IHL rules, the latter view is preferable<sup>[49]</sup>.

The current patterns observed at the CCW support the idea that humans and AWS will collaborate on the battlefield. Guiding Principle (c) acknowledges the crucial role of human-machine interaction, which can manifest in diverse ways and at different stages of the operational process. While a detailed discussion of this topic is beyond the scope of this discussion, it is important to note that these trends indicate that AWS, as a complete substitute for humans in combat, would be tricky. This underscores the significance of targeting law in evaluating whether such AWS can be utilized in compliance with IHL rules. Now, let us shift our focus to the primary norms within targeting law, which include the prohibition of indiscriminate attacks and the obligation to take precautions in an attack.

#### 4.2.1 Deploying AWS and the Protection Against Indiscriminate Attacks

Derived from the principle of distinction, regulations against indiscriminate attacks establish a distinction between permitted and prohibited targets. The civilian population and individual civilians are not legitimate targets during conflicts. This prohibition, outlined in Article 51(2) of API and 13(2) of APII, is supplemented by more exhaustive rules constraining parties involved in a conflict.

Moreover, it is important to emphasize that the prohibition of indiscriminate attacks is of great importance within the framework of the targeting law. The most important rules consistent with the context of AWS deployment fall into two categories. First, the principle of discrimination contains many rules that are important in classifying individuals when launching an attack, those whose targeting is legal and those whose

---

<sup>49</sup> Vincent Boulanin, Neil Davison, Netta Goussac, Moa Peldán Carlsson, *Limits on Autonomy in Weapon Systems: Identifying Practical elements of Human Control* (2020).

targeting is illegal. Second, proportionality is a principle that balances expected and actual military advantages and reduces collateral damage.

#### 4.2.1.1. AWS AND THE PRINCIPLE OF DISTINCTION

First, the rule against indiscriminate attacks mandates that the involved party in a conflict abstain from employing tactics that lack discrimination. These tactics encompass warfare methods aimed at protecting individuals or objects, thereby starkly contravening the standards mentioned earlier. This rule is succinctly articulated in Article 51(4)(a) of the API, which explicitly prohibits indiscriminate attacks as those not aimed at a distinct military target, a rule widely recognized as customary.

This rule complements the one against indiscriminate weapons, concurrently, they constitute a set of rules representing the core principle of distinction outlined in Article 48 of API. According to this fundamental rule, parties engaged in a conflict must always distinguish between civilians and combatants, as well as between civilian objects and military targets, leading their actions solely towards the latter. Articles 51(2) and 52(1) elaborate on this principle.

The primary challenge faced by a commander when opting to deploy AWS are ensuring that attacks conducted through them are aimed solely at legitimate targets. A key concern commonly linked with remote warfare is that the likelihood of misidentifying targets escalates due to the separation of humans from the battlefield and the reliance on automated or autonomous systems for crucial functions<sup>[50]</sup>. To mitigate and eliminate these risks, AWS must be able to assess the status of individual targets before initiating engagement. However, depending on the circumstances, an autonomous system may have difficulty making such assessments accurately.

According to Article 52(2) of API, the classification of „military objectives” encompasses „objects that, due to their nature, location, purpose, or utility, contribute significantly to military activities, and whose complete or partial destruction, capture, or neutralization, in the prevailing circumstances, provides a clear military advantage”<sup>[51]</sup>.

---

<sup>50</sup> Emily Crawford, „The Principle of Distinction and Remote Warfare”, [in:] *Research Handbook on Remote Warfare* (Cheltenham: Edward Elgar Publishing, 2017), 50-78.

<sup>51</sup> Horace B. Robertson, „The Principle of the Military Objective in the Law of Armed Conflict”, [in:] *The Development and Principles of International Humanitarian Law* (London: Routledge, 2017), 531-557.

Although identifying a military target based on its „essence” might appear straightforward, AWS will require qualified sensors to distinguish a military vehicle from a civilian one<sup>[52]</sup>. Parameters such as „purpose” or „emploi” pose greater challenges for assessment, inevitably necessitating a context-dependent evaluation. The ICRC’s Commentary describes the notion of „purpose” as the planned utilization of an object, while the notion of „use” pertains to its current role. It must be pointed out that the concept of concrete military advantage has been subject to many interpretations, but raising such an issue results in a loss of protection for civilians and civilian objects<sup>[53]</sup>.

To comply with these rules, AWS must have algorithms that can process vast amounts of time-sensitive data. In addition, determining the military value of a target requires an assessment of the immediate military advantage to be gained from an attack, which is another challenge for algorithms<sup>[54]</sup>. Consequently, some suggest deploying AWS solely in structured, simplified environments, where algorithms can reliably make exact time assessments<sup>[55]</sup>. In international armed conflicts (IAC), identifying combatants on the battlefield can be challenging because IHL does not mandate a specific uniform for regular forces, only requiring irregular forces to carry their weapons openly.

It is important to navigate the extent of human control required over AWS in adhering to the rule against indiscriminate attacks, particularly when these machines undertake crucial roles on the battlefield. A common argument questions the compatibility of AWS with targeting laws, suggesting that the subjective and context-dependent nature of categorizing individuals clashes with algorithmic systems, making it challenging to employ AWS in an IHL-compliant manner. However, this argument presents a technological constraint against AWS, which may change with future advancements. For instance, developments in deep-learning algorithms could enable AWS to differentiate between permissible and non-permissible

<sup>52</sup> Markus Wagner, „Autonomy in the Battlespace: Independently Operating Weapon Systems and the Law of Armed Conflict”, [in:] *International Humanitarian Law and the Changing Technology of War* (Leiden: Brill Nijhoff, 2013), 99-122.

<sup>53</sup> Michael N. Schmitt, „Targeting and Humanitarian Law: Current Issues” *Israel Yearbook on Human Rights*, Vol. XXXIV (2004): 59-104.

<sup>54</sup> Wagner, „Autonomy in the battlespace”, 99-122.

<sup>55</sup> Matthias Brenneke, „Lethal Autonomous Weapon Systems and their Compatibility with International Humanitarian Law: a Primer on the Debate” *Yearbook of International Humanitarian Law*, Vol. XXI (2020): 59-98.

targets. Therefore, if algorithmic systems can ensure the proper categorization of individuals, it implies compliance with rules against indiscriminate attacks. The recent United Nations General Assembly Resolution on AI assured this. Although the resolution is not aimed at the military sector, it confirms that the development of reliable AI should keep pace with the urgent need to reach a global consensus on safe, secure, and trustworthy AI systems<sup>[56]</sup>.

In combat situations, one of the challenges for AWS will be identifying when a combatant surrenders and thus gain protected status. Once surrendered, the individual cannot be targeted. AWS must be equipped to recognize and acknowledge surrender, requiring suitable sensors and algorithms to accurately detect and interpret human behavior. While some authors have highlighted the technological difficulties in these situations, this does not warrant a complete ban on AWS<sup>[57]</sup>.

While it is plausible to argue that AWS do not violate the rule against indiscriminate attacks when human operators are not directly involved in target selection and engagement, the crucial aspect is determining the level of „human control” required over vital functions. At its core, AWS must be able to „classify” targets to ensure proper discrimination. While autonomous systems excel in „observing” and „recognizing” potential targets, the decision to use lethal force is more uncertain and may necessitate human intervention. Therefore, human operators may retain control to intervene, when necessary, especially in situations where categorizing a specific individual is uncertain.

In situations of uncertainty regarding status, targeting law mandates parties to a conflict to assume that the individual is civilian. This principle aligns with customary law, emphasizing the need to refrain from automatically attacking anyone who appears dubious. Applied to AWS, this principle prohibits autonomous systems from attacking when there is doubt about an individual’s status. In such cases, human operators are required to intervene. However, humans do not need to intervene every time doubt arises regarding the permissibility of a target. This may be suitable initially, but as autonomous systems become more advanced, they may handle doubt effectively. For instance, it is suggested that AWS should convert doubts into a measurable probability, classifying individuals below a certain threshold

---

<sup>56</sup> UN General Assembly resolution on AI, document A/78/L.49, 21 March 2024.

<sup>57</sup> Robert Sparrow, „Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender” *International Law Studies*, No. 1 (2015): 20.

as civilians<sup>[58]</sup>. If the AWS operate comparably to a reasonable human in the same situation, they comply with the doubtful rule.

The conclusion we arrived at can be summarized that, the absence of human intervention in target selection and engagement does not inherently violate the principles of distinction, provided that AI techniques integrated into AWS enable accurate categorization of human targets.

#### 4.2.1.2 AWS AND THE RULES OF THE PRINCIPLE OF PROPORTIONALITY

Another set of rules that require human oversight of AWS is derived from the principle of proportionality. The prohibition against direct attacks on civilians does not mean that civilians cannot be targeted under any circumstances. The principle of proportionality states that when strategizing and conducting an attack, the anticipated military advantages must be weighed against the expected civilian harm, often known as „collateral damage”. Essentially, civilian harm is not automatically forbidden; it only becomes unacceptable when disproportionate<sup>[59]</sup>.

This introduces an additional level of notional complexity: not only will parties engaged in a conflict need to utilize methods and strategies to classify targets accurately, but they will also have to evaluate the potential military advantages of executing a specific attack and compare it with the anticipated collateral damage. Nevertheless, in warfare, collateral damage is inevitable; it is impossible to envision warfare without it<sup>[60]</sup>.

Article 51(5)(b) states that an attack is considered „indiscriminate” when the unintended harm to civilians or their objects exceeds the anticipated military advantage. If this occurs, according to Article 57(2)(b), the attack must be halted or aborted. While such rules are not explicitly stated in the APII, they are generally accepted as applicable to non-international armed conflicts (NIAC) on the basis of humanitarian principles or as custom.

At the functioning stage, achieving equilibrium consisting of the principle of proportionality entails a thorough three-phase analysis beforehand: (1) estimating potential collateral damage, (2) evaluating military

<sup>58</sup> Joshua G. Hughes, „The Law of Armed Conflict Issues Created by Programming Automatic Target Recognition Systems Using Deep Learning Methods” *Yearbook of International Humanitarian Law*, Vol. XXI (2018): 99-135.

<sup>59</sup> Gregor Noll, „Analogy at War: Proportionality, Equality and the Law of Targeting” *Netherlands Yearbook of International Law*, 43 (2012): 205-230.

<sup>60</sup> Yoram Dinstein, *Discussion: Reasonable Military Commanders and Reasonable Civilians. Legal and Ethical Lessons of NATO’s Kosovo Campaign* (Newport: Naval War College, 2002).

advantages, and (3) discerning any excessiveness<sup>[61]</sup>. In the initial step, proportionality mandates assigning significance to the expected collateral damage, which varies depending on the characteristics of the target, for instance, the presence of vulnerable individuals and the severity of the harm, where injuries are typically considered less severe than loss of life.

In assessing military advantages, a major concern centers on the complex issue of self-protection, which is especially pertinent to AWS. A scenario where no personnel are harmed in an attack, such as the matter with an AWS, appears inherently advantageous from a military standpoint. However, suggesting that an attacker with superior weaponry can obliterate the enemy and view civilian casualties as collateral damage is morally repugnant. To prevent such a scenario, it is strongly recommended that the safety of the attacking forces not be factored into the calculation of the military advantage.

The final phase, assessing excessiveness, stands out as particularly intriguing. Proportionality-based regulations necessitate balancing conflicting weights: military advantage and collateral damage. There is been speculation about whether these capabilities could be translated into algorithms and, more broadly, whether the assessment of proportionality could be delegated entirely to AWS<sup>[62]</sup>.

Matching these interests poses a challenging duty for humans themselves. Balancing involves naturally unique and context-dependent evaluations based on reasonableness and excessiveness, which adhere to a standard akin to a well-informed individual<sup>[63]</sup>. However, this does not imply that such standards are arbitrary, as they are ultimately based on the beliefs and knowledge of the agent involved.

Due to the complexity of this equilibrium, it is argued that algorithmic techniques are structurally insufficient to meet that criterion<sup>[64]</sup>. Accordingly, some propose a ban on AWS, while others suggest that AWS can adhere to proportionality rules with proper adjustments in human supervision<sup>[65]</sup>. Major military powers globally have funded AI systems capable of estimating collateral damage using matter-of-fact norms, which

---

<sup>61</sup> Petra Rešlová, *Meaningful Human Control in Autonomous Weapons* (2023).

<sup>62</sup> Jeroen Van Den Boogaard, „Proportionality and Autonomous Weapons Systems” *Journal of International Humanitarian Legal Studies*, No. 2 (2015): 247–283.

<sup>63</sup> Enzo Cannizzaro, *Proportionality in the Law of Armed Conflict* (2014).

<sup>64</sup> Michael N. Schmitt, „Autonomous Weapon Systems and International Humanitarian Law: a Reply to the Critics” *Harvard National Security Journal Feature* (2012).

<sup>65</sup> Supra not (6).

can be rephrased as algorithmic vocabulary<sup>[66]</sup>. Nevertheless, these systems have been criticized for not being able to translate moral considerations into algorithmic codes, such as feelings and reason.

If the result is reasonably consistent with a conjectural human agent, full compliance with the relevant rules is achieved. Furthermore, in IHL, the benchmark ensuring reasonableness through the ability to understand and justify the actions of AWS, which is crucial<sup>[67]</sup>. It is essential to recognize that proportionality rules present challenging missions to military personnel, requiring them to balance military necessities with human values. This complexity makes it inappropriate to embody proportionality rules in the algorithms. However, it is important to note that future advancements may lead to the development and deployment of AWS that operate in accordance with proportionality constraints.

#### 4.2.2. AWS and the Precautionary Principle

The stipulation embedding the obligation to exercise precaution in attacks, as outlined in Article 57 of the API, commences with a fundamental principle mandating the application of „continuous supervision” in safeguarding civilians and civilian objects. The term „continuous” implies an enduring commitment, and the expansive interpretation of „military process” reaffirms that this obligation remains incumbent upon parties involved in a conflict throughout its duration. Regarding restrictions concerning indiscriminate attacks, precautionary measures also hinge upon contextual evaluations and are aligned with a measure of properness.

Additionally, there exist regulations mandating the selection of means and methods of warfare aimed at mitigating or averting collateral damage, alongside the choosing of targets anticipated to pose the least risk of collateral harm. Furthermore, precautionary principles necessitate parties to a conflict to abstain from initiating attacks and to halt or annul ongoing attacks when it becomes evident that they cannot adhere to the principles of distinction and proportionality. Finally, when attacks are anticipated

---

<sup>66</sup> Jeffrey S. Thurnher, „Feasible Precautions in Attack and Autonomous Weapons”, [in:] *Dehumanization of Warfare: Legal Implications of New Weapon Technologies* (Berlin-Heidelberg: Springer Verlag, 2018), 99–117.

<sup>67</sup> Michael N. Schmitt, Jeffrey S. Thurnher, „Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict” *Harvard National Security Journal*, 4 (2012): 231.

to impact the civilian populace, parties must provide „effective warning” whenever feasible to reduce civilians’ openness to preventable harm.

Taken collectively, these rules operationalize most laws pertaining to weapons and targeting, as discussed earlier. The utilization of AWS in armed conflicts is anticipated to pose significant challenges for parties opting to employ them. Miscellaneous suggestions have been made concerning executing precautionary measures when specific crucial functions are delegated to unsupervised autonomous systems operating. To achieve the precautions’ objective, it is imperative that human operators consistently observe and deactivate any AWS instances that exhibit unauthorized behaviour<sup>[68]</sup>. Leaving a „kill button” for AWS, a fail-safe measure against clear violations of admissible conduct by AWS, presents developers with technological hurdles, such as mitigating threats of spoofing or hacking. Nevertheless, maintaining human oversight in line with the fundamental precautionary principle remains critical<sup>[69]</sup>.

A perspective has been put forward likening AWS to „fire-and-forget” projectiles, which cannot be recalled once launched and do not raise concerns about compatibility with IHL if human operators cannot recall them post-deployment. However, this conceit’s applicability for AWS depends heavily on the operational environment and the system’s intended targets. While it may hold in military settings, environments with civilian presence may necessitate human intervention, possibly by an override mechanism or operator regular check-in<sup>[70]</sup>. Given these characteristics, it is evident that adherence to precautionary measures in targeting mandates a level of human control over AWS to make instructed decisions on their deployment. Commanders must comprehend the capacities of AWS in a given context and take necessary precautions<sup>[71]</sup>.

Nevertheless, systems that facilitate improved collaboration between humans and machines may prove pivotal. Therefore, the opinion that some decisions regarding target selection and engagement could be made

---

<sup>68</sup> Kjølv Egeland, „Lethal Autonomous Weapon Systems Under International Humanitarian Law” *Nordic Journal of International Law*, No. 2 (2016): 89-118.

<sup>69</sup> Henderson, Keane, Liddy, „Remote and Autonomous Warfare Systems”, 335-370.

<sup>70</sup> Maziar Homayounnejad, „Ensuring Fully Autonomous Weapons Systems Comply with the Rule of Distinction in Attack”, [in:] *Drones and Other Unmanned Weapons Systems under International Law* (Leiden: Brill Nijhoff, 2018), 123-157.

<sup>71</sup> Marco Sassoli, „Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified” *International Law Studies*, No. 1 (2014): 1.

unsupervised humans is not vigorous; precautionary actions can be established to meet IHL requirements regardless of human intervention in crucial decision-making processes.

#### 4.2.3. The Martens Clause: A Controversial Perspective on AWS

The assessment of emerging technology by the principle of humanity within the framework of IHL incontrovertibly carries influential weight. The legal importance, or authoritative mandate, of this principle is broadly discussed in IHL circles owing to its notional conjectural nature and functional ramifications. It is pleaded that the Martens Clause in IHL operates akin to Article 38 of the Statute of the ICJ, which delineates the origins of the legal framework<sup>[72]</sup>. Nevertheless, a constant controversy exists concerning the legal potency of the principle of humanity, as mentioned in the Martens Clause, from different doctrinal and jurisprudential viewpoints.

Some argue that the principle of humanity lacks autonomous, legally binding effects and cannot prohibit specific weapons or methods of warfare on its own. This view is supported by the observation that no weapon has been declared illegal based solely on the Martens Clause<sup>[73]</sup>. Instead, domestic and international case law tend to use the clause to confirm existing legal solutions, offer new interpretations, or reject arguments. However, this stance risks rendering the clause redundant, merely reiterating existing norms. While the clause explicitly refers to established custom<sup>[74]</sup>, its mention of „principles of humanity and dictates of public conscience” suggests consideration of other sources of law, prompting alternative interpretations. Another group of interpreters contends that the Martens Clause influences the sources of international law, with some advocating a more significant role for natural law<sup>[75]</sup>. They argue that the clause operates beyond positive law, embodying moral imperatives with

<sup>72</sup> Jeroen C. van den Boogaard, „Fighting by the Principles: Principles as a Source of International Humanitarian Law”, [in:] Mariëlle Matthee, Brigit Toebees, Marcel Bru, *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (The Hague: Springer, 2013), 3-31.

<sup>73</sup> Elena Carpanelli, „General Principles of International Law: Struggling with a Slippery Concept”, [in:] *General Principles of Law-The Role of the Judiciary* (Cham: Springer International Publishing, 2015), 125-143.

<sup>74</sup> Georges Abi-Saab, *The Specificities of Humanitarian Law* (1984).

<sup>75</sup> Antonio Cassese, „The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, [in:] *The Development and Principles of International Humanitarian Law* (London: Routledge, 2017), 373-402.

---

a binding force. Some ICJ judges have implicitly or explicitly invoked extra-positive law to support their positions. This perspective underscores the close connection between IHL and extra-positive values<sup>[76]</sup>.

However, questions remain about the inconsistent binding effect of legal sources, such as the principle of humanity. It remains uncertain whether the principle should be considered a binding source, without a middle ground. Transitioning to the specific realm of AWS, the principle of humanity assumes heightened significance. As technological advancements reshape the nature of warfare, ethical considerations surrounding the deployment of autonomous systems have become increasingly prominent. The Martens Clause, with its emphasis on humanitarian values, provides a framework for evaluating AWS deployment's ethical and legal implications.

Due to its compelling moral foundation, the principle of humanity is a significant argument for NGOs that oppose AWS<sup>[77]</sup>. Human Rights Watch, for instance, frequently cites this principle in its reports, using it as a basis to challenge the legality of AWS. While there is no unanimous agreement among experts and the general public regarding the acceptability of autonomous killing, a considerable number find the concept deeply troubling and unacceptable. States are urged to consider these perspectives when assessing dictates of public conscience.

The ICRC also emphasizes the significance of the „principles of humanity” and „dictates of public conscience”, viewing them as inherently linked to morality and distinct from positive law<sup>[78]</sup>. However, the ICRC does not offer clear arguments regarding the normative status of these principles. Nonetheless, AWS raise ethical concerns that require translation into legal terms; failure to do so could imply permissibility under IHL<sup>[79]</sup>. Some authors advocate for a normative role for the principle of humanity, arguing that discussions on legal and moral standards for killing cannot

---

<sup>76</sup> Hilly Moodrick-Even Khen, „Aidōs and Dikē in International Humanitarian Law: Is IHL a Legal or a Moral System?” *The Monist*, No. 1 (2016): 26-39.

<sup>77</sup> Amanda Sharkey, „Autonomous Weapons Systems, Killer Robots and Human Dignity” *Ethics and Information Technology*, No. 2 (2019): 75-87.

<sup>78</sup> Jérémie Labbé, Pascal Daudin, „Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross” *International Review of the Red Cross*, No. 897-898 (2015): 183-210.

<sup>79</sup> Schmitt, Thurnher, „Out of the Loop”, 231.

overlook essential human qualities, such as conscience, common sense, and intuition, which cannot be programmed into machines<sup>[80]</sup>.

In this context, the principle of humanity requires careful consideration of the potential humanitarian consequences of autonomous weapons. It advocates a balanced approach that considers military necessity and ethical concerns. This underscores the imperative for human responsibility in decision-making processes, ensuring accountability and compliance with fundamental principles of humanity and the dictates of public conscience.

In essence, general principles similar to those in IHRL can be identified in IHL. Humanity, as a core value, can be regarded as a general principle of IHL, allowing for its application in cases where existing IHL rules, such as AWS, may fall short.

By integrating the principle of humanity into discussions on AWS, policymakers, and legal experts can navigate the intricate ethical and legal challenges posed by emerging technologies. This approach ensures that advancements in warfare remain aligned with the overarching goal of preserving human dignity and minimizing the cost of armed conflict, following established international legal principles and humanitarianism.

In summary, the principle of humanity provides a strong legal foundation for asserting that delegating critical functions to machines, with human operators having minimal to no power to intervene, is unacceptable. However, state and non-state actors often invoke the Martens Clause more as a tool to influence future lawmaking than as a strictly legal imperative. While some view it primarily as a moral guideline, others seek to ensure that the development and deployment of AWS align with IHL rules. In cases where „human control” is maintained, and human operators can understand and explain the actions of AWS in compliance with IHL, the use of AWS are deemed permissible. However, in both scenarios, the significance of the principle of human dignity was greatly underestimated.

---

<sup>80</sup> Mary Ellen O'Connell, „Banning Autonomous Killing: The Legal and Ethical Requirement that Humans Make Near-time Lethal Decisions”, [in:] *The American Way of Bombing: How Legal and Ethical Norms Change* (Cornell: Cornell university Press, 2014): 224-236.

## 5 | Conclusion

The evolving landscape of warfare, driven by new tactics, geopolitical shifts, and technological advances, necessitates a legal debate to regulate emerging combat technologies, such as AWS. The concept of autonomy in weapon systems further complicates the debate, with definitions and distinctions between automatic and autonomous systems remaining ambiguous. The development of AWS is progressing globally, with various countries investing in advanced systems for military applications. The capacity of technology to detect human emotions raises additional legal and ethical concerns, yet some argue that appropriate control procedures can ensure AWS compliance with international law. Given these complexities, a comprehensive legal analysis of AWS from the perspective of weapons law and targeting law is necessary to navigate the ethical and legal implications effectively. Such an analysis will contribute to shaping responsible governance frameworks and ensuring the adherence of AWS to international humanitarian principles.

The legal examination of the development and use of AWS has revealed the complexity of evaluating these technologies under IHL. Two aspects have been studied to assess legality of AWS: weapons law and targeting law. Weapons' law, governed by the IHL, evaluates weapons' lawfulness and inherent characteristics. Article 35 of the API prohibits weapons from causing superfluous injury or unnecessary suffering, establishing the legality criteria for AWS. Although AWS's autonomy introduces complexity, it does not inherently render them unlawful, because their impact depends on specific scenarios and programming.

Regarding the targeting law, the AWS must distinguish between military objectives and civilian targets, as mandated by Article 51(4)(b) of the API. Current technological limitations may challenge AWS's ability to distinguish themselves effectively in certain scenarios, but potential advancements could improve their capability. Additionally, AWS must undergo a legal review process, as outlined in Article 36 of API, to ensure compliance with IHL principles, including humanity.

While challenges exist in evaluating AWS's adherence to IHL, tailored review processes and continuous assessments can help address these complexities.

The principle of humanity, enshrined in the Martens Clause, plays a pivotal role in evaluating the ethical and legal implications of deploying AWS within the framework of IHL. While the Martens Clause is often invoked

more as a tool to influence future law-making than as a strict legal imperative, it underscores the imperative for human responsibility in decision-making processes regarding AWS.

Consequently, AWS must adhere to IHL rules, with human control maintained to intervene when necessary, and operators must be able to understand and explain AWS actions in compliance with IHL. However, regardless of the specific legal interpretations and applications, the significance of upholding human dignity remains paramount in discussions surrounding the development and deployment of AWS.

Finally, it is mandatory to Promote Transparency and Accountability; mechanisms for transparency and accountability must be established to ensure that the use of AWS is conducted responsibly and ethically. This includes robust monitoring, reporting, review processes, and mechanisms for addressing violations of IHL and ethical standards.

## Bibliography

- A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977, January 2006" *IRRC*, No. 864 (2006).
- Abi-Saab Georges, *The Specificities of Humanitarian Law* (1984).
- Anderson Kenneth, Reisner Daniel, Waxman Matthew C., „Adapting the Law of Armed Conflict to Autonomous Weapon Systems” *International Law Studies*, (2014): 386-411.
- Asaro Peter, „Jus Nascendi. Robotic Weapons and the Martens Clause”, [in:] *Robot Law*, ed. Michael A. Froomkin, Ryan Calo, Ian Kerr, Edward Elgar. 367-386. Cheltenham, 2016. <https://doi.org/10.4337/9781783476732.00024>.
- Azaria Asaph, Asma Ghandeharioun, Akane Sano, Rosalind Picard, Natasha Jaques, Sara Taylor, *Predicting Students' Happiness from Physiology, Phone, Mobility, and Behavioral Data*. International Conference on Affective Computing and Intelligent Interaction and workshops: [proceedings]. ACII (Conference), September 2015. <https://pubmed.ncbi.nlm.nih.gov/28515966/>.
- Bitar Mohammad Chakka Benarji, „Drone Attacks During Armed Conflict: Quest for Legality and Regulation” *International Journal of Intellectual Property Management*, No. ¾ (2023): 97-411.

- Boulanin Vincent, Neil Davison, Netta Goussac, Moa Peldán Carlsson, *Limits on Autonomy in Weapon Systems: Identifying Practical elements of Human Control.* 2020.
- Brenneke Matthias, „Lethal Autonomous Weapon Systems and their Compatibility with International Humanitarian Law: a Primer on the Debate” *Yearbook of International Humanitarian Law*, Vol. XXI (2020): 59-98.
- Cannizzaro Enzo, *Proportionality in the Law of Armed Conflict.* 2014.
- Carpanelli Elena, „General Principles of International Law: Struggling with a Slippery Concept”, [in:] *General Principles of Law-The Role of the Judiciary.* 125-143. Cham: Springer International Publishing, 2015.
- Cassese Antonio, The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, [in:] *The Development and Principles of International Humanitarian Law.* 373-402. London: Routledge, 2017.
- Choi Charles Q., Mood-Detecting Sensor Could Help Machines Respond to Emotions” *IEEE Spectrum*, 24 June 24 2021. <https://spectrum.ieee.org/mood-detecting-sensor-could-help-machines-respond-to-emotions>.
- Coker Christopher, „On Banning Autonomous Weapon Systems: Human Rights, Automation and the Dehumanization of Lethal Decision Making” *Future Wars*, (2015): 57-60.
- Coupland Robin M., Review of the Legality of Weapons: a New Approach” *International Review of the Red Cross*, No. 835 (1999): 583-592.
- Crawford Emily, „The Principle of Distinction and Remote Warfare”, [in:] *Research Handbook on Remote Warfare.* 50-78. Cheltenham: Edward Elgar Publishing, 2017.
- Crootof Rebecca, „The Killer Robots Are Here: Legal and Policy Implications” *Carodozo Law Review*, No. 5 (2015): 1837-1916.
- Dinniss Heather Harrison, *Cyber Warfare and the Laws of War.* Cambridge: Cambridge University Press, 2012.
- Dinstein Yoram, *Discussion: Reasonable Military Commanders and Reasonable Civilians. Legal and Ethical Lessons of NATO’s Kosovo Campaign.* Newport: Naval War College, 2002.
- Drew James, „USAF’s Small UAS Roadmap Calls for Swarming «kamikaze» Drones” *Flight Global*, 10 December 2019. <https://www.flighthglobal.com/civil-uavs/usafs-small-uas-roadmap-calls-for-swarming-kamikaze-drones/120493.article>.
- Egeland Kjølv, „Lethal Autonomous Weapon Systems Under International Humanitarian Law” *Nordic Journal of International Law*, No. 2 (2016): 89-118.
- Expert Meeting: Autonomous Weapon System: Technological, Military, Legal, and Humanitarian Aspects” ICRC, (2014).
- Ford Christopher M., Autonomous Weapons and International Law” *South Carolina Law Review*, 69 (2017): 413-478.

- Forestier-Walker Robin, „Nagorno-Karabakh: New Weapons for an Old Conflict Spell Danger” *Al Jazeera*, 13 October 2020. <https://www.aljazeera.com/features/2020/10/13/nagorno-karabakh-new-weapons-for-an-old-conflict-spell-danger>.
- Haight Joel M., Vladislav Kecojevic, „Automation vs. human intervention: What is the best fit for the best performance?” *Process Safety Progress*, No. 1 (2005): 45-51.
- Handy Brian, *Royal Air Force Aircraft & Weapons (DCC(RAF))*. Publications Belmont Press, 2007.
- Hardy Michael, „Pentagon Proves Air-Launched UAV Swarm Ability” *C4ISRNet*, 19 August 2022. <https://www.c4isrnet.com/unmanned/uas/2016/03/15/pentagon-proves-air-launched-uav-swarm-ability/>.
- Hayir Nurbanu, „Defining Weapon Systems with Autonomy: The Critical Functions in Theory and Practice” *Groningen Journal of International Law*, No. 2 (2022): 239-265.
- Henderson Ian, Patrick Keane, Joshua Liddy, „Remote and Autonomous Warfare Systems – Precautions in Attack and Individual Accountability”, [in:] *Research Handbook on Remote Warfare*, ed. Jens David Ohlin. Cheltenham: Edward Elgar Press, 2016.
- Hernandez Joe, „A Military Drone with a Mind of Its Own Was Used in Combat, U.N. Says” *NPR*, 1 June 2021. <https://www.npr.org/2021/06/01/1002196245/a-u-n-report-suggests-libya-saw-the-first-battlefield-killing-by-an-autonomous-d>.
- Heyns Christof, „Extrajudicial, Summary or Arbitrary Executions” *Security Issues in the Greater Middle East*, (2013).
- Homayounnejad Maziar, „Ensuring Fully Autonomous Weapons Systems Comply with the Rule of Distinction in Attack”, [in:] *Drones and Other Unmanned Weapons Systems under International Law*. 123-157. Leiden: Brill Nijhoff, 2018.
- Hughes Joshua G., „The Law of Armed Conflict Issues Created by Programming Automatic Target Recognition Systems Using Deep Learning Methods” *Yearbook of International Humanitarian Law*, Vol. XXI (2018): 99-135.
- Khalil Ahmad, S. Anandha Krishna Raj, „Challenges to the Principle of Distinction in Cyber Warfare Navigating International Humanitarian Law Compliance” *Prawo i Więź* (2024).
- Khen Hilly Moodrick-Even, „Aidōs and Dikē in International Humanitarian Law: Is IHL a Legal or a Moral System?” *The Monist*, No. 1 (2016): 26-39.
- Labbé Jérémie, Pascal Daudin, „Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross” *International Review of the Red Cross*, No. 897-898 (2015): 183-210.

- Lewis Dustin A., „Three Pathways to Secure Greater Respect for International Law Concerning War Algorithms” *Harvard Law School PILAC* (2020). <https://pilac.law.harvard.edu/three-pathways-to-secure-greater-respect-for-international-law-concerning-war-algorithms>.
- Lucas Jr George R., „Automated Warfare” *Stanford Law & Policy Review*, 25 (2014): 317-340.
- McDuff Daniel J., Javier Hernandez, Sarah Gontarek, Rosalind W. Picard, „Cogcam” *Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems*, No. 3 (2016): 4000-4004. <https://doi.org/10.1145/2858036.2858247>.
- Melzer Nils, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*. Directorate-General for External Policies, European Parliament, 2013.
- Morillo Stephen, *What is Military History?*. Hoboken: John Wiley & Sons, 2017.
- „Neuron Unmanned Combat Air Vehicle (UCAV) Demonstrator” *Airforce Technology*, 18 February 2020. <https://www.airforce-technology.com/projects/neuron/>.
- Noll Gregor, „Analogy at War: Proportionality, Equality and the Law of Targeting” *Netherlands Yearbook of International Law*, 43 (2012): 205-230.
- O’Connell Mary Ellen, „Banning Autonomous Killing: The Legal and Ethical Requirement that Humans Make Near-time Lethal Decisions”, [in:] *The American Way of Bombing: How Legal and Ethical Norms Change*. 224-236. Cornell: Cornell University Press, 2014.
- Reeves Shane, William Johnson, „Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?” *The Army Lawyer*, (2014).
- Rešlová Petra, *Meaningful Human Control in Autonomous Weapons* (2023).
- Robertson Horace B., „The Principle of the Military Objective in the Law of Armed Conflict”, [in:] *The Development and Principles of International Humanitarian Law*. 531-557. London: Routledge, 2017.
- Ruth A. David, Paul Nielsen, „Defense Science Board Summer Study on Autonomy”. Washington: Defense Technical Information Center, 2016.
- Sassoli Marco, „Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified” *International Law Studies*, No. 1 (2014): 308-340.
- Scharre Paul, Michael C. Horowitz, „Autonomy in Weapon Systems” *Center for a New American Security Working Paper*, (2015).
- Schmitt Michael N., „Autonomous Weapon Systems and International Humanitarian Law: a Reply to the Critics” *Harvard National Security Journal Feature* (2012).
- Schmitt Michael N., „Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict” *Harvard National Security Journal*, 4 (2012): 321-
- Schmitt Michael N., „Targeting and Humanitarian Law: Current Issues” *Israel Yearbook on Human Rights*, Vol. XXXIV (2004): 59-104.

- Sharkey Amanda, „Autonomous Weapons Systems, Killer Robots and Human Dignity” *Ethics and Information Technology*, No. 2 (2019): 75-87.
- Sparrow Robert, Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender” *International Law Studies*, No. 1 (2015): 699-728.
- „STM Kargu” *Smartencyclopedia*, 4 January 2023. <https://smartencyclopedia.org/content/stm-kargu/>.
- Suchman Lucy, „Algorithmic Warfare and the Reinvention of Accuracy” *Critical Studies on Security*, No. 2 (2020): 175-187. <https://doi.org/10.1080/21624887.2020.1760587>.
- Surabhi Ankita, *From „Killer Robots” to Autonomous Weapons Systems (AWS)*, 2019.
- Taddeo Mariarosaria, Alexander Blanchard, „A Comparative Analysis of the Definitions of Autonomous Weapons”, [in:] *The 2022 Yearbook of the Digital Governance Research Group*. 57-79. Cham: Springer Nature Switzerland, 2023.
- Tattersall Alec, Damian Copeland, *Reviewing autonomous cyber capabilities*. 2021.
- Thurnher Jeffrey S., „Means and Methods of the Future: Autonomous Systems”, [in:] *Targeting: the Challenges of Modern Warfare*. 186-187. The Hague: TMC Asser Press, 2015.
- Thurnher Jeffrey S., Feasible Precautions in Attack and Autonomous Weapons”, [in:] *Dehumanization of Warfare: Legal Implications of New Weapon Technologies*. 99-117. Berlin-Heidelberg: Springer Verlag, 2018.
- Toscano Christopher, „«Friends of Humans»: An Argument for Developing Autonomous Weapons Systems” *Journal of National Security Law & Policy*, No. 1 (2015): 189-246.
- Turns David, „Weapons in the ICRC Study on Customary International Humanitarian Law” *Journal of Conflict & Security Law*, No. 2 (2006): 201-237.
- Van Den Boogaard Jeroen, „Proportionality and Autonomous Weapons Systems” *Journal of International Humanitarian Legal Studies*, No. 2 (2015): 247-283.
- Van Den Boogaard, Jeroen C., „Fighting by the Principles: Principles as a Source of International Humanitarian Law”, [w:] Mariëlle Matthee, Brigit Toebees, Marcel Bru, *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*. 3-31. The Hague: Springer, 2013.
- Wagner Markus, „Autonomy in the Battlespace: Independently Operating Weapon Systems and the Law of Armed Conflict”, [in:] *International Humanitarian Law and the Changing Technology of War*. 99-122. Leiden: Brill Nijhoff, 2013.
- Weber Jutta, Lucy Suchman, „Human-Machine Autonomies”, [in:] *Autonomous Weapons Systems: Law, Ethics, Policy*, ed. Nehal Bhuta, Susanne Beck, Robin Geiß, Hin-Yan Liu, Claus Kreß. 75-102. Cambridge: Cambridge University Press, 2016.

Yan Liu Hin, „Categorization and Legality of Autonomous and Remote Weapons Systems” *International Review of the Red Cross*, No. 886 (2012).

Zajac Maciej, „Beyond Deadlock: Low Hanging Fruit and Strict yet Achievable Options in AWS Regulation” *Journal of Ethics and Emerging Technologies*, No. 2 (2022): 1-14.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>



# In Search of Adequate Principles for AI Civil Liability\*

## Abstract

This paper examines the civil liability of AI systems in EU legislation. The analysis discusses current problems with AI liability, proposals of the European Union legislator on how to solve existing problems and includes *de lege ferenda* suggestions. The observations' conclusions allow us to answer whether the legal solutions offered by the Products Liability Directive proposal and the AI Liability Directive proposal are adequate to the identified problems with the liability of AI systems.

**KEYWORDS:** artificial intelligence, AI systems, AI liability, fault-based liability, product liability, strict liability, EU legislation

IWONA GREDKA-LIGARSKA, PhD in law, University of Silesia in Katowice,  
ORCID – 0000-0002-9243-3158, e-mail: iwona.gredka-ligarska@us.edu.pl

## 1 | Introduction

The EU legislator notes the growing legal problems related to AI technology, including civil liability for damage caused by AI systems. The proof for the above is that we are preparing a legal framework adequate to the latest technologies, which have existed for several years. This means a legal framework that serves the development of innovation on the one hand, and guarantees the development of AI that is safe for people and trustworthy on

---

\* This article was financed by funds granted under the Research Excellence Initiative of the University of Silesia in Katowice. Project no. ZFIN11061022.

the other. The legal framework for AI technology will also include regulations dedicated to civil liability for damage caused by artificial intelligence.

Regarding security, a milestone in legal regulations is undoubtedly the proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (the AI Act)<sup>[1]</sup>. The AI Act legislative process has not yet been completed, but the AI Act will be the first regulation of this type not only in Europe but also in the world. In this way, the European Union took the leading position in developing new legal regulations on AI. The purpose of the AI Act is to improve the functioning of the internal market by laying down a uniform legal framework in particular for the development, marketing and use of artificial intelligence in line with the values of the Union. The Regulation pursues a number of overriding reasons of public interest, such as a high level of protection of health, safety and fundamental rights<sup>[2]</sup>. It ensures the free movement of AI-based goods and services cross-border, thus preventing Member States from imposing restrictions on the development, marketing and use of AI systems unless explicitly authorised by the Regulation<sup>[3]</sup>.

When deciding to introduce ground-breaking legal provisions in AI safety, the European Union legislator also decided to amend the law in the area of AI liability. The legal literature has long discussed new principles of AI liability. This is the case since the current legal regime of liability for defective products is not adequate to AI systems. As a consequence of increasing legal problems in that area, the EU legislator, in 28 September 2022, published draft proposals of two new legislative acts: the Directive of the European Parliament and of the Council on liability for defective products (the Products Liability Directive proposal)<sup>[4]</sup> and the Directive of

<sup>1</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>.

<sup>2</sup> The law doctrine also noticed some disadvantages of the AI Act, which should be fixed. See e.g.: Nathalie A. Smuha et. al., *How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act* (Birmingham: University of Birmingham, 2021), 1-59; Michael Veale, Frederik Zuiderveen Borgesius, „Demystifying the Draft EU Artificial Intelligence Act: Analysing the good, the bad, and the unclear elements of the proposed approach” *Computer Law Review International* No. 4 (2021): 97-112.

<sup>3</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>.

<sup>4</sup> Brussels, 28 September 2022, COM(2022) 495 final, 2022/0302(COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495>.

the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), (the AI Liability Directive proposal)<sup>[5]</sup>.

The aim of this article is to trace the issue of civil liability of AI and to confront the conclusions of such an investigation with the latest legislative proposals of the EU legislator, as included in the Products Liability Directive proposal and the AI Liability Directive proposal. The analysis will be carried out within a broader context, from current problems with AI's liability, an overview of legislative proposals to recommendations *de lege ferenda*. The considerations made according to the presented model will allow to answer the question if the legal provisions contained in the Products Liability Directive proposal and the AI Liability Directive proposal are adequate to the identified problems with the liability for damage caused by AI systems.

The article focuses exclusively on the law of the European Union, although the question of AI liability is worldwide problem. Bearing in mind the global reach of AI and the international profile of companies developing AI, it would be optimal to prepare and introduce a universal model of AI's liability on a global scale. However, it is currently impossible to achieve this goal for at least two reasons. First, because the legal systems in different parts of the world are very different. There is no common, worldwide set of rules for civil liability<sup>[6]</sup>. Second, technological giants such as the US or China are competing to develop increasingly advanced AI and achieve global hegemony in this field. Such countries compete with one another on the technological and commercial level<sup>[7]</sup> and often have conflicting interests. Therefore, competition in the area of AI takes place not only between specific corporations but also between countries and regions of the world. As a result, the aspiration to develop a single worldwide model of AI's liability is, at least for the time being, unrealistic. On the other hand, it is legitimate and feasible to develop a regional model of AI's liability on

<sup>5</sup> Brussels, 28 September 2022, COM(2022) 496 final, 2022/0303 (COD). [https://commission.europa.eu/system/files/2022-09/1\\_1\\_197605\\_prop\\_dir\\_ai\\_en.pdf](https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf).

<sup>6</sup> Monika Jagielska, „Odpowiedzialność za sztuczną inteligencję”, [in:] *Prawo sztucznej inteligencji*, ed. Luigi Lai, Marek Świerczyński (Warsaw: C.H. Beck, 2020), 69-79.

<sup>7</sup> See Alan O. Sykes, „The Law and Economics of «Forced» Technology Transfer and Its Implications for Trade and Investment Policy (and the U.S.-China Trade War)” *Journal of Legal Analysis*, No. 1 (2021): 127-171.

the level of the European Union. Therefore, I have presented the research limited solely to European legislation in this article.

## 2 | AI's potential to become dangerous

The European lawmaker is determined to introduce high safety standards for high-risk AI systems. Artificial intelligence should undoubtedly remain under human control, and its development may not proceed at the expense of human rights. At this point, however, a question must be asked: can AI be completely safe? In other words, is it possible, by means of introducing appropriate legislation and exercising supervision, to develop AI systems that will not cause injury to humans or damage to human property? The safety of AI systems can be considered on two levels. The first level involves the special risk to people posed by AI systems. Algorithms developed without strict human control could assume control over us – humans (e.g. by manipulating and exerting excessive influence on the decisions and choices made by a human being). To avoid this, such pieces of legislation as the AI Act are necessary. However, there is also a second level of risk posed by AI, which can be referred to as inevitable risk. Even if AI systems are safe in the legal sense – conforming to the requirements laid down in the AI Act and in other legislative acts – the risk of damage still cannot be fully eliminated. The occurrence of random events, understood as future and uncertain events that cause personal injury or damage to human property, is something that humanity has had to deal with since the beginning of its existence on Earth, and the complete elimination of such events is impossible. The foregoing is confirmed by the system of (property and personal) insurance, as developed by humankind, whose origins date back to ancient China, Mesopotamia, Phoenicia, and then Greece or Rome<sup>[8]</sup>. Despite the huge civilizational development of mankind that has taken place since the times of the first pre-insurance transactions, the operation of the insurance system in its contemporary form is still necessary. This is the case as insurance risks deriving from forces of nature have been joined by new dangers, which, paradoxically, are a consequence of the progress

<sup>8</sup> Pietro Masci, „The History of Insurance: Risk, Uncertainty and Entrepreneurship” *Journal of the Washington Institute of China Studies*, No. 3 (2011): 25-68.

of civilization. As a result, even safe – in the legal sense – artificial intelligence will cause damage.

AI systems have the potential to become – as a result of interacting with their environment – dangerous artificial intelligence<sup>[9]</sup>. An immanent feature of AI is its ability to learn, to transform and to self-improve. In case of AI systems intended to interact with the environment in which they are expected to operate – and, in the first place, intended to interact with humans – the potential of AI is revealed, which eludes legislation such as the AI Act and which does not easily qualify as the product's defect. At the time of being put into circulation or put into use, an AI system is safe in the legal sense (in compliance with the requirements set out in legislative acts), and only has the potential to transform in future into a dangerous AI system and to cause damage. In this context, it is not predetermined whether or not such negative transformation is actually going to take place. This will depend on the interactions taking place between the AI system and humans. Consequently, it cannot be ruled out that the same AI system would not have undergone negative transformations and caused damage if it had interacted with another user. The user, by choosing inputs that trigger various branches in the program, acts interactively with the AI system. Thus, two different users, operating from the same fact base, may select different alternatives and generate different results. In the case of AI, because of the interactive nature of the system with the user and the non-linear approach to output, it may not be possible to determine exactly how an error occurs<sup>[10]</sup>. In the learning process, an AI system is programmed to independently adjust to the environment in which it operates in response to new data. When an AI system receives new data, the system processes the data, identifies patterns, and then develops and integrates the new patterns, allowing the system to test different hypotheses and to come up with new solutions<sup>[11]</sup>. Thus, unlike traditional software, where programmers specify predetermined outcomes that serve to explicitly confine the program's output to a limited set of possible solutions, AI programs

---

<sup>9</sup> Greg Swanson, „Non-Autonomous Artificial Intelligence Programs and Products Liability: How New AI Products Challenge Existing Liability Models and Pose New Financial Burdens” *Seattle University Law Review*, No. 3 (2019): 1201-1222.

<sup>10</sup> Maruerite E. Gerstner, „Liability Issues with Artificial Intelligence Software” *Santa Clara Law Review*, No. 1 (1993): 239-269.

<sup>11</sup> Swanson, „Non-Autonomous Artificial Intelligence Programs and Products Liability”, 1206.

are expressly designed to identify and develop original solutions<sup>[12]</sup>. The transformation of an AI system into a dangerous AI system – one that can cause damage – can take place even if the system has been exploited according to its intended use. Greg Swanson gave the following example:

An AI product is manufactured and purchased in its original form, state A. After interacting with the consumer, the AI product acquires and integrates new data provided by the consumer and subsequently begins refining and altering its internal processes (the reinforcement learning process) and “evolves” to state B. Continued consumer interactions will generate more new data, which the AI will continue to analyse and either integrate or discard. Barring pre-programmed restrictions or general computer processing limitations, this iterative process will cycle onward and the AI will become more and more distinct from its original form at the time of purchase<sup>[13]</sup>.

At the same time, Swanson concluded that even with the availability of programming restrictions, the nearly infinite body of potential data inputs from over hundreds of thousands of various AI-consumer interactions render any attempt at creating a “perfect” program impractical, if not entirely impossible<sup>[14]</sup>. In addition, Maruerite Gerstner highlighted that manufacturers of AI systems are not in a position to eliminate all risk, as far as AI safety is concerned, but have to determine what level of risk is acceptable so as to maximize the utility of an AI system and minimize liability. The more restrictions imposed on an AI system to improve its safety, the more limited the system’s ability to generate new solutions<sup>[15]</sup>. It should also be remembered that the high safety standards laid down in the AI Act apply only to high-risk AI systems. On the other hand, the capacity to transform in consequence of interactions with the environment may be a feature of not only those systems but of all AI systems in general. The potential of AI to transform into dangerous AI, as a result of interacting with the environment, refers to currently used AI systems, that are not yet autonomous. However, this potential will not disappear when AI systems become fully autonomous. What may change is the reason for

<sup>12</sup> Gerstner, „Liability Issues with Artificial Intelligence Software”, 242-243.

<sup>13</sup> Swanson, „Non-Autonomous Artificial Intelligence Programs and Products Liability”, 1203.

<sup>14</sup> Ibidem, 1207.

<sup>15</sup> Gerstner, „Liability Issues with Artificial Intelligence Software”, 241.

the transformation of a safe AI system into a dangerous AI – even if the AI system has been used according to its intended use and even if the system is fully safe in a legal sense (in compliance with the safety requirements of the applicable legislation). In the context of autonomous AI systems, the source of danger may be the capacity of such systems to make independent, fully autonomous decisions. It is emphasized that inasmuch as a characteristic feature of machine learning systems is their capacity to construct their own conclusions based on the available information, a distinctive feature of autonomous AI systems will be their capacity to make independent decisions, aimed at achieving the assumed objective<sup>[16]</sup>. Moreover, Stuart Russell draws attention to the fact that danger posed by artificial intelligence may relate to all AI systems whose capacities to reach the assumed objective are higher than human capacities, if the objective the AI system tries to achieve has been wrongly defined and is unfavourable for humans. If we add to that an AI system's autonomy in taking steps with the intention to achieve the assumed objective and the missing possibility of any effective human intervention, there is no doubt that AI systems pose serious danger to humans. Russell emphasizes that a key question is so called “objective function”. This objective function must be designed to serve humanity<sup>[17]</sup>.

---

<sup>16</sup> Marcin Rojszczak, „Prawne aspekty systemów sztucznej inteligencji. Zarys problemu”, [in:] *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek (Warsaw: C.H. Beck, 2019), 1–22.

<sup>17</sup> Stuart Russell proposed a solution that he calls an „assistance game”. According to this solution, a machine still needs information from a person to complete its task. It knows it does not know everything: „Inevitably, these machines will be uncertain about our objectives – after all, we are uncertain about them ourselves – but it turns out that this is a feature, not a bug (...). Uncertainty about objectives implies that machines will necessarily defer to humans: they will ask permission, they will accept correction, and they will allow themselves to be switched off. Removing the assumption that machines should have a definite objective means that we will need to tear out and replace part of the foundations of artificial intelligence – the basic definitions of what we are trying to do. That also means rebuilding a great deal of the superstructure – the accumulation of ideas and methods for actually doing AI”. See: Stuart Russell, *Human Compatible: AI and the Problem of Control* (UK, USA, Canada, Ireland, Australia, India, New Zealand, South Africa: Penguin Books, 2019), 12.

### 3 | Current problems with AI liability

Currently, in the legal system of the European Union, the liability for damage caused by AI systems is frequently qualified as liability for a defective product under the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Directive 85/374/EEC)<sup>[18]</sup>. The approach to liability for AI along the lines of liability for a product is not specific to the EU. However, it is also a common practice in the USA, for example<sup>[19]</sup>. David C. Vladeck argues that:

Truly autonomous machines may be driving cars through our neighbourhoods or piloting drones that fly above our heads sooner than we think. So long as we can conceive of these machines as “agents” of some legal person (individual or virtual), our current system of products liability will be able to address the legal issues surrounding their introduction without significant modification<sup>[20]</sup>.

However, immanent characteristics of – so far semi-autonomous – AI, such as the ability to learn, to transform, to interact with the environment give rise to serious difficulties, which are already the case, in the application of the liability regime for defective products. Moreover, such difficulties can be associated with the most crucial rules of liability for defective products under Directive 85/374/EEC. It should be remembered that under Art. 1 of Directive 85/374/EEC, the producer is liable for the damage caused by a defect in his product. ‘Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer (Article 3(1) of Directive 85/374/EEC). Without prejudice to the liability

<sup>18</sup> <http://data.europa.eu/eli/dir/1985/374/oj>.

<sup>19</sup> For more on product liability regulations in Austria, Czech Republic, Denmark, England and Wales, France, Germany, Italy, the Netherlands, Norway, Poland, Spain, Switzerland, Canada, Israel, South Africa and United States of America, see: *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski (Cambridge, Antwerp, Portland: Intersentia, 2016), 111-616.

<sup>20</sup> David C. Vladeck, „Machines without Principals: Liability Rules and Artificial Intelligence” *Washington Law Review*, No. 1 (2014): 150.

of the producer, any person who imports into the Community a product for sale, hire, leasing, or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer (Article 3(2) of Directive 85/374/EEC). Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated (Article 3(3) of Directive 85/374/EEC). For the purpose of attributing liability, it is irrelevant whether the product is supplied to the final consumer directly by the producer or through other parties involved in the distribution chain<sup>[21]</sup>. The right to compensation is granted to any person who suffers personal injury or damage to property as a result of a defect in a product (Article 9 letter (a) & (b) of Directive 85/374/EEC). Damage to property may consist of damage to or destruction of any item other than the defective product itself, provided that the item was intended for private use or consumption and that it was actually used by the injured person for their own private use or consumption. According to Article 4 of Directive 85/374/EEC ‘the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.’

Under the Directive 85/374/EEC, a producer’s liability for a defective product is based on risk. However, this liability is not absolute. The producer may avoid liability by invoking one of the exonerating conditions laid down in the Directive. Therefore, the producer will not incur liability under the provisions of the Directive if the producer proves one of the following conditions:

- a. that the producer has not placed the product into circulation;
- b. that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards;

---

<sup>21</sup> Monika Jagielska, *Odpowiedzialność za produkt* (Warsaw: Wolters Kluwer, 2009), 98.

- c. that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business;
- d. that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- e. that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered (use of state of the art evidence);
- f. in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product (Article 7 of Directive 85/374/EEC).

Another exonerating condition is the fault of the injured person. Under Article 8(2) of Directive 85/374/EEC, the liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible. However, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party for whom the injured person is not responsible (Article 8(1) of Directive 85/374/EEC). On the other hand, Directive 85/374/EEC does not provide for an exonerating condition in the form of force majeure. In spite of the above, in a guidance note relative to the Directive<sup>[22]</sup>, it was pointed out that force majeure may be invoked if such possibility follows from the legal regimes applicable in particular Member States. Directive 85/374/EEC, introduced in the 20th century and applicable for over 30 years, is unsuitable for AI technology. This Directive was drafted with movable items in mind which were of a completely different nature from modern AI. The biggest problem does not, however, lie in the too narrow definition of the product, as used in the Directive, which in a literal sense covers only movable items<sup>[23]</sup>. Artificial intelligence – understood as algorithms that are not movable items but intangible assets – cannot qualify as products

<sup>22</sup> See: Notes of the E.C. Commission on the individual Articles of the draft Directive, Commercial Laws of Europe 1986, no. 96.

<sup>23</sup> Product definition is included in Art. 2 of Directive 85/374/EEC, under which: „product” means all movables even if incorporated into another movable or into an immovable. „Product” includes electricity.

in the understanding of Directive 85/374/EEC. The legal doctrine is divided on this subject<sup>[24]</sup>. However, the European Court of Justice has dealt with the problem by using functional, rather than literal interpretation of the term product and by having regard to the fact that software is often incorporated into tangible items and that it forms their element. The most serious problems with the application of Directive 85/374/EEC to AI systems currently relate to the following: 1. the exonerating condition in the form of the risk inherent in the development, and 2. the need to prove a defect in the product (AI system) and the causal link between the defect and the resulting damage (the burden of proof is on the injured party). By referring first to the exonerating condition of risk inherent in development, it should be stressed that this prerequisite is not adequate to the liability for damage caused by AI systems. This follows from the fact that AI systems are not ‘finished’ products but systems whose immanent features are development and change. Under the current legal framework, producers of AI systems, in case of damage caused by such systems, can avoid liability by demonstrating that the state of scientific and technical knowledge at the time of putting the AI system into circulation did not allow for detection of the damage. Indeed, an AI system at the time of being put into circulation by the producer, may actually be free from any defects, and from any errors in design. However, throughout its entire lifecycle, the AI system will be subject to endless modifications; by learning, by self-improving and by acquiring experience under the influence of the environment with which the system interacts. Under the AI Act, providers of AI systems are imposed with an obligation to monitor those systems on an ongoing basis – from the time of placing them into circulation throughout their entire lifecycle – with regard to their compliance with the safety requirements laid down in the AI Act. However, this obligation covers only high-risk AI systems. Besides, it may be the case that not all potentially negative changes are identified in time, i.e. before damage is caused by a high-risk AI system. Moreover, certain transformations in the operation of the AI system may reveal their hazardous nature only at the time when the damage occurs. Finally, the eventuality cannot be ruled out that the AI system may cause damage and, at the same time, does not show any deviations from the safety requirements, and no defect in the system is identified. An AI system’s feature of being subject to transformations throughout the

<sup>24</sup> Duncan Fairgrieve et. al., „Product Liability Directive”, [in:] *European Product Liability*, 46.

entire lifecycle should, therefore, be decisive for excluding the possibility to invoke, by a producer of such system, the prerequisite of development risk. Since development is an immanent feature of AI systems, why should a commercial entity that manufactured such system and put it into circulation be exempt from liability for the consequences of such development? The invocation of inherent risk in an increasing number of cases may lead to a situation where liability for harm caused by AI systems becomes a fiction, as providers of such systems will be able to easily avoid liability. The exonerating condition of risk inherent in development is justified only in relation to ‘finished’ products, to which Directive 85/374/EEC had been originally addressed. AI systems, as such, are not ‘finished’ products.

Another serious problem in the area of AI liability, understood as liability for a defective product, relates to the tracing, identifying and proving of a defect in the AI system that caused the damage. Identifying a defect in an AI system is extremely difficult, and as AI technology evolves, it will become more difficult with each passing year. Consequently, the injured person is in a doubly disadvantageous position. The injured person has to demonstrate a defect of the AI system that caused the damage and the causal relationship between the identified defect and the resulting damage. Moreover, one way or another, the injured person may be deprived of legal protection if the producer of the AI system invokes the risk inherent in development and demonstrates that, at the time of putting the system into circulation, the state of the art precluded identification of the defect that caused the damage. Israel Gilead emphasizes that:

[i]t may be very complex and expensive to establish that a product is defective or was produced in a negligent manner. To establish a design defect the plaintiff has to provide evidence indicating that an alternative design would have been safer without substantially derogating from the usefulness of the product (cost-benefit analysis). To establish a manufacturing defect the plaintiff has to show that something was wrong with the quality control over the production process. These issues may involve complex questions requiring expert opinions. (...) A change that may be needed (...) is to ease the burden of proof that in principle lies upon the plaintiff. New technologies are very complex, and it may be impossible or prohibitively expensive for the plaintiff to prove that his or her harm was indeed caused by the defendant’s product-related negligence. Although present law already embraces powerful presumptions, favourable to plaintiffs, that shift the burden of proof to the defendant, it may be advisable to extend the scope

and the effectiveness of these presumptions in order to cope with the challenge of liability for new technologies<sup>[25]</sup>.

Although the opinion of the cited author refers to the terms of product liability applicable in Israel, the very postulate – to reverse the burden of proof – is also appropriate in the context of the legislation of the European Union, as analyzed in this article.

Within the legal framework of Directive 85/374/EEC, it is very difficult, and often even impossible, for the claimant to prove a defect in an AI system. This is the case despite the fact that, in court proceedings, such determinations are made with the involvement of specialized expert witnesses. Identification of a defect in an AI system poses a very serious challenge even to expert witnesses. This is due to the level of advancement and complication of AI systems<sup>[26]</sup>. Those systems are often a collection of algorithms originating not from one but from several providers. Development of a particular AI system is never a consequence of the work of a single person but an entire team of different specialists (analysts, knowledge engineers, programmers, program designers, developers, algorithm testers), and often even several expert teams. As a result, one person cannot possess the entire knowledge of the operation of such an AI system and cannot independently verify its operation and any possible defects. Additionally, the ‘black box effect’ makes it difficult to trace the AI’s decision-making process. For all the above reasons, court proceedings require the involvement of an increasing number of specialists which, however, does not in any way guarantee success. On the other hand, most certainly, this increases judicial costs and makes the proceedings longer. Consequently, the application of the terms of product liability to AI systems leads to a situation in which, along with the development of AI technologies, the costs of legal proceedings (including the costs of opinions by specialized expert witnesses) become increasingly higher. If the plaintiff loses the case, he or she will have to

<sup>25</sup> Israel Gilead, „Product Liability in Israel”, [in:] *European Product Liability*, 546–547.

<sup>26</sup> Gerstner underlines that „Without question, the software dealers are better able to detect a fault: they are in possession of the source code and they employ skilled workers who have experience in the field. With their technical sophistication, software dealers are better positioned to determine whether there are risks in using the software, whether those risks can be prevented, and what procedures are necessary to eliminate the problems”. Gerstner, „Liability Issues with Artificial Intelligence Software”, 254–255.

bear the costs. This can be a serious obstacle for injured parties, making the right of access to justice an illusion.

Therefore, it may seem that a solution of the outlined problems will be, first, annulment of the prerequisite of risk inherent to development in relation to AI systems and, second, reversal of the burden of proof. This would relieve the plaintiff of the need to prove a defect in the AI system and the causal link between the defect and the resulting damage. This could be done by adopting the legal presumption that damage caused with the involvement of an AI system – without intentional fault of the injured person – was caused by the defect of that system. The burden of proof that the damage suffered by the plaintiff was not caused by a defect of the AI system would be with the defendant (producer of the AI system). This could be demonstrated in two ways. Namely, the producer could prove that the AI system may indeed have a defect but there is no causal link between that fault and the damage suffered (the system's fault could not have been the cause of the damage suffered by the claimant). The second option open to the producer would be to demonstrate that the AI system with whose involvement the damage was caused operates completely regularly, i.e. no defect can be imputed to that system. On the other hand, the claimant would have to prove only that the damage was caused with the involvement of the AI system and the extent of that damage. The presented solution seems advantageous as it eliminates the difficulties in the application of Directive 85/374/EEC to damage caused by AI systems. However, in my opinion, this solution is not sufficient. This is due to the fact that the AI system that caused the damage might be free from any defects, both in the technical and legal sense. In consequence, damage may occur despite a lack of defect in the AI system (understood as defect of a product), and along with the development of AI technologies, such cases may become increasingly frequent. At the present time, it is assumed that the cause of a damage inflicted by an AI system is always some kind of defect of that system. That is, a mistake was made by a human responsible for designing, programming, or training the AI system<sup>[27]</sup>. However, increasing autonomy of AI systems – detachment from human decisions – can make it more and

<sup>27</sup> See the statement presented in the European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence (2020/2014(INL)), (European Parliament's Resolution on AI civil liability). [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html).

more difficult to defend the thesis that harmful operation of an AI system is a consequence of a specific mistake that can be identified and imputed to a human. This is the case as the damage caused by AI may result from interaction of the AI system with a human. In all those situations where an AI system causes damage despite the absence of any defect in the system, the injured person is deprived of compensation, which undermines the idea of legal protection.

With all the above in mind – in my opinion – it is legitimate to depart from the liability of AI systems as liability for a defective product. Defect of a product can only be considered when we are dealing with a finished product that is not subject to constant changes, and AI systems do not belong to such a category of products<sup>[28]</sup>. As technology develops, AI systems will increasingly evade the paradigm of product defect as it is known today. Therefore, approaching the issues of civil liability for artificial intelligence in terms of the defective product liability regime is a dead end. This obviously does not mean that producers of AI systems should not incur liability for their operation on the account that such systems – throughout their lifecycle – will be subject to constant transformations and self-improvement. Quite the contrary: producers of AI systems should incur civil liability for personal injuries and damage to human property caused by those systems. However, the terms of liability should be defined differently from the present legal framework<sup>[29]</sup>. I have specifically presented my proposals in this regard in the fifth chapter of this article.

---

<sup>28</sup> As I argued above, damage will not always be a consequence of a defect in an AI system. A particular AI system may be free from any design flaws but, as a result of interaction with its environment- and predominantly with humans – in a specific situation (X) it will react in an unpredictable way (Y) and cause damage (Z).

<sup>29</sup> As Gerstner underlines „[s]trict liability should be applied to software. A key consideration in the application of strict liability is the relative position of the victim with respect to the defendant. Applying strict liability allows the financial burden to be placed on the manufacturer and/or the vendor, the parties most able to bear the costs of the loss. The manufacturer is also in a better position to detect and correct flaws in the program, thus contributing to accident reduction. Fairness requires that compensation be provided to the innocent victim who has been financially damaged because of the injury. This compensation can be supplied by the manufacturer, who is in the better financial position relative to the victim. Further-more, the manufacturer can absorb the costs, either through insurance or price adjustments”. Gerstner, „Liability Issues with Artificial Intelligence Software”, 254–256.

## 4 | Proposed legislative changes

In the legislative process undertaken by the EU, intended to prepare and introduce legal provisions adequate to the latest technologies, one can notice an evolution of legislative projects from proposals most innovative and step into the future towards more conservative ones, focusing on optimal regulation of the current legal problems relating to AI technology. An example of this is the legislative work on civil liability for damage caused by artificial intelligence. The presented amendments evolved from a proposal to confer on autonomous, most advanced robots the status of electronic persons, through the European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), (EP's AI Civil Liability Resolution), to the currently debated drafts of two directives: the Products Liability Directive proposal (PLD proposal) and the AI Liability Directive proposal (AILD proposal). In the context of withdrawal from the idea of introducing electronic personality, it is worth reminding the critical position expressed in relation to this concept in Experts' Open Letter addressed to the European Commission. Ultimately, also the EP's AI Civil Liability Resolution was not met with approval. Eventually, the European Commission proposed to repeal Directive 85/374/EEC and to introduce two new Directives instead: the Products Liability Directive and the AI Liability Directive. It is precisely these two directives that should provide the basis for a consistent system of civil liability for damage caused by AI systems. Already at this point, it should be noted that, in the Products Liability Directive, the legislator did not introduce a key, and highlighted in the third Chapter of this article, modification of the terms of liability for defective products by: 1. reversing the burden of proof and 2. setting aside the exonerating condition of development risk. In the draft proposal of the Products Liability Directive, however, legal instruments have been envisaged that are expected to facilitate the injured party's assertion of claims under the regime of liability for defective products, including AI systems. As pointed out in the explanatory memorandum of the above Directive proposal, the purpose of the new Products Liability Directive is, among others: easing the burden of proof in complex cases and easing restrictions on making claims while ensuring a fair balance between the legitimate interests of manufacturers, injured persons and consumers in general. The Products Liability Directive, like the previous Directive 85/374/EEC, provides for a strict liability regime for defective products.

In the PLD proposal, AI systems were clearly qualified as a product. The PLD proposal confirms that AI systems and AI-enabled goods are „products” and therefore fall within the Products Liability Directive’s scope, meaning that compensation is available when defective AI causes damage, without the injured person having to prove the manufacturer’s fault, just like for any other product. Additionally, the PLD proposal makes it clear that not only hardware manufacturers but also software providers and providers of digital services that affect how the product works (such as a navigation service in an autonomous vehicle) can be held liable. The PLD proposal ensures that manufacturers can be held liable for changes they make to products they have already placed on the market, including when these changes are triggered by software updates or machine learning. According to the definition contained in the PLD proposal, a product means ‘[a]ll movables, even if integrated into another movable or into an immovable. „Product” includes electricity, digital manufacturing files and software’<sup>[30]</sup>. The plaintiff will be required to prove the defectiveness of the product, the damage suffered and the causal link between the defectiveness and the damage<sup>[31]</sup>. In consequence, the EU legislator did not decide to reverse the burden of proof and explained the foregoing by the need to ensure a fair balance between the legitimate interests of manufacturers, injured persons and consumers in general<sup>[32]</sup>. A new legal instrument favourable to the claimant – provided for in the Products Liability Directive – is the claimant’s right to request that the court obliges the defendant to disclose appropriate evidence at the defendant’s disposal in relation to the defective product. The claimant’s right will obviously be correlated with the power of national courts to order the defendant to disclose such information on the defective product<sup>[33]</sup>. At the same time, it was emphasized that:

---

<sup>30</sup> Art. 4(1) of the PLD proposal.

<sup>31</sup> Art. 9(1) of the PLD proposal

<sup>32</sup> However, it was noticed that: „[I]njured persons, are, however, often at a significant disadvantage compared to manufacturers in terms of access to, and understanding of, information on how a product was produced and how it operates. This asymmetry of information can undermine the fair apportionment of risk, in particular in cases involving technical or scientific complexity”. See the PLD proposal, point (30-31), 19-20. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495>.

<sup>33</sup> See Art. 8 of the PLD proposal.

[I]t is also necessary to alleviate the claimant's burden of proof provided that certain conditions are fulfilled. [...] In order to provide an incentive to comply with the obligation to disclose information, national courts should presume the defectiveness of a product where a defendant fails to comply with such an obligation. [...] In order to reinforce the close relationship between product safety rules and liability rules, non-compliance with such requirements should also result in a presumption of defectiveness<sup>[34]</sup>.

Accordingly, Article 9 of the Products Liability Directive proposal provides that:

2. The defectiveness of the product shall be presumed, where any of the following conditions are met: (a) the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal pursuant to Article 8(1); (b) the claimant establishes that the product does not comply with mandatory safety requirements laid down in Union law or national law that are intended to protect against the risk of the damage that has occurred; or (c) the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances.
3. The causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.
4. Where a national court judges that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, or both, the defectiveness of the product or causal link between its defectiveness and the damage, or both, shall be presumed where the claimant has demonstrated, on the basis of sufficiently relevant evidence, that: (a) the product contributed to the damage; and (b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both. [...].

The presumptions envisaged in the Products Liability Directive proposal are to considerably facilitate the claimant's pursuit of compensation, however, they do not entirely remove the burden of proof from the

<sup>34</sup> PLD proposal, point (33-35), 20-21. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495>.

claimant. Even in especially difficult cases<sup>[35]</sup>, the defect of the product or the causal link between the defect of the product and the damage, or both, will only be presumed if the plaintiff has proved, on the basis of sufficiently relevant evidence, that the product contributed to the damage and that it is probable that the product was defective or that its defective nature is a probable cause of the damage, or both<sup>[36]</sup>. On the other hand, the defendant will have the right to question the existence of excessive difficulties and to question the probability that the product was defective or that the product's defect was the likely cause of the damage, or that both these circumstances have been the case<sup>[37]</sup>. The defendant will also have the right to rebut all the presumptions referred to in Art. 9 (2), (3) and (4) of the PLD proposal. For manufacturers (defendants), it might prove easier to rebut the presumptions, provided for by the EU legislator in Art. 9 of the PLD proposal, than for claimants to prove the defect of the product, the damage suffered and the causal link between the defect and the damage. Such situation may be the case even despite the obligation imposed on the defendant by the court to disclose the information on the defective product – as known to the defendant – and despite the presumptions laid down in relation to especially difficult cases. This is the case since these are manufacturers (defendants) that have specialist knowledge concerning the product, including technical and scientific information about the product's construction, its specific features and operating principles. When it comes to disclosure of such information at the court's request, one can never be certain if the information concerning the product, presented in order to comply with such request, will be complete and confirm the product's defect. The defendant (manufacturer), when requested by the court, may in fact disclose only the information about the product chosen by the manufacturer, and the court, without any special knowledge about that particular product, will not be able to verify whether the information as disclosed by the manufacturer is complete.

Moreover, in the PLD proposal – similarly as in Directive 85/374/EEC – the EU legislator laid down certain exonerating conditions, exempting the

---

<sup>35</sup> Matters in which the national court judges that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, or both (Art. 9(4) of the PLD proposal). Such difficulties may arise irrespective of the disclosure by the defendant of information about the product.

<sup>36</sup> Art. 9(4) of the PLD proposal.

<sup>37</sup> Art. 9(4) of the PLD proposal.

defendant from liability for a defective product. Most of those conditions were already present in Directive 85/374/EEC and among them one can find the prerequisite of the state of the art. The EU legislator did not decide to abolish this solution. However, importantly enough, the PLD proposal includes a modification of that condition in relation to the provisions of Directive 85/374/EEC. That is to say, the PLD proposal provides that the manufacturer shall not incur liability for damage caused by a defective product if the manufacturer proves that:

[t]he objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered<sup>[38]</sup>.

Therefore, the modification of the exonerating condition of development risk is twofold. First, it was specified that the relevant benchmark should be the objective state of scientific and technical knowledge. Second, the manufacturer's liability was extended to the entire period in which the product is within the manufacturer's control. As a consequence, the protection of injured parties has been reinforced. However, the modification is not significant enough to remove problems that have been discussed in more detail in the Chapter entitled: Current Problems with AI Liability. It is generally known that learning and development are immanent features of artificial intelligence, and many properties of AI systems can be traced precisely to the condition of constant development. Consequently, leaving the condition of development risk among the exonerating conditions that exclude liability for damage caused by AI systems may lead to a situation in which, in practice, in many cases the manufacturer's liability will be excluded. This is because, according to the objective state of scientific and technical knowledge, the defectiveness of an AI system may not be detectable. In effect, what the EU legislator could actually achieve for the enhancement of protection of injured parties due to the expansion of the definition of product defectiveness<sup>[39]</sup> will be thwarted by leaving to manufacturers the possibility of relying on the state of the art. The above relates to the extension of the defectiveness concept to factual situations in which the product does not ensure the safety that might be expected by

<sup>38</sup> Art. 10(1e) of the PLD proposal.

<sup>39</sup> See Art. 6 of the PLD proposal.

the public at large taking into consideration: „[t]he effect on the product of any ability to continue to learn after deployment”<sup>[40]</sup> This means that the EU legislator has fully noticed the possibility of defectiveness of an AI system as a result of that system’s further learning; already after being placed on the market or put into service. On the other hand, however, the same legislator does not ensure full legal protection to persons injured by the product’s defectiveness as defined in Art. 6(1c) of the PLD proposal. If such defectiveness arises and leads to the emergence of damage but, at the same time, the defectiveness is undetectable according to the current state of scientific and technical knowledge, the manufacturer will be in a position to avoid liability, and the injured person will be left without compensation.

In the Products Liability Directive proposal, the principle of maximum harmonization was adopted. According to Art. 3 of the PLD proposal:

[M]ember States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to achieve a different level of consumer protection, unless otherwise provided for in this Directive.

Complementation of the civil liability regime for damages caused by artificial intelligence is to be the AILD proposed by the European Commission. The Products Liability Directive and the AI Liability Directive are expected to make up a consistent and complete system of legal protection for persons injured by AI systems. According to the assumptions of the EU legislator, the principles of civil liability for damages caused by AI systems are to be compatible with the safety principles of those systems. The AI Liability Directive will apply to non-contractual, civil law claims for compensation based on fault in situations when the damage is caused by an artificial intelligence system<sup>[41]</sup>. The harmonization envisaged in the AI Liability Directive proposal is to cover only such national provisions of law concerning fault-based liability that govern the burden of proof in relation to

---

<sup>40</sup> Art. 6(1c) of the PLD proposal.

<sup>41</sup> In Art. 1(1) of the AILD, it is indicated that: „[T]his Directive lays down common rules on: (a) the disclosure of evidence on high-risk artificial intelligence (AI) systems to enable a claimant to substantiate a non-contractual fault-based civil law claim for damages; (b) the burden of proof in the case of non-contractual fault-based civil law claims brought before national courts for damages caused by an AI system”.

persons seeking compensation for damages caused by artificial intelligence systems. Other than that, the purpose of the AI Liability Directive is not to harmonize: „[g]eneral aspects of civil liability which are regulated in different ways by national civil liability rules, such as the definition of fault or causality, the different types of damage that give rise to claims for damages, the distribution of liability over multiple tortfeasors, contributory conduct, the calculation of damages or limitation periods”<sup>[42]</sup>. In the AI Liability Directive proposal, adopts the principle of minimum harmonization, allowing plaintiffs in cases of damage caused by AI systems to rely on more favorable rules of national law.

The AILD – similar as the PLD – contains facilitations in the area of disclosing evidence and legal presumptions supposed to support the claimant in the pursuit of compensation under the non-contractual liability regime for damages caused by AI systems. However, facilitations concerning disclosure of evidence have been provided only with regard to high-risk AI systems. The distinction between high-risk AI systems (and the definition of high-risk AI systems) and non-high-risk AI systems is taken from the AI Act. Under the AILD, both a plaintiff and a potential plaintiff are to be provided with facilitations with respect to evidentiary material<sup>[43]</sup>. The rights of a potential claimant were defined in two stages. Accordingly, in case of suspicion that a high-risk AI system caused damage, the potential claimant – prior to bringing the suit – will be in a position to request the AI system provider, a person subject to the obligations of a provider (under the AI Act) or the AI system's user to disclose essential evidence in the disposal of such parties with regard to the specific AI system. If – despite a respective request from a potential claimant – such information is not provided, the potential claimant will be in a position to enforce the right to obtain information about an AI system in a court proceeding<sup>[44]</sup>. The potential plaintiff is obliged to submit sufficient facts and evidence to substantiate the claim for damages in the statement of claim submitted to the court. One should note the formulation: „[f]acts and evidence sufficient to support the plausibility of a claim for damages”. This is an indeterminate and undoubtedly evaluative expression. In this context, national courts adjudicating in non-contractual matters of civil law compensatory claims for damages

<sup>42</sup> The AILD proposal, point (10), 17. [https://commission.europa.eu/system/files/2022-09/1\\_1\\_197605\\_prop\\_dir\\_ai\\_en.pdf](https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf).

<sup>43</sup> See Art. 2(7) of the AILD proposal.

<sup>44</sup> See Art. 3(1) of the AILD proposal.

caused by AI systems will have a far-reaching decisive leeway in respect of which requests from potential plaintiffs deserve to be allowed. In case of the AILD – similarly as in the context of the PLD – it is clearly apparent that the EU legislator puts much emphasis on balancing the interests of potential claimants and defendants and on the adjustment of the level of legal protection afforded to both these groups to the – individually considered – factual circumstances of an individual case<sup>[45]</sup>. Analogous right will be available to the claimant already at the stage of judicial proceedings. Suppose the court orders the defendant to disclose or preserve evidence at the defendant's disposal, and the defendant does not follow that order. In that case, the presumption of the defendant's fault will apply<sup>[46]</sup>. In the AILD proposal, the EU legislator also provided for a rebuttable<sup>[47]</sup> legal presumption of a causal link between the defendant's fault and the output produced by the AI system or the failure of the AI system to produce an output<sup>[48]</sup>. However, the presumption of a causal link will apply only where:

[a]ll of the following conditions are met: (a) the claimant has demonstrated or the court has presumed pursuant to Article 3(5), the fault of the defendant, or of a person for whose behaviour the defendant is responsible, consisting in the non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred; (b) it can be considered reasonably likely, based on the circumstances of the case, that the fault has influenced the output produced by the AI system or the failure of the AI system to produce an output; (c) the claimant has demonstrated that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage<sup>[49]</sup>.

The Liability Directive proposal was limited to situations in which the requirements under the AI Act have not been fulfilled, as per the specific rules of Art. 4(2-3) of the AILD proposal. The possibility for the plaintiff to benefit from the legal presumption was strongly correlated to the safety requirements for high-risk AI systems contained in the AI Act. This means that if an AI system follows the safety requirements imposed on the system

<sup>45</sup> See Art. 3(3-4) of the AILD proposal.

<sup>46</sup> See Art. 3(5) of the AILD proposal.

<sup>47</sup> The defendant has the right to rebut the presumption laid down in Art. 4(1) of the AILD proposal. See Art. 4(7) of the AILD proposal.

<sup>48</sup> Art. 4(1) of the AILD proposal.

<sup>49</sup> Art. 4(1) of the AILD proposal.

according to the AI Act, the above-mentioned legal presumption will not apply. Accordingly, the European legislator clearly accentuates the high safety standards prescribed for high-risk AI systems under the AI Act. Furthermore:

[i]n the case of a claim for damages concerning a high-risk AI system, a national court shall not apply the presumption laid down in paragraph 1 where the defendant demonstrates that sufficient evidence and expertise is reasonably accessible for the claimant to prove the causal link<sup>[50]</sup>.

A situation in which the plaintiff can obtain easy access to the evidence and expert knowledge about a high-risk AI system will rather not be frequent in practice. In fact, the legal regime laid down in Art. 4(4) of the AILD proposal will provide an additional reinforcement of the legal situation of the defendant and, in turn, imply a weaker procedural position of the claimant. On the other hand, in relation to AI systems other than high-risk ones, the presumption laid down in Art. 4(1) of the AILD proposal, will apply only when the adjudicating court concludes that it is excessively difficult for the claimant to prove the causal link between the defendant's fault and the result produced by an AI system or the fact of not obtaining any result from such system<sup>[51]</sup>. Application of the presumption under Art. 4(1) of the AILD proposal will also be limited with regard to a defendant who has used the AI system exclusively as a part of his or her personal non-professional activity<sup>[52]</sup>. Therefore, according to the regulatory regime contained in the AILD proposal, the claimant still has to prove the defendant's fault<sup>[53]</sup> (or fault of a person for whose conduct the defendant is responsible) and the fact that the damage was caused by the AI system (i.e. that the damage was caused by a result generated by the AI system or by the fact of non-obtaining of any result from that system). On the other hand, the EU legislator offers a hand to the claimant by introducing a legal presumption of causal link between the defendant's fault and the damage caused by the AI system. However, application of that presumption by the adjudicating court is subject to many restrictions, which has been already

---

<sup>50</sup> Art. 4(4) of the AILD proposal.

<sup>51</sup> Art. 4(5) of the AILD proposal.

<sup>52</sup> Art. 4(6) of the AILD proposal

<sup>53</sup> Except for situations in which the court, under Art. 3(5) of the AILD proposal, has applied the presumption of fault.

discussed above. The liability of AI system operators has been included in the regulatory scope of the AILD, which clearly stipulates that such liability will continue to be based on fault.

## 5 | Reflections de lege ferenda

I join the voices of researchers who support the introduction of AI liability, understood as strict liability. For example, Christiane Wendehorst believes that the introduction of strict liability would be:

[a]n appropriate response to situations where significant and/or frequent harm may occur despite the absence of any fault, defect, malperformance or noncompliance. It may also be an appropriate response where such elements would be so difficult for the victim to prove that requiring such proof would lead to under-compensation or inefficiency. [...] The further extension of strict liability may be justified for AI applications because the «autonomy» and «opacity» of AI may give rise to exactly the kind of difficulties strict liability is designed to overcome<sup>[54]</sup>.

In my view, the solution to the problems related to liability for damage caused by AI systems would be achieved by departing from the liability regime for defective products in favour of a uniform, strict liability regime for damage caused by all AI systems. As a consequence, all producers of AI systems as well as professional operators of AI systems should incur risk-based liability. Just as previously, under Directive 85/374/EEC, a uniform liability regime was introduced for products understood as any movable items<sup>[55]</sup>, it is currently legitimate to introduce consolidated liability for damage caused by all and any AI systems. Thanks to such uniform liability principles, it would not be necessary to constantly update the list of high-risk AI systems. Moving on to details of such uniform, risk-based liability of both manufacturers and operators of all AI systems, in my opinion, there should be only two exonerating conditions: 1. force majeure; 2. exclusive

<sup>54</sup> Christiane Wendehorst, „Strict Liability for AI and other Emerging Technologies” *Journal of European Tort Law*, No. 2 (2020): 179.

<sup>55</sup> With the exception of primary agricultural products and game.

fault of the injured person or a third party for whom the injured person is responsible. As far as force majeure is concerned, it should be remembered that it will only be possible to invoke this circumstance in the case of external events, i.e. events that originate outside the AI system to whose operation the compensatory liability relates. If liability is to be exempt, the damage must be a consequence of the force majeure, which means that there is no adequate causal link between the operation of the system or device and the damage caused<sup>[56]</sup>. On the other hand, the exonerating conditions of the exclusive fault of the injured person or of a third person for whom the injured person is responsible will open a wide scope of exoneration for the defendants. This is the case since fault of the injured person (or of a third person) covers both intentional and unintentional fault. In this context, as far as unintentional fault is concerned, the defendant will be in a position to prove that the damage was caused because the injured person (or person for whom the injured person was responsible) did not acquire or did not maintain a level of knowledge necessary to duly operate the AI system, or that he or she acted under a misapprehension about the AI system's infallibility, as a result of which the outcomes generated by the system were not precisely verified by the injured person<sup>[57]</sup>. This will relate predominantly to such AI systems that could be used by a claimant and which the claimant used without involvement of the AI system's operator. As a result, the proposed liability model is not overly harsh on manufacturers and professional operators of AI systems. For appropriate legal protection of the injured parties, however, the essential part is that the defendant will be in a position to avoid liability only when the injured person's fault (or the fault of a third party for whom the injured party is responsible) is exclusive. That is when, apart from behavior – act or omission – of the injured person or a third party for whom the injured person is liable, there are no other factors contributing to the occurrence of damage or increasing its extent. On the other hand, in all those situations when the claimant (or third party for whom the claimant is responsible) only contributes to the occurrence of damage or to the increase of its scope, producers and operators of AI systems should incur compensatory liability, reduced according to the level of the injured person's (or the third party's) contribution to the occurrence the extent of the damage.

<sup>56</sup> Zbigniew Radwański, *Zobowiązania – część ogólna*, 2nd ed. (Warsaw: C.H. Beck, 1998), 77.

<sup>57</sup> Gerstner, „Liability Issues with Artificial Intelligence Software”, 249.

The burden of proving exonerating conditions should obviously be with the defendant. This is necessary to secure the position of the injured person. Moreover, the burden of proof should be reversed in relation to the causal link between the damage caused and operation of the AI system. Traditionally, in case of liability based on risk, the plaintiff bears the burden of proof with regard to the occurrence and extent of damage as well as the causal link between the damage and, for instance, service of a motor vehicle. However, in case of AI systems – having regard to their complexity, opacity and autonomy – it can be very difficult for the claimant to prove the causal relationship between operation of the system and the damage caused. This, in particular, will relate to those AI systems that are not incorporated into movable items. Thus, the burden of proof regarding the causal link between the operation of the AI system and the damage should be shifted from the plaintiff to the defendant. As a result, in order to avoid liability, the defendant would have to prove that there is no causal link between the operation of the AI system and the damage caused. It should be emphasized that the unified model of risk-based liability – as proposed above – would apply to all AI systems and to all their uses (whether direct or indirect). It would refer both to the use of AI systems through professional operators of those systems and to direct use, without involvement of any operators. The second type of use would naturally relate only to such AI systems that are intended for direct use.

In case of damage, it is the injured person that should decide whom he or she wishes to sue; the professional operator – if the injured person used the AI system through such operator – or directly the producer of the AI system (if such is the decision of the injured person or when there was no operator). Therefore, the injured person should have a choice. In all situations where there is an operator of an AI system, it will be easier for the injured person to identify the operator and seek compensation directly from the operator. In addition, the operator of an AI system should have the right to recourse compensation paid by the AI system's manufacturer in any case when the operator had paid compensation to the injured person. The principles of liability of a manufacturer of an AI system vis-à-vis the operator of that system should, however, be defined differently from that which can be found in the Regulation proposal. Notably, under Art. 12(3) of the Regulation proposal, it was envisaged that in situations when the operator of a defective AI system fully compensates for the damage to the injured person, the operator may seek recourse compensation from the manufacturer of that system under the terms of liability for a defective

product. As a consequence, liability of an AI system operator would be more severe than the liability of the AI system's manufacturer. In my opinion, the principles of liability of a manufacturer of an AI system and of the system's operator should be aligned. If a manufacturer wishes to avoid liability towards the operator of an AI system that compensated in full the damage suffered by the injured person, the manufacturer should prove that such damage was a consequence of force majeure or exclusive fault of the AI system's operator or a person for whom the operator is responsible<sup>[58]</sup>. If the manufacturer were unable to demonstrate any of the above-mentioned exonerating conditions, then the manufacturer would have to pay the compensation. The operator of a defective AI system should be relieved from the burden of proving the defect of the AI system that caused the damage and the causal link between the defect and the damage caused.

## 6 Conclusion

Despite the high safety standards proposed in the AI Act, AI systems will undoubtedly cause damage, both in the material and immaterial dimension. This follows, among others, from the immanent characteristics of artificial intelligence: capacity to learn, to transform, to interact with humans, as well as its complexity, opacity, autonomy. The more complex a given AI system is, the more its properties merit from that complexity. Transformations that take place throughout the life cycle of an AI system will be a consequence of, among other things, interaction with the environment, including humans. In this context, AI systems that are safe upon being put into circulation – following the applicable legal requirements – have a potential to become dangerous later on in their lifecycle. This is the case since the potential to develop, represented by AI systems, is at the same time the potential to become a dangerous AI system. To face the current challenges, i.e. to make sure that the principles of liability for damages caused by AI systems create real – and not only illusory – protection of the

<sup>58</sup> The operator inappropriately handled the AI system (uploading to the AI system defective data or data other than of the highest quality; lack of ongoing updates; non-compliance with the specific instructions provided by the manufacturer; omission to maintain a due level of knowledge and/or skill necessary for the operation of the AI system), which gave rise to the damage.

injured parties and, at the same time, that they do not hinder the dynamic growth of artificial intelligence (safe AI), in my view, it is necessary to amend the EU legislation. Just as a couple of decades ago, in the European Union, separate terms of liability were introduced for defective products (Directive 85/374/EEC), presently we face a growing need to create a separate model of liability for damage caused by AI systems. The objective scope of such liability should cover all AI systems. On the other hand, as far as the subjective scope is concerned, in my opinion, all producers of AI systems and professional operators of AI systems (both back-end operators and front-end operators) should bear risk-based liability towards any person who has suffered injury or damage as a result of the physical or virtual operation, device or process controlled by an AI system.

The latest proposals for legislative amendments contained in the PLD proposal and the AILD proposal are rather conservative. With regard to civil liability for damage caused by AI systems, the EU legislator has not decided to introduce bold reforms, the nucleus of which, for example, could be seen in the European Parliament's resolution of October 20, 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence. According to the European Commission, it is still too early for any avant-garde reforms in the area of civil law liability of AI systems<sup>[59]</sup>. In consequence of the above, the EU legislator concentrated on such legal provisions that offer an answer to the problems with the liability for the discussed systems as reported so far. AI systems were unambiguously classified as products and covered by the civil liability regime for defective products (the Products Liability Directive proposal). The division has been preserved into the strict liability of manufacturers<sup>[60]</sup> of AI systems (liability for a defective product) and fault-based non-contractual liability attaching to providers and users of AI systems.

Although one can agree that the legal provisions contained in the PLD proposal and the AILD proposal are suited to the current development level of AI systems, it can be doubted whether the level of legal protection of persons injured by AI systems, as offered by the EU legislator, will be sufficient. This is the case since the European legislator strongly focused on balancing the interests of manufacturers, providers and users of AI systems with the interests of persons injured by such systems. The reason for such course of action was definitely the fear of slowing down the dynamic

---

<sup>59</sup> See the AILD proposal, Explanatory Memorandum, point 5, 14. [https://commission.europa.eu/system/files/2022-09/1\\_1\\_197605\\_prop\\_dir\\_ai\\_en.pdf](https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf).

<sup>60</sup> Manufacturers and other parties referred to in the PLD proposal.

development of the latest technologies and making the European Union a peripheral region in the sector of AI systems. Obviously, such fear is not groundless. However, the question arises as to whether the priority is the rapid development of AI systems and the maintenance of the European Union's competitiveness in relation to technological giants (e.g. China), or whether the most important task is to develop optimal legal conditions for the development of trustworthy and completely safe AI. As far as safety is concerned, however, the legal provisions contained in the AI Act inspire optimism. The solutions envisaged in that legislative act, at least in respect of high-risk AI systems, can really be considered ground-breaking and important in the perspective of the entire world. The AI Act sets completely new standards in the area of AI safety. Development of new technologies is important, and the newly created legal regulations are to be conducive in that regard. However, it is technology that should serve the human being and not the other way round. Therefore, the most important task is to protect human rights and European values. The intention behind putting people at the center is to develop safe and reliable AI<sup>[61]</sup>.

In summary, the proposals for legislative reform contained in the PLD proposal and the AI Liability Directive proposal are of a temporary nature and will certainly not be sufficient in the longer term. In any case, the European Commission is fully aware of this fact, as it emphasizes continuous monitoring of the situation in order

[t]o provide the Commission with information on incidents involving AI systems. The targeted review will assess whether additional measures would be needed, such as introducing a strict liability regime and/or mandatory insurance<sup>[62]</sup>.

<sup>61</sup> See: Ethics Guidelines for Trustworthy AI (2019), High-Level Expert Group on Artificial Intelligence. [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=60419](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty „Building Trust in Human-Centric Artificial Intelligence”. COM(2019) 168 final. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52019DC0168>; The Assessment List for Trustworthy Artificial Intelligence (ALTAI) for self-assessment (2020), High-Level Expert Group on Artificial Intelligence. <https://digital-strategy.ec.europa.eu/en/library/assessment-list-trustworthy-artificial-intelligence-altaï-self-assessment>; European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)). [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html).

<sup>62</sup> The AILD proposal, Explanatory Memorandum, point 5, 14. [https://commission.europa.eu/system/files/2022-09/1\\_1\\_197605\\_prop\\_dir\\_ai\\_en.pdf](https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf).

It will only be possible to evaluate in retrospect and from a practical perspective to what extent and for how long the legal solutions contained in the PLD proposal and the AILD proposal prove efficient. For the time being, the legislative procedure in respect of the above-mentioned legislative acts has not yet been completed.

In this article, I have tried to show that the legislator should completely abandon liability for a defective product and instead adopt a uniform, risk-based liability regime for damage caused by all AI systems. Damage caused by an AI system should therefore be dissociated from a defect in that system. The risk-based liability regime should be limited to determining the damage and its extent, and whether there is a causal link between the operation of the AI system and the damage caused. On the other hand, it should be irrelevant whether the AI system was defective or not and, if so, what the nature of any defect was. The person injured by the operation of an AI system should also be compensated when the system was not defective – no defect in the technical and legal sense – or when it is impossible to establish of what the possible defect consisted. In consequence, if the damage occurred in consequence of the operation of an AI system and there are no conditions exempting liability of the manufacturer or operator of such system (there is no exonerating condition), the injured party should receive compensation, regardless of whether the AI system was defective or not. Such a liability model, in combination with the rules on the safety of AI systems (e.g., AI Act), would allow to develop social confidence in the AI technology.

In my opinion, a uniform system of strict civil liability for damages caused by all and any AI systems<sup>[63]</sup>, risk-based and covering both manufacturers and professional operators of those systems is an adequate response to the challenges relating to the development of AI technologies. Critics of the position presented in this article could obviously raise an objection that risk-based liability would be too severe with regard to AI systems that do not pose a high risk. An additional objection could be made by saying that the introduction of risk-based liability for damages caused by AI systems would be favorable to the largest technological companies and, at the same time, detrimental to medium-sized and small firms or to start-up ventures. This relates to the opinion that only technological giants have the financial capacity to incur the costs of severe risk-based liability. The introduction of such a liability regime could therefore lead to a situation in which such

---

<sup>63</sup> This refers both to the most and to the least complex and autonomous AI systems.

giants monopolize the market for new technologies. In response to such objections, I would like to point out that, in my view, they are inaccurate. AI systems which do not pose a high risk do not bring such danger to health, life and property of natural persons as in the case of high-risk AI systems, correspondingly the damages caused by these systems will not be damage of great extent. Such damage will relate to individuals rather than entire communities. As a result, compensation to be paid by producers of AI systems not characterized by high risk will be proportionally lower. Only the frequency of their payment may be high, bearing in mind the increasing use of AI systems. However, it must be emphasized that severe risk-based liability will, in fact, encourage or even force manufacturers of AI systems to develop systems that are as safe as possible. This will relate to all manufacturers and all AI systems, starting from the least complex and the least autonomous to the most advanced high-risk AI systems. Since liability would be consolidated for manufacturers of all AI systems, all such manufacturers would also be affected by the pressure to minimize costs through developing increasingly safer AI. In this context, introduction of a uniform risk-based liability would have a very positive consequence: that is, a motivation to create ever safer AI systems. The manufacture of such systems, as well as payment of compensation for damage caused by AI systems, obviously implies a need to incur costs by those systems' producers. It should be remembered that manufacturers of AI systems verify their costs and ascertain the most cost-effective route: payment of compensation or investment in ever safer AI systems. Therefore, severe risk-based liability is conducive to raising safety standards. On the other hand, lenient liability for a defective product – which under the existing legal framework will not be enforceable in an increasing number of cases – categorically does not serve the same purpose. As regards the second objection signaled above, relating to the monopolization of the new technologies market by the largest firms operating in the area of artificial intelligence, it has been thoroughly examined by Anat Lior.<sup>[64]</sup> At this point, it seems legitimate to refer the reader to the scientific analysis carried out by that author. This analysis shows that large technological companies already enjoy a strong position in the AI industry. This is caused by many factors: the ability of such firms to attract the most talented specialists; having at their disposal huge data pools, gathered for years; having the greatest financial

<sup>64</sup> Anat Lior, „AI Strict Liability Vis-à-Vis AI Monopolization” *Columbia Science and Technology Law Review*, No. 1 (2020): 90-126.

resources. However, Lior shows that the introduction of risk-based liability will not change the status quo mentioned above to the detriment of small firms. On the other hand, the problem of monopolizing the market should be solved by appropriate regulations specifically devoted thereto. However, abandonment of risk-based liability, most definitely, cannot be regarded as one of such regulations. There is no proof that by abandoning a risk-based liability regime for AI systems the legislator would improve the situation of small firms trying their hand in the AI sector.<sup>[65]</sup> Lior's argument leaves no doubt that we should not abandon the risk-based liability model for damages caused by AI systems.

## Bibliography

- Fairgrieve Duncan, Geraint Howells, Peter Møgelvang-Hansen, Gert Straetmans, Dimitri Verhoeven, Piotr MacHnikowski, André Janssen, Reiner Schulze, „Product Liability Directive”, [in:] *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski. 46. Cambridge, Antwerp, Portland: Intersentia, 2016.
- Gerstner Maruerite E., „Liability Issues with Artificial Intelligence Software” *Santa Clara Law Review*, No. 1 (1993): 239-269. <https://digitalcommons.law.scu.edu/lawreview/vol33/iss1/7/>.
- Gilead Israel, „Product Liability in Israel”, [in:] *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski. 546–547. Cambridge, Antwerp, Portland: Intersentia, 2016.
- Jagielska Monika, „Odpowiedzialność za sztuczną inteligencję [Liability for Artificial Intelligence]”, [in:] *Prawo sztucznej inteligencji [The Law of Artificial Intelligence]*, ed. Luigi Lai, Marek Świerczyński. 69-79. Warsaw: C.H. Beck, 2020,
- Jagielska Monika, *Odpowiedzialność za produkt [Product Liability]*. Warsaw: Wolters Kluwer, 2009.
- Lior Anat, „AI Strict Liability Vis-à-Vis AI Monopolization” *Columbia Science and Technology Law Review*, No. 1 (2020): 90-126. <https://doi.org/10.52214/stlr.v22i1.8055>.
- European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski. Cambridge, Antwerp, Portland: Intersentia, 2016.

<sup>65</sup> Ibidem, 125-126.

- Masci Pietro, „The History of Insurance: Risk, Uncertainty and Entrepreneurship” *Journal of the Washington Institute of China Studies* No. 3 (2011): 25-68. [https://www.academia.edu/45474658/The\\_History\\_of\\_Insurance\\_Risk\\_Uncertainty\\_and\\_Entrepreneurship](https://www.academia.edu/45474658/The_History_of_Insurance_Risk_Uncertainty_and_Entrepreneurship).
- Radwański Zbigniew, *Zobowiązania – część ogólna [Obligations – General]*, 2nd ed. Warsaw: C.H. Beck, 1998.
- Rojszczak Marcin, Marcin Rojszczak, „Prawne aspekty systemów sztucznej inteligencji. Zarys problemu [Legal Aspects of Artificial Intelligence Systems: Outline of the Problem]”, [in:] *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane [Artificial Intelligence, Blockchain, Cybersecurity and Personal Data: Selected Issues]*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek. 1-22. Warsaw: C.H. Beck, 2019.
- Russell Stuart, *Human Compatible: AI and the Problem of Control*. UK, USA, Canada, Ireland, Australia, India, New Zealand, South Africa: Penguin Books, 2019.
- Smuha Nathalie A., Emma Ahmed-Rengers, Adam Harkens, Wenlong Li, James MacLaren, Riccardo Piselli, Karen Yeung. *How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission’s Proposal for an Artificial Intelligence Act*. Birmingham: University of Birmingham, 2021. <http://dx.doi.org/10.2139/ssrn.3899991>.
- Swanson Greg, „Non-Autonomous Artificial Intelligence Programs and Products Liability: How New AI Products Challenge Existing Liability Models and Pose New Financial Burdens” *Seattle University Law Review*, No. 3 (2019): 1201-1222. <https://digitalcommons.law.seattleu.edu/sulr/vol42/iss3/11/>.
- Sykes Alan O., „The Law and Economics of «Forced» Technology Transfer and Its Implications for Trade and Investment Policy (and the U.S.-China Trade War)” *Journal of Legal Analysis*, No. 1 (2021): 127-171. <https://doi.org/10.1093/jla/laaa007>.
- Veale Michael, Frederik Zuiderveen Borgesius, „Demystifying the Draft EU Artificial Intelligence Act: Analysing the good, the bad, and the unclear elements of the proposed approach” *Computer Law Review International* No. 4 (2021): 97-112. <https://doi.org/10.9785/cri-2021-220402>.
- Vladeck David C., „Machines without Principals: Liability Rules and Artificial Intelligence” *Washington Law Review*, No. 1 (2014): 117-150. <https://digitalcommons.law.uw.edu/wlr/vol89/iss1/6>.
- Wendehorst Christiane, „Strict Liability for AI and other Emerging Technologies” *Journal of European Tort Law*, No. 2 (2020): 179. <https://doi.org/10.1515/jetl-2020-0140>.



URSZULA NOWICKA

# Pomiędzy tradycją a prawem. Sytuacja hinduskich kobiet w Indiach

## Between Tradition and Law: The Situation of Hindu Women in India

Contemporary India is caught between its attachment to tradition and the demands of modern civilization for respect for human dignity. Despite the constitutional guarantee of equality before the law and the prohibition of discrimination based on gender, the shape and character of society are determined by religion and loyalty to tradition. The research problem of this paper is the situation of Hindu women in India; the author searches for the causes and possibilities of change in this situation. In pursuit of her research objective, she analyzes the Hindu tradition to find sources that define the role of women; studies the actions taken by the Indian government to be able to assess the relevance and effectiveness of the state policy; interprets data that reflect the everyday life of Indian women to show that the problem is not only theoretical but requires a specific response, which is postulated in the conclusions.

**SŁOWA KLUCZE:** prawa kobiet  
w Indiach, polityka Indii, indyjskie  
kobiety, tradycja hinduska, godność  
kobiety

**KEYWORDS:** women's rights in India,  
Indian Politics, Indian women, Hindu  
tradition, Women's dignity

**URSZULA NOWICKA**, doktor habilitowany nauk prawnych, profesor Uniwersytetu  
w Siedlcach, ORCID – 0000-0003-4684-0980,  
e-mail: urszula.nowicka@uws.edu.pl

## 1 | Wstęp

Sytuacja kobiet w Indiach jest uzależniona od wielu czynników, takich jak religia, którą wyznają, region, w którym żyją, rodzina, w jakiej się wychowywały, klasa społeczna, do której należą. Szczególnie trudna jest rzeczywistość hindusek, których rola w tradycyjnej strukturze społecznej często była definiowana przez ich pozycję jako córek, żon i matek, z silnym naciskiem na posłuszeństwo. Choć hinduizm czci wiele bogini i otacza je głębokim szacunkiem, realne traktowanie kobiet w społeczeństwie hinduskim jest często sprzeczne z tym ideałem. Co jakiś czas pojawiają się w mediach doniesienia, że po raz kolejny w Indiach godność kobiety została pogwałcona, a jej prawa zignorowane. Tak było w 2012 r. po brutalnym zbiorowym gwałcie popełnionym na przedmieściach Delhi, którego ofiarą padła młoda studentka<sup>[1]</sup>. Dziewczyna stała się symbolem współczesnych Indii, istniejących pomiędzy tradycją i nowoczesnością – a przez to tak zróżnicowanych, jakby funkcjonowały w wielu stuleciach jednocześnie. Tradycja hinduska ściera się tam z codziennością, której z kolei teoretycznie usiłuje zaradzić państwo. Teoretycznie, ponieważ minęło kolejne 10 lat i nadal dochodzi do podobnych dramatów, a brakuje konsekwentnych decyzji i zmian. Przeciwnie, media donoszą o bezkarności sprawców, opieśalaści indyjskiej policji, zacieraniu śladów czy wręcz ich ignorowaniu.

Powyzszy stan rzeczy skłania do podjęcia refleksji nad sytuacją indyjskich kobiet, nad przyczyną ich dramatu. Czy tkwi ona w tradycji? Czy w nieudolnej polityce państwa? Czy można zmienić codzienność tych kobiet okradanych z godności, zawieszonych pomiędzy wiernością tradycji a pragnieniem właściwie pojmowanego człowieczeństwa? Złożoność zagadnienia nie daje możliwości jego ostatecznego wyczerpania, poniższa refleksja jest jednak próbą oceny efektywności podejmowanych działań oraz znalezienia perspektywy zmian na przyszłość.

<sup>1</sup> Smriti Sings, „Delhi ganga rape: case diary” *The Times of India*, 13 September 2013, <http://timesofindia.indiatimes.com/india/delhi-gang-rape-case-diary/articleshow/22455125.cms?from=mdr>.

## 2 | Tradycja w świadomości hinduskiej

Tradycja w świadomości hinduskiej ma głębokie znaczenie, jest bowiem nieodłącznym elementem tożsamości, duchowości oraz codziennego życia hindusów. Choć o hinduizmie często mówi się jako o religii, w rzeczywistości jest to system zróżnicowanych wierzeń, kultura i sposób życia, oparty na wielowiekowych praktykach i filozofii, żywo obecnych w życiu jego wyznawców. Niezmiennałość tradycji w hinduizmie odnosi się do ciągłości tych praktyk, wierzeń, rytuałów oraz społecznych i duchowych zasad, które przetrwały przez wieki. Wskazuje ona na głębokie zakorzenienie religii w historii i kulturze, a także na jej zdolność – mimo elastyczności i umiejętności dostosowywania się do zmieniających się kontekstów społecznych i kulturowych – do zachowania istotnych elementów tożsamości religijnej i kulturowej w obliczu zmieniających się warunków historycznych i społecznych. Tradycja hinduska charakteryzuje się bowiem wyjątkową elastycznością i umiejętnością adaptacji (to z pewnością pozwoliło jej przetrwać i rozwijać się przez stulecia), zachowując jednocześnie swój rdzeń i wartości, którym pozostaje wierna.

Jedną z takich wartości, a jednocześnie fundamentem społecznej organizacji w hinduizmie jest rodzina, w której jednak nie ma miejsca na równość czy indywidualizm: istnieje silne podporządkowanie grupie, a o statusie w niej świadczy przede wszystkim płeć. Pojmowanie roli kobiety jest jednym z aspektów tak głęboko zakorzenionych w tradycji hinduskiej, że nawet dziś trudno jest w Indiach o społeczną akceptację postulowanych i prawnie regulowanych zasad równości, równouprawnienia i braku dyskryminacji. Nie oznacza to, że status kobiety pozostaje niezmienny. W okresie wedyjskim (ok. 1500-500 r. p.n.e.) kobiety w hinduizmie były szanowane i cieszyły się pewnym stopniem autonomii. I choć ideałem kobiety była zawsze wierna żona, to taka jej rola, choć wyrażająca niższą pozycję w społeczeństwie, nie kojarzyła się wówczas z poniżeniem<sup>[2]</sup>. Do marginalizacji statusu kobiety przyczynił się mityczny Manu (ok. II w. p.n.e. – II w. n.e.), który uważa, że kobieta jest stworzona wyłącznie do służenia mężczyźnie oraz do opieki nad dziećmi, inne zaś prawa nie dotyczą jej i jej nie przysługują<sup>[3]</sup>. W średniowieczu to przekonanie jedynie pogłębiało się, a sytuacja kobiet stawała się coraz trudniejsza. Hinduska kobieta to przede

<sup>2</sup> Monika Tworuschka, Udo Tworuschka, *Hinduizm* (Warszawa: Agora, 2009), 70.

<sup>3</sup> Aldona Piwko, „Kobieta w tradycji hinduskiej” *Nurt SVD* 46 [wydanie specjalne] (2012): 29.

wszystkim żona i matka synów. Jednak nie z własnego wyboru, ale z aranżacji rodziców<sup>[4]</sup>, negocjujących w tej kwestii już w jej dzieciństwie. Córka w hinduskiej rodzinie to problem, bowiem wychowywana była tylko po to, by przejść do rodziny męża, której należała się ponadto posag<sup>[5]</sup>. Rodziców rzadko stać było na małżeństwa kilku córek, bywało więc, że oddawali je do służby świątynnej. Dewadasi początkowo usługiwały bóstwu śpiewem i tańcem<sup>[6]</sup>, z czasem jednak znaczenia nabrala ich seksualna aktywność, co zaszczynią niegdyś funkcję sprowadziło do roli prostytucji świątynnej<sup>[7]</sup>.

W domu rodzinnym dziewczynki przebywały do czasu osiągnięcia dojrzalości płciowej, a za najlepszy wiek dla panny młodej uważano 1/3 wieku pana młodego, co miało umożliwiać realizację patriarchalnego charakteru małżeństwa. W hinduskiej rodzinie to mąż był panem i władcą domu, ponadto wyłącznie on sprawował w nim kult<sup>[8]</sup>. Jeśli umierał, wina za jego śmierć spadała z reguły na żonę<sup>[9]</sup>, ale była także najgorszą rzeczą, jaka mogła spotkać kobietę. Jej powtórne małżeństwo było bowiem zakazane, zaś dla rodziny męża, której nie przynosiła już żadnych korzyści, stawała się ogromnym obciążeniem. Często jako istota przeklęta wykluczana była z życia społeczności i pozbawiana nawet podstaw do życia. To z kolei doprowadziło do upowszechnienia się obrzędu sati, gdyż pogardzany stan wdowi prowadził hinduskie żony do walki o prawo takiej śmierci jak o przywilej<sup>[10]</sup>.

Głęboko zakorzeniona w świadomości hinduskiej tradycja utrwała przekonanie o słuszności nierówności społecznych. Gdy więc w połowie XVIII w. Królestwo Wielkiej Brytanii podbiło Indie, kolonizatorzy okazali się niemal bezsilni wobec zastanej rzeczywistości – mogli jedynie próbować

<sup>4</sup> Saleema Parveen, *Dowry system in India an annotated select bibliography* (Aligarh: Aligarh Muslim University, 1982), 73.

<sup>5</sup> S. Anukriti, Sungoh Kwon, Nishith Prakash, „Saving for Dowry Evidence from Rural India” *Journal of Development Economics*, 154 (2022): 4; Gaurav Chiplunkar, Jeffrey Weaver. „Marriage Markets and the Rise of Dowry in India” *Journal of Development Economics*, 164 (2023): 106.

<sup>6</sup> Tworuschka, Tworuschka, *Hinduizm*, 72.

<sup>7</sup> Rajendran Kalaivani, „Devadasi System in India and Its Legal Initiatives – An Analysis” *Journal of Humanities and Social Science*, 20/2/II (2015): 50–51; Piwko, „Kobieta”, 38–39.

<sup>8</sup> Henryk Jagodziński, „Niektóre zagadnienia dotyczące małżeństwa i rodziny w hinduizmie” *Kieleckie Studia Teologiczne*, 15 (2016): 12.

<sup>9</sup> Urviya Priyadarshini, Pande Rekha, „Exploring the Politics of Widowhood in Vrindavan: An Analysis of Life Narratives of Vrindavan Widows” *Advances in Applied Sociology*, 11/4 (2021): 163.

<sup>10</sup> Aldona Piwko, „Małżeństwo i rodzina w hinduizmie” *Nurt SVD*, 47/2 (2013): 228.

odnaleźć się pomiędzy szacunkiem wobec indyjskiej przeszłości a pogardą względem tamtejszych praw i zwyczajów. Owszem, kiedy ich obecność na subkontynencie indyjskim wzmacniła się, podjęły próby zhumanizowania surowych zasad religijnych<sup>[11]</sup>, a w tej perspektywie bardzo ważne stały się sprawy kobiet i najbardziej hańbiące praktyki ich dotyczące: *sati*, małżeństwa dzieci, dzieciobójstwo, sytuacja wdów, *dewadasi* i system edukacji<sup>[12]</sup>. Ich nagłośnienie powodowało jednak podwójny skutek. Z jednej strony rodziło ryzyko buntu, chodziło przecież o dyskredytację najbardziej zakorzenionych w tradycji zasad. Z drugiej niosło nową wiedzę, idee i technologie. Neera Desai i Usha Thakkar piszą, że wówczas „po raz pierwszy zakłócono głębokie i ciche wody indyjskiej tradycji”<sup>[13]</sup>. I w tym właśnie, jak się wydaje, tkwi źródło dzisiejszej dysharmonii, którą pogłębia ponadto wielokulturowość, system kastowy, wielość zwyczajów i praktyk. Indie są krajem niezwykle zróżnicowanym i nie można ulegać złudzenia jednorodności tamtejszej kultury. Splatają się tam wpływy święte i世俗ne, tradycyjne i nowoczesne, lokalne i globalne, tworząc dynamiczną mozaikę doświadczeń. A na gruncie tego zróżnicowania miała jeszcze powstać przepaść pomiędzy tym, co zasadniczo hierarchiczne i akceptujące normy dyskryminacji oraz marginalizację indywidualizmu, a nowością Zachodu, głoszącego ideę równości i wolności<sup>[14]</sup>.

### 3 | Polityka społeczna względem kobiet w Indiach

Już w 1948 r., krótko po odzyskaniu niepodległości, Indie przyjęły Powszechną Deklarację Praw Człowieka, która głosi uznanie i zachęca do przestrzegania praw przysługujących z racji ludzkiej godności. Wśród nich jako pierwsza została wskazana wolność i równość wszystkich ludzi pod względem godności i praw, bez względu na jakiekolwiek różnice, w tym

<sup>11</sup> Geraldine Forbes, *Women in Modern India* (Cambridge: Cambridge University Press, 2004), 58.

<sup>12</sup> Neera Desai, Usha Thakkar, *Women in Indian Society* (New Delhi: National Book Trust, 2009), 2.

<sup>13</sup> Ibidem.

<sup>14</sup> Anna Staniszewska, „Status społeczno-polityczny kobiety w Indiach na przełomie XX i XXI wieku – konflikt tradycji i prawa” *Świat Idei i Polityki*, 12 (2013): 44.

płeć. Uchwalona rok później Konstytucja Indii<sup>[15]</sup> została sformułowana tak, aby sprzyjać rozwojowi egalitarnego społeczeństwa i wyeliminowaniu dyskryminujących i uwłaszczających godności kobiety praktyk<sup>[16]</sup>. Gwarantowała ona wszystkim równość wobec prawa i równą ochronę prawną (art. 14), nakładała na państwo zakaz dyskryminacji obywateli ze względu m.in. na płeć oraz przynależność kastową (art. 15 (1)), obywatelom zaś nakazywała odrzucanie w swoim postępowaniu praktyk naruszających godność kobiet (art. 51 ust. A lit. e z 1976 r.). Liczne są w Konstytucji Indii prawa, które przynależą „wszystkim” bądź „każdemu”, nawet jeśli jako ich adresatki nie wskazano bezpośrednio kobiet (por. art. 19; 21; 25 (1)).

Taka ilość gwarancji, pozytywnych deklaracji i zapewnienia ochrony daje podstawy, by oczekiwać właściwych rozwiązań prawnych realizujących wskazane cele polityki państwa. I rzeczywiście wydawało się, że w połowie XX w. Indie zapoczątkowały erę wolności, w której kobiety będą równe mężczyznom<sup>[17]</sup>, że tworzy się nowa świadomość i wrażliwość na sprawy kobiet. Założenia programowe ówczesnego rządu obejmowały kompleksowy program opieki społecznej, kładły nacisk na edukację kobiet, opiekę zdrowotną i dożywianie matek<sup>[18]</sup>. A mimo to w 1974 r. Komitet ds. Statusu Kobiet w Indiach ujawnił drastyczne dane na temat istniejących nierówności oraz statystyki ukazujące ogromne dysproporcje płci<sup>[19]</sup>. Były one tak szokujące, że parlament jednogłośnie wezwał premiera do podjęcia kompleksowych działań, rząd zaś niemal natychmiast sformułował Krajowy Plan Działania na Rzecz Kobiet<sup>[20]</sup>. Analizując jednak kolejne dekady walki o ich prawa, można wysunąć wniosek, że podejmowane działania nie mają charakteru polityki prewencyjnej, ale są reakcją (wymuszoną?) na różnego rodzaju wydarzenia. I co więcej, jak zobaczymy poniżej, reakcją nieskuteczną.

<sup>15</sup> Konstytucja Indii uchwalona przez Zgromadzenie Konstytuczjne 26 listopada 1949 r. <http://biblioteka.sejm.gov.pl/wp-content/uploads/2021/02/Konstytucja-Indii-tłumaczenie.pdf>.

<sup>16</sup> Anamika Kumar, „Wybrane aspekty sytuacji kobiet w Indiach. Analiza społeczno-historyczna”, [w:] *Gender: kobieta w kulturze i społeczeństwie*, red. Beata Kowalska, Katarzyna Zielińska, Ben Koschalka (Kraków: Rabid, 2009), 66.

<sup>17</sup> Desai, Thakkar, *Women in Indian Society*, 15.

<sup>18</sup> Ibidem, 148.

<sup>19</sup> Committee on the Status of Women in India, *Report Towards Equality*, New Delhi 1974. <http://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf>.

<sup>20</sup> Desai, Thakkar, *Women in Indian Society*, 151.

Przykładem takiej daremnej interwencji jest prawo posagowe. Zwyczaj jego dawania i przyjmowania był obecny mimo uchwalenia w 1961 r. ustawy o zakazie posagu<sup>[21]</sup>. Gdy początek lat osiemdziesiątych przyniósł masowe demonstracje i protesty w tej kwestii, głośno komentowane w mediach, praktykę posagową uznano za przestępstwo nie podlegające kaucji, nakazano także karać każde działanie związane z posagiem doprowadzające kobietę do samobójstwa<sup>[22]</sup>. W praktyce jednak niczego to nie zmieniło.

Inną kwestią jest przemoc względem kobiet, w tym również przemoc seksualna. Najgłośniejszy przypadek, już wspomniany, miał miejsce w 2012 r. w New Delhi i wywołał bezprecedensowe reakcje społeczne w całych Indiach. To one zmusiły rząd indyjski do działania, ocenianego jednak bardzo krytycznie. Przede wszystkim dlatego, że sytuacja w Indiach domaga się gruntownych reform, tymczasem wątpliwości budzi już sam proces wprowadzania rozwiązań prawnych. Od dnia gwałtu do nowelizacji prawa karnego, o którym poniżej, poprzedzonego rzekomo analizą 80 tys. sugestii i petycji, minęło zaledwie półtora miesiąca – wszystko działało się więc bardzo szybko, zbyt szybko. A liczba przestępstw względem kobiet nie zaczęła maleć.

Liczne są przykłady ustaw uchwalanych po to, aby polepszyć sytuację kobiet. W 1929 r. ograniczono małżeństwa dziewcząt przed ukończeniem 14 lat, ale mężczyznom je poślubiającym groziły niewspółmiernie niskie kary (pozbawienie wolności do 15 dni lub 3 miesięcy, w zależności od wieku mężczyzn)<sup>[23]</sup>. Ustawa z 2006 r. pozwoliła na unieważnienie małżeństwa zawartego przed ukończeniem przez kobietę 18 roku życia<sup>[24]</sup>, zaś nowelizacja z 2021 r. zrównała w tym względzie wiek kobiet i mężczyzn – do 21 lat<sup>[25]</sup>. Mocą ustawy o sukcesji z 1956 r. kobiety zostały dopuszczone do dziedziczenia<sup>[26]</sup>, zaś po nowelizacji z 2005 r. córki mogą otrzymać taki sam majątek jak synowie<sup>[27]</sup>. W 1988 r. formalnie zakazano w Indiach

<sup>21</sup> Dowry Prohibition Act, 1961, Act n° 28 of 1961.

<sup>22</sup> Desai, Thakkar, *Women in Indian Society*, 137.

<sup>23</sup> The Child Marriage Restraint, 1929, Act n° 19 of 1929, s. 3-4.

<sup>24</sup> The Prohibition of Child Marriage, 2006, Act n° 6 of 2007, s. 3.

<sup>25</sup> The Prohibition Of Child Marriage (Amendment) Bill, 2021, No. 15/LN/Ref./June/2022.

<sup>26</sup> Hindu Succession Act, 1956, Act n° XXXVIII of 1956, ch. II, s. 5.

<sup>27</sup> The Hindu Succession (Amendment) Act, 2005, Act n° 39 of 2005, s. 6. Sanchari Roy w swoich badaniach wykazuje, że reforma nie zwiększyła faktycznego dziedziczenia majątku przez kobiety, a jedynie wprowadziła zwyczaj „oddawania” przez rodziców części ziemi synom, aby obejść prawo – Sanchari Roy, „Empowering women? Inheritance rights, female education and dowry payments in India” *Journal of Development Economics*, 114 (2015): 250.

istnienia *dewadasi*<sup>[28]</sup>, a w 1994 r. wykonywania badań prenatalnych, których celem jest poznanie płci dziecka, a w konsekwencji selektywna aborcja<sup>[29]</sup>. W 2005 r. ustanowiono prawną ochronę kobiet przed przemocą fizyczną, seksualną, emocjonalną i ekonomiczną w domu<sup>[30]</sup>. Takie przykłady można mnożyć, natomiast analizując działania podejmowane przez państwo indyjskie na rzecz kobiet, warto zadać pytanie, jaka jest ich skuteczność? Niestety w mediach pojawiają się bowiem informacje o tragicznej sytuacji kobiet w Indiach, która mimo upływu czasu, cywilizacji, działalności różnego rodzaju organizacji ochrony praw człowieka, wydaje się nie polepszać. Jaka jest tego przyczyna?

## 4 | Rzeczywistość hinduskich kobiet

Analizy dokonane powyżej powinny prowadzić do oczywistego wniosku, że w XXI w. nawet najgłębiej zakorzeniona tradycja musiała ustąpić podstawowym prawom człowieka, których poszanowania domaga się międzynarodowa społeczność. Szacunek dla ludzkiej godności oraz prawo do wolności i równości wydaje się wspólnie czymś tak oczywistym, że aż trudno uwierzyć, iż gdzieś ktoś żyje inaczej – bez ochrony prawnej, bez telefonu, bez możliwości stanowienia o samym sobie. A jednak – jak ukazują poniższe dane – indywidualne poczucie niesprawiedliwości, brak normalności i bezpieczeństwa jest codziennym udziałem milionów hindusek – obywatelek i żon.

### 4.1. Pozyция kobiety w społeczeństwie

Wedle najnowszego raportu ONZ Indie zamieszkuje ponad 1 428 627 tys. ludzi, co czyni je najludniejszym krajem świata. Oficjalnie są one państwem świeckim, w praktyce jednak religia stanowi jeden z najważniejszych

<sup>28</sup> The Andhra Pradesh Devadasis (Prohibition Of Dedication) Act, 1988, Act n° 10 of 1988, s. 3.

<sup>29</sup> The Pre-Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Act, 1994, Act n° 57 of 1994, s. 3A.

<sup>30</sup> The Protection of Women from Domestic Violence Act, 2005, Act n° 43 of 2005, s. 3.

aspektów życia. Przeszło 80% Indyjczyków wyznaje hinduizm. Indie są państwem należącym do tzw. grupy BRICS, której rozwój napędza światowy rynek. Pod względem PKB Indie zajmują piąte miejsce wśród wszystkich gospodarek świata<sup>[31]</sup>. I to właśnie w tym kraju 14% społeczeństwa dotyczy problem niedożywienia, z czego większość stanowią kobiety. Ponad połowa hindusek w wieku rozrodczym cierpi z powodu anemii, co piąte dziecko boryka się z poważną niedowagą. Co roku z powodu głodu umiera 2 miliony dzieci przed 5. rokiem życia<sup>[32]</sup>. I trudno o optymizm nawet wobec faktu, że w stosunku do 2000 r. sytuacja Indii w tej kwestii uległa poprawie. W 2023 r., Indie znalazły się na 111. miejscu w tym niechlubnym rankingu (na 125 państw dysponujących danymi do obliczenia wyników GHI), plasując się wśród krajów, w których panuje „poważny głód”<sup>[33]</sup>.

Wsparcie dla kobiet oferują tzw. *anganwadi*, czyli wiejskie ośrodki opieki. Kobiety ciężarne i karmiące mogą przejść w nich kontrolę stanu zdrowia, otrzymać szczepienia i dodatkowe racje żywieniowe. Pomoc tą skomplikowała jednak pandemia Covid-19, na czas której zawieszone zostały programy realizujące zasiłki macierzyńskie<sup>[34]</sup>. Choć i wcześniej ich popularność była niewielka, korzystało z nich ok. 17% uprawnionych kobiet. Nadmiar formalności, rejestracja internetowa i wymóg posiadania konta bankowego nie są bowiem oczywiste na obszarach wiejskich oraz w mocno tradycyjnych rodzinach.

Tradycja hinduska wymaga od kobiety urodzenia męskiego potomka, co w praktyce powoduje z jednej strony dużą liczbę dzieci w rodzinach, szczególnie biednych, z drugiej problem selektywnej aborcji. Wiąże się to przede wszystkim z aspektem materialnym, który spowodował początkowo rozprzestrzenienie się na szeroką skalę dzieciobójstwa, a następnie – wraz z rozwojem medycyny prenatalnej – aborcji selektywnej<sup>[35]</sup>. Niewiele w tej kwestii zmieniło wprowadzenie zakazu badań prenatalnych ze względu na płeć dziecka, które upowszechniły jedynie podziemie aborcjone. Oczywiście nie są znane oficjalne statystyki dotyczące liczby wykonanych aborcji, ale

<sup>31</sup> The World Bank, *Data. India*, 2022, <http://data.worldbank.org/country/IN>.

<sup>32</sup> Hunger Generation, *Problem głodu w Indiach*. <http://hungergeneration.com/problem-glodu-w-indiach/>.

<sup>33</sup> Global Hunger Index, *Global Hunger Index Scores by 2023 Ghi Rank*. <http://globalhungerindex.org/india.html>.

<sup>34</sup> Ministry of Women & Child Development, *Anganwadi Services*, 2023. <http://wcd.nic.in/schemes/anganwadi-services>.

<sup>35</sup> Małgorzata Hućko, „Selektywna aborcja a sytuacja demograficzna państw azjatyckich – rozwój oraz konsekwencje zjawiska” *Wschodnioniemieckie Studia Prawne*, 8 (2014): 222.

problem obrazuje współczynnik SRB: w Indiach wynosi on obecnie 1,10. Analiza danych przeprowadzona przez Pew Research Center ujawnia, że w latach 2000-2019 „zginęło” w Indiach przynajmniej 9 milionów dziewczynek<sup>[36]</sup>. Międzynarodowe badania pokazują, że społeczeństwo o tak wysokim wskaźniku SRB ponosi bardzo drastyczne skutki, prowadzące do wzrostu przemocy i przestępstw seksualnych oraz handlu kobietami<sup>[37]</sup>.

Odpowiedzią na tę dramatyczną sytuację miał być rządowy program Beti Bachao, Beti Padhao (BBBP), uruchomiony w 2015 r.<sup>[38]</sup>. Jego celem było edukowanie obywateli przeciwko uprzedzeniom ze względu na płeć i poprawa skuteczności opieki społecznej dla dziewcząt oraz ich wykształcenia. Program, jak wiele innych, okazał się nieskuteczny (większość środków przeznaczonych na jego realizację została wydatkowana na reklamę), zwrócił jednak uwagę, że problem w Indiach stanowi nie tylko selekcja dziewczynek, ale także – jeśli się urodzą – ich wychowanie, w tym wykształcenie. Zgodnie z hinduską tradycją edukacja kobiety (z wyjątkiem kurtyzan i córek możnych) powinna sprowadzać się do wiedzy na temat prac domowych, wychowania dzieci i usługiwania mężowi. Praktyka nieposyłania dziewcząt do szkół jest obecna przede wszystkim na wsiach – a to właśnie tam mieszka większość indyjskiego społeczeństwa (ok. 65%). Wprawdzie od 2009 r. istnieje w Indiach obowiązkowa i darmowa edukacja dla dzieci w wieku od 6 do 14 lat<sup>[39]</sup> – ale obowiązek to jedno, drugie to jego niezbyt powszechna akceptacja. Odsetek analfabetów w Indiach nadal sięga niemal ¼ społeczeństwa, z czego większość stanowią kobiety<sup>[40]</sup>.

<sup>36</sup> Pew Research Center, *India's Sex Ratio at Birth Begins To Normalize. Report 2022.* <http://pewresearch.org/religion/2022/08/23/indias-sex-ratio-at-birth-begins-to-normalize/>.

<sup>37</sup> Ibidem.

<sup>38</sup> India Brand Equity Foundation, *Beti Bachao, Beti Padhao* 2018. <http://ibef.org/government-schemes/beti-bachao-beti-padhao>.

<sup>39</sup> The Right Of Children To Free And Compulsory Education Act, 2009, Act n° 35 of 2009, ch. II, s. 3.

<sup>40</sup> Beata Pietkiewicz-Pareek, *Analfabetyzm w Indiach. Źródła, dynamika, programy przemian i działania naprawcze* (Wrocław: Instytut Pedagogiki Uniwersytetu Wrocławskiego, 2021), 143-144.

## 4.2. Kobieta w małżeństwie hinduskim

W tradycyjnej hinduskiej rodzinie małżeństwa są aranżowane przez rodziców. Można pytać, czy młodzi hindusi są dziś zwolennikami tej tradycji, istotniejsze wydają się jednak konsekwencje ewentualnej ich odmowy. Wedle oficjalnych statystyk, w Indiach dochodzi rocznie do ok. tysiąca zabójstw honorowych, czyli dokonywanych w imię honoru zhańbionych rodzin<sup>[41]</sup>. Jedną z hańb jest małżeństwo z osobą spoza kasty (choć system kastowy został zniesiony kilkadziesiąt lat temu), nie mówiąc już o małżeństwach międzyreligijnych.

Innym problemem jest fakt, że choć w Indiach obowiązuje zakaz małżeństw dzieci, to w rejonach wiejskich jest on często ignorowany. Wprawdzie według statystyk UNICEF-u odsetek kobiet w Indiach, które wyszły za mąż przed ukończeniem 18 lat znacznie zmalał w ostatnich latach, ale w 2021 r. nadal wynosił 23,3%<sup>[42]</sup>. Z małżeństwami dzieci wiąże się natomiast problem tzw. gwałtu małżeńskiego, będącego przedmiotem szerszej debaty o prawach człowieka i o równości płci. Indyjski kodeks karny, uznając gwałt za przestępstwo, przewiduje bowiem bulwersujący wyjątek, na mocy którego wyklucza z pojęcia gwałtu stosunek seksualny mężczyzny z własną żoną, o ile ukończyła ona określony wiek. Ponieważ w kodeksie karnym z 2013 r. został on określony na 15 lat<sup>[43]</sup>, Independent Thought, organizacja działająca na rzecz praw kobiet i dzieci, zaskarżyła ów wyjątek jako niezgodny z prawem, a w 2017 r. Sąd Najwyższy Indii wydał przełomową decyzję: „nie można przyzwalać na zwyczaj niezgodny z konstytucją tylko dlatego, że jest uznawany za tradycję”<sup>[44]</sup>. Z jednej strony było to zwycięstwem w zakresie ochrony praw dzieci (wyjątek ma teraz dotyczyć osób pełnoletnich w małżeństwie), z drugiej jednak gwałt małżeński nadal pozostał zgodny z prawem. Mimo licznych dyskusji i debat

<sup>41</sup> International Resource Centre Honour Based Violence Awareness Network, *Statistics & Data*, 2022. <http://hbv-awareness.com/statistics-data/#India>.

<sup>42</sup> UNICEF Data Warehouse, *Percentage of women (aged 15-49 years) who consider a husband to be justified in hitting or beating his wife for at least one of the specified reasons*, 2022. [http://data.unicef.org/resources/data\\_explorer/unicef](http://data.unicef.org/resources/data_explorer/unicef).

<sup>43</sup> The Criminal Law (Amendment) Act, 2013, Act n° 13 of 2013, s. 375, exc. 2.

<sup>44</sup> Supreme Court, Judgement in Independent Thought vs Union of India, 2017. <http://clpr.org.in/wp-content/uploads/2018/09/Independent-Thought-Judgement.pdf>.

nie doczekał się penalizacji także w nowym indyjskim prawie karnym, uchwalonym w grudniu 2023 r.<sup>[45]</sup>.

Zacieranie różnicy pomiędzy tradycją a godnością człowieka prowadzi do przyzwolenia na szeroko rozumianą przemoc, która nie wyczerpuje się w zjawisku gwałtu ani nie zamyka w ramach małżeństwa. Z danych publikowanych corocznie przez Narodowe Biuro ds. Przestępcości wynika, że w 2022 r. zarejestrowano 445 256 przypadków przestępstw popełnionych przeciwko kobietom. Wśród nich większość to okrucieństwo ze strony męża lub jego krewnych (31,4%), napaść na kobiety z zamiarem naruszenia ich godności (18,7%), porwanie i uprowadzenie (19,2%) oraz gwałt (7,1%)<sup>[46]</sup>. Trzeba jednak mieć świadomość, że są to statystyki, które nie odzwierciedlają problemu, większość przestępstw nie jest bowiem zgłoszana. W społeczeństwie indyjskim nadal pokutuje przekonanie, że mąż ma prawo bić żonę – uważa tak 38,2% kobiet w przedziale wiekowym 15-49 lat. Wedle najnowszych danych, 25% kobiet w wieku 18-49 lat przynajmniej raz w życiu doświadczyło przemocy fizycznej w domu, zaś 6% przemocy seksualnej, a jedynie 14% kobiet zadeklarowało, że kiedykolwiek szukało z tego powodu pomocy<sup>[47]</sup>. Większość żyje w absolutnym przekonaniu, że obowiązkiem kobiety jest posłuszeństwo mężowi, zaś świadomość walki o swoje prawa, zwłaszcza na wsiach, jest bardzo niska. Wskaźnik rozwo- dów jest przy tym jeden z najwyższych na świecie (w 2022 r. wyniósł 1,1), a znacznie częściej niż rozwód hinduskie kobiety wybierają samobójstwo: w 2022 r. popełniły je 48 172 kobiety, z czego 30 771 to mężatki. Wśród przy- czyn samobójstw 31,7% stanowią problemy rodzinne, a 4,8% inne kwestie związane z małżeństwem<sup>[48]</sup>.

Wśród dramatów hinduskich żon trzeba też wspomnieć o tzw. zabój- stwach posagowych. Mimo formalnych zakazów i kar instytucja posagu jest nadal powszechna: według danych Banku Światowego jest on wręczany w 95% przypadków i chociaż jego wysokość zazwyczaj prowadzi do zuboże- nia, to często „nowa rodzina” uznaje go za zbyt niski, a w konsekwencji żąda dopłaty lub próbuje pozbyć się zbędnego ciężaru. Z danych statystycznych

<sup>45</sup> The Bharatiya Nyaya Sanhita, 2023, Act n° 45 of 2023, s. 63, exc. 2.

<sup>46</sup> National Crime Recorss Bureau, *Crime in India 2022. Statistics. Volume 1*, 211.

<sup>47</sup> National Family Health Survey, *India Report 2019-21 (NFHS - 5)*, Bombaj: International Institute for Population Sciences, 643; Subadra Panchanadeswaran, Catherine Koverola, „The Voices of Battered Women in India” *Violence Against Women*, 11(2005): 756.

<sup>48</sup> National Crime Recorss Bureau, *Accidental Deaths § Suicides in India 2022*, New Delhi, 202.

wynika, że w 2022 r. w Indiach 1 561 kobiet popełniło samobójstwa z przyczyn związanych z posagiem, ponadto odnotowano 6 450 tzw. zabójstwa posagowe<sup>[49]</sup>.

Na koniec należy wspomnieć o sytuacji indyjskich wdów. Wprawdzie rytuał *sati* jest zakazany, nie oznacza to jednak, że problem społeczny został rozwiązany. Prawo nie zabrania już wdowom ponownego małżeństwa, mają też prawo do dziedziczenia, ale przepisy te często pozostają martwe<sup>[50]</sup>. Tradycję *sati* zastąpił powszechny ostracyzm i pogarda, a kobieta-wdowa nie przedstawia żadnej wartości. Zwłaszcza na wsiach nadal zdarza się, że zmuszana jest do opuszczenia domu i trafia na ulicę. Według statystyk w Indiach żyje ok. 46 milionów wdów, co stanowi ponad 9% populacji i jednocześnie najbardziej marginalizowaną grupę w kraju. Część z nich przebywa we Wrindawan, nazywanym miastem wdów, gdzie przez wiele lat warunki życia były tragiczne. W 2012 r. Krajowa Służba Prawna poinformowała Sąd Najwyższy o poćwiartowaniu i zutylizowaniu ciała zmarłej we Wrindawan wdowy, gdyż nie było osoby, która mogłaby opłacić pogrzeb. Spowodowało to powołanie specjalnej komisji przy Ministerstwie ds. Kobiet i Rozwoju Dziecka, której prace zaowocowały działalnością organizacji Sulabh International. I rzeczywiście, dla wdów we Wrindawan przygotowano pięć domów schronienia, zapewniono środki finansowe do własnej dyspozycji, zorganizowano bezpłatne obozy zdrowotne, a także naukę pisania i czytania oraz przygotowanie zawodowe. Tak przynajmniej wynika z oficjalnych informacji, przedstawiających na stronie internetowej organizacji uśmiechnięte wdowy we Wrandiwan.

## 5 | Wnioski i postulaty

Podejmowane badania nad sytuacją hindusek muszą przede wszystkim uwzględnić fakt ich wieloaspektowości. Nie ma wątpliwości, że ogromna jest rola tradycji, a siła jej wierności pozostaje czasem wręcz niezrozumiała. Z drugiej strony coraz częściej kobiety w Indiach domagają się swoich praw, również protestując na ulicach przeciwko swojej sytuacji. Wydaje się niestryżni, że mają one bardzo słaby głos w tworzeniu, wdrażaniu i stosowaniu

<sup>49</sup> National Crime Recorss Bureau, *Crime in India 2022. Statistics. Volume 1*, 15.

<sup>50</sup> Thara Kitchlu, *Widows in India* (New Delhi: Asish, 1993), 13.

przepisów. Patrząc zatem na codzienność hindusek, refleksja nad nią musi koncentrować się wokół odpowiedzi na pytanie o przyczynę bezskuteczności dotychczasowych rozwiązań. Dopiero wtedy można wysuwać postulaty względem polityki społecznej państwa.

Dyskryminacja, jakiej doświadczają kobiety w Indiach, jest zatem uświęcona tradycją, a historia hinduizmu to zdecydowanie „historia dyskursu męskiego”<sup>[51]</sup>. Jest to pierwsza przyczyna tego, że uchwalanie nawet najbardziej postępowych ustaw nie toruje drogi do egalitarnego społeczeństwa<sup>[52]</sup>. Abstrahuję w tym miejscu od jakości prawa, a zwracam jedynie uwagę na przyczynę sprzeczności między równością nakazywaną przez prawo a nierównością uświęconą tradycją. Rzeczywistość jest bowiem taka, że nawet jeśli konstytucja gwarantuje kobietom równe prawa, to obyczaje dyktują im obowiązki głęboko zakorzenione w tradycji. Zaś społeczna mentalność i struktura patriarchalna nie zmieniają się pod wpływem ogłoszenia fundamentalnych zasad czy założeń liberalnej demokracji<sup>[53]</sup>, uprzywilejowanie prawne kulturowo upośledzonych warstw społeczeństwa nie doprowadzi do wyrównania ich statusu. Dlatego wprowadzanie zmian musi wiązać się najpierw ze zmianą mentalności samych hindusów, co oczywiście nie jest procesem łatwym, szybkim czy możliwym do zrealizowania przez nakaz.

Wydaje się, że ten aspekt został w procesie normalizacji sytuacji kobiet pominięty, a w konsekwencji prawa podstawowe pozostały wyłącznie teorią, która okazała się nie mieć przełożenia w rzeczywistości. Podobnie należy ocenić skuteczność kolejnych ustaw, będących zazwyczaj reakcją indyjskich władz na głośne wydarzenia w kraju. Tak prowadzona polityka państwa pozostaje bezskuteczna, a tworzone prawo okazuje się jedynie „papierowym tygrysem”, niezdolnym do zmiany sytuacji. W ostatnim dziesięcioleciu kilkakrotnie zaoszczędzano kary za gwałt, zawsze po głośnych i bulwersujących wydarzeniach. Znów reagowano nie prewencyjnie, ale pod wpływem medialnych spraw. Jak pokazują statystyki, niczego to nie zmieniło. W państwie, gdzie wedle oficjalnych danych co ok. 20 minut dochodzi do gwałtu, różne szacunki pokazują, że 99% przestępstw seksualnych nigdy nie zostaje zgłoszana. A nawet najsurowsze kary nie ochronią indyjskich kobiet, jeśli one nie będą zgłaszać przestępstw, których stały się

<sup>51</sup> Gavin Flood, *Hinduizm. Wprowadzenie* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2008) 21.

<sup>52</sup> Akshayakumar Ramanlal Desai, *Urban Family and Family Planning in India* (Bombaj: Popular, 1980), 47.

<sup>53</sup> Kumar, „Wybrane aspekty”, 167.

ofiarami. A nie będą, jeśli system ich rejestracji nie zostanie naprawiony – aktualnie mnóstwo skarg jest przez policję (czyli mężczyzn) zwyczajnie ignorowanych. Nie będą, jeśli nie ulegną poprawie statystyki wykrywalności przestępstw, jeśli formalny model nierówności nie zniknie z sądownictwa, jeśli procent skazanych nadal będzie utrzymywał się na minimalnym poziomie. Na nic zdadzą się również surowe kary, jeśli prawo nadal będzie arbitralnie decydować, co jest warter osądzenia, a co nie. Owszem, każdorazowym ofiarom głośnych gwałtów indyjskie kobiety zawdzięczają większą świadomość, że przemoc seksualna jest złem, że mogą domagać się sprawiedliwości zamiast wstydzić się bycia ofiarą. Niemniej wiedza kobiet musi wspólnie ze skuteczną polityką państwa, a nie pozorowanymi działaniami, które pozwalają wykazać w oficjalnych danych, jak wiele inicjatyw jest podejmowanych na ich rzecz.

Takie wnioski są aktualne nie tylko w kwestii przemocy, ale w każdym aspekcie życia kobiet. Nie wystarczy bowiem przyznanie im zasiłków macierzyńskich, jeśli z racji analfabetyzmu czy braku dostępu do nowoczesnych technologii nie będą mogły z nich skorzystać. Jaka pociecha z opieki medycznej, skoro nadal nieroziwiążany pozostaje problem indyjskich sanitariatów, a co piąta hinduska pozbawiona jest dostępu do bieżącej wody. Podniesienie do 21. roku życia wieku do zawarcia małżeństwa bez zmiany patriarchalnych norm społecznych spowoduje skutek odwrotny do zamierzzonego: rodzice poczują się jeszcze bardziej obciążeni obowiązkiem, co prawdopodobnie pogłębi problem aborcji selektywnej. Zresztą zakazanie badań prenatalnych ze względu na płeć również nie przyniesie rezultatu wobec ignorowania faktu rosnącego w sile podziemia aborcjonistycznego czy obojętności na fakt, że Indie pozostają najbardziej skorumpowanym krajem w Azji. Owszem, analizując liczbę indyjskich programów społecznych, trzeba stwierdzić, że polityka i strategia władz Indii bywa hojna wobec potrzebujących. Problem jednak polega na tym, że znaczna część funduszy znika w kieszeniach skorumpowanych urzędników, a sytuacja kobiet jest nadal dramatyczna.

Nie można jednak skonkludować, że sytuacja indyjskich kobiet nie uległa żadnej poprawie. Istnienie licznych organizacji pozarządowych oraz poświęcenie wielu osób działających każdego dnia na rzecz ochrony praw i godności kobiet świadczy o realnych ukierunkowanych inicjatywach. Pozytywnym przykładem jest determinacja Manishi Tokle, indyjskiej działaczki społecznej, która poświęciła wiele lat na uświadamianie hinduskich kobiet, że histerektomia wykonywana bez wskazania jest złem. Problem ten zaistniał przede wszystkim w stanie Maharasztra, w tzw. Pasie

Cukrowym, gdzie przez ostatnie dziesięć lat 14 000 zbieraczek trzciny poddało się takiej operacji, ponieważ wmówiono im, że jest to konieczne. Tymczasem chodziło wyłącznie o większą wydajność ich pracy oraz o zarobek prywatnych klinik ginekologicznych<sup>[54]</sup>. Ten problem społeczny, choć w skali kraju niewielki, skupia w sobie wieloaspektowość indyjskiej rzeczywistości: poniżenie kobiet, korupcję, nieskuteczność ochrony zdrowia, słabość prawa oraz – co niezwykle istotne – ignorancję.

Świadomość własnych praw oraz właściwe rozumienie ludzkiej godności są kluczowymi elementami zmian społecznych i ekonomicznych w Indiach. Owszem, wobec tak silnej tradycji jest to rozpoczęcie krucjaty wobec całego społeczeństwa, w tym również mężczyzn, ale jest to nie-uniknione. Wprowadzanie zmian musi się wiązać ze zmianą mentalności samych hindusów, co wymaga konkretnych działań. Pierwszym krokiem są kampanie społeczne, mające na celu powszechną świadomość praw i godności przysługujących kobietom. Jest to szczególnie istotne wśród społeczności marginalizowanych, zwłaszcza z terenów wiejskich. Konieczna jest wiedza o tym, że przemoc wobec kobiety jest złem, że gwałt nie znajduje usprawiedliwienia, że kobieta nie jest przedmiotem sprzedaży wycentanym wartością posagu, że każdy ma prawo wolnego wyboru swojego stanu życia. Istotny do zaakceptowania jest fakt, że równa pozycja kobiet w społeczeństwie nie jest dla mężczyzn ani zagrożeniem, ani dyshonorem. Jednocześnie same kobiety muszą pozbyć się przekonania, że są w jakikolwiek sposób podporządkowane mężczyznom. I nie chodzi tutaj bynajmniej o jakąkolwiek formę buntu czy zaprzeczanie tradycji, w której przecież nie wszystko jest złe. Chodzi przede wszystkim o świadomość własnych praw, o zrozumienie, że każdy człowiek właśnie ze względu na bycie człowiekiem, cieszy się taką samą godnością.

W tym aspekcie niezwykle ważna jest edukacja, przede wszystkim na terenach wiejskich. Mentalność społeczna jest taka, że inwestowanie w wykształcenie córek nie ma sensu, skoro i tak odejdą do rodziny męża. A zatem, jeśli rodzice faktycznie odkładają pieniądze to raczej na posag, a nie na edukację. Tymczasem w ten sposób jakiekolwiek zmiany są niemożliwe, bowiem edukacja to szansa na samodzielność i niezależność, którego indyjskim kobietom brakuje. Fundament to oczywiście umiejętność czytania i pisania, natomiast okazuje się, że czym wyższy poziom kształcenia, tym procent „uczniów” drastycznie spada. Paradoksalnie w Indiach nie brakuje szkół wyższych, istnieją tam filie największych światowych uniwersytetów.

<sup>54</sup> Antoine Védeilhé, *Indie: wioski bez macicy*. Arte Reportage, 2021. <http://arte.tv/pl/videos/100785-000-A/arte-reportage/>.

Z edukacją wiąże się również kwestia dostępu kobiet do zatrudnienia, które jest szansą ich niezależności. Tymczasem udział hindusek w rynku pracy zamiast rosnąć – spada: do 19% w 2020 r. i aż do 9% w 2022 r., co było oczywiście wynikiem pandemii. Co więcej, stale utrzymują się nierówności w zakresie warunków pracy i wynagrodzenia<sup>[55]</sup>. Tymczasem praca kobiet – pomijając problem pracy niemal niewolniczej, jak choćby na plantacjach trzciny cukrowej – to przede wszystkim ich samodzielność, która może stać się przyczynkiem do bezkrwawej rewolucji, ale mieć również ogromny wpływ na gospodarkę kraju.

Wydaje się, że dopiero realizacja powyższych celów – uświadamiania, edukacji, zatrudnienia – nadaje sens ustawodawstwu gwarantującemu kobietom należne im prawa. Co więcej, potrzeba nie tylko gruntownych reform w procesie stanowienia prawa, ale istotna jest również jego realizacja i egzekwowanie. Konieczność likwidacji luk prawnych, które czynią prawo nieskutecznym, jest oczywista i fundamentalna, pozostaje jednak ostatnim elementem całego procesu zmian, które wymagają ogromnej siły i pasji, ale które nie są skazane na niepowodzenie.

## Bibliografia

- Anukriti S., Sungoh Kwon, Nishith Prakash. „Saving for Dowry Evidence from Rural India” *Journal of Development Economics*, 154 (2022).
- Chiplunkar Gaurav, Jeffrey Weaver, „Marriage markets and the rise of dowry in India” *Journal of Development Economics*, 164 (2023): 103-115.
- Desai Akshayakumar Ramanlal, *Urban Family and Family Planning in India*. Bombay: Popular, 1980.
- Desai Neera, Usha Thakkar, *Women in Indian Society*. New Delhi: National Book Trust, 2009.
- Flood Gavin, *Hinduizm. Wprowadzenie*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2008.
- Forbes Geraldine, *Women in Modern India*. Cambridge: Cambridge University Press, 2004.

<sup>55</sup> N. Neetha, „Persistent Inequalities and Deepened Burden of Work? An Analysis of Women’s Employment in Delhi”, [w:] *Women Workers in Urban India*, red. Saraswati Raju, Santosh Jatrana (Cambridge: Cambridge University Press, 2016), 148.

- Hućko Małgorzata, „Selektywna aborcja a sytuacja demograficzna państw azjatyckich – rozwój oraz konsekwencje zjawiska” *Wschodnioniemieckie Studia Naukowe*, 8 (2014): 219–232.
- Jagodziński Henryk, „Niektóre zagadnienia dotyczące małżeństwa i rodziny w hinduizmie” *Kieleckie Studia Teologiczne*, 15 (2016): 7–24.
- Kalaivani Rajendran, „Devadasi System in India and Its Legal Initiatives – An Analysis” *Journal of Humanities and Social Science*, 20/2/II (2015): 50–55.
- Kitchlu T., *Widows in India*. New Delhi: Asish, 1993.
- Kumar Anamika, „Wybrane aspekty sytuacji kobiet w Indiach. Analiza społeczno-historyczna”, [w:] *Gender: kobieta w kulturze i społeczeństwie*, red. Beata Kowalska, Katarzyna Zielińska, Ben Koschalka. 149–171. Kraków: Rabid, 2009.
- Neetha N., „Persistent Inequalities and Deepened Burden of Work? An Analysis of Women’s Employment in Delhi”, [w:] *Women Workers in Urban India*, red. Saraswati Raju, Santosh Jatrana. 139–163. Cambridge: Cambridge University Press, 2016.
- Panchanadeswaran Subadra, Catherine Koverola, „The Voices of Battered Women in India” *Violence Against Women*, 11 (2005): 736–758.
- Parveen Saleema, *Dowry system in India an annotated select bibliography*. Aligarh: Aligarh Muslim University, 1982.
- Pietkiewicz-Pareek Beata, *Analfabetyzm w Indiach. Źródła, dynamika, programy przemian i działania naprawcze*. Wrocław: Instytut Pedagogiki Uniwersytetu Wrocławskiego, 2021.
- Piwko Aldona, „Kobieta w tradycji hinduskiej” *Nurt SVD*, 46/wyd.spec. (2012): 27–41.
- Piwko Aldona, „Małżeństwo i rodzina w hinduizmie” *Nurt SVD*, 47/2 (2013): 215–239.
- Priyadarshini Urvija, Pande Rekha. „Exploring the Politics of Widowhood in Vrindavan: An Analysis of Life Narratives of Vrindavan Widows” *Advances in Applied Sociology*, 11/4 (2021): 158–176.
- Roy Sanchari, „Empowering women? Inheritance rights, female education and dowry payments in India” *Journal of Development Economics*, 114 (2015): 233–251.
- Smriti Sings, „Delhi ganga rape: case diary” *The Times of India*, 13 September 2013, <http://timesofindia.indiatimes.com/india/delhi-gang-rape-case-diary/articleleshown/22455125.cms?from=mdr>.
- Staniszewska Anna, „Status społeczno-polityczny kobiety w Indiach na przełomie XX i XXI wieku – konflikt tradycji i prawa” *Świat Idei i Polityki*, 12 (2013): 42–53.
- Tworuschka Monika, Udo Tworuschka, *Hinduizm*. Warszawa: Agora, 2009.
- Védeilhé Antoine. *Indie: wioski bez mocy*. Arte Reportage, 2021. <http://arte.tv/pl/videos/100785-000-A/arte-reportage/>.



JYOTI SINGH, KAJORI BHATNAGAR

# Uniform Civil Code, Legal Pluralism and Inheritance Rights of Tribal Indian Women

## Abstract

The 42nd Amendment to the Indian Constitution heralded India as a “Sovereign, Socialist, Secular Democratic Republic”. It initiated a constitutional narrative that has sparked ongoing debates and scrutiny regarding the true essence of India’s secularism. With the National Democratic Alliance (NDA) led by Bhartiya Janta Party(BJP) forming government with after the 2024 general elections, the discussion on potential implementation of the Uniform Civil Code at the forefront of political discourse. In this commentary, the authors discuss legal pluralism in India and the impact of the introduction of a uniform civil code on on customary laws of tribes, placing special emphasis on the inheritance rights of tribal women. The paper also discusses the approach of the higher courts in securing property rights for tribal women in the absence of such a code.

**KEYWORDS:** Uniform Civil Code, Secularism, Article 44, Gender Equality, Women's Rights

**JYOTI SINGH**, Research Scholar, Christ University (Bangalore, India),  
ORCID – 0000-0002-8758-2706, e-mail: jyoti.singh@res.christuniversity.in  
**DR. KAJORI BHATNAGAR**, Assistant Professor, Christ University (Co-author)

## 1 | Introduction

The 42nd Amendment to the Indian Constitution<sup>[1]</sup> heralded India as a „Sovereign, Socialist, Secular Democratic Republic”<sup>[2]</sup>. This initiated a constitutional narrative that has sparked ongoing debates and scrutiny regarding the true essence of India’s secularism. With the National Democratic Alliance (NDA) led by Bhartiya Janta Party (BJP) forming government with after the 2024 general elections, the discussion on potential implementation of the Uniform Civil Code at the forefront of political discourse. This agenda, long pursued by the current government, aims to promote gender equality and foster national integration. Embedded within the constitutional framework, Article 44, found under the Directive Principles of State Policy, unequivocally declares, „The State shall endeavour to secure the citizen a Uniform Civil Code throughout the territory of India”<sup>[3]</sup>. This provision implies that the state must actively work towards instituting a uniform civil law governing crucial aspects such as marriage, divorce, adoption, guardianship, inheritance, etc., irrespective of an individual’s religious affiliation. Despite the foundational role of the directive principles in the governance of the country, it is essential to note that these principles are not legally enforceable before a court of law<sup>[4]</sup>. Currently, numerous areas of civil law are regulated by personal laws, encompassing Hindu, Muslim, Christian, and Parsi Law. Notably, communities like Sikhs, Jainas, Buddhists, Dalits, Scheduled Castes, and tribes are categorised as Hindus under the Hindu Personal Laws<sup>[5]</sup>. The adoption of the Uniform Civil Code is intrinsically linked to the rejection of these personal laws.

The Uniform Civil Code (UCC) is designed with the overarching objective of establishing a standardized legal framework applicable to all citizens irrespective of their religious affiliations. The adoption of a meticulously crafted and all-encompassing UCC holds the potential to rectify the

---

<sup>1</sup> The Constitution (Forty-second Amendment) Act, 1976.

<sup>2</sup> Ahmar Afafq, Sukhvinder Singh Dari, „Understanding Uniform Civil Code: Its Need and Challenges” *Russian Law Journal*, No. 1S (2023), <https://doi.org/10.52783/rlj.v1i1S.358>.

<sup>3</sup> The Constitution of India, 1950.

<sup>4</sup> Article 37, The Constitution of India, 1950: The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

<sup>5</sup> See Section 2, The Hindu Marriage Act, 1955.

prevailing gender disparities perpetuated by religion-specific personal laws. Fundamental to this prospect is the safeguarding of women's rights across various domains including inheritance, matrimonial decisions, dissolution of marriages, adoption, and related spheres, thereby breaking away from entrenched patriarchal norms and fostering gender parity. Moreover, the implementation of standardized adoption laws under the UCC is poised to ensure equal entitlements for all children irrespective of gender or religious categorization. In addition, the UCC can create gender-neutral paradigms for guardianship and custody issues that prioritize the best interests of the child. It also has the potential to reform intestacy laws to ensure equitable distribution of assets, thereby mitigating discriminatory practices that disadvantage certain demographic groups<sup>[6]</sup>.

However, the imposition of a uniform legal approach may inadvertently dilute the distinctive cultural identities of religious communities and potentially undermine cherished traditions and practices therein. Notably, concerns are articulated regarding the internal diversity prevalent within religious communities, exemplified by the coexistence of over 200 different tribal communities in the Northeast region each adhering to their own customary laws. The constitutional recognition and safeguarding of local customs in certain states underscore the imperative to uphold cultural practices while simultaneously advancing gender equality initiatives. The UCC encounters substantive challenges pertaining to facets such as mandatory marriage registration, legal age of marriage, and tax and financial legislations. Discrepancies in personal laws on issues such as child marriages and age of consent engender complexities in effectuating a uniform legal framework. Furthermore, the existing tax and financial systems do not adequately recognize and provide for families belonging to religious denominations other than Hinduism, raising pertinent concerns about equitable treatment and parity. In the absence of a testamentary disposition, succession laws govern the distribution of a deceased individual's assets among legal heirs. Under Hindu succession law, assets of a deceased man are primarily bequeathed to his class I heirs – comprising the widow, children, and mother – equally<sup>[7]</sup>. In the absence of these, class

<sup>6</sup> Ashish Sinha, „Uniform Civil Code: The Impact it Will have on India's Religions, Sects and Communities” *The Sunday Guardian*, 25th June 2023, <https://sundayguardianlive.com/news/uniform-civil-code-the-impact-it-will-have-on-indias-religions-sects-and-communities>.

<sup>7</sup> Mayank Mohanka, „The Implications of Uniform Civil Code for Taxation and Inheritance” *Mint*, 11th July 2023. <https://www.livemint.com/money/>

II heirs, including the father, grandchildren, siblings, and other relatives, may claim the property. Conversely, if the deceased is a Hindu woman, her assets are transferred to her husband and children in equal proportion, or in their absence, to her husband's heirs, followed by her parents. According to Muslim law, heirs recognized by Shari'ah inherit the estate as tenants in common in predetermined shares. Christian mothers are excluded from inheritance under the Indian Succession Act of 1925, with the father inheriting all property. Sikhs, Jains, and Buddhists follow the inheritance laws outlined in the Hindu Succession Act, 1956.

From a taxation standpoint, the Income Tax Act, 1961 exempts ancestral property acquired through inheritance from capital gains or income tax. Furthermore, upon an individual's demise, the tax liability is assumed by legal heirs. Similarly, under the Central Goods & Service Tax (CGST) Act, 2017 in the event of a sole proprietor's death, the business can either be transferred to legal heirs or a new owner, involving the transfer of assets and liabilities, and the transition of input tax credit. Personal laws intersect with taxation matters, necessitating clarity on the rightful legal heir's identity for tax purposes and the discharge of the deceased's tax liabilities. The proposed implementation of the Uniform Civil Code (UCC) would revise established inheritance laws governed by personal laws, thereby requiring amendments to the Income Tax Act, 1961, and the CGST Act, 2017. Additionally, the impact of the UCC on the distinct legal status of Hindu Undivided Families (HUFs) raises concerns. Currently, HUFs enjoy separate legal personality, entitling them to tax benefits akin to individuals. The enactment of the UCC could challenge this status quo, affecting numerous HUFs and necessitating amendments to tax legislation. Thus, the UCC's ramifications extend to tax policies, demanding meticulous consideration from policymakers to address potential implications effectively.

The Supreme Court has wielded considerable influence in the discourse surrounding the Uniform Civil Code, providing discerning insights into the subject matter. Emphasizing the imperative of a judiciously balanced approach, the court has underscored the necessity of reconciling the pursuit of egalitarianism with the preservation of cultural heterogeneity. Acknowledging the pivotal significance of reforming family laws for different communities without merging all family laws, the court has advocated for measures geared towards fostering gender equity and

safeguarding women's entitlements, all while upholding the tenets of cultural pluralism.

## 2 | Background

The absence of a uniform civil code has been scrutinised since before the independence. During the Constitutional Assembly Debates, several scholars recommended the exclusion of personal laws within the uniform civil code provision<sup>[8]</sup>. This was mainly to protect those civil laws which were inseparable from religious customs and practices. Having guaranteed freedom to propagate and practice religion, establishing such a civil code would have been an anomaly. However, not all civil laws are associated with essential religious practices such as the law of contract, transfer of property, evidence law, etc. Many including Ambedkar also objected to the amendments excluding personal laws. In 1951, Dr Ambedkar resigned from Nehru's Cabinet and stepped down from his position as the country's first Law Minister after the Hindu Code Bill faced opposition from orthodox parliamentarians and the public and could not be passed in 1951. This was a historic moment in the Indian women's rights movement<sup>[9]</sup>. Ambedkar believed that the passage of the bill was essential as a means of unifying Hindu society and making one law applicable to all Hindus irrespective of caste or class. He believed it could be a tool to introduce absolute equality between men and women by placing both sons and daughters on an „equal and balanced ground”<sup>[10]</sup>. Later, the bill was divided and passed by the Nehru Government as The Hindu Marriage Act, 1955, the Hindu Adoption and Maintenance Act, 1956, The Hindu Minority and Guardianship Act, 1956 and the Hindu Succession Act, 1956<sup>[11]</sup>. The issue of the Uniform Civil

<sup>8</sup> Samaraditya Pal, Deepan Kumar Sarkar, *India's Constitution: Origins and Evolution: Constituent Assembly Debates, Lok Sabha Debates on Constitutional Amendments and Supreme Court Judgments* (Gurgaon, Haryana, India: LexisNexis, 2017).

<sup>9</sup> B.R. Ambedkar, Sharmila Rege, *Against the Madness of Manu: B.R. Ambedkar's Writings on Brahmanical Patriarchy* (New Delhi: Navayana Publishing Pvt. Ltd, 2013).

<sup>10</sup> B.R. Ambedkar, Vasant Moon, *Dr. Babasaheb Ambedkar: Writings and Speeches* (New Delhi: Dr. Ambedkar Foundation, 2014).

<sup>11</sup> Komal Rajak, „Trajectories of Women's Property Rights in India: A Reading of the Hindu Code Bill” *Contemporary Voice of Dalit*, No. 1 (2020): 82-88. <https://doi.org/10.1177/2455328X19898420>.

Code was again widely discussed in 1986 in the matter of *Mohd Ahmed Khan v. Shah Bano Begum*<sup>[12]</sup> before the Supreme Court of India. In this case, the appellant was an advocate with an annual income of Rs. 60,000 and the respondent was his wife of many decades and the mother of his five children. After being driven out of her matrimonial home in 1975, after 43 years of marriage, the respondent had filed a petition before the Judicial Magistrate Class I, seeking maintenance of Rs.500 per month under Section 125<sup>[13]</sup> of the Criminal Procedure Code. In 1978, the appellant divorced the respondent through an irrevocable talaq and refused to pay any further maintenance on the ground that she had ceased to be his wife and he had already paid „dower or Mahr” as per Muslim law during the period of „Iddat”. The Judicial Magistrate directed the appellant to pay Rs.25 per month as maintenance. The High Court of Madhya Pradesh increased the amount to Rs. 179.20 per month in response to a revision application. Hence, the appellant filed a special leave to appeal before the Supreme Court of India. Dismissing the appeal and upholding the judgment of the High Court of Madhya Pradesh, the SC observed,

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter [...] There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

The application of Section 125 to Muslim personal law led to massive public outrage from the Muslim community, especially due to political mobilisation by several Muslim organisations such as the Muslim League,

---

<sup>12</sup> 1985 AIR 945, 1985 SCR (3) 844.

<sup>13</sup> Section 125 of the Criminal Procedure Code mandates any person having sufficient means to maintain his wife who is unable to maintain herself unless she is living in adultery or refuses to live with him without any sufficient cause or they are living separately by mutual consent. Section 125 is a secular provision and can be applied to any person irrespective of the existence of personal laws on the matter.

All India Muslim Personal Law Board and Jamaat-e-Islami. To quickly appease the community, the Rajiv Gandhi government passed the Muslim Women (Protection of Rights on Divorce) Bill, 1985 which reserved the gains of the Shah Bano Judgment. A minority section of Muslims vehemently supported the judgment; however, their voices were suppressed. Securing the support of the Muslim vote bank in the forthcoming elections took precedence over ensuring the rights of Muslim women.

### 3 | New movement for uniform civil code vis-à-vis legal pluralism in India

The emergence of the UCC is a major part of the agenda for the 2024 elections. This raises several questions and contradictions relating to the state of multireligious secular India and its dynamics with the women's rights movement. Legal pluralism is the acceptance of the coexistence of multiple legal realities within a normative universe. Narratives of right or wrong are often shaped by commonalities, practices, usages, obligations and commitments of communities which form a part of the normative universe as formal laws and legal institutions. Once we begin to understand these narratives and the meaning they give to law, law becomes not merely a system of rules we ought to observe and abide by but a world for us to live in<sup>[14]</sup>. Despite the immense growth of legal pluralism, especially since the 1970s, the term itself has been met with much confusion. For the most part, legal pluralism is used to refer to the recognition given to customary laws and the institutions associated with them within the realm of state law<sup>[15]</sup>. In other words, it also refers to the „independent coexistence” of customary laws and their institutions alongside state law<sup>[16]</sup>. Legal pluralism became

<sup>14</sup> Line Engbo Gissel, „Nomos and Narrative in International Criminal Justice” *Journal of International Criminal Justice*, No. 1 (2022): 117-138, <https://doi.org/10.1093/jicj/mqac004>.

<sup>15</sup> Michael Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975).

<sup>16</sup> Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York Evanston San Francisco: Harper & Row, 1971).

a central theme in socio-legal studies<sup>[17]</sup> and penetrated other social science disciplines steadily but in a limited manner in the late 1980s<sup>[18]</sup>. However, the idea of legal pluralism was never uniform and was used for different purposes with different motivations. The core challenge in reaching a uniform definition of legal pluralism is the inability to resolve the question of „what is law?”<sup>[19]</sup>. Legal scholars have often defined law as a normative regulation to maintain the social order. Since all societies or groups (large or small) have normative regulations that govern how they sustain their social order, they all have laws, irrespective of whether law and legal institutions established by the state exist or not. Bronislaw argues that a savage follows a custom automatically and submits to its authority through what he calls „mental inertia” working with fear of punishment from God or other supernatural powers or public opinion<sup>[20]</sup>. Another crucial factor in obedience to laws is group sentiment or what is often referred to as „primitive communism”<sup>[21]</sup>. However, a different approach has been adopted by some others such as Hoebel, Hart and Weber, where they refer to law as enforcement of norms in an institutional manner. In this regard, one example is the primary and secondary rules established by Hart. Primary rules refer to laws that are duty-imposing in nature and secondary rules include power-conferring rules such as the rule of recognition, the rule of adjudication and the rule of change<sup>[22]</sup>. This approach is often closely associated with the system of rules through which the state now enforces the law. However, both the approaches have their inherent flaws such as the first approach is plagued by a lack of stability of sanctions. The second approach does not take into account that many societies have had no institutionalised form of law enforcement for centuries. It also fails to define which institutional enforcement agencies would be deemed to be „public” and therefore, law. Hence, there is lack of agreement on what is law. In this regard, Griffiths

<sup>17</sup> Sally Engle Merry, „Legal Pluralism” *Law & Society Review*, No. 5 (1988): 869, <https://doi.org/10.2307/3053638>.

<sup>18</sup> Boaventura De Sousa Santos, „Law: A Map of Misreading. Toward a Post-modern Conception of Law” *Journal of Law and Society*, No. 3 (1987): 279, <https://doi.org/10.2307/1410186>.

<sup>19</sup> Brian Z. Tamahana, „Understanding Legal Pluralism: Past to Present, Local to Global” *Sydney Law Review*, 29 (2007).

<sup>20</sup> Bronislaw Malinowski, *Crime and Custom in Savage Society* (NJ: Rowman & Allanheld, 1985).

<sup>21</sup> W.H. R. Rivers, *Social Organisation* (Stephen, Austin & Sons Ltd., 1924).

<sup>22</sup> H.L. A. Hart et al., *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, Incorporated, 2012).

in seminal work on legal pluralism<sup>[23]</sup> reiterates Moore's idea that there are several legal orders in society and multiple „semi-autonomous social fields” which create and enforce these rules<sup>[24]</sup>. However, Galanter points out that Merry's theory is flawed as it fails to distinguish between social life regulations and law, implying that every regulation governing social life of individuals is not necessarily law<sup>[25]</sup>. However, scholars such as Griffith and Woodman have concluded that social regulations are also legal in nature to a certain extent and can be found in everyday encounters of human life<sup>[26]</sup>. Despite these theoretical complexities, legal pluralism continues to grow and evolve. In India, while there are statutory laws governing most areas of human behaviour, there is no single set of laws governing family life. Different aspects of social life such as age of marriage, divorce, adoption, guardianship, maintenance and alimony, succession and inheritance are all governed by personal laws. These personal laws have their roots in religion and customary practices. Thus, they vary according to, among other things, the religion, tribe, place of residence, community, sect, marital status and type of marriage of the parties involved<sup>[27]</sup>. Personal laws and its diversity are rooted in the religion and practices of different communities. These customs grew through practice and imitation and are considered representative of the values of the community. Due to continued practice by society over long periods of time, usage becomes custom. These customs are passed on from generation to generation and are accompanied by enforcement methods and sanctions<sup>[28]</sup>. The leaders of these tribal communities often

---

<sup>23</sup> John Griffiths, „What Is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law*, 24 (1986).

<sup>24</sup> Sally Falk Moore, „Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” *Law & Society Review*, No. 4 (1973): 719, <https://doi.org/10.2307/3052967>.

<sup>25</sup> Marc Galanter, „Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” *The Journal of Legal Pluralism and Unofficial Law*, No. 19 (1981): 1-47, <https://doi.org/10.1080/07329113.1981.10756257>.

<sup>26</sup> Griffiths, „What Is Legal Pluralism?”; Gordon R. Woodman, „Ideological Combat and Social Observation: Recent Debate about Legal Pluralism” *The Journal of Legal Pluralism and Unofficial Law*, No. 42 (1998): 21-59, <https://doi.org/10.1080/07329113.1998.10756513>.

<sup>27</sup> Gitanjali Ghosh, „Gender Preference in Customary Inheritance Laws of the Khasi Tribe in India: Myth or Fact?” *SSRN Electronic Journal*, (2021), <https://doi.org/10.2139/ssrn.3793397>.

<sup>28</sup> *Tribal Ethnography Customary Law and Change*, ed. K.S. Singh (New Delhi: Concept Publishing Company 1993).

use customs as means of social control<sup>[29]</sup>. These customs are practised even without formal recognition as they help the communities balance their interests and that of the nature and environment<sup>[30]</sup>. Several changes were introduced through legislation to the tribal customary laws when colonialism became a reality in India. The application of provincial laws was restricted to the tribes in different parts of the country, including Northeast India unless the Governor was of the opinion that such application was necessary for the maintenance of peace<sup>[31]</sup> and good governance<sup>[32]</sup>. Later the Sixth Schedule to the Indian Constitution was introduced to recognize the tribal community ownership and protect the livelihood of several tribes. In the North-Eastern region of the country, there are numerous tribes such as the Khasis, Garos, Jaintis, Mizos, Kukis, Nagas and Bodos whose customary laws regulate inheritance. The Indian Constitution under Part XXI, Temporary, Transitional and Special provisions provide protection to the tribal customary laws of some states such as the state of Nagaland under Article 371A and the state of Mizoram under Article 371G<sup>[33]</sup>. There is no such protection to customary laws of Meghalaya. Even where such protection is accorded to states, the State Legislative Assemblies or the Governors or the President of India (as the case may be) have been empowered to apply the Act of the Parliament or the State Legislature through a resolution or by notification (as the case may be). Under the Sixth Schedule which provides for the „Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram”, under Clause 12A, Acts of the Parliament and that of the Legislature of the State of Meghalaya can applied to the State of Meghalaya, even though the District Councils have the primary law-making power in the State. Further, in pursuance to the

<sup>29</sup> Lucy Zehol, „The Tangkhul Women Today”, [in:] *Women in Naga Society*, ed. Lucy Zehol (New Dehli: Regency Publications, 1998), 20-29.

<sup>30</sup> *The Customary Laws and Practices of the Angami Nagas of Nagaland*. ed. M.C. Goswami (Guwahati: Law Research Institute, Eastern Region, Gauhati High Court 1985).

<sup>31</sup> *Samantha v. State of Andhra Pradesh* (1997) 8 SCC 191.

<sup>32</sup> J.B. Ganguli, „The Sixth Schedule of the Constitution of India and the North-East India”, [in:] *Antiquity to Modernity in Tribal India: Vol. II: Tribal Self-Management in North East India*, ed. Bhupinder Singh (New Delhi: Inter-India Publishers, 1998), 64-90.

<sup>33</sup> Jyoti Singh, Kajori Bhatnagar, „Evaluating the Categorical Exclusion of Khasi Women from Inheritance and Property Rights: A Case of East Khasi Hills” *International Journal on Minority and Group Rights*, 30 January, (2024): 1-22, <https://doi.org/10.1163/15718115-bja10143>.

Article 13 of the Indian Constitution, all laws in force in the territory of India immediately before the commencement of the constitution, including customs and usages, which are inconsistent with the provisions of the Part III of the constitution are to be void to the extent of such inconsistency<sup>[34]</sup>. With respect to customs existing in India, including customs of tribal communities, which continue after the commencement of the Constitution, if challenged, they shall yield to fundamental rights and, in some cases, to statutory law.

## 4 | Impact of the Uniform Civil Code on property rights of tribal women with special reference to Khasi Tribe of Meghalaya and the Approach of Higher Indian Judiciary

One of the most contentious issues has been that of inheritance rights of women in India, especially that of tribal women. Provided that the Indian Succession Act, 1925 and the Hindu Succession Act, 1956 do not directly apply to the tribal communities. The Indian Succession Act, 1925 regulates inheritance among Christians and does not explicitly exclude the tribes but provides the power to exclude tribal communities under Section 3 of the Act. The Hindu Succession Act, 1956 categorically prevents the application and extension of the law to the members of the scheduled tribes unless the contrary is notified by the Central Government. The HSA, 1956 only applies to completely or sufficiently Hinduised tribal communities, forcing the adoption of Hindu traditions and customs on the tribes. The implication of the same has been to exclude other non-hinduised tribal women from the right of survivorship, denying them any share in the father's property, unlike their Hindu and Christian counterparts. Such discrimination denies a tribal woman the right to socio-economic development and the right to live with dignity. Given the transformative nature of the Indian Constitution, the Supreme Court of India in Kamla Neti v. Special

---

<sup>34</sup> C. Masilamani.

Land Acquisition Officer (2022)<sup>[35]</sup> observed that the State must review the exceptions and exclusions and act as levellers in the society.

However, the tribal women in India are divided between the traditionalist and positivist views. Traditionalists and positivists differ in their approach to understanding the role of customary laws in defining the rights and liabilities of women in modern societies. Traditionalists idealise the customary law's oral and indigenous beginnings and transmission, as well as its conservative role and identity implications derived from its consuetudinary sources. Additionally, they argue that tribal women can legitimize their existence by preserving the traditions of their forefathers. Further, institutions established by customary laws are accessible easily geographically and economically<sup>[36]</sup>. On the other hand, positivists argue that customary laws in existence create a division between men and discriminate against women on several grounds. In many tribal societies, women have no access to any property and perpetuate inequality in order to maintain social order. Positivists also argue that customary law is not law at all<sup>[37]</sup>. Tiput Nongbri in her work on discussing Khasi Matrilineal societies takes note of two prominent theories<sup>[38]</sup>. The „disintegration model” posits that matrilineal inheritance systems are fundamentally unstable and cannot persist in economies based on market principles. Conversely, the „resilience model” emphasizes the fortitude of matrilineal societies and advocates for the empowerment of women within such societies. Nongbri expresses apprehension regarding the lack of mutual exclusivity of these theories. Despite the benefits afforded by matrilineal structures, susceptibility to disruption within a male-dominated capitalist society cannot be discounted. Nongbri cites the illustration of two terminologies prevalent in the Khasi communities. The term „u rangbah” signifies the bearer or carrier, commonly used to refer to adult males. In contrast, „ka kynthei ka-khynnah” translates as „the woman, the child” implying that women

<sup>35</sup> Civil Appeal no. 6901 of 2022 before the Supreme Court of India. [https://main.sci.gov.in/supremecourt/2017/520/520\\_2017\\_5\\_1501\\_40564\\_Judgement\\_09-Dec-2022.pdf](https://main.sci.gov.in/supremecourt/2017/520/520_2017_5_1501_40564_Judgement_09-Dec-2022.pdf).

<sup>36</sup> Ranga Ranjan Das, „Gender, Customary Laws and Codification- The North-Eastern Perspectives”, [in:] *Gender Implications of Tribal Customary Law: The Case of North-East India* (North Eastern Social Research Centre; Rawat Publications, 2017).

<sup>37</sup> Hart et al., *The Concept of Law*.

<sup>38</sup> Tiput Nongbri, „Khasi Women and Matriliney: Transformations in Gender Relations” *Gender, Technology and Development*, No. 3 (2000): 359-395, <https://doi.org/10.1080/09718524.2000.11909976>.

are akin to children. In Khasi societies, it is a widespread belief that men possess twelve units of strength while women have only one. Such ideologies are rooted in the notion that men are natural protectors and guardians of women who are incapable of maintaining themselves, thus establishing a firm ideological base of male dominance and supremacy.

Further, all customary laws survive on the hegemony of patriarchal norms. Re-Riyad and the Re-kynti lands were acquired by men despite the prevalence of matrilineage in the state of Meghalaya. The land laws of Meghalaya were first codified in 1925 by the Khasi Darbar. It defined ri kynti (private land), ri shnong (village land), reid (land belonging to a member of the vicinity), Re seng (undivided and undistributed lands from predeces-sors), Ri lyndoh (land owned by the siem (priest or his family), Re lapduh (Unclaimed land which can be kept or disposed of by the siem). All these lands came to be ruled by men<sup>[39]</sup>. Even the clan lands are managed by the maternal uncle of the youngest daughter called the Kni. No land can be alienated by the ka-khaduh without the consent of the men-manned durbar. This flawed matrilineal system would have never survived had it been against the nobility which also consisted of male members<sup>[40]</sup>. Despite the non-existence of structures which coerce women into being socially controlled such as chastity, purity, pollution, and restrictions on divorce or re-marriage, male control over women was real amongst the north-eastern tribes and hence, gender inequality persisted<sup>[41]</sup>. The position of authority in a Khasi household is shared between the husband of the youngest daughter and her eldest maternal uncle. The Ka Khadduh is bound by the responsibility to maintain exemplary moral conduct and to preserve Khasi customs and traditions. Any deviation from these norms or inappropriate behaviour may result in disinheritance. Within Khasi matrilineal society, gender asymmetry is apparent in various spheres of life. Although the Ka Khadduh inherits ancestral property, she seldom has the liberty to act of her volition. She is relegated to the role of a custodian, while the absolute control and management of the property remain in the hands of her male kin from the mother's side. This gender dynamic renders her bereft of an autonomous identity. As Mukhim observes in her work on the Khasi community:

<sup>39</sup> Bani Prassana Misra, „Agrarian Relations in a Khasi State” *Economic and Political Weekly*, No. 20 (1979): 888-892.

<sup>40</sup> Ibidem.

<sup>41</sup> Aparna Mahanta, „Understanding Politics of Identity and Ethnicity in North East India: A Gender Perspective”, [in:] *In Souvenir: North East India History Association* (Dibrugarh: 29th Annual Session, 2008).

It is not just about property and who inherits it. It is about who does what and who has access and control over what resources. A woman has no right to decide how to use that property unless she gets a green signal from her husband and children [...] If a Khasi woman is still following a clear-cut routine based on the gender division of work and is unable to break free of that social liability, how can their society be called gender equitable? [...] Decision-making by women is restricted to what is perceived as less important matters. Gender awareness is a very new concept and it has not been caught up among the urban population. In fact, women themselves negate their strengths when they say, „Let men take care of activities outside the home, let them attend the durbar. Why should women interfere”. This sort of remark from educated, well-placed women like college teachers and professors reveals that Khasi women are understanding gender equality<sup>[42]</sup>.

Women were only granted concessionary rights relating to gift, inheritance, etc. In some tribes such as the Karbi and Riang, women were entitled to inherit their deceased husband's property, but they lost the same upon re-marriage or becoming unchaste. In other tribes such as the Ao Nagas, the grant of property to the daughter was conditional on the payment of a fee to her father to acquire the right to property or its reversal to the male heirs of her father upon her death<sup>[43]</sup>. The legislation introduced by the British did not affect the concessionary rights of the tribal women nor did it uphold individual property rights for women. Instead, it introduced communal lands and coparcenary rights in favour of men. Writers of the time also legitimized the men's right over land such as Raja of Manipur was defined as the „absolute proprietor of the soil” and so did Das about the Kachari rulers<sup>[44]</sup>. Customary laws, therefore, began to make the men comfortable and tribal women were sequestered. The emergence of a paradigm shift was triggered by the efforts of tribal women to challenge the gender subordination prevalent in phallocentric customary laws. In order to achieve this, women turned to the Anglo-centric vertical law for assistance. However, it was observed such a positive law, despite its attempt to challenge the notion of men as the norm and women as deviations from

<sup>42</sup> Patricia Mukhim, „Crisis of Authority in the Khasi Matrilineal Society”, [in:] *The Dynamics of Family System in a Matriliney of Meghalaya* (Tribal Research Institute, 1999).

<sup>43</sup> Temsula Ao, „Land, Ethics and Economic Management among Ao Nagas” *Institute of Northeast India Studies*, 1 (2010).

<sup>44</sup> J.N. Das, *A Study of Land System in Manipur* (Law Research Institute of Guwahati High Court, 1989).

the norm, still upheld patriarchy. Consequently, it became imperative to shift the focus of inquiry from the definition of custom to examining the impact of customs<sup>[45]</sup>. This shift was pivotal because tribal men were able to gain political and economic authority through customary law, while women in their communities were marginalized and excluded<sup>[46]</sup>.

In the case of *Langa Manjhi & Ors v. Jaba Majhian & Ors*<sup>[47]</sup>, the High Court of Patna discusses whether the aboriginal community of Santhals fall within the purview of Hinduism and hence should be governed by Hindu Law to allow the only daughter of the deceased to inherit his property instead of the agnates who were the appellants in the instant case. The court observed that the word „Hindu” is used in a theological sense and in determining whether a tribe falls under the sway of Hindu law, one must determine if the tribe has absorbed Hinduism and has become sufficiently Hindu. Under such circumstances, it is necessary to enquire if they have abandoned their tribal custom relating to inheritance and if they have been Hinduised, which school of Hindu Law they adhere to<sup>[48]</sup>. In most cases, even where tribes are completely or sufficiently Hinduised, they do abide by their customary laws of inheritance. The Court held that aboriginal non-Hindu can therefore become ‘sufficiently Hinduised’ and would be subjected to Hindu law in matters of succession and inheritance unless the existence of a custom contrary to such law is proven<sup>[49]</sup>. The burden of proving the existence of custom is on the party who claims that such custom exists. The appellants in this case had failed to do so. The court held that the Santhals were in fact governed by Hindu law in matters of Inheritance and Succession and not the Santhals tribal law. Hence, the appeal was dismissed. In the landmark case of *Madhu Kishwar & Ors v. State of Bihar*<sup>[50]</sup>, a writ petition was filed before the Supreme Court of India challenging the constitutional validity of Sections 7 and 8 of the Chota Nagpur Tenancy Act, 1908 which provided for succession through

<sup>45</sup> F. Ahmmed, „Challenges of Aging and Coping Mechanisms among the Khasi and Garo Tribal Groups: An Ethnographic Observation” *Journal of International Social Issues*, No. 1 (n.d.): 23-38.

<sup>46</sup> Valentina Pakyntein, „Gender Preference in Khasi Society: An Evaluation of Tradition, Change and Continuity” *Indian Anthropologist. Indian Anthropological Association*, 30 (2000): 27-35.

<sup>47</sup> AIR 1971 Pat 185, <https://indiankanoon.org/doc/782755/>.

<sup>48</sup> See *Krittibash Mahton v. Budhan Mahtani*, AIR 1925 Pat 733, <https://indiankanoon.org/doc/1746832/>

<sup>49</sup> See *Chunku Manjhi v. Bhabani Majhan*, AIR 1946 Pat 2181.

<sup>50</sup> 1996 AIR 1864, 1996 SCC (5) 125, <https://main.sci.gov.in/jonew/judis/15685.pdf>.

the male line. Neither the Hindu Succession Act nor the Indian Succession Act or the Shariat Act were applicable in the instant case and the customs prevailed. However, the customs varied from region to region and people to people. Sections 7 and 8 recognised the historical method of identifying an agricultural family through the male head of the family. The court observed, „Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil". Therefore, when the male head dies, it is necessary to protect those dependent on him including the female heirs and their right to livelihood. If right to inherit is made to be exclusively through the male descendant, then the other females of the family such as the mother, widow, daughter, daughter-in-law, granddaughter would be rendered destitute. Hence, while the court did not strike down the law being in violation of Article 14 as the same would „bring about a chaos in the existing state of law", the court suspended the exclusive right of male succession until the female descendants chose other means of livelihood and thereby abandon or release existing right in agricultural property. The Court also directed the central government to examine the withdrawal of exemptions made for scheduled tribes under the Hindu Succession Act and Indian Succession Act. However, in the case of *Matius Tirkey v. Jusuphin Lakra*<sup>[51]</sup>, the court accepted the custom through which widows and married daughters were barred from inheriting property. Only where a man dies without a male heir, the widow and daughter hold property as sum of maintenance. However, they only have a life interest and are limited owners of the property. This was reiterated in *Sinta Munda & Others v. Junathan Munda*<sup>[52]</sup>.

In another case before the Jharkhand High Court, *Prabha Minz v. Martha Ekka*<sup>[53]</sup>, the plaintiff a woman of the Oraon tribe challenged customary laws that denied her the right to inheritance. One key argument in the case was that a custom cannot be valid if it is „illegal, immoral, unreasonable or opposed to public policy"<sup>[54]</sup>. The plaintiff also argued that given that

<sup>51</sup> AIR JHAR R 375, 2008 (1) AIR JHAR R 375, 2008 A I H C 1144, (2007) 4 JLJR 539, <https://indiankanoon.org/doc/1638512/>.

<sup>52</sup> 1968 (1) PLJR 215., <https://app.supremetoday.ai/judgement/00800037660>.

<sup>53</sup> S.A. No. 127 of 2014, High Court of Jharkhand, <https://www.livelaw.in/pdf-upload/display66-415845.pdf>.

<sup>54</sup> See *Laxmibai v. Bhagwantbuva* (2013) 4 SCC 97, <https://indiankanoon.org/doc/115367233/>.

the custom was of „remote antiquity” and that was not much evidence to its uniform and continuous usage, it could not be recognised. Several tribunals and High courts have passed order not accepting such customs<sup>[55]</sup>. It was also noted that where a custom is judicially recognised, it need not be proved again<sup>[56]</sup>. However, such custom must be proved properly and satisfactorily<sup>[57]</sup>. The High Court of Jharkhand held that the defendants had failed to prove the uniformity of application of custom through which property is transferred only in the male lineage. Hence, the court cancelled the orders of the subordinate and first appellate court to accept the appellate petition in favour of the appellant. In Khetro Bhumij @ Krishna Chandr vs Smt.Gurubari Bhumijani & Anr<sup>[58]</sup> the Jharkhand High Court again dealt with the question of whether a tribal female can inherit deceased husband's landed property. The court observed that even if the wife cannot inherit the property of the husband as per the customary law, she had every right to be maintained out of the income from her husband's property till her death. Again, in Nr. Soren & Ors. Ranjan Murmu<sup>[59]</sup>, the Jharkhand HC dealt with the question of whether a widow from Santhal Community can adopt if her husband dies issueless and whether under such circumstances the property would be inherited by the surviving agnates. The Court cited the U.N. Report 1980, „women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property” to emphasis on the discrimination and silence faced by women throughout the world. It observed that the Indian constitution through its multiple provisions prohibits such discrimination on the grounds of sex<sup>[60]</sup> to uphold the decision of the trial court and the appealed court stating given that all customs and ceremonies were performed, a Santhal widow can in fact adopt a child in the absence of her husband.

<sup>55</sup> See Joseph Munda v. Most Fudi, AIR 2009 Jhar 115, <https://indiankanoon.org/doc/1409829/>.

<sup>56</sup> Section 57 (1), Indian Evidence Act, 1872.

<sup>57</sup> Effuah Amissah v. Effuah Krabah, AIR 1936 PC 147; T. Saraswathi Ammal v. Jagadambal, AIR 1953 SC 201, Siromani v. Hemkumar, AIR 1968 SC 1299.

<sup>58</sup> C.R. No.031 of 2011, HC of Jharkhand, <https://www.casemine.com/judgement/in/56093093e4b0149711203eab>.

<sup>59</sup> AIR 2009 JHARKHAND 23, 2009 (2) AKAR (NOC) 299 (JHA) (2009) 1 JCR 262 (JHA), (2009) 1 JCR 262 (JHA), <https://indiankanoon.org/doc/890826/>

<sup>60</sup> See Article 13, 14, 15 and 16, The Constitution of India, 1950.

In the case of Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors<sup>[61]</sup>, the Supreme Court examined the constitutionality of a law that prohibited women between the ages of 10-50 (menstruating age) from entering the Sabarimala Temple. This rule was based on an ancient custom that barred the entry of women into the temple of Lord Ayyappa, a celibate deity, as their presence could affront his celibacy. The respondents contended that the devotees of the lord constituted a religious sect and, therefore, should have the authority to govern their own affairs in accordance with Article 26 of the Indian Constitution. The Apex Court held that the devotees constituted no such religious denomination and there was not enough evidence on record to justify the exclusion of women as an essential practice. It was further held that that such exclusion based on notions of „purity and pollution” was a form of untouchability. In Surjotin And Ors vs Chamrin Bai<sup>[62]</sup>, the Chhattisgarh High Court held that since the plaintiffs failed to establish that women belonging to the Scheduled tribe, Halba, are excluded from inheriting the property of their fathers as per the custom, the court dismissed the second appeal stating there is hence no substantial question of law to be determined by the court. In Babulal S/O Bapurao Kodape v. Sau Reshmabai Narayanrao<sup>[63]</sup>, the Bombay HC, in a dispute between brothers and sisters belonging to the Gond Community, held that the legal protection of customs within the Scheduled Tribes community is unequivocal. It is worth noting that customs can diverge significantly between various geographical regions, castes and tribes. Consequently, it becomes imperative to substantiate the customs prevalent through compelling pleadings and supporting evidence. In the instant case, the defendants failed to proffer any evidence that would substantiate the customs observed within their community. Given the dearth of evidence regarding tribal customs, the principles prescribed in Hindu Law shall govern the property inheritance. Thus, relying upon the principles enshrined within Hindu Law, the court held that the plaintiff’s sisters possess a right to inherit property and are not excluded from inheritance as per the Gond Customary Law. Further, the plaintiffs are under no obligation to prove

<sup>61</sup> 2018 SCC OnLine SC 1690. Summarised at: <https://www.scobserver.in/cases/inian-young-lawyers-association-v-state-of-kerala-sabarimala-temple-entry-background/> Full judgment accessible at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-366587.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-366587.pdf).

<sup>62</sup> Second Appeal No. 162 of 2008, High Court of Chhattisgarh, <https://indiankanoon.org/doc/143003651/>.

<sup>63</sup> Accessible at: <https://indiankanoon.org/doc/51827725/>.

that they were not excluded from inheritance as per the Gond Customary Law as per section 101-103 of the Indian Evidence Act. The burden of proof is on the defendants to prove the same through clear and cogent evidence. The judgment in the present case has been reiterated by the High Court of Chattisgarh in Bhuneshwar vs. Munna<sup>[64]</sup> and is persuasive.

From the above discussion, it can be concluded that the approach of the Indian courts has also been to use the law as an instrument of social transformation and to ensure the right of tribal women to inheritance and succession. According to Article 13(1), the pre-constitutional laws including customary laws which are inconsistent with fundamental rights are void to the extent of such inconsistency. Nonetheless, there cannot be a general resistance against customs for offending fundamental rights, especially Article 14, Article 15 and Article 21 of the Indian Constitution. Each case brought before the courts has to be examined carefully in light of the evidence produced support such custom. However, under no circumstances, customary laws should be used to deny tribal women the right to development, right to life with dignity and right to livelihood.

Recently, on 14 June 2023, the Law Commission of India issued a public notice inviting comments from the public on the introduction of a Uniform Civil Code within 30 days from the date of the notice. No reference was made to the Law Commission of India's 2018 Consultation Paper on Family Law Reform<sup>[65]</sup>, in which the Commission had stated:

While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.

The Commission failed to acknowledge its earlier recommendation, which emphasised the priority of ensuring gender equality within

<sup>64</sup> Second Appeal No.265 of 2007, Chattisgarh HC, <https://indiankanoon.org/doc/137639614/>.

<sup>65</sup> Published by the Government of India, <https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf>.

communities over the introduction of a unified civil code. In addition, the Commission trivialised the need for a comprehensive discussion on the code, reducing it to a mere procedural requirement. This approach disregarded the expectations of many individuals who were eager for a substantive and meaningful discourse on the matter. The notice issued also lacked clarification on the application of the Uniform Civil Code (UCC). Sushil K Modi, Chairperson of the Parliamentary Committee on Law and Justice, countered the notion of uniformity by highlighting the exemption of the UCC for Christians and States covered by Article 371 of the Indian Constitution in his statement.

## 5 Conclusion

Although legal pluralism in India is an obvious phenomenon, protected and promoted by the Indian Constitution itself, the Uniform Civil Code is also a constitutional imperative. Given the immense polarisation on the issue, a consensus on this transformative paradigm is yet to be achieved. If a Uniform Civil Code is to be established, it must be established consistently in line with the other provisions and goals set by the Constitution of India<sup>[66]</sup>. Advocates of the Uniform Civil Code often characterize it as a plea for „legal equality for women” and intimately associate it with the women’s rights movement. Without a comprehensive draft of the Uniform Civil Code specifying whether it will supersede personal laws, supplement them, or exist as an optional civil code, a definitive assessment of its potential to alleviate the challenges faced by tribal women is unattainable. This top-down approach to the code carries with it the responsibility of being a secular law that safeguards the interests of minority religious groups without producing adverse effects. Nevertheless, if the code remains optional, given the prevailing power imbalances and resource disparities against women, it is highly probable that the code will prove ineffective. Despite this, an optional Uniform Civil Code appears to be the most viable solution in harmony with the principles of legal pluralism. An optional uniform civil code not only aligns with the constitutional mandate but also instigates

<sup>66</sup> M.P. Singh, “On Uniform Civil Code, Legal Pluralism And The Constitution Of India” *Journal of Indian Law and Society*, Vol. V (2014).

progressive reforms in the personal law framework. Consequently, the decision lies between adopting a secular legislation adhering to principles of gender equality or introducing amendments to varied areas of personal laws. While some advocate for incremental yet noteworthy changes in personal laws rather than the comprehensive and overarching nature of a uniform code, historical precedent reveals that the initiation of a secular law has been instrumental in catalysing substantial transformations within communities in India. The creation of a code based on the principles of gender equality has the potential to revive faith in social democracy and facilitate what Ambedkar called the 'structural repair of the society'. Such a code could confront patriarchal norms and entrenched systems of female oppression under the guise of religion and customs. However, as the parliament undertakes the drafting of the Uniform Civil Code, careful consideration is essential. The aim should be to replace glaring inequalities with meaningful equity, and the code should remain free from gender bias and religious affiliations at its core. The provisions of the Indian constitution seek to create an egalitarian order of the society by removing social, economic, political and cultural inequalities. This has led to the establishment of the Indian Constitution as the „Grund Norm”. wherever, in a hierarchical system a subordinate law violates or is repugnant to the Grund Norm, it is to be struck down. This helps in removing legal disadvantages which are primary causes of disempowerment or other disadvantage to weaker and vulnerable sections of the society, helping in social engineering to remove all biases and discriminations, including gender-based discrimination.

## Bibliography

- Afaq Ahmar, Sukhvinder Singh Dari, „Understanding Uniform Civil Code: Its Need and Challenges” *Russian Law Journal*, No. 1S (2023), <https://doi.org/10.52783/rlj.v1i1S.358>.
- Ahmmmed F., „Challenges of Aging and Coping Mechanisms among the Khasi and Garo Tribal Groups: An Ethnographic Observation” *Journal of International Social Issues*, No. 1 (n.d.): 23-38.
- Ambedkar B.R., Vasant Moon, *Dr. Babasaheb Ambedkar: Writings and Speeches*. New Delhi: Dr. Ambedkar Foundation, 2014.

- Ambedkar B.R., Sharmila Rege, *Against the Madness of Manu: B.R. Ambedkar's Writings on Brahmanical Patriarchy*. New Delhi: Navayana Publishing Pvt. Ltd, 2013.
- Ao Temsula, "Land, Ethics and Economic Management among Ao Nagas" *Institute of Northeast India Studies*, 1 (2010).
- Das J.N., *A Study of Land System in Manipur*. Law Research Institute of Guwahati High Court, 1989.
- Das Ranga Ranjan, „Gender, Customary Laws and Codification - The North-Eastern Perspectives”, [in:] *Gender Implications of Tribal Customary Law: The Case of North-East India*. North Eastern Social Research Centre ; Rawat Publications, 2017.
- De Sousa Santos Boaventura, „Law: A Map of Misreading. Toward a Postmodern Conception of Law” *Journal of Law and Society*, No. 3 (1987): 279-302. <https://doi.org/10.2307/1410186>.
- Galanter Marc, „Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” *The Journal of Legal Pluralism and Unofficial Law*, No. 19 (1981): 1-47. <https://doi.org/10.1080/07329113.1981.10756257>.
- Ghosh Gitanjali, „Gender Preference in Customary Inheritance Laws of the Khasi Tribe in India: Myth or Fact?” *SSRN Electronic Journal*, (2021), <https://doi.org/10.2139/ssrn.3793397>.
- Gissel Line Engbo, „Nomos and Narrative in International Criminal Justice” *Journal of International Criminal Justice*, No. 1 (2022): 117-138. <https://doi.org/10.1093/jicj/mqac004>.
- Griffiths John, „What Is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law*, 24 (1986).
- Hart H.L. A., Leslie Green, Joseph Raz, Penelope A. Bulloch, *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, Incorporated, 2012.
- Hooker Michael Barry, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. Oxford: Clarendon Press, 1975.
- Mahanta Aparna, „Understanding Politics of Identity and Ethnicity in North East India: A Gender Perspective”, [in:] *In Souvenir: North East India History Association*. Dibrugarh, 2008.
- Malinowski Bronislaw, *Crime and Custom in Savage Society*. NJ: Rowman & Allanheld, 1985.
- Merry Sally Engle, „Legal Pluralism” *Law & Society Review*, No. 5 (1988): 869. <https://doi.org/10.2307/3053638>.
- Misra Bani Prassana, „Agrarian Relations in a Khasi State” *Economic and Political Weekly*, No. 20 (1979): 888-892.

- Moore Sally Falk, „Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” *Law & Society Review*, No. 4 (1973): 719-746. <https://doi.org/10.2307/3052967>.
- Mukhim Patricia, „Crisis of Authority in the Khasi Matrilineal Society”, [in:] *The Dynamics of Family System in a Matriliney of Meghalaya*. Tribal Research Institute, 1999.
- Nongbri Tiplut, „Khasi Women and Matriliney: Transformations in Gender Relations” *Gender, Technology and Development*, No. 3 (2000): 359-395. <https://doi.org/10.1080/09718524.2000.11909976>.
- Pakyntein Valentina, „Gender Preference in Khasi Society: An Evaluation of Tradition, Change and Continuity” *Indian Anthropologist, Indian Anthropological Association*, 30 (2000): 27-35.
- Pal Samaraditya, Deepan Kumar Sarkar, *India's Constitution: Origins and Evolution: Constituent Assembly Debates, Lok Sabha Debates on Constitutional Amendments and Supreme Court Judgments*. Gurgaon, Haryana, India: LexisNexis, 2017.
- Pospisil Leopold, *Anthropology of Law: A Comparative Theory*. New York Evanston San Francisco: Harper & Row, 1971.
- Rajak Komal, „Trajectories of Women’s Property Rights in India: A Reading of the Hindu Code Bill” *Contemporary Voice of Dalit*, No. 1 (2020): 82-88. <https://doi.org/10.1177/2455328X19898420>.
- Rivers W.H. R., *Social Organisation*. Stephen, Austin & Sons Ltd., 1924.
- Singh Jyoti, Kajori Bhatnagar, „Evaluating the Categorical Exclusion of Khasi Women from Inheritance and Property Rights: A Case of East Khasi Hills” *International Journal on Minority and Group Rights*, 30 January (2024): 1-22. <https://doi.org/10.1163/15718115-bja10143>.
- Singh M.P., „On Uniform Civil Code, Legal Pluralism And The Constitution Of India” *Journal of Indian Law and Society*, Vol. V (2014).
- Tamahana Brain Z., „Understanding Legal Pluralism: Past to Present, Local to Global” *Sydney Law Review*, 29 (2007).
- Woodman Gordon R., „Ideological Combat and Social Observation: Recent Debate about Legal Pluralism” *The Journal of Legal Pluralism and Unofficial Law*, No. 42 (1998): 21-59. <https://doi.org/10.1080/07329113.1998.10756513>.





NATALIA PLISZKA

# Ochrona interesu dewelopera przez prawo odstąpienia od umowy deweloperskiej i modyfikację stosunku umownego na podstawie klauzuli *rebus sic stantibus*

**Protection of the Developer's Interest by the Right of withdrawal  
From the Development Agreement and Modification  
of the Contractual Relationship on the Basis of the *rebus sic  
stantibus* Clause**

Nowadays, the prevailing views in society regarding the improper practices of real estate developers have led to the formation of a negative perception of this professional group. The necessity to write the following work arose from the fact that most representatives of the doctrine, or scientific authors focus in their considerations on strengthening the protection of the purchaser of premises as the weaker party. Even the legislator himself did not hide his assumptions when creating the law and giving it the title Law on the Protection of the Rights of the Purchaser of a Dwelling or Single-Family House. In the author's opinion, it is necessary to ensure the protection of each of the parties to the development contract and to create a study to draw attention to the lawful ways of pursuing claims in the cases of improper behavior on the part of the purchaser. The work will address issues related to the developer's ability to apply the *rebus sic stantibus* clause and the contractual right of withdrawal. The attention will also be paid to the limits and possible consequences of not applying the principle of *pacta sunt servanda*, which is still known from Roman times.

NATALIA PLISZKA, magister prawa, Uniwersytet Pomorski w Słupsku,  
ORCID – oooo-ooo2-5359-0505, e-mail: natalia.pliszka@apsl.edu.pl

**SŁOWA KLUCZOWE:** deweloper, klauzula nadzwyczajnej zmiany stosunków, umowne prawo odstąpienia, umowa deweloperska, ochrona dewelopera

**KEY WORDS:** developer, extraordinary change of relations clause, contractual right of withdrawal, development contract, developer protection

## Słowniczek

Deweloper – za dewelopera uważa się przedsiębiorcę w rozumieniu art. 43 (1) k.c., który w ramach prowadzonej działalności gospodarczej realizuje przedsięwzięcie deweloperskie (art. 5 pkt 1 ustawy z dnia 20 maja 2021 r. (Dz.U. z 2021 r. poz. 1177) o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego oraz Deweloperskim Funduszu Gwarancyjnym). Uznanie danego podmiotu za dewelopera uwarunkowane jest tym, czy jest to podmiot profesjonalny, czy prowadzone przez niego działania mają charter przedsięwzięć deweloperskich oraz czy dokonuje zbycia nieruchomości mieszkalnej na rzecz nabywcy (w rozumieniu przepisów wskazanej ustawy).

Nabywca – osoba fizyczna, która zawiera umowę w celu niezwiązanym bezpośrednio z jej działalnością gospodarczą lub zawodową. Stosunek nabywcy z deweloperem musi opierać się o umowę deweloperską, inną umowę zobowiązującą do przeniesienia własności lokalu mieszkalnego lub domu jednorodzinnego, umowę zobowiązującą do wybudowania budynku i przeniesienia własności lokalu.

Umowa deweloperska – umowa dwustronna pomiędzy deweloperem a nabywcą, której celem jest zobowiązanie dewelopera do wybudowania budynku w ramach przedsięwzięcia deweloperskiego oraz przeniesienie własności nieruchomości na nabywcę. Essentialia negotii umowy deweloperskiej zostały wskazane w art. 2 Ustawy z dnia 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego, (t.j. Dz. U. z 2021 r. poz. 1445).)

Klauzula nadzwyczajnej zmiany stosunków (*rebus sic stantibus*) – została uregulowana przez polskiego ustawodawcę w art. 357 (1) k.c. Jej celem jest stworzenie stronom stosunku możliwości do ingerowania w treść umowy, czy też jej rozwiązanie przez sąd w sytuacji zaistnienia nadzwyczajnych

okoliczności. Niezbędnymi czynnikami stwarzającymi możliwość do zastosowania *rebus sic stantibus* są:

1. wystąpienie nadzwyczajnej zmianę stosunków (tj. Pojawienie się sytuacji, których wstąpienia nie mogła przewidzieć żadna ze stron w chwili zawarcia umowy np. klęska żywiołowa, inflacja etc... Należy jednak podkreślić, że zdarzenia te nie mogą mieć charakteru przejściowego, incydentalnego);
2. trudność w spełnieniu świadczenia lub groźba rażącej straty dla jednej ze stron, w sytuacji wykonania umowy;
3. związek przyczynowy pomiędzy zmianą stosunków, a problemami związanymi z realizacją stosunku, lub rażąca stratą dla strony.

Umowne prawo odstąpienia – stworzone przez ustawodawcę dodatkowe zastrzeżenie umowne, które stanowi wyjątek od zasady *pacta sunt servanda*. Jego celem jest doprowadzenie do ustania stosunku obligacyjnego łączącego strony bez konieczności zaspokojenia wierzyciela. Wyjątek musi zostać przewidziany w treści umowy, a jego realizacja opiera się na oświadczeniu woli strony uprawnionej. Zgodnie z przyjętą zasadą, że odstąpienie od umowy niweluje jej byt prawnego, „od samego początku”.

Dodatkowe zastrzeżenie umowne – pojęcie to zostało ukształtowane w czasie obowiązywania kodeksu zobowiązań z 1933 r. Dodatkowe zastrzeżenia umowne to klauzule kontraktowe, które nie stanowią konstytutywnych elementów danego stosunku. Stwarzają możliwość ukształtowania stosunku w taki sposób, aby był on jak najbardziej dogodny dla strony uprawnionej. Należą do nich: zadatak, umowne prawo odstąpienia, kara umowna oraz odstępne.

## 1 | Wstęp

Prawo zobowiązań opiera się na zasadzie zaufania, przejawiającej się w dążeniu uczestników porządku prawnego do nienaruszalności i niewzruszalności wcześniejszych konsensusów. Imperatyw wklarowany jeszcze w starożytnym prawie rzymskim *pacta sunt servanda* stanowi klauzulę generalną, której podstawowym celem pozostaje wzmacnianie pierwotnego „kształtu” umowy. Następuje to przez zapewnienie każdej ze stron

ciągłości ustalonego stosunku. Warto jednak podkreślić, że omawiana zasada na gruncie prawa polskiego nie jest traktowana w sposób bezwzględny. Zarówno realia obrotu gospodarczego, zmieniające się ceny, jak i czynniki o charakterze losowym każdą traktować tę regułę nie na zasadzie ochronnej, ale jako dyrektywę o charakterze warunkowym. Dlatego też kodeks cywilny przewiduje odstąpienie od wskazanej reguły postępowania w konkretnych przypadkach oraz przy spełnieniu ściśle określonych warunków. Podstawowymi kodeksowymi zasadami, umożliwiającymi takie ukształtowanie stosunku pozostają: prawo odstąpienia oraz zastrzeżenie klauzuli *rebus sic stantibus*.

Zasada trwałości umowy pełni funkcję gwarancyjną i w doniosłym tego słowa znaczeniu warunkuje zaufanie kontrahentów do samego prawa. Na gruncie stosunku deweloperskiego pozostaje ona na szczycie najważniejszych sposobów ochrony strony słabszej (nieprofesjonalnej). Nieskuteczność egzekwowania od deweloperów obowiązków umownych sprawia, że Polacy w coraz większym stopniu zwracają się ku wtórnemu rynkowi pozyskiwania nieruchomości. Dostrzegalny zanik powszechnego zaufania do deweloperskiej grupy zawodowej wywołuje nadmierne ograniczanie ich profesjonalnych działań do tego stopnia, że nawet te mieszczące się w granicach prawa traktowane są jako nadużycia i celowe dążenie do pokrzywdzenia kontrahenta<sup>[1]</sup>.

Motywację do sporządzenia poniższego tekstu stanowi fakt, że większość artykułów naukowych oraz tez stawianych przez przedstawicieli doktryny skupia się głównie na poszukiwaniu sposobów ochrony nabywców, jako strony słabszej w relacji z deweloperem. Pomijane tym samym pozostawały sytuacje, w których to deweloper zmuszony był do wykorzystania przysługującej mu ochrony prawnej. W ocenie autorki, na gruncie polskiego prawa cywilnego niezbędne jest zapewnienie poszanowania prawa każdej ze stron umowy deweloperskiej. W ślad za tym celowym pozostaje stworzenie opracowania, pozwalającego zwrócić uwagę na prawne sposoby

<sup>1</sup> Badania dotyczące stosunku Polaków do deweloperów zostały opublikowane w 2015 r. (nie przeprowadzono nowszych badań).

Badanie TNS Polska *Nieruchomości i mieszkania* z 2015 r. pokazało, że grupa respondentów nie ufa deweloperom i nie jest zadowolonych z jakości ich usług. Podczas analizy wyników wywnioskowano opinię wielu Polaków. Uważają oni, że deweloperzy nie są w stanie zrealizować inwestycji w wyznaczonym czasie, a nieruchomości są często budowane z niskiej jakości materiałów. (Aleksandra Kubicka, Jarosław Mikołaj Skoczeń, *Jak sprawdzić wiarygodność dewelopera?*, 2015. <https://prnews.pl/jak-sprawdzic-wiarygodnosc-dewelopera-11762> [dostęp: 12.02.2023 r.])

dochodzenia roszczeń przez dewelopera, w przypadku niewłaściwych zachowań leżących po stronie nabywcy.

Problem badawczy skupia się wokół realizacji ochrony dewelopera poprzez zastosowanie umownego prawa odstąpienia od umowy deweloperskiej oraz możliwości wykorzystania klauzuli *rebus sic stantibus*.

Autorka dąży do wskazania, że możliwość skorzystania przez podmiot profesjonalny z umownego uprawnienia do odstąpienia oraz z klauzuli *rebus sic stantibus* nie jest przejawem złej praktyki deweloperskiej, ingerującej w trwałość stosunku umownego, a jedynie prawnie przewidzianym narzędziem ochrony, która przysługuje nie tylko stronie potencjalnie słabszej, jaką jest nabywca.

Analizując możliwość korzystania przez deweloperów z umownego prawa odstąpienia należy zacząć od wskazania, iż na wzór klauzul kontraktowych, jego zastosowanie w umowie odbywa się w oparciu o swobodę umów. Skuteczność takiego postanowienia nie zależy jednak jedynie od wskazania go w umowie, konieczne pozostaje także zakreślenie terminu końcowego obowiązywania, dzięki czemu nie posiada ono nieograniczonego charakteru. Omawiana możliwość nie stanowi wiedzy powszechnie funkcjonującej w polskim społeczeństwie. Uczestnicy porządku prawnego w Polsce często nie są świadomi przysługujących im uprawnień, co obrazują badania przeprowadzone przez agencję badawczą PBS z 2016 r.; wynika z nich, że co dziesiąta osoba nie czyta treści umowy przed jej podpisaniem, a co trzecia czyta ją w sposób pobieżny<sup>[2]</sup>. Nic więc dziwnego, że skorzystanie przez stronę uprawnioną z odstąpienia umownego, traktowane jest przez drugą stronę umowy jako swoistego rodzaju nadużycie pozycji.

## 2 Umowa deweloperska zagadnienia ogólne

Pierwotnie funkcjonowanie umowy deweloperskiej w Polsce opierało się o zasadę swobody umów:

<sup>2</sup> Badanie opinii publicznej *Jak Polacy zawierają umowy i rola dziennikarstwa ekonomicznego* przeprowadzone w związku z Nagrodą Dziennikarstwa Ekonomicznego Press Club Polska, na zlecenie partnerów nagrody Axa i Provident Polska, Czy wystarczająco uważnie podpisujemy umowy i czy dziennikarze pomagają w edukacji konsumentów?, 2016, <https://pressclub.pl/wp-content/uploads/2016/11/Jak-Polacy-zawierają-umowy-i-rola-dziennikarstwa-ekonomicznego.pdf>. [dostęp: 12.02.2023].

Nienazwana umowa deweloperska powstała w wyniku specjalnego połączenia czynności realizowanych w ramach budowlanego procesu inwestycyjnego, z docelowym zamiarem przekazania inwestycji (budynku, lokalu) drugiej stronie umowy, mająca charakter umowy właściwej (a nie przedwstępnej), niezależnie od formy, w której została zawarta, skutkuje dla kontrahenta powstaniem roszczenia odszkodowawczego *ex contractu* w przypadku niewykonania lub niewłaściwego wykonania umowy (deweloperskiej)<sup>[3]</sup>.

Dopiero od 29 kwietnia 2012 r. doprecyzowano jej charakter w przepisach z ustawy deweloperskiej<sup>[4]</sup>. Należy w tym miejscu podkreślić, że wprowadzenie tej regulacji stworzyło nie tylko podstawy do właściwej praktyki związanej ze sposobem kształtowania wzajemnych obowiązków stron, ale także przyczyniło się do ujednolicenia formy oraz trybu jej zawierania. Opisano także granice odpowiedzialności w sytuacji nienależytego, a także całkowitego niewykonania tego stosunku. Kluczowe stało się również doprecyzowanie sposobów ochrony kontaktujących, w szczególności strony nieprofesjonalnej, przez wyposażenie jej w środki ochrony również w przypadku ogłoszenia przez dewelopera upadłości<sup>[5]</sup>. Pomimo licznych zalet płynących z uregulowania umowy deweloperskiej we wskazanej ustawie część przedstawicieli doktryny wyrażała się w sposób krytyczny o nowej regulacji. Podnoszono m.in., że regulacja powstawała w dużym pośpiechu, zawierała liczne sformułowania z języka potocznego, a nie prawniczego.

Widać pośpiech w uchwalaniu ustawy (uchwalona została na ostatnim posiedzeniu Sejmu przed upływem VI kadencji), co rzutuje na jakość tego prawa [...] Niektóre rozwiązania niewiele wnoszą albo są jedynie fasadą wyczerpującego uregulowania, które w praktyce na pewno wywoływać będzie problemy (np. art. 25 i art. 27 OchPrNU). Można też postawić pytanie, czemu jedynie konsumenti zasługują na standardy ochronne ustawy, a np. przedsiębiorca chcący nabyć lokal użytkowy już nie. Co wreszcie absolutnie nie powinno się przydarzyć, przepisy rażą w wielu miejscach błędnymi sformułowaniami. Pretensjonalny jest tytuł ustawy (dotyczy również nabywców na

<sup>3</sup> Wyrok Sądu Okręgowego w Poznaniu – II Wydział Cywilny Odwoławczy z dnia 19 marca 2021 r. II Ca 83/21, Legalis nr 2576241.

<sup>4</sup> Ustawa z dnia 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego, (t.j. Dz. U. z 2021 r., poz. 1445).

<sup>5</sup> Dorota Matyjaszek, „Essentialia negotii umowy deweloperskiej” *Roczniki Administracji i Prawa*, nr 13 (2013): 457–473.

rynkowi wtórnym) czy sformułowanie „rozpoczęcie sprzedaży” (art. 3 pkt 10 OchPrNU), które żywcem wzięte zostało z języka powszechnego, natomiast większą tradycję normatywną ma przedstawienie oferty zawarcia umowy<sup>[6]</sup>.

Ustawa z 2011 r. została jednak uchylona przez wprowadzenie regulacji z dnia 20 maja 2021 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego oraz Deweloperskim Funduszu Gwarancyjnym, Dz.U. 2021 poz. 1177 (później skrót OchrNabDFGU). Warto wskazać, że początkowo istniało wiele kontrowersji związanych z umową deweloperską. Jeszcze przed wprowadzeniem ustawy z 2011 r., kiedy to umowa ta wynikała z treści art. 353 (1) k.c. deweloperzy zmuszani byli do sprzedaży prawa własności nieruchomości, jeszcze przed wybudowaniem inwestycji, bowiem w oparciu o treść art. art. 157 § 1 kodeksu cywilnego<sup>[7]</sup> (później skrót k.c.) niemożliwe pozostało przeniesienie własności nieruchomości z zastrzeżeniem warunku lub terminu<sup>[8]</sup>. Kolejnym problemem, który narodził się w odniesieniu do umowy deweloperskiej, już po wprowadzeniu ustawy ją regulującej było to, czy nie należałyby traktować stosunku prawnego jako odpowiednika umowy przedwstępnej, albowiem w ramach *essentialia negotii* tego kontraktu występuje zobowiązanie dewelopera do ustanowienia lub przeniesienia na nabywcę prawa odrębnej własności lokalu mieszkalnego, albo własności nieruchomości zabudowanej domem jednorodzinnym, po zakończeniu budowy<sup>[9]</sup>. Tym samym w swoim charakterze umowa uregulowana w art. 2 OchrNabDFGU nie jest stosunkiem prawnym, na podstawie którego dochodzi do przeniesienia własności nieruchomości, a jedynie stanowi przyrzeczenie dokonania takiego przeniesienia (w oparciu o treść przepisu 155 k.c.).

W umowie deweloperskiej występują cechy wspólne z umową przedwstępnią, ponieważ elementem umowy deweloperskiej jest zawsze zobowiązanie stron do zawarcia w przyszłości umowy definitywnej, która przeniesie tytuł do domu lub lokalu. Z drugiej jednak strony, nie można pomijać faktu,

<sup>6</sup> Bartłomiej Gliniecki, „Zamach na swobodę umów czy lepsze zabezpieczenie interesów klientów” *Edukacja Prawnicza*, nr 4 (2012): 6.

<sup>7</sup> Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (t. j. Dz. U. z 2022 r., poz. 1360 z późn. zm.).

<sup>8</sup> Matyjaszek, „*Essentialia negotii* umowy deweloperskiej”.

<sup>9</sup> Zob. art. 2 ustawy z dnia 20 maja 2021 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego oraz Deweloperskim Funduszu Gwarancyjnym (Dz. U. 202 r., poz. 1177).

że analizowana czynność prawa obejmuje także inne, skonkretyzowane obowiązki dewelopera dotyczące procesu budowlanego. Muszą być one prawidłowo wykonane, aby zrealizowanie ostatecznego celu transakcji stało się w ogóle możliwe. Ponadto, szczególnie istotne znaczenie ma tu okoliczność, że umowa deweloperska wprowadza po stronie nabywcy obowiązek zapłaty wynagrodzenia (ceny nabycia) i to jeszcze przed zakończeniem inwestycji. W przypadku klasycznej umowy przedwstępnej sytuacja taka nie występuje. Umowa deweloperska nie może być uznana za umowę przedwstępnią w rozumieniu art. 389 k.c. Z okoliczności, że umowa łącząca strony zawiera pewne postanowienia charakterystyczne dla umowy przedwstępnej, nie można wysnuwać wniosku, zgodnie z którym oznacza to ograniczenie obowiązku naprawienia szkody wynikającej z niewykonania zobowiązania jedynie do tzw. ujemnego interesu umowy<sup>[10]</sup>.

### 3 Umowne prawo odstąpienia w umowie deweloperskiej

Przechodząc do analizy uprawnień dewelopera w związku z umownym prawem odstąpienia, należy skupić się na tym, jaki jest cel wprowadzania do danego stosunku takiej klauzuli, w jaki sposób się ją wykonuje, czy mają tu zastosowanie przepisy kodeku cywilnego, jakie rodzi konsekwencje, w zależności od tego kto z uprawnienia skorzysta.

Dla potrzeb artykułu, autorka skupi się jedynie na umownym, a nie ustawowym prawie odstąpienia od umowy. Istotą umownego prawa odstąpienia na gruncie prawa zobowiązań jest stworzenie możliwości dla jednej albo dla każdej ze stron odstąpienia od umowy, bez konieczności uzasadniania tej decyzji. Oczywiście, jak wskazano wcześniej, odstąpienie jest możliwe tylko, jeśli zostało przewidziane przez strony oraz obarczono je terminem umożliwiającym jego przeprowadzenie. Dodatkowo określenie czasu na odstąpienie od umowy może nastąpić przez wskazanie zdarzenia przyszłego i niepewnego (warunku), czy też przez posłużenie się określonymi zachowaniami jednej ze stron, które to za skutkują skorzystaniem

<sup>10</sup> Wyrok Sądu Okręgowego w Sieradzu – I Wydział Cywilny z dnia 21 listopada 2018 r. I Ca 447/18, Legalis nr 2093037.

z omawianego uprawnienia. Każda z przywołanych okoliczności winna w sposób jasny i wyczerpujący zostać ujęta w umowie, bowiem temporalność tego zastrzeżenia ma na celu ograniczenie sytuacji, w której jedna ze stron pozostawałaby w stanie niepewności i braku wiedzy o potencjalnej nietrwałości zawisanego stosunku.

W oparciu o zasadę jedności prawa cywilnego nie należy traktować ustawy deweloperskiej w oderwaniu od przepisów k.c. Istota umownego prawa odstąpienia od umowy będzie miała tym samym zastosowanie także do tego typu kontraktów. Odstąpienie znosi stosunek prawny z mocą wsteczną, a umowę uważa się za niezawartą. Jak wskazano, na gruncie kontraktu deweloperskiego nie budzi wątpliwości możliwość dodania takiego zastrzeżenia, choć w przypadku niektórych stosunków niemożliwe będzie zastrzeżenie umownego odstąpienia – dotyczy to umowy przenoszącej własności nieruchomości (w związku z treścią art. 157 k.c.), choć, jak wskazałam, umowa deweloperka jedynie zobowiązuje do przeniesienia własności nieruchomości.

Przy omawianiu umownego prawa odstąpienia warto poruszyć problematykę niedopuszczalności cofnięcia oświadczenia o odstąpieniu. Jak już podkreślono, skorzystanie z tego zastrzeżenia ingeruje w całą umowę i skutkuje uznaniem jej za niezawartą z mocą wsteczną. W wyniku takiego działania złożone oświadczenie o odstąpieniu nie może zostać cofnięte ani odwołane bez stosownej zgody drugiej strony. Chociaż takie stanowisko również budzi kontrowersje, jak podkreślił Sąd Najwyższy w sentencji wyroku z 6 marca 2009 r., „[...] po dotarciu oświadczenia o odstąpieniu od umowy do jego adresata, skutki oświadczenia nie mogą być uchylone, nawet za jego zgodą”<sup>[11]</sup>. Nie należy tego utożsamiać także z nowacją, bowiem to na skutek oświadczenia woli dochodzi do ustania dotychczasowego stosunku obligacyjnego i uznaje się, że stosunek istniejący między stronami nigdy nie istniał. Zdaniem autorki, wyrażenie zgody na cofnięcie oświadczenia woli o odstąpieniu w rezultacie zmusza strony do zawarcia nowej umowy, której treść odpowiadałaby umowie uznanej za niezawartą. Jak słusznie zauważył Wojciech Popiółek:

Nie można – jednostronną czynnością prawną skierowaną do adresata – kształtać jego sytuacji prawnej w ten sposób, że staje się on ponownie stroną stosunku obligacyjnego. Jeżeli stosunek obligacyjny wygasł (przestał

<sup>11</sup> Wyrok Sądu Najwyższego – Izba Cywilna, z dnia 6 marca 2009 r. II CSK 518/08, Legalis nr 244061.

istnieć), to nie można go „reanimować”, chyba że wyraźny przepis prawa pozwala znieść skutki określonego zdarzenia prawnego z mocą wsteczną<sup>[12]</sup>.

Jeżeli cofnięcie oświadczenia o odstąpieniu prowadziłoby do automatycznego zawiązania nowej umowy, druga strona została zmuszona do zawarcia niezależnie od swojej woli. W rezultacie doszłoby do naruszenia zasadyswobody umów i prawa stron do decydowania o swoich interesach.

Przechodząc do scharakteryzowania skutków umownego odstąpienia należy wskazać, że doniosłe znaczenie ma wzajemne rozliczenie między stronami. Takie działanie następuje jednak tylko w sytuacji, gdy doszło do chociażby częściowego wykonania umowy. Nie budzi wątpliwości, że regulacja z art. 395 § 2 k.c. ma charakter samodzielnynie jest uzupełnieniem zwrotu nie należnego świadczenia w oparciu o przepisy bezpodstawnego wz bogacenia.

W ocenie autorki skorzystanie przez stronę uprawnioną z umownego prawa odstąpienia jest zasadne i nie powinno budzić kontrowersji, wszysktko zależy jednak od tego, w jakim celu to prawo się wykonuje. Zdarzają się bowiem sytuacje, w których umowne prawo odstąpienia stwarza deweloperowi możliwość dodatkowego zysku. Deweloper skorzysta z umownie przysługującego mu uprawnienia celem zwolnienia się od obowiązku ustanowienia lub przeniesienia na nabywcę prawa odrębnej własności. Działanie powyższe umożliwia przedsiębiorcy zbycie omawianej nieruchomości za wyższą cenę niż pierwotnie oczekiwali. Nie zawsze deweloperowi będzie przysługiwała możliwość skorzystania z klauzuli *rebus sic stantibus*, a tym samym przy niespodziewanym i niewkalkulowanym przez dewelopera wzroście cen materiałów budowlanych, podwyższeniem znacząco cen energii elektrycznej, wzmożeniem inflacji, podniesieniem kosztów pracy i kursu walut obcych, będzie zagrożony zastojem inwestycji bądź poważniejszymi skutkami dla własnej działalności. W poszukiwaniu innych metod zabezpieczenia swoich interesów może skorzystać z wcześniej zawartego w umowie prawa odstąpienia od tejże umowy. Zdaniem autorki, w takiej sytuacji należałyby analizować te uprawnienia w oparciu o art. 5 k.c. Zgodnie z treścią przytoczonego przepisu, ochronie prawnej nie podlega takie korzystanie z przysługującego nam prawa, które byłoby sprzeczne ze społeczno-gospodarczym przeznaczeniem tego prawa lub z zasadami współżycia społecznego. Warto jednak wskazać, że strony mogą swobodnie kształtować swoje stosunki, w oparciu o zasadę swobody umów,

<sup>12</sup> Wojciech Popiołek, „Komentarz do art. 395”, [w:] *Kodeks cywilny. Komentarz*, red. Krzysztof Pietrzykowski, wyd. 10, t. I (Warszawa: C.H. Beck 2020), 1307.

jednak jej granice (z art. 353 (1) k.c.) nie stanowią jedynego ograniczenia dla deweloperów. Szereg klauzul abuzywnych, bogata linia orzecznicza i odpowiedzi Prezesa UOKiK wyłączają m.in. ustanawianie przed przedsiębiorców kar umownych w przypadku zaistnienia nieterminowych płatności<sup>[13]</sup>. W takiej sytuacji deweloperowi pozostaje wyłącznie uprawnienie do odstąpienia od umowy, chyba że niespełnienie przez nabywcę świadczenia pieniężnego jest spowodowane działaniem siły wyższej<sup>[14]</sup>. Należy poddać zatem analizie przepis art. 492 § 1 k.c., z którego wynika, że strona odstępująca od umowy wzajemnej obowiązana jest zwrócić drugiej wszystko, co otrzymała od niej na mocy umowy, a druga strona obowiązana jest to przyjąć. Strona, która odstępuje od umowy może żądać nie tylko zwrotu tego co świadczyła, lecz również na zasadach ogólnych, naprawienia szkody wynikłej z niewykonania zobowiązania. Zgodnie z przyjętą zasadą, że odstąpienie od umowy niweluje jej byt prawny „od samego początku” (*ex tunc*), należy uznać, że deweloper zostałby pozbawiony nie tylko możliwości domagania się odstąpienia od umowy, ale także odsetek ustawowych od opóźnionych płatności, związanych z zapłatą ceny na poczet nabycia prawa własności nieruchomości przez konsumenta. Pozostaje mu jedynie możliwość domagania się naprawienia szkody na zasadach ogólnych oraz zwrot poczynionych przez niego nakładów koniecznych.

Ustawodawca w sposób jednoznaczny w art. 494 k.c. przesądził, iż wskutek odstąpienia od umowy (na podstawie upoważnienia ustawowego, jak również umownego uregulowanego w art. 492 k.c.) powstaje stan, który należy zakwalifikować jako niewykonanie zobowiązania, skoro strona, która odstąpiła od umowy, na podstawie przywołanego przepisu może dochodzić naprawienia szkody wynikłej z niewykonania zobowiązania. Z tego względu, że odstąpienie od umowy powoduje przekształcenie się stanu zwłoki lub opóźnienia w stan niewykonania zobowiązania, strona może dochodzić kary umownej przewidzianej na wypadek odstąpienia od umowy, tj. kary przewidzianej na wypadek niewykonania zobowiązania z wyłączeniem możliwości

<sup>13</sup> Roszczenie o zapłatę kary umownej na wypadek zwłoki lub opóźnienia nie przysługuje stronie odstępującej od umowy wzajemnej, jeżeli w umowie zastrzeżono również taką karę w związku z odstąpieniem od umowy – tak w uchwale Sądu Najwyższego z dnia 18 lipca 2012 r., III CZP 39/12, Legalis nr 503354.

<sup>14</sup> Art. 43 ust. 7 ustawy z dnia 20 maja 2021 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego oraz Deweloperskim Funduszu Gwarancyjnym, (Dz. U. 2021 r., poz. 1177).

równoczesnego dochodzenia kary umownej zastrzeżonej z tytułu zwłoki lub opóźnienia, jako jednej z postaci nienależytego wykonania zobowiązania<sup>[15]</sup>.

Przy analizie umownego prawa odstąpienia od umowy istotne pozostaje także zwrócenie uwagi na jego związek z ustawowym prawem odstąpienia, który wynika z art. 491 k.c. Chociaż autorka nie opisuje w artykule skutków zastosowania regulacji ze wskazanego artykułu, to należy zwrócić uwagę na to, że zastrzeżenie umownego prawa odstąpienia nie wpływa na możliwość posłużenia się ustawowym prawem odstąpienia od umowy. Jak słusznie wskazał Sąd Najwyższy w wyroku z dnia 2 kwietnia 2008 r.<sup>[16]</sup>, ustawowe prawo odstąpienia od umowy wzajemnej stanowi uprawnienie kształtujące wierzyciela. Nie można tym samym podważać możliwości zastosowania prawa przewidzianego przez ustawodawcę w art. 491 k.c., w sytuacji umieszczenia w umowie klauzuli kontraktowej przewidzianej w art. 395 § 1 k.c.<sup>[17]</sup>.

## 4 | Klauzula *rebus sic stantibus* w stosunkach pomiędzy deweloperem a nabywcą

Klauzula *rebus sic stantibus*, podobnie do umownego prawa odstąpienia, stanowi przełamanie zasady trwałości stosunku umownego. Wprowadzenie normy z 357 (1) k.c. umożliwiło uelastycznenie treści stosunku łączącego strony poprzez uregulowanie ujemnych konsekwencji grożących w przypadku zdarzenia, na które żaden z kontrahentów nie mógł się przygotować. Normatywne przywrócenie ogólnej klauzuli *rebus sic stantibus* nie oznacza w żadnym razie całkowitego przełamania zasady *pacta sunt servanda*. Wręcz przeciwnie, sposób zredagowania art. 357 (1) wskazuje, że ma on wprawdzie stanowić swego rodzaju „zawór bezpieczeństwa” jedynie w sytuacjach zgoła wyjątkowych. Przy wykładni art. 357 (1) należy zatem uwzględnić, że chodzi

<sup>15</sup> Uchwała Sądu Najwyższego z dnia 18 lipca 2012 r., III CZP 39/12, Legalis nr 503354.

<sup>16</sup> Wyrok Sądu Najwyższego z dnia 2 kwietnia 2008 r., III CSK 323/07.

<sup>17</sup> Tak: wyrok Sądu Najwyższego z dnia 30 stycznia 1998 r., III CKN 279/97, LEX nr 315347.

o wyjątek od ogólnej zasady i wspomniana klauzula w żadnym razie nie ma charakteru nadzędnego. Sprowadza ona jedynie zasadę *pacta sunt servanda* do rozsądnych granic<sup>[18]</sup>. Warto wskazać, że klauzula ta, pomimo ingerencji w ciągłość i nienaruszalność stosunku umownego, zapewnia zindywiduализowaną ochronę interesu kontrahenta. Ustawodawca słusznie zauważył, że przypisywanie zasadzie *pacta sunt servanda* charakteru bezwzględnego rodziłoby negatywne konsekwencje dla uczestników porządku prawnego, prowadząc do pokrzywdzenia ich interesu. Elastyczność stosowana za pomocą klauzuli nadzwyczajnej zmiany stosunków obarczona została enumeratywnymi przesłankami, których wystąpienie stwarza stronie jedynie możliwość żądania od sądu ingerencji w treść stosunku, celem rozważenia o sposobie wykonania zobowiązania, wysokości świadczenia lub nawet orzeczeniu rozwiązania umowy.

Nie można pomijać faktu, że przepis ten ma charakter wyjątkowy, a więc może dotyczyć jedynie sytuacji powstały w wyniku nadzwyczajnej zmiany stosunków. Nie ma natomiast takiego charakteru zmiana stosunków będąca następstwem „ciągłego” spadku siły nabywczej pieniądza [...] a więc takiej zmiany, której obie strony nie mogły przewidzieć w chwili powstania należności<sup>[19]</sup>.

Nie budzi wątpliwości, że klauzula *rebus sic stantibus* dotyczy jedynie zobowiązań o charakterze umownym, jednakże brak jest przeszkód do tego, aby stosować ją do umów nienazwanych. Należy dodatkowo podkreślić, że nadzwyczajna zmiana stosunków występuje także na gruncie umowy deweloperskiej, bowiem ustawodawca nie wyłączył możliwość jej zastosowania do świadczeń w obrocie handlowym. Analizując klauzulę *rebus sic stantibus* należy podkreślić, że poza regulacją przewidzianą w art. 357 (1) istnieje możliwość stworzenia przez strony własnego, umownego postanowienia regulującego nadzwyczajną zmianę stosunków. Kontrahenci określają wtedy skutki jej zastosowania oraz wzajemne obowiązki np. w przypadku wystąpienia znaczącego wzrostu cen na rynku budowlanym. W tym wypadku ingerencja sądu w treść umowy staje się ograniczona, działa on bowiem wyłącznie w granicach przewidzianych przez strony.

<sup>18</sup> Tadeusz Wiśniewski, „Art. 357(1)”, [w:] Kodeks cywilny, t. II, Komentarz do art. 353-626, red. Maciej Gutowski, wyd. 3 (Warszawa: C.H. Beck, 2022), 164-170.

<sup>19</sup> Wyrok Sądu Apelacyjnego w Warszawie z dnia 11 marca 2004 r., I Aca 1181/03, Legalis nr 67531.

Dodatkowo w związku z tym, że *rebus sic stantibus* to przepis o charakterze dyspozytywnym, nie ma przeciwskazań do tego, aby w drodze konsensusu wyłączyć możliwość jego zastosowania, gdyż „wyłączenie zastosowania klauzuli nie musi być wprost wskazane w umowie; często przybiera ono następującą treść: *Strony przyjmują na siebie wszelkie rodzaje ryzyk wynikających z zawieranej umowy; już taki zapis co do zasadys będzie wyłączał możliwość skorzystania z ingerencji sądu*”<sup>[20]</sup>.

Kontrowersyjne pozostaje zastosowanie klauzuli *rebus sic stantibus* po częściowym lub całkowitym wykonaniu zobowiązania z umowy deweloperskiej. Nie powinno budzić żadnych wątpliwości, że możliwość zastosowania regulacji z art. 357 (1) k.c. powinno nastąpić w czasie trwania danego stosunku zobowiązaniowego<sup>[21]</sup>. Tym samym należy przyjąć, że spełnienie świadczenia w całości wyłącza możliwość dokonania sądowej modyfikacji stosunku w oparciu o *rebus sic stantibus*. Sąd Najwyższy w wyroku z 21.7.2006 r. podkreślił, że „sąd nie może oznaczać na podstawie art. 357 (1) k.c. wysokości spełnionego świadczenia, nawet gdy zdaniem strony nie zostało ono wykonane należycie lub w ogóle nie zostało wykonane. Po terminie, w którym świadczenie powinno być spełnione, nie można twierdzić, że jego spełnienie byłoby połączone z nadmiernymi trudnościami lub groziło jednej ze stron nadmierną stratą”<sup>[22]</sup>. Jednakże częściowe wykonanie zobowiązania nie powinno wyłączać możliwości dostosowania jego treści, jeśli byłoby połączone z nadmiernymi trudnościami albo groziłoby jednej ze stron rażąca stratą. Kwestionowane zasadności zastosowania klauzuli *rebus sic stantibus* przy częściowym wykonaniu zobowiązania jest zdaniem autorki nieadekwatne do celu, jakim kierował się ustawodawca przy kreowaniu tej reguły. Jednakże możliwości sądu związane z ingerencją w ten stosunek powinny być już obarczone pewnymi ograniczeniami. W odniesieniu do umowy deweloperskiej, jeżeli zobowiązanie nabywcy (w odniesieniu do uiszczenia ceny za wybudowanie budynku oraz ustanowienia odrębnej własności lokalu mieszkalnego) ma być realizowane periodycznie, to niezasadne wydaje się żądanie zmniejszenia wartości już dokonanego świadczenia. Należy podkreślić, że takie stanowisko wydaje się być słuszne

<sup>20</sup> Aleksandra Cempura, Anna Kasolik, „Klauzula *rebus sic stantibus*”, [w:], *Metodyka sporządzania umów gospodarczych*, red. Aleksandra Cempura, Anna Kasolik wyd. 9 (Warszawa: Wolters Kluwer, 2021), 408.

<sup>21</sup> Zob.: Piotr Machnikowski w: Edward Gniewek, Piotr Machnikowski, *Kodeks cywilny. Komentarz*, wyd. 9 (Warszawa: C.H. Beck, 2019), 750-770.

<sup>22</sup> Wyrok Sądu Najwyższego z dnia 21 lipca 2006 r., III CSK 119/05, Legalis nr 107540.

także w sytuacji, gdy nabywca dokona całkowitego, finansowego zaspokojenia dewelopera, a przedsiębiorca wybudował nieruchomość objętą umową, jednak nie dokonał jeszcze przeniesienia na nabywcę własności nieruchomości zabudowanej domem. Założenie to znajduje wyraz w tym, że deweloper nie doznał negatywnych skutków w momencie wykonywania prac, a ceny na rynku odpowiadały wartości dokonanych przez nabywcę płatności. Przeciwne założenia możemy znaleźć m.in. w wyroku Sądu Apelacyjnego w Rzeszowie z 28 marca 2013 r, w którym to stwierdzono, że:

powoływanie się na niemożność modyfikacji wysokości świadczenia według zasad określonych w art. 357(1) k.c., po wykonaniu umowy i uiszczeniu przez pozwanego na rzecz powoda całości zryczałtowanego wynagrodzenia, w toku procesu nie znajduje zastosowania w sytuacji, gdy strona opiera swoje żądanie modyfikacji sposobu wykonania zobowiązania na tym, że spełnienie świadczenia groziłoby jej rażąca stratą i w rezultacie domaga się przywrócenia ekwiwalentności świadczeń, poprzez zasądzenie dalszej kwoty<sup>[23]</sup>.

W wyroku Sądu Apelacyjnego w Warszawie z 25 września 2013 r. wskazano natomiast jednoznacznie, iż „w świetle 357 (1) k.c. wykonanie umowy w całości nie uniemożliwia sądowi oznaczenia wysokości świadczenia należnego w związku z wykonaniem umowy”. Analizując orzecznictwo w tej materii należy stwierdzić, że nie wykształciła się jeszcze jednoznaczna linia orzecznicza, regulująca powyższy problem.

Przy ocenie zasadności zastosowania *rebus sic stantibus* w pierwszej kolejności należy podać w wątpliwość możliwość dokonania przez dewelopera zmiany ceny za nieruchomość, po podpisaniu umowy deweloperskiej. Przez ostatnie dwa lata, tj. na przestrzeni 2020-2022 r., nastąpił odczuwalny rozwój branży deweloperskiej. Zainteresowanie nowymi lokalami mieszkalnymi i domami było tak znaczące, że deweloperzy nie nadążali za popytem rynkowym. Jednakże wzrost cen surowców, w tym m.in. stali i paliwa, a co za tym idzie kosztów logistyczno-spedytywnych, czy też spadek siły nabywczej polskiej waluty przyczynił się do znaczącego podwyższenia cen nowobudowanych nieruchomości. Nie budzi wątpliwości fakt, że najczęściej umowy deweloperskie są zawierane na etapie samego projektu/wizualizacji. Wtedy też określana jest wartość zabudowanej nieruchomości, a co za tym idzie wysokość należności dla dewelopera. Przed wejściem w życie ustawy

<sup>23</sup> Zob.: sentencja wyroku Sądu Apelacyjnego w Rzeszowie, z dnia 28 marca 2013 r. I ACa 452/12, Legalis nr 739500.

z 2011, a następnie z 2021 r. OchrNabDFGU, deweloperowi działającemu na rynku zapewniało się praktycznie nieograniczoną wolność w zakresie prowadzonych przez niego procesów, tj. od budowy po finansowanie i sprzedaż. Obecnie obowiązujące przepisy skupiają się w znacznym stopniu na zapewnieniu szerokiej ochrony nabywców<sup>[24]</sup>. Deweloperzy są traktowani jako strona silniejsza, profesjonalna, a tym samym doznają licznych ograniczeń. Zazwyczaj cena określana jest jednoznacznie, tj. kwotowo lub za metr kwadratowy powierzchni, gdzie kwota powinna być właściwie niezmienna, chociaż w umowach deweloperskich zdarzają się postanowienia dotyczącego tego, że może ona ulec zmianie w wyjątkowych okolicznościach. Bez wątpienia coraz częściej deweloperzy sami zastrzegają w kontrakcie sposobność do podwyższenia wartości ceny, przez klauzule waloryzacyjne. Należy jednak podkreślić, że takie działania rodzą szereg kontrowersji. Najczęściej takie postawienia traktowane są jako klauzule niedozwolone (abuzywne). Prawidłowe ustalenie ceny sprzedawanej nieruchomości jest elementem obligatoryjnym każdej umowy deweloperskiej. Powinna być ona określona w sposób jasny, taki który dla obu kontrahentów nie budzi wątpliwości.

Przeprowadzona przez UOKiK analiza stosowanych przez deweloperów wzorców umownych wykazała, iż najczęściej stosowanymi rodzajami klauzul waloryzacyjnych są klauzule waloryzujące ostateczną cenę zakupu nieruchomości, z uwagi na zmianę stawki podatku VAT, zmianę kosztów usług i materiałów budowlanych oraz zmianę powierzchni nieruchomości wybudowanej w stosunku do projektowanej powierzchni nieruchomości<sup>[25]</sup>.

Takie postanowienia umowne mają za zadanie zapewnić deweloperowi możliwość modyfikacji ceny ostatecznej, którą to zobowiązany będzie uiścić nabywca nieruchomości. Należy jednak podkreślić, że aby dane postanowienie umowne nie zostało uznane za jednostronne korzystne

<sup>24</sup> Więcej o ochronie nabywców lokali w świetle ustawy deweloperskiej w: Agnieszka Malarewicz-Jakubów, „Ochrona nabywcy lokalu mieszkalnego w przypadku realizacji przedsięwzięcia deweloperskiego przez spółki celowe”, [w:] Działalność deweloperska w praktyce obrotu gospodarczego – wybrane zagadnienia, red. Adma Bieranowski, Maria Królikowska-Olczak, Jakub Jan Zięty (Warszawa: C.H. Beck, 2014), 49.

<sup>25</sup> Tomasz Darłak, „Problematyka niedozwolonych klauzul umownych w umowach zawieranych z konsumentami przez deweloperów i pośredników nieruchomości” Nieruchomości, nr 2 (2010): 8.

rozwiązań, należałyby dodać klauzulę umożliwiającą nabywcy, w przypadku modyfikacji ceny, odstąpienie od kontraktu. Dodatkowo uprawnienie to powinno być wolne od jakichkolwiek niedogodności, w tym np. odstepnego czy kary umownej.

Analizując treść art. 42 OchrNabDFGU należy wskazać, że ustalenia stron mniej korzystne dla nabywców (w odniesieniu do reguł określonych w art. 2 ust. 1 pkt 2, 3 lub 5 lub ust. 2 oraz art. 3 albo art. 4) są nieważne, a w ich miejsce stosuje się odpowiednie przepisy ustawy. Tym samym warto poddać pod wątpliwość to, czy wystąpienie klauzul abuzywnych również zmusza strony do stosowania odpowiednio przepisów ustawy, czy też skutkuje nieważnością całego stosunku<sup>[26]</sup>. Sąd Najwyższy w uchwale z dnia 13 stycznia 2011 r. jednoznacznie stwierdził, że:

Postanowienie wzorca umownego sprzeczne z ustawą jest więc nieważne, a art. 385(1) k.c. nie może być traktowany jako przepis, który przewiduje inny skutek w rozumieniu art. 58 § 1 *in fine* k.c, w szczególności ten, że na miejsce nieważnych postanowień czynności prawnej wchodzą odpowiednie przepisy ustawy. Odmienna interpretacja oznaczałaby, że w wypadku abstrakcyjnej kontroli wzorca umownego, postanowienie sprzeczne z ustawą mogłoby być jedynie uznane za niedozwolone, natomiast w razie zamieszczenia takiego postanowienia w konkretnej umowie byłoby ono nieważne (art. 58 § 1 i 3 k.c.)<sup>[27]</sup>.

<sup>26</sup> Więcej na temat klauzul niedozwolonych w umowach deweloperskich w: Katarzyna Niekrasz-Gierejko, „Klauzule abuzywne w umowach deweloperskich z uwzględnieniem zmian od 1.7.2022 r.” *Nieruchomość*, nr 7 (2022): 4-8.

<sup>27</sup> Uchwała Sądu Najwyższego z dnia 13 stycznia 2011 r., III CZP 119/10, Legalis nr 284858.

## 5

## Odstąpienia od umowy deweloperskiej oraz modyfikacja stosunku umownego na podstawie klauzuli *rebus sic stantibus* a ochrona nabywcy

Celowość zastosowania klauzuli nadzwyczajnej zmiany stosunków przejawia się w tym, że proces budowy, a następnie sprzedaż nieruchomości stanowią długotrwałe przedsięwzięcie, a tym samym narażone są na różne ryzyka, w tym: zmiany w prawie, zmiany w warunkach rynkowych i inne nieprzewidywalne okoliczności. W takich sytuacjach deweloper powinien mieć możliwość modyfikacji lub unieważnienia umowy, aby dostosować kontrakt do zmieniających się okoliczności.

Wskazanie różnic pomiędzy tymi instytucjami pozwoli na wykłarowanie stanowiska na temat skuteczności i celowości posłużenia się każdym z tych środków ochrony. Istotą odstąpienia od umowy pozostaje „unicestwienie” kontraktu z mocą wsteczną. Nawet przyjęcie założenia, że skutkiem odstąpienia od umowy jest wykreowanie się zobowiązania restytucyjnego (według którego powstaje zobowiązanie do zwrotu wzajemnych świadczeń) nie spowoduje podważenia poglądu, iż umowa deweloperska przestaje wiązać, a nawet istnieć. W przeciwnieństwie do umownego prawa odstąpienia *rebus sic stantibus* pozwala nam na modyfikację stosunku pierwotnego. Oczywiście nie zamyka to drogi do unicestwienia stosunku, ale nie musi do tego prowadzić. Wybór pomiędzy umownym prawem odstąpienia a klauzulą *rebus sic stantibus* będzie zależał od kilku czynników, w tym od: cech projektu deweloperskiego, rynkowych realiów i preferencji stron. Z jednej strony, umowne prawo odstąpienia może być korzystne dla dewelopera z uwagi na to, że to same strony (najczęściej jednak deweloper) określają warunki, w jakich przedsiębiorca może odstać od stosunku. Przy umownym prawie odstąpienia skutki oraz możliwości jego zastosowania nie wymagają wystąpienia dodatkowych, nieprzewidzianych okoliczności, jeżeli zostały właściwie określone w kontrakcie. Z drugiej zaś strony, klauzula *rebus sic stantibus* pozwala na większą elastyczność i dostosowanie umowy do zmieniających się okoliczności, co jest szczególnie ważne w przypadku projektów deweloperskich, gdzie często występują zmiany w warunkach rynkowych i prawnych. Należy jednak podkreślić, że interpretacja tej klauzuli, a dokładniej zwrot „nadzwyczajna zmiana stosunków”, może nastręczyć wiele trudności, a tym samym doprowadzić do niekorzystnego rezultatu. Niezależnie jednak od tego, czy deweloper zastoże odstąpienie od umowy, czy *rebus sic stantibus*, jego zachowanie może

być postrzegane negatywnie przez nabywców i partnerów biznesowych, a tym samym wpływać w sposób pejoratywny na wizerunek marki. Z tego też powodu pierwszą, najważniejszą przesłanką do skorzystania z tych instytucji jest ich absolutna konieczność, brak innych, mniej inwazyjnych rozwiązań. Kiedy jednak sytuacja nie pozwala na odmienne ukształtowanie stosunku, należy przygotować się na kontrreakcję nabywcy. Jeśli druga strona nie godzi się na zastosowanie przez dewelopera umownego prawa odstąpienia, może wnioskować o sądowe ustalenie braku postaw do skutecznego odstąpienia od umowy. Należy jednak pamiętać, że ciężar dowodowy spoczywa będzie na powodzie i to on będzie zobowiązany do tego, aby wykazać, że odstąpienie dewelopera od umowy w oparciu o postawę przez niego wskazaną nie mieści się w granicach jego kontraktowych uprawnień. Dodatkowo nabywca może posłużyć się zasadą równowagi interesów, która zobowiązuje strony do uwzględniania wzajemnych interesów tak, aby stosunek pozostał trwały, czy wskazaną już regulacją z art. 5 k.c.

## 6 | Podsumowanie

Przed wprowadzeniem w Polsce pierwszej tzw. umowy deweloperskiej, większość stosunków umownych opierała się o zasadę swobody umów lub przepisy regulujące umowę przedwstępnią. Taka praktyka budziła jednak szereg wątpliwości zarówno po stronie podmiotów profesjonalnych, jak i konsumentów. Związane one były z wzajemnymi obowiązkami i uprawnieniami stron, kwestiami rozliczeń, odpowiedzialnością z tytułu niewykonania zobowiązania. Działania ustawodawcze skutkowały ewolucją prawa deweloperskiego w Polsce i wprowadzeniem ustawy z dnia 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego. Dzisiaj większość dylematów została rozwiązana w oparciu o obowiązującą ustawę, dorobek doktryny oraz orzecznictwo. Jednak na przestrzeni ostatnich lat zmiany cen materiałów na rynku, niepewna sytuacja ekonomiczna, upadłość przedsiębiorców, czy najbardziej błahe – nieczytanie umów przez konsumentów – spowodowały naruszanie fundamentalnej zasady prawa cywilnego, *pacta sunt servanda*. Coraz częściej deweloperzy poszukiwali metod na to, aby chronić swoje inwestycje. I choć sama instytucja modyfikacji stosunku umownego w oparciu o klauzulę *rebus sic stantibus* była przedmiotem analiz w doktrynie i orzecznictwie,

to ujęcie tego zjawiska w odniesieniu do umowy deweloperskiej może stanowić asumpt do dyskusji naukowej.

Bez sprzecznie obecna sytuacja na rynku nieruchomości rodzi szereg pytań i wątpliwości. Jednak w oparciu o powyższe rozważania należy przyjąć, że zasada *pacta sunt servanda* nie może być traktowana na gruncie prawa polskiego w sposób bezwzględny. Badając tezę postawioną we wstępie artykułu, można dojść do konkluzji, że prawo cywilne stwarza obu stronom umowy deweloperskiej stosowne środki ochrony. Tym samym trudno jest z tego miejsca nie zgodzić się ze stwierdzeniem, że wskazane uprawnienia dewelopera nie są przejawem złej praktyki deweloperskiej, ingerującej w trwałość stosunku umownego, a jedynie niezbędnym narzędziem ochrony.

## Bibliografia

- Cempura Aleksandra, Anna Kasolik, „Klaузula rebus sic stantibus”, [w:] *Metodyka sporządzania umów gospodarczych*, wyd. 9, red. Aleksandra Cempura, Anna Kasolik. Warszawa: Wolters Kluwer 2021.
- Darłak Tomasz, „Problematyka niedozwolonych klauzul umownych w umowach zawieranych z konsumentami przez deweloperów i pośredników nieruchomości” *Nieruchomości*, nr 2 (2010).
- Gliniecki Bartłomiej, „Zamach na swobodę umów czy lepsze zabezpieczenie interesów klientów” *Edukacja Prawnicza*, nr 4 (2012): 3-7.
- Gniewek Edward, Piotr Machnikowski, *Kodeks cywilny. Komentarz*, wyd. 9 zmienione i poszerzone. Warszawa: C.H. Beck, 2019.
- Kubicka Aleksandra, Jarosław Mikołaj Skoczeń, *Jak sprawdzić wiarygodność dewelopera?*, 2015. <https://prnews.pl/jak-sprawdzic-wiarygodnosc-dewelopera-11762>.
- Malarewicz-Jakubów Agnieszka, „Ochrona nabywcy lokalu mieszkalnego w przypadku realizacji przedsięwzięcia deweloperskiego przez spółki celowe”, [w:] *Działalność deweloperska w praktyce obrotu gospodarczego – wybrane zagadnienia*, red. Adma Bieranowski, Maria Królikowska-Olczak, Jakub Jan Zięty. 49-72. Warszawa: C.H. Beck, 2014.
- Matyjaszek Dorota, „Essentialia negotii umowy deweloperskiej” *Roczniki Administracji i Prawa*, nr 13 (2013): 457-473.
- Niekrasz-Gierejko Katarzyna, „Klaузule abuzywne w umowach deweloperskich z uwzględnieniem zmian od 1.7.2022 r.” *Nieruchomości*, nr 7 (2022): 4-9.

Popiołek Wojciech, *Kodeks cywilny. Komentarz*, red. Krzysztof Pietrzkykowski, wyd. 10 zmienione i poszerzone. Warszawa: C.H. Beck, 2020.

Wiśniewski Tadeusz, „Art. 357(1)”, [w:] *Kodeks cywilny, t. II, Komentarz do art. 353-626*, red. Maciej Gutowski, wyd. 3. Warszawa: C.H. Beck, 2022.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>



KAMRI AHMAD

# Child Exploitation within the Illicit Narcotics Trade, as Described by Doen Pleger\*

## Abstract

In addition to the right to growth and development, every child is entitled to protection against violence and discrimination. Three rights should be bestowed upon children. In this context, the right to survival entails attaining self-sufficiency from childhood to adulthood. The entitlement to mature and progress. Individuals have the right to protection against violence and discrimination, which entails being free from unkind or unjust treatment and being subjected to appropriate treatment. The objective of this research is to assess the impact on the daily lives of children in Sidenreng Rappang regency who are exploited as delivery personnel for the illegal trade of narcotics. According to the results of the study conducted in October 2021 – January 2022. The interview questions pertaining to drug usage in this study were guided by the observational approach. Because they do not deserve it, children should not be expected to bear the same level of responsibility as adults in criminal and civil matters. In contrast, children are the nation's most valuable resource and its future. Rehabilitation of drug users under the jurisdiction of the law narcotics should be reevaluated, as it not only imposes a significant financial burden on the state but is also frequently misconstrued in the policy of law enforcement.

**KEYWORDS:** child exploitation, criminal drug abuse, drug trafficking, and Doen Pleger

**KAMRI AHMAD**, associate professor, Universitas Muslim Indonesia (Makassar, South Sulawesi), ORCID – 0000-0003-4891-6889, e-mail: kamri.ahmad@umi.ac.id

---

\* Thank you Universitas Muslim Indonesia for suggest and support this research.

## 1 | Introduction

International attention has long been paid to the issue of child exploitation in the drug trade. The exploitation of children in the global drug trade has emerged as one of the gravest risks to children's health, welfare, and rights, based on the United Nations' 2014 annual report on drugs and international crime. Children who work in the drug trade are frequently compelled to work as drug guards, dealers, or couriers, exposing them to a variety of hazards that might harm their health and safety. Children participating in Illicit trafficking of narcotics are frequently the targets of violence, exploitation, and abuses of their human rights. Consequently, it is essential to have a criminal justice system that respects children's rights and needs. Principles of justice based on Pancasila ideals must be included in the juvenile criminal justice system<sup>[1]</sup>.

A 2015 study also found that the physical development and mental health of children are significantly impacted by child exploitation in the drug trade. According to research, children who participate in drug trafficking are more likely to experience interfering mental problems such as melancholy, anxiety, and PTSD. The risk of drug misuse and addiction is also quite high for children/kinder who are involved in drug trafficking<sup>[2]</sup>.

„Wisdom” can be found in society as well as on college campuses. Campuses must provide opportunities for students to learn from everyone and about everything, including social issues. Therefore, it is necessary to look for and gather local wisdom. The concept of this study is hence like a tit-for-tat in terms of social research, which is extremely specific about the law and variances in community behavior regarding the increasing rate of drugs in Indonesia, particularly in Sidenreng Rappang Regency, South Sulawesi. The actions of adults (both drug traffickers and dealers of illegal goods) who include youngsters in the trafficking of illegal drugs constitute the behavior of the community. This relates to philosophical (the national philosophy of life) and factual factors in the context of protection. Children's crime is a serious issue because, in addition to playing

<sup>1</sup> Elaine Craig, „Child's Play or Sexual Abuse? Reviewing the Efficacy of the Justice Framework in Dealing with Child on Child Sexual Abuse in the United Kingdom” *Journal of Child Sexual Abuse*, 6 (2020): 734-48. <https://doi.org/10.1080/10538712.2020.1719448>.

<sup>2</sup> Charlotte Hunn, Caroline Spiranovic, Karen Gelb, *Why Internet Users' Perceptions of Viewing Child Exploitation Material Matter for Prevention Policies*, 2020, <https://doi.org/10.1177/0004865820903794>.

a vital role in their own lives and those of their families, they also play a crucial role in the future survival of the nation's next generation as the people who will rule the country and the state. This indicates that in the future, based on the findings of the study, talking about the environment in children's life is a very significant topic. The connection between child exploitation and illegal drug trafficking might be referred to as an issue that needs special attention<sup>[3]</sup>.

As was already established, the exploitation of minors in the drug trade is a very significant problem worldwide. According to the United Nations Annual Report on Drugs and International Crime, at least one in four victims of human trafficking are juveniles, and many are trafficked for exploitation in the drug trade<sup>[4]</sup>. According to research, adolescents involved in drug trafficking in Latin America often come from wealthy and impoverished homes that lack access to health care and educational resources<sup>[5]</sup>. An extensive study has been conducted to comprehend the underlying source of this issue and offer a workable remedy. Numerous studies have attempted to pinpoint risk factors, such as deprivation, domestic abuse, and a lack of educational and employment opportunities, that place children at risk of being exploited in the drug trade<sup>[6]</sup>. Other research aims to comprehend the psychological effects of drug trafficking on children, such as mental illnesses, substance abuse, or addiction<sup>[7]</sup>.

Using a multidimensional approach involving various parties, Pancasila justice-based reformulation of the criminal justice system for children involved in conflict and application of the value of legal benefits in reducing

---

<sup>3</sup> Tammy J. Toney-Butler, Megan Ladd, Olivia Mittel, „Human Trafficking”, [in:] *Treasure Island* (FL, 2023).

<sup>4</sup> Charlotte M. Hunn, Helen Cockburn, Caroline Spiranovic, Jeremy Prichard, „Exploring the Educative Role of Judges' Sentencing Remarks: An Analysis of Remarks on Child Exploitation Material” *Psychiatry, Psychology and Law*, No. 6 (2019): 811-828.

<sup>5</sup> Mira Hitikasch, Hannah Lena Merdian, Todd Hogue, „Perceptions of Narrative Child Sexual Exploitation Material in a German Community Sample” *Sexual Offender Treatment*, No. 2 (2016): 1-13.

<sup>6</sup> Monique Anderson, Kate Parkinson, „Balancing Justice and Welfare Needs in Family Group Conferences for Children with Harmful Sexual Behavior: The HSB-FGC Framework” *Journal of Child Sexual Abuse*, No. 5 (2018): 490-509.

<sup>7</sup> Naiyi Sun, Benjamin E Steinberg, David Faraoni, Lisa Isaac, „Variability in Discharge Opioid Prescribing Practices for Children: A Historical Cohort Study” *Canadian Journal of Anaesthesia*, December (2021). <https://doi.org/10.1007/s12630-021-02160-6>.

drug use, including conflict and drug abuse. Pancasila is the cornerstone of principles focused on justice and the defense of children's rights in the reformulation of the criminal justice system for children. Both share the same viewpoint of defending the rights and interests of children and ensuring that they are equitably protected and given opportunities<sup>[8]</sup>.

Narcotics crimes have hit Indonesia, for example, in South Sulawesi, including the Sidenreng Rappang district, where many children are used as a medium to generate billions of dollars in profits for exploiters. In recent political developments in Indonesia, there is a perception that the younger generation has been corrupted in various ways. One way that appears empirically is that children are being used, invited, and provoked to dare to commit crimes, especially the crime of illegal drug trafficking. As a result, they no longer pay attention to or study the past of their nation in a historical order of high value. When a child is invited to be involved in a crime, it means that the child will lose a life guide that will be very important for him in the future. Evidently, before 2010, Sidenreng Rappang (Sidrap) was known as a *Santri* area, especially during the reign of Opu Sidik. However, during the reigns after that, especially the two following periods, this area changed its title from a rice barn to a narcotics barn. The *Santri* area has changed into Passobis area and Cakdoleng-doleng, as reported by Kompas and Fajar Daily. Based on a survey, the number of children involved in drug crimes has reached hundreds. There is a large-scale drug crime involving the exploitation of children. Based on these explanations, this research aims to analyze the extent to which the exploitation of children who are used as *doen pleger* in the illegal drug trade in Sidenreng Rappang Regency affects their daily lives.

This study is a socio-legal research, which is also used as a paradigm, namely a sociological approach and a juridical approach. The sociological approach is intended to study the behavioral tendencies of people's social life, especially the correlation between traffickers of teenage children and *doen pleger*, which is considered a narcotics crime. This is because the object called narcotics is a very new object known to the people in Sidrap, South Sulawesi. Illegal goods have become a trend among teenagers in recent years and have penetrated their social world. This is where the sociological approach comes in. As for the legal approach, this study attempts to

<sup>8</sup> Batari Laskarwati, „Implementasi Nilai Kemanfaatan Hukum Dalam Pencegahan Penyalahgunaan Narkoba Melalui Lomba Keluarga Sadar Hukum (KADAR-KUM)” *Lex Scientia Law Review*, No. 1 (2018): 47-64.

examine it from a legal perspective; specifically, how well the general public is familiar with the laws that govern the regulations that are permissible or impermissible in the distribution of narcotics. What are the factors that influence drug dealers to disregard the morals associated with drugs and take advantage of teenagers? Similarly, from the perspective of law enforcement, this study examined, using a legal syllogism, what motivates young people in Sidrap to engage in illegal drug trafficking<sup>[9]</sup>.

The population of this study was teenagers who are involved in narcotics crimes as *doen pleger*, then they become couriers and/or users to dependency or victims in Sidrap Regency, which amounts to more than 100 children. A sample was attempted from three categories of adolescents, such as dealers, couriers, users, and victims. Seven children were used as a sample. Such a sample will be supported by the results of interviews with officials and the wider community. The sampling method used is convenience sampling because this sampling method is believed to have a higher level of validity while at the same time avoiding the influence of subjectivity on the data collection results. Thus, the results are as objective as possible<sup>[10]</sup>. This research used a combination of analytical methods, namely qualitative and quantitative analysis methods. The qualitative method was used as the main method because this research focused on describing the phenomenon of the rapid circulation of narcotics in South Sulawesi, especially in the Sidrap Regency. The phenomenon of the development of narcotics circulation is very unusual, especially among teenagers. Apart from that, this research is also based on case studies. Based on this, in order to deepen the research of the phenomenon of the spread of narcotics, a group discussion forum was conducted with the participation of several experts such as legal experts, sociologists and clergymen, as well as educators and educational staff<sup>[11]</sup>.

<sup>9</sup> Daniel Winetsky, Aaron Fox, Ank Nijhawan, Josiah D Rich, „Treating Opioid Use Disorder and Related Infectious Diseases in the Criminal Justice System” *Infectious Disease Clinics of North America*, 3 (2020): 585-603. <https://doi.org/10.1016/j.idc.2020.06.012>.

<sup>10</sup> Michele M. Carr, Eric W Schaefer, Jane R Schubart, „Post-Tonsillectomy Outcomes in Children With and Without Narcotics Prescriptions” *Ear, Nose, & Throat Journal*, 2 (2021): 124-129. <https://doi.org/10.1177/0145561319859303>.

<sup>11</sup> Amir Sariasan, Antti Kääriälä, Joonas Pitkänen, Hanna Remes, Mikko Aaltonen, Heikki Hiilamo, Pekka Martikainen, Seena Fazel. 2022. “Long-Term Health and Social Outcomes in Children and Adolescents Placed in Out-of-Home Care.” *JAMA Pediatrics*, 1 (2022): e214324. <https://doi.org/10.1001/jamapediatrics.2021.4324>.

The author conducted interviews with seven foster children as a sample at the Special Child Development Institute (LPKA) in Maros Prison on October 12, 2021. The seven children interviewed were 16-17 years old. Two of them are 16 years old and five others are 17 years old. The average level of education is high school (SMA/SMK). Sampling of children who are perpetrators of abuse and/or illegal drug dealing is done randomly. A summary of the interview results is presented in Table 1 below.

**Table 1**  
**Summary of Interview Result**

No	Name (Initial)	Age	Education	Get Involved From	Genesis	Place
1	Im	17	Senior High School	Junior High School	From friends	Gowa
2	Z	17	Vocational High School	Vocational High School	From friends	Maros
3	ly	16	Vocational High School	Junior High School	From friends & family	Sidrap
4	I	17	Senior High School	Junior High School	From friends	Sidrap
5	F	17	Senior High School	Junior High School	From family	Pare-pare
6	N	17	Senior High School	Junior High School	From friends & family	Makassar
7	D	17	Senior High School	Junior High School	From friends & family	Makassar

Data Source: LPKA Class II B Maros, October 2023

Table 1 shows that children who become involved in the illicit trade of different types of narcotics, including when they become users and dealers at the same time, almost all of them start when they are still in junior high school through friends and family. Five of them were introduced to drugs by their families. Only two did not have a family. But 100% of the time, for kids who are involved as users, drug couriers start from the mutual influence between friends.

In terms of school age, they first learned about drugs in junior high school. Only one person started after the first year of high school. This means that 92.3% of the children in South Sulawesi, estimated from five years ago to the present, have been familiar with shabu and powder narcotics since junior high school. Most of them are known and supported by their families. They know drugs directly as users and then become drug dealers. LPKA Class II Maros is a special place in South Sulawesi for fostering children for illicit trafficking and abuse of narcotics and illegal drugs. There were 50 children who came from different regions in South Sulawesi because of illegal trafficking and abuse of narcotics and illegal drugs. This is what Mr. R., a warden at the institute with the rank of a beam, said

when we asked him to help us gather information by conducting personal interviews with the seven children.

In general, the child does not know if the illegal act is a crime or is prohibited by law. What they do know is that they have done something fun and that they can get great economic benefits from it, even though there is a possibility of getting caught. When asked if they thought doing drugs made them want to fight or commit other crimes, the kids said they did not feel that way. In general, people prefer to avoid things that are criminal, violent, or of a similar nature. Researchers claim that the relationship between this mental state and cases of drinking is inverse.

## 2 | Effects of Narcotics on Physical and Mental Health

Narcotics come from the Greek word *narkon* which means „frozen and stiff”. In medical science, it is known as *narcose* or „*narcicis*”, meaning „anesthetize” Law No. 35 of 2009 on narcotics states that „Narcotics can only be used for the benefit of health services and/or scientific development”. Especially for the benefit of science, such as law and medicine, it should be supported by research results. In addition, research on the use of narcotics is also important with regard to the effects of narcotic abuse itself.

The participants in this study reported how they felt when they used the drugs, and the answer was similar. They felt joyful, sensual and calm after using it. Another effect was a feeling of fever and tightness in the chest. There was a feeling of stress related to financial problems. Besides, ecstasy pills as a form of drug also cause euphoria that lasts up to 12 (twelve) hours. The family continued to allow it, but there was only a reprimand. The environment influences the way of thinking. For example, even though they use drugs, they have no intention of committing violent acts such as fighting and the like.

For those who are accustomed to using drugs, the sensory and psychomotor systems are greatly affected [1]. But the most dominant of all reasons for the abuse and illicit trafficking of narcotics is the urge for economic gain. The economic pressure in question is that, in addition to obtaining a good profit, it is also necessary to repeatedly obtain illicit goods using online transactions. From the results of the analysis, it means that the legal awareness of the community still exists, but its compliance with the law

is very poor, if not completely lost. This is against the law, but the level of compliance is very low<sup>[12]</sup>.

From 2019 to 2021, there were 96% of adult drug cases in the Rappang District Court. There are 151 people per year who are caught and processed in conflict with the law. About 13 people per month are legally processed with sufficient evidence based on Article 183 of the Criminal Procedure Code. From the phenomenon of the community regarding the symptoms of the spread of illegal drugs in Sidrap, it can be estimated that there are many more that have not been detected. The indications come from the four sub-districts mentioned by Kalapas (the head of Sidrap Prison) or with the community term „closed cases”. Quantitatively, the data from the prisons and the data from the Sidrap District Court seem to be the same

## 2.1. Definition of exploitation

The term „exploitation” in the field of law has not been widely studied by social scientists. This term is generally used in engineering. For example, the exploitation of mining or plantation land. In short, this term is found only in the writings of the exact sciences. Meanwhile, in the field of social sciences, there is almost no legal knowledge. The term „exploitation” in the study of law is found only in criminal cases of trafficking in women and children, as well as in cases of prostitution or commercialization of sex, either online or not<sup>[13]</sup>.

In the book entitled Legal Aspects of Trafficking in Persons in Indonesia, it is stated, „Human trafficking made up the majority of women and children is a type of slavery in this modern era. It is a serious global problem and has become a global business that has provided great benefits to actors”. In 2005, the ILO Global Report on Forced Labor estimated that nearly 2.5 million people were exploited through human trafficking worldwide, and more than half of them were in the Asia-Pacific region, where 40% of them were children (US Department of Justice, Office of Foreign Cooperation Development, Assistance and Training and Office of the

<sup>12</sup> Bastianto Nugroho, Daniel Susilo, „Problematika Penegakan Hukum (Law of Enforcement) Tindak Pidana Penyalahgunaan Naerkotika Di Wilayah Hukum Kota Surabaya” *Justitia Jurnal Hukum*, No. 2 (2018).

<sup>13</sup> Protecting Children from Criminal Exploitation, Human Trafficking and Modern Slavery: An Addendum, No. 180032, November 2018.

Indonesian Attorney's Training Center, Human Trafficking and Labor Law)<sup>[14]</sup>. As stated by ILO analysis, one of the causes of the exploitation of women and children was poverty. More dominant victims are women and children because they are often to be targeted and considered the most vulnerable. In Dutch, it is called „de exploitatie van arbeiders” which means utilization, exploitation. Such meanings according to the ILO that exploitation leads to economic benefits for those who carry out the exploitation and it is economically provoking to the children involved<sup>[15]</sup>.

Child Protection explained that „Exploitation treatment, for example, is the act or treatment of using, exploiting, or extorting children to obtain personal, family, or group benefits”<sup>[16]</sup>. Economic exploitation means an act, with or without the consent of the child victim, which includes, but is not limited to, prostitution, forced labor or services, slavery or practices similar to slavery, oppression, extortion, exploitation of the sexual, physical or reproductive organs or unlawful transfer or transplantation of organs and/or body tissues, or the use of the child's power or ability by other parties to obtain material benefits. This means that the provisions of this article can already be imposed on those who exploit a child, whether or not the child has consented. While „sexual exploitation” of children includes all forms of use of other bodily organs for profit, including but not limited to all activities of prostitution and obscenity<sup>[17]</sup>.

Based on the Law of the Republic of Indonesia Number: 10 of 2012 concerning Ratification of the Optional Protocol to the Convention on the Rights of the Child Regarding the Trafficking of Children, Child Prostitution, and Child Pornography, it is very clear in paragraphs a and b, that: children have the right to be protected from economic exploitation and work in jobs

<sup>14</sup> Geri L. Dimas, Renata A. Konrad, Kayse Lee, Maass, Andrew C. Trapp, „Operations Research and Analytics to Combat Human Trafficking: A Systematic Review of Academic Literature” *Plos One*, August (2022): 1-24.

<sup>15</sup> Lemma Derseh Gezie, Alemayehu Worku Yalew, Yigzaw Kebede Gete, Telake Azale, Tilman Brand, „Socio-Economic, Trafficking Exposures and Mental Health Symptoms of Human Trafficking Returnees in Ethiopia: Using a Generalized Structural Equation Modelling” *International Journal of Mental Health Systems* Vol. 12 (2018): 1-13.

<sup>16</sup> Vishwendra Singh, Gurvanit Lehl, „Child Abuse and the Role of a Dentist in Its Identification, Prevention and Protection: A Literature Review” *Dental Research Journal*, No. 3 (2020)

<sup>17</sup> Joanne Csete, Adeeba Kamarulzaman, Michel Kazatchkine, Frederick Altice, Marek Balicki, Julia Buxton, Javier Cepeda, et al. 2017. „HHS Public Access” *Lancet*, 387 (2017): 1427-1480. [https://doi.org/10.1016/S0140-6736\(16\)00619-X](https://doi.org/10.1016/S0140-6736(16)00619-X).Public.

that endanger or interfere with the child's education, damage the child's physical, mental, spiritual, moral, and social development health. These activities are crimes against humanity that must be eradicated<sup>[18]</sup>.

„Everyone is prohibited from placing, allowing, committing, ordering to commit or participating in violence against children [...].” The question is, „ordering children to participate” means a person who orders to abuse another person (*doen pleger*) in the illicit trafficking of narcotics is classified as a sense of violence or not. To find that out, we must explore the juridical notion of violence itself. The notion of violence has undergone a development of understanding, which is no longer limited to the understanding as regulated in the Criminal Code, but the notion of violence is also included in the psychological sense as regulated in Act No. 23/2004 on Domestic Violence<sup>[19]</sup>. Domestic violence is now classified as a criminal act and related to Law Number: 35/2014 as an amendment to Law No. 23 of 2002 concerning Child Protection<sup>[20]</sup>.

## 2.2. Children in accordance with the legal science

Different legal texts define a child differently. For example, in Islamic law, children are defined as those between the ages of 7 and 13. Using another parameter, if a girl has her period and a boy has a wet dream, they are no longer called children. Those under the age of seven are called children and minors are those who are under 16 years of age and unmarried. If a minor is prosecuted for an act committed when he or she was under 16, the judge may order that the guilt be returned to his or her parents, guardian or custodian, without punishment; or order that the guilt be surrendered to the Government, without punishment, if the act is part of a crime or one of the offenses described in the articles. According to WHO, a child is

<sup>18</sup> Paul N. Goldwater, „Iatrogenic Blood-Borne Viral Infections in Refugee Children from War and Transition Zones” *Emerging Infectious Diseases*, 6 (2013): 892-898. <https://doi.org/10.3201/eid1906.120806>.

<sup>19</sup> Sanaa Mohamed Aly, Ahmed Omran, Jean-Michel Gaulier, Delphine Allorge, „Substance Abuse among Children” *Archives de Pédiatrie*, 8 (2022): 480-484.

<sup>20</sup> R.I. Kemensesneg, „Undang – Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang – Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak” *UU Perlindungan Anak*, 48 (2014) <https://peraturan.bpk.go.id/Home/Details/38723/uu-no-35-tahun-2014>.

counted from the time a person is in the womb until the age of 19. This is based on the 1989 United Nations Convention on the Rights of the Child.

According to the United Nations Convention on the Rights of the Child adopted on November 20th, 1989 to which Indonesia is a party, Article 1 states, „For use in the current Convention, a child means any human being under eighteen years old, unless, under applicable law for children, maturity has been reached sooner”<sup>[21]</sup>. Thus, in Law No. 23 of 2002, there are at least six things in which children must obtain protection. One of them is the prohibition of exploitation, both economic and sexual<sup>[22]</sup>.

### 2.3. Doen Pleger – Medeplichtige

There are four criteria for people who commit acts related to criminal acts which are commonly referred to as „participation in criminal offense”, which refers to criminal acts that are intended to be both activities and violations in KUHP. In this case, there are 4 (four) criteria for people who commit crimes. The four criteria are as follows<sup>[23]</sup>:

- a. People who do (*pleger*). This person is a person who does all the elements or elements of a criminal event alone. For example, in a criminal event that is committed „in the office”, this person must also fulfill the element of „status as a public official”.
- b. The person who ordered to do (*doen pleger*). There are at least two persons, the one who ordered and the one who received the order. So it is not the person himself who commits the crime, but the person who orders other people. Despite this, he is still seen and punished as a man who did it himself.
- c. People who participate in doing (*medepleger*). „To do” in the sense of doing together. In this context, there are at least two people, namely people who do (*pleger*) and people who participate in doing (*medepleger*). These people together realize the elements of the crime, not

<sup>21</sup> R. Subekti, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 1984), LN. 31–54.

<sup>22</sup> Eithne Downs, „Children Born of Sexual and Gender-Based Violence in Conflict: The International Criminal Court, Ecological Environments and Human Development” *Children & Society*, No. 3 (2019): 226–238.

<sup>23</sup> A.K. Ahmad, N. Fadhilah, *Penelitian Kualitatif Filosofi dan Praksis* (Yogyakarta, 2021).

including people who only help or do preparatory actions. Helpers are not included as *medepleger*. However, they are punished as aiding and abetting (*medeplichtig*), as regulated in Article 56 of the Criminal Code. However, this article is not possible for children, because the offense referred to in this article only relates to the *amtenar delicten*.

A person who, by giving, misusing power, using force, etc., deliberately induces others to do that act (*uitlokker*). The person must deliberately persuade others, and the persuasion must be by giving, misusing power, etc. It is not allowed to use any other way than the intended way.

### 3 | Juvenile justice system according to the Criminal Code

The person who does an act that cannot be accounted for because he is imperfect in his brain (sick) should not be punished. Imperfection in this case is the form of the power of the mind, the power of thinking, and the intelligence of the mind. In Dutch, it is called *verstandelijke vermogens*, or *geest vermogens* which means the power of the soul. It is also when pain changes someone's mind (*Ziekelijke storing der verstandelijke vermogens*) such as madness and others<sup>[24]</sup>. People who are drunk from drinking alcohol are not included here. Nevertheless, the investigators must still examine them by making a verbal process, and later the judge's decision will determine what the decision will be.

If a minor is prosecuted for an act committed when he was under sixteen years of age, the judge may order that the guilty party be returned to his parents or guardian without being subject to any punishment, or order that the guilty party be handed over to the Government without being subject to any punishment, i.e. if the act is part of a crime or one of the described offenses and the act was committed before two years after the previous decision establishing the error or punishing the guilty child<sup>[25]</sup>.

<sup>24</sup> Kamri Ahmad, *Pengantar Hukum Indonesia*, (Makassar: Umithoha Press, 2019).

<sup>25</sup> Kamri Ahmad, Hambali Thalib, Mursyid Muchtra, „The State's Economic Protection by the Criminal Justice System Corruption: A Case Study” UNIMMA

Based on the previous explanation, children who commit crimes or violations can be punished. However, it depends on the legal considerations of the judge who conducts the trial. There are two criteria for punishment. First, they must be immature at the time of committing the act. Second, the prosecution of a criminal case is for a person who committed the crime but is under the age of 16. The question then arises, what is the difference between the understanding of a minor and that of a person under the age of 16? Problems like this should be reviewed after there is direct data to follow. The Criminal Code relates to *tempus delictie*. If both conditions are met, the judge will decide on one of the following three options

- a. The child is returned to their parents without being subject to any punishment.
- b. The child is made a child of the state, meaning that he is not sentenced, but is handed over to the *Rumah Pendidikan Anak Nakal* to be educated by the state until he/she reaches the age of 18.
- c. The child is sentenced as usual, if the threat of punishment is reduced by one-third of the primary penalty.

## 4 | Discussion

In his book *The Political Criminal: The Problem of Morality and Crime*, Stephen Schafer states: „Despite a legion of theories about the crime problem, crime is increasing with us. In analyzing laws that are criminally violated, most theories contrast crime with justice, many of them contrast with morality, but very few seek to explore the relationships between justice and morality in crime”. In the analysis of criminally violated laws, most theories contradict crime and justice, and many of them contradict morality, but very few explain the relationship between justice and morality in crime.

For the sake of the survival of school-age children, the drug crimes (including abuse and illegal trafficking) that occurred in the Rappang District between 2018 and 2021 were very concerning. What Stephen Schafer described as a crime that transpired is getting worse along with us. Drug-related crime is all around us (read: illicit traffic of narcotics).

If there is circulation of illicit goods, it means there is a local dealer, as well as narcotics abuse. Especially in the four sub-districts mentioned by the Sidrap Chief of Staff, the sub-districts in question are Baranti, Panca Rijang, Maritengngae, and Duapitue/Tanru Tedong District. This is proven by the number of narcotics cases handled by the Sidrap District Court reaching 453 cases until 2021. Such a phenomenon is very dangerous for all levels of society, especially children of school age considering that many children are involved or involved in acts of exploitation in the form of *doen pleger*.

Children are exploited by inviting them to sell, delivering them to people they do not know, or ordering them to take or buy the illicit goods at a certain place that has been indicated by the exploiter with a certain code that the children do not understand. The exploiter's invitation is first given or determined to be rewarded to the children in an amount of money sufficient for them. However, it appears that there is already a waiting liaison (legal apparatus) when the youngster has delivered the intended things to the specified location. When they arrived at their destination, the watchman was ready to wait for none other than the law enforcement officers, so that the child will be caught red-handed. In the next process, they will also be the negotiators for the child's parents. The goal is for the child's parents to be informed whether the case has been resolved or if there is some other type of agreement, such as a promise to reduce the threat of punishment with a note that certain agreements must be met, after learning that their child has been prosecuted for being arrested for carrying drugs. As a result, awareness and obedience to the law are buried by themselves.

When a child is taken into custody, it is time to contact the parents to find out what to do next. Negotiation then takes place, whether in the form of „article buyer”, as the name has come to be known among those who have gone through it, or „closed case”, which is a phrase consistently used by the community. If only the buyer of the product (the provisions of the article will be imposed on the child), the negotiator will only guarantee a reduction of the penalty when the case is heard in court by the judge. However, if a „closed case” is chosen – even if it is only a promise – the case will not go to the next stage of the judicial system. This is determined by the negotiator as part of the agreement.

As a result, two different avenues of child exploitation work together in the illegal distribution of drugs. First, although they are among the main traffickers of children, they are in contact through cell phones, even though they are strangers. They are then exploited as couriers. Second, the method of treatment resembles planned blackmail because it is repeated

by some schoolchildren. It is estimated that those who are 19 years old or younger and already experienced will, in time, have the courage to import drugs on a large scale and engage in trafficking of drugs weighing up to hundreds of kilograms, like the two young men from Baranti who were arrested during the month of Ramadhan (between April and May) in 2021 and then shot in the district of Bone. One died and it was not known where the other was taken. Some claim that they were transported to Jakarta, but this is currently unknown.

According to a formal legal perspective on the issue of illegal trafficking and drug abuse in the Sidrap region, there are several legal institutions and regulations (including legislation) related to the life of children. For example, Law No. 12 of 1948 states that the government prohibits children from working under any circumstances. Although criminal penalties have strengthened the rule, it is still impossible to adequately enforce the restriction. At the normative level, the ineffectiveness is partly caused by the ambivalent attitude or indifference of the government itself<sup>[26]</sup>. What we refer to as a disregard for and non-compliance with local laws. In the element of a crime, it is called *mens rea*.

Sudaryono's statement seemed to justify what happened in Sidrap Regency regarding the illicit trafficking of Narcotics. It seems that the state and government are not present, even though the situation is quite worrying for the survival of school-age children. Let's compare Sudaryono's statement with someone who gets lost in the forest or someone who drowns in a river or at sea.

Viewed from the point of view of crime and sentence, Brian Hogan and J.C. Smith in *Criminal Law* (6<sup>th</sup> edition, 1988), stated that, „The traditional attitude of the common lawyers is that a crime is essentially a moral wrong”. The doctrine of *mens rea* is based on the assumption that blameworthy intention is required<sup>[27]</sup>. Other laws and regulations that regulate the life of children, namely Law No. 23 of 2002 Jo. Law No. 35 of 2014 on Child Protection, Convention on the Rights of the Child, Law No. 10 of 2012 on Ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Also included here is Law Number: 11 of 2012 concerning the Juvenile Justice

<sup>26</sup> *Hak Asasi Manusia, Hakikat, Konsep dan Implikasinya Dalam Perspektif Hukum dan Masyarakat* (Bandung: Aditama, 2007), 203.

<sup>27</sup> B. Hogan, J.C. Smith, *Criminal Law* (sixth edition) (Chatham: Mackayes of Chatham PLC, 1988), 4.

System. Law Number: o2 of 2002 concerning the Indonesian National Police, Law Number: 8 of 2010 concerning Money Laundering Jo. Law No. 3 of 2011 concerning the transfer of funds. All the above mentioned laws are directly or indirectly related to the crime of narcotics and children.

From the empirical side, Rahardjo describes very accurately, that „law enforcement always involves humans in it and involves human behavior”. The law cannot be enforced by itself, which means that the law is not capable of realizing the promises and wills contained in the law. The promise and will, for example, to give rights to someone, to impose a penalty on someone who meets certain requirements. In this context, the law is not autonomous, but must be carried out by people as representatives of the state or as part of the state itself. This is in line with Raharjo's view that the method commonly referred to as normative-dogmatic departs from the requirements stated in legal regulations and accepts them as reality. Thus, the human order is ignored in his speech<sup>[28]</sup>. The author does not see that the requirements of the normative-dogmatic method are consistent from this point on. We can consider, for example, the term „article buyer” or „closed case”. Here, Sidrap Regency has been included in the category of „black market for narcotics” as stated by the Minister of Law and Human Rights, Yasonna Laolly. His statement on one of the private TV stations mentioned „if a place has a dealer, a dealer and there are drug users, it is called a black market”.

What is described by Rahardjo and Parsons (1951) calls it a relational scheme or the structure of the system of actions. Durkheim calls it reciprocations. The structure of the action system according to Parsons as described by Rahardjo, consists of (1) the perpetrator of the act itself, (2) his interaction with other people, and (3) cultural patterns. The qualitative social theories of Parson and Rahardjo are similar and congruent with the narcotics illicit trafficking incident in Sidrap which involved children as *doen plegers*. According to Parsons, something is still missing from the theoretical relational scheme or the structure of the action system, namely „the community's attitude towards the content of the applicable legal rules according to the normative-dogmatic method, which has a significant effect”, i.e. attitudes towards awareness and obedience

<sup>28</sup> Amy L. Wilson, Cathy Nguyen, Svetlana Bogomolova, Byron Sharp, Timothy Olds, „Analysing How Physical Activity Competes: A Cross-Disciplinary Application of the Duplication of Behaviour Law” *International Journal of Behavioral Nutrition and Physical Activity*, Vol. XVI (2019): 1-13.

to the law of society. Since this is where the dogmatic imperatives can be recognized, the Parsonian theory of the structure of the system of action must also include „people's attitudes toward the substance of the rule of law”. Regardless of the size of the village community or the number of law enforcement personnel, this is one of the conclusions of the study. This happens when individualistic profit interests override collectivism as the primary objective of the rule of law in society.

It turns out that qualitative empirical studies can provide strengthening justification for normative studies that are more quantitative in nature. To make the author's intent clear, children are exploited in the form of *doen pleger*, which indicates that not all groups, including parents, the community, and law enforcement officials, particularly those who exploit the child, are aware of the lost child's rights. Almost everywhere, people evade their responsibilities and children's rights.

Regarding the amendments to the Law No. 23 of 2002 on Child Protection, it is explicitly stated that „The State, Government, Regional Government, Community, Family, and Parents or Guardians are obliged and responsible for the implementation of Child protection”. Likewise, „The State, Government, and Regional Government are obliged and responsible for respecting the fulfillment of children's rights without distinguishing ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status, birth order, and physical, and/or mental condition”.

## 5 Conclusion

The above explanation leads to the conclusion that children involved in the illegal drug trade in Sidrap district are not aware that they are being exploited. The school-age children are content to be exploited (*doen pleger*), even if they were initially unaware of the risks associated with their actions. This is because, despite the sacrifices they make, such as missing school, they only seek financial rewards. The children engaged in the illicit trafficking of narcotics did not recognize the alleged traffickers, who have been working together since the beginning, as those who were taking advantage of them.

Similarly, the parents of these children were unaware that their children were being used as media in the illegal drug trade, endangering the future

of their social lives. They typically believed that the impact on exploited children's daily lives was neither harmful to them nor to other people. They were happy because they received money, which was considered quite valuable according to their view, but they loathed conflict and actively avoided it. The idea is then made that it is crucial to conduct outreach in schools that involve parents and kids. This counseling is important to provide them with an understanding of drug abuse, both from a legal perspective and from a physical and mental health perspective. In addition, Law No. 35/2009 on Narcotics needs to be reviewed with regard to the rehabilitation of users, as it not only represents a great economic burden for the state, but also tends to be misinterpreted in the policy of implementing the law.

## Bibliography

- Ahmad Kamri, Fadhilah N., *Penelitian Kualitatif Filosofi dan Praksis*. Yogyakarta 2021.
- Ahmad Kamri, Hambali Thalib, Mursyid Muchtra, „The State's Economic Protection by the Criminal Justice System Corruption: A Case Study” *UNIMMA Journal*, 1 (2020): 59-69.
- Ahmad Kamri, *Pengantar Hukum Indonesia*. Makassar: Umithoha Press, 2019.
- Aly Sanaa Mohamed, Ahmed Omran, Jean-Michel Gaulier, Delphine Allorge, „Substance Abuse among Children” *Archives de Pédiatrie*, 8 (2022): 480-484
- Anderson Monique, Kate Parkinson, „Balancing Justice and Welfare Needs in Family Group Conferences for Children with Harmful Sexual Behavior: The HSB-FGC Framework” *Journal of Child Sexual Abuse*, No. 5 (2018): 490-509.
- Carr Michele M., Eric W Schaefer, Jane R Schubart, „Post-Tonsillectomy Outcomes in Children With and Without Narcotics Prescriptions” *Ear, Nose, & Throat Journal*, 2 (2021): 124-129. <https://doi.org/10.1177/0145561319859303>.
- Craig Elaine, „Child's Play or Sexual Abuse? Reviewing the Efficacy of the Justice Framework in Dealing with Child on Child Sexual Abuse in the United Kingdom” *Journal of Child Sexual Abuse*, 6 (2020): 734-48. <https://doi.org/10.1080/0538712.2020.1719448>.
- Csete Joanne, Adeeba Kamarulzaman, Michel Kazatchkine, Frederick Altice, Marek Balicki, Julia Buxton, Javier Cepeda, et al., „HHS Public Access” *Lancet*, 387 (2017): 1427-1480. [https://doi.org/10.1016/S0140-6736\(16\)00619-X](https://doi.org/10.1016/S0140-6736(16)00619-X).Public.

- Dimas Geri L., Renata A. Konrad, Kayse Lee, Maass, Andrew C. Trapp, „Operations Research and Analytics to Combat Human Trafficking: A Systematic Review of Academic Literature” *Plos One*, August (2022): 1-24.
- Downs Eithne, „Children Born of Sexual and Gender-Based Violence in Conflict: The International Criminal Court, Ecological Environments and Human Development” *Children & Society*, No. 3 (2019): 226-238.
- Gezie Lemma Derseh, Alemayehu Worku Yalew, Yigzaw Kebede Gete, Telake Azale, Tilman Brand, „Socio-Economic, Trafficking Exposures and Mental Health Symptoms of Human Trafficking Returnees in Ethiopia: Using a Generalized Structural Equation Modelling” *International Journal of Mental Health Systems*, Vol. 12 (2018): 1-13.
- Goldwater Paul N., „Iatrogenic Blood-Borne Viral Infections in Refugee Children from War and Transition Zones” *Emerging Infectious Diseases*, 6 (2013): 892-898. <https://doi.org/10.3201/eid1906.120806>.
- Hitikasch Mira, Hannah Lena Merdian, Todd Hogue, „Perceptions of Narrative Child Sexual Exploitation Material in a German Community Sample” *Sexual Offender Treatment*, No. 2 (2016): 1-13.
- Hogan B., Smith, J.C., *Criminal Law (sixth edition)*. Chatham: Mackayes of Chatham PLC, 1988.
- Hunn Charlotte M., Helen Cockburn, Caroline Spiranovic, Jeremy Prichard, „Exploring the Educative Role of Judges’ Sentencing Remarks: An Analysis of Remarks on Child Exploitation Material” *Psychiatry, Psychology and Law*, No. 6 (2019): 811-828.
- Hunn Charlotte, Caroline Spiranovic, Karen Gelb, *Why Internet Users’ Perceptions of Viewing Child Exploitation Material Matter for Prevention Policies*, 2020, <https://doi.org/10.1177/0004865820903794>.
- Kemensesneg R.I., „Undang - Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang - Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak.” *UU Perlindungan Anak*, 48 (2014) <https://peraturan.bpk.go.id/Home/Details/38723/uu-no-35-tahun-2014>.
- Dunlea James P., Larisa Heiphetz, „Children’s and Adults’ Understanding of Punishment and the Criminal Justice System” *Journal of Experimental Social Psychology*, Vol. LXXXVII (2023).
- Laskarwati Batari, „Implementasi Nilai Kemanfaatan Hukum Dalam Pencegahan Penyalahgunaan Narkoba Melalui Lomba Keluarga Sadar Hukum (KADAR-KUM)” *Lex Scientia Law Review*, No. 1 (2018): 47-64.
- Nugroho Bastianto, Daniel Susilo, „Problematika Penegakan Hukum (Law of Enforcement) Tindak Pidana Penyalahgunaan Naerkotika Di Wilayah Hukum Kota Surabaya” *Justitia Jurnal Hukum*, No. 2 (2018): 234-259.

- Sariaslan Amir, Antti Kääriälä, Joonas Pitkänen, Hanna Remes, Mikko Aaltonen, Heikki Hiilamo, Pekka Martikainen, Seena Fazel, „Long-Term Health and Social Outcomes in Children and Adolescents Placed in Out-of-Home Care.” *JAMA Pediatrics*, 1 (2022): e214324. <https://doi.org/10.1001/jamapediatrics.2021.4324>.
- Protecting Children from Criminal Exploitation, Human Trafficking and Modern Slavery: An Addendum, No. 180032, November 2018.
- Singh Vishwendra, Gurvanit Lehl, „Child Abuse and the Role of a Dentist in Its Identification, Prevention and Protection: A Literature Review” *Dental Research Journal*, No. 3 (2020):167-173.
- Subekti R., *Kitab Undang-Undang Hukum Perdata*. Jakarta: Pradnya Paramita, 1984.
- Hak Asasi Manusia, Hakikat, Konsep dan Implikasinya Dalam Perspektif Hukum dan Masyarakat*. Bandung: Aditama, 2007.
- Sun Naiyi, Benjamin E Steinberg, David Faraoni, Lisa Isaac, „Variability in Discharge Opioid Prescribing Practices for Children: A Historical Cohort Study” *Canadian Journal of Anaesthesia*, December (2021). <https://doi.org/10.1007/s12630-021-02160-6>.
- Toney-Butler Tammy J., Megan Ladd, Olivia Mittel, „Human Trafficking”, [in:] *Treasure Island* (FL, 2023).
- Wilson Amy L., Cathy Nguyen, Svetlana Bogomolova, Byron Sharp, Timothy Olds, „Analysing How Physical Activity Competes: A Cross-Disciplinary Application of the Duplication of Behaviour Law” *International Journal of Behavioral Nutrition and Physical Activity*, Vol. XVI (2019): 1-13.
- Winetsky Daniel, Aaron Fox, Ank Nijhawan, Josiah D Rich, „Treating Opioid Use Disorder and Related Infectious Diseases in the Criminal Justice System” *Infectious Disease Clinics of North America*, 3 (2020): 585-603. <https://doi.org/10.1016/j.idc.2020.06.012>.



# Cooperation Between Law Enforcement Agencies of Ukraine and The Republic of Poland in Countering Criminal Election Offenses During Ukrainian External Voting, Committed Outside the Diplomatic Institutions of Ukraine in Post-War Conditions

## Abstract

The paper deals with the current legal issues of law enforcement agencies' cooperation during the criminal proceedings on election offences committed during the Ukrainian elections on the territory of the Republic of Poland. The article focuses on the most problematic situations when an election criminal offence is committed outside the territory of a diplomatic institution of Ukraine. Gaps in the legal regulation are identified, as well as issues that need to be additionally regulated in the agreement between Ukraine and the Republic of Poland on cooperation in the organization and conduct of Ukrainian elections in order to prevent election offences.

**KEYWORDS:** elections to state authorities of Ukraine; foreign election precinct; criminal election offense; criminal proceedings; legal assistance in criminal cases.

**LIDIIA PALIUKH**, Dr.Sc. in law, Ivan Franko National University of Lviv,  
ORCID – oooo-ooo1-7073-5457, e-mail: lidiya.palyukh@lnu.edu.ua

**OKSANA KALUZHNA**, associate professor, Ivan Franko National University of Lviv,  
ORCID – oooo-ooo2-5995-1383, e-mail: oksana.kaluzhna@lnu.edu.ua

## 1 | Introduction

Due to the full-scale aggression of the Russian Federation against Ukraine, the world is faced with many challenges. One of them is how to organize the future post-war parliamentary and presidential elections in Ukraine in such a way as to ensure active voting rights of Ukrainian citizens living abroad. Most of the countries of the world, including Ukraine, Poland, allow their citizens to vote outside the borders of the state (so-called „external voting”), the number of such countries has greatly increased in recent decades. If Ukrainian elections abroad are held, as usual, in the premises of diplomatic missions and consular institutions of Ukraine, less than 1% of Ukrainians will be able to vote.

Therefore, today Ukraine needs to work out the mechanisms of the best possible organization of elections in the foreign constituency, taking into account that about 20% of Ukrainian citizens are abroad (including refugees and those who lived abroad until February 24, 2023).

There are different estimates of the scale of migration caused by the Russian aggression against Ukraine. We will use data from the Office of the United Nations High Commissioner for Refugees (UNHCR), with the caveat that the actual numbers may be higher, since not all migrants from Ukraine were able to register as refugees. Thus, as of October 29, 2023, more than 6.2 million Ukrainians have gone abroad since the beginning of the war. About 5.8 million are in Europe<sup>[1]</sup>.

The most significant number of Ukrainian refugees with the status of temporary protection (as of January–February 2023) are in Poland – 1 million 563.39 thousand, in Germany – up to 881.4 thousand, in the Czech Republic – 485.1 thousand, in Italy – 169.31 thousand, Spain – 161.01 thousand, Great Britain – 158.8 thousand, Bulgaria – 151.71 thousand<sup>[2]</sup>.

Even if the next regular elections will be held after the end of the war, the calculation of Ukrainian voters abroad should be based on at least 60-70%

<sup>1</sup> Ukraine Refugee Situation. Operational Data Portal, September 26, 2023. <https://data.unhcr.org/en/situations/ukraine/> [accessed: 27.09.2023].

<sup>2</sup> “У Європі зареєстрували вже майже п'ять мільйонів біженців з України”, 4 лютого, 2023. <https://www.ukrinform.ua/rubric-society/3665195-u-evropi-zareestruvali-vze-majze-pat-miljoniv-bizenciv-z-ukraini-oon.html> [accessed: 27.09.2023] („Almost five million refugees from Ukraine have already been registered in Europe”, February 4, 2023. <https://www.ukrinform.ua/rubric-society/3665195-u-evropi-zareestruvali-vze-majze-pat-miljoniv-bizenciv-z-ukraini-oon.html> [accessed: 27.09.2023]).

of those who are currently abroad. At the same time, Ukraine has now permanently established 102 polling stations abroad (100 – in Ukrainian diplomatic institutions, 2 – in military units (formations) deployed outside Ukraine)<sup>[3]</sup>.

For comparison, on the day of the election (presidential in 2019, in the first round – clarification by our – L.P., O.K.), 101 polling stations were in operation: 47 large (more than 1,500 voters), 15 medium (500-1,500 voters) and 39 small (up to 500 voters)<sup>[4]</sup>. Arithmetic calculations show that the maximum number of voters was about 250,000.

The problem of the „capacity” of foreign precinct election commissions within diplomatic institutions was very urgent even during the previous elections of 2019: huge queues, the impossibility of voting were noted by voters, journalists, international observers, as well as public organizations. Immediately after the 2019 elections, the need to significantly increase the number of election precincts by amending the relevant provisions of Ukrainian legislation was widely discussed.

The situation is predicted to worsen at the next Ukrainian elections in the foreign constituency. Therefore, the Central Election Commission of Ukraine, in Resolution № 102 of September 27, 2022 „On proposals for improving the legislation of Ukraine, aimed at ensuring the preparation and holding of elections after the termination or cancellation of martial law in Ukraine”, proposes to introduce the possibility of voting abroad outside the diplomatic institutions in future elections.

The creation of additional premises or places for voting outside the diplomatic institutions of Ukraine is one of the obvious ways to ensure the realization of the will of a significantly larger (compared to previous elections) number of voters abroad.

In the case of real implementation of such a possibility, it would be a significant innovation and laborious achievement of Ukraine’s bilateral

---

<sup>3</sup> About the Establishing of Foreign Election Precincts on a Permanent Basis: Resolution of the Central Election Commission of Ukraine, June 25, 2020, № 118. <https://zakon.rada.gov.ua/laws/show/v0118359-20#Text/> [accessed: 27.09.2023].

<sup>4</sup> Ігор Решетняк, „Непотрібні голоси: чому не голосували 99% виборців закордонного округу” Європейська правда, 3 квітня 2019. <https://www.eurointegration.com.ua/experts/2019/04/3/7094702/> [accessed: 23.09.2023] (Ihor Reshetnyak, “Unnecessary votes: why 99% of the voters of the overseas district did not vote”, Yevropeiska pravda, April 4, 2019. <https://www.eurointegration.com.ua/experts/2019/04/3/7094702/> [accessed: 23.09.2023]).

agreements with almost all European states where there is a large number of Ukrainian citizens.

In the case of holding elections to the state authorities of Ukraine, it is predicted that some problems will arise in the foreign constituency in the event of election criminal offenses<sup>[5]</sup> and prosecution of guilty persons. These problems will be caused by gaps in legal regulation in national legislation as well as international legal acts.

Firstly, it should be noted that the procedure for criminal proceedings regarding election offenses will differ significantly depending on the place of their committing: 1) on the territory of diplomatic institutions of Ukraine abroad, 2) outside the diplomatic institutions of Ukraine abroad.

In the first case, diplomatic missions and consular posts are subject to the criminal jurisdiction of Ukraine (the application of criminal and criminal procedural legislation). The procedure for carrying out criminal proceedings on the territory of diplomatic institutions of Ukraine abroad is defined in Chapter 41 of the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine)<sup>[6]</sup>. In accordance with Part 1 of Art. 520 of the CPC of Ukraine, the head of a diplomatic mission or consular institution of Ukraine or an official designated by him is obliged to immediately carry out the necessary procedural actions after they become aware of circumstances that may indicate the commission of a criminal offense from a statement, notification, self-discovery or from another source offenses on the territory of a diplomatic mission, consular institution of Ukraine. Further, the collected materials are transferred through the Ministry of Foreign Affairs of Ukraine to the National Police of Ukraine (hereinafter – the NP of Ukraine). The investigator of the NP of Ukraine enters information about an electoral criminal offense into the Unified register of pre-trial investigations and starts a pre-trial investigation. If it is necessary to perform any procedural actions provided for by the CPC of Ukraine and the Code of Criminal Procedure of Poland, on the territory of Poland, the investigator, in agreement with the prosecutor, prepares a request, the form and

<sup>5</sup> Regarding the meaning of the notion „election offenses”, we join the position of understanding it as a separate group of criminal offenses defined in the Chapter V of the Criminal Code of Ukraine (Tetiana P. Matiushkova, „Crimes against the electoral rights of citizens in Ukraine: the peculiarities of their committing and investigation” *Law and Safety*, No.1 (2019): 14. doi: 10.32631/pb.2019.1.01. of crimes defined by chapter V of the Special Part of the Criminal Code of Ukraine).

<sup>6</sup> *Criminal Procedural Code of Ukraine*. The Official Bulletin of the Verkhovna Rada of Ukraine, 2013, No 9-10, 11-12, 13, art. 88.

content of which are determined by Art. 552 of the CPC of Ukraine. The request is submitted to the Polish police through the regional prosecutor's offices of Ukraine and the Voivodeship Prosecutor's Offices of the Republic of Poland<sup>[7]</sup>. The police of Poland fulfills the request of the Prosecutor's Office of Ukraine within the limits of the requirements for procedural actions formulated therein and does not have the authority to carry out any procedural actions on its own initiative. Since during the Ukrainian elections of 2019 there were no criminal proceedings regarding criminal election offenses committed in Poland, there are grounds to assert that the joint activity of the Ukrainian and Polish police in this area has not been tested or practiced.

This procedure is clear and relatively simple (as simple as procedures in the form of international legal assistance can be called), so we will leave it aside from the focus of attention of this research.

On the other hand, the second order of proceedings regarding criminal election offenses committed outside the diplomatic institutions of Ukraine has a red degree of difficulty. The territorial principle of validity of the criminal law of Ukraine does not apply to these offenses, nor can the national legislation of the Republic of Poland be applied. Hypothetically, in some cases, the Criminal Code of Ukraine may be applicable to these offenses based on the principle of citizenship or the real principle of criminal law in space, but it is impossible to extradite to Ukraine persons who have committed such offenses.

Thus, the immediate goal of the article is to analyze the state of legal regulation of cooperation between law enforcement agencies of Ukraine and the Republic of Poland in the investigation of criminal election offenses committed outside the diplomatic institutions of Ukraine on the territory of the Republic of Poland, to identify problems, gaps in legal regulation and propose their possible solution.

The research methodology includes logical, comparative-legal, dogmatic, systemic-structural and modeling methods.

<sup>7</sup> Agreement between the General Prosecutor's Office of Ukraine and the Ministry of Justice of the Republic of Poland on the Implementation of Article 3 of the Agreement between the Republic of Poland and Ukraine on Legal assistance and legal relations in civil and criminal matters, dated May 24, 1993, signed on November 10, 1998. [https://zakon.rada.gov.ua/laws/show/616\\_013#Text](https://zakon.rada.gov.ua/laws/show/616_013#Text) [accessed: 11.07.2023].

## 2 Legal regulation of cooperation between law enforcement agencies of Ukraine and the Republic of Poland in the investigation of criminal offenses committed during elections on the territory of the Republic of Poland outside the territory of diplomatic institutions of Ukraine

### 2.1. Legal grounds for the cooperation between law enforcement agencies of Ukraine and Poland regarding countering criminal election offenses, maintaining public order during elections

In the case of committing a criminal election offense during Ukrainian external voting on the territory of the Republic of Poland outside the premises of diplomatic missions, consular institutions (that is, outside the premises of election precincts of a foreign constituency) of Ukraine, criminal liability is possible based on the principle of citizenship, in some cases – real principles of criminal law in space and will be carried out under Chapter IX of the CPC of Ukraine „International Co-operation in Criminal Proceedings”, as well as based on international agreements.

According to Art. 54 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters of May 24, 1993 (hereinafter – the Agreement) each of the Contracting Parties shall undertake, at the request of the other Party, to prosecute its citizens, as well as foreigners who have their permanent residence in its territory, suspected of committing a crime in the territory of the requesting Contracting Party. The Contracting Parties may also apply for the adoption of criminal proceedings in respect of such infringements of law as, under the law of the requesting Contracting Party, constitute a crime and, under the law of the requested Contracting Party, a mere misdemeanor. In such cases (p. 1, 2 of Art. 54 of this Convention), the competent judicial authorities of the requested Party shall apply the law of their state.

## **2.2. Is the penal code of the republic of Poland applicable to election offenses in the Ukrainian elections?**

In the current Penal Code of the Republic of Poland of 1997 , in the special part, there is a separate chapter XXXI entitled „Offenses against elections and referenda”.

At the same time, „the Penal Code of the Republic of Poland cannot be applied to criminal offenses against the electoral rights of citizens of Ukraine, since the criminal offenses provided for in Chapter XXXI of the Polish Penal Code have a different object under the legislation of the Republic of Poland – the public relations regarding the holding of elections to state bodies and local self-government bodies of the Republic of Poland, referenda in this state”. Hence, there is a problematic question about the validity of the legislation of Ukraine to the accountability for violations of electoral rights of citizens of Ukraine in Poland. It was noted above that in some cases the Criminal Code of Ukraine does not apply to criminal offenses against the electoral rights of citizens of Ukraine.

In some cases, the Criminal Code of Ukraine extends its application to criminal offenses against the electoral rights of Ukrainian citizens committed abroad outside the territory of the diplomatic institutions of Ukraine. This follows from the principles of the operation of the criminal law in the space – citizenship, real – provided in the Criminal Code of Ukraine. However, it does not cover all possible cases of committing criminal election offenses outside the diplomatic institutions of Ukraine abroad. Therefore, in this regard, there is a gap. At the same time, in those cases when the Criminal Code of Ukraine extends its action to these offenses committed outside the diplomatic institutions of Ukraine abroad (in the case under consideration – in the Republic of Poland), another question arises:

## **2.3. Is it possible to take over the criminal prosecution of criminal election offenses committed on the territory of the Republic of Poland**

The answer to this question can be given unequivocally on the basis of the current legal regulation: today it is impossible.

Article 54 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters refers only to the obligation to take over the criminal prosecution of criminal offenses committed on the territory of the requesting party (Ukraine). Therefore, this article does not apply to criminal offenses against the election rights of citizens of Ukraine in the territory of the Republic of Poland. This article applies to cases when a citizen of the Republic of Poland or a foreigner permanently residing in the territory of the Republic of Poland has committed a criminal offense on the territory of Ukraine. The exception to this rule applies only to war crimes and crimes against humanity — in cases of these crimes, the acceptance of criminal prosecution applies even if they were committed outside the requesting Contracting Party.

#### **2.4. Are the pre-trial investigation bodies of the republic of Poland authorized to initiate criminal prosecution of persons who committed criminal election offenses during the Ukrainian elections in Poland outside the diplomatic institutions of Ukraine (including cases if additional premises or places for voting will be created outside the diplomatic institutions)?**

On the basis of the current legal regulation, the pre-trial investigation bodies of the Republic of Poland are not authorized to initiate criminal proceedings against persons who committed criminal electoral offenses during the elections to the state authorities of Ukraine on the territory of Poland outside the diplomatic institutions of Ukraine (including the polling stations outside the diplomatic institutions, if they are established and do not have the status of the premises of the diplomatic institutions of Ukraine). The criminal legislation of the Republic of Poland does not provide for liability for criminal offenses against the electoral rights of citizens of Ukraine. That is why in case of holding elections to state authorities outside the territory of diplomatic institutions of Ukraine in the Republic of Poland, there will be a noticeable gap in legal regulation. Then there will be a need to conclude an additional agreement between Ukraine and the Republic of Poland to resolve these issues. Also, a possible future agreement between Ukraine and the Republic of Poland, should take into account that the vast majority of Ukrainian citizens currently staying in Poland, in accordance with the Law „On Assistance to Citizens of Ukraine

in connection with the Armed Conflict in the Territory of this State", fall under the status of foreigners who do not permanently reside in Poland. In particular, all citizens of Ukraine who arrived in Poland after February 24, 2022, are entitled to temporary protection, which gives them the right to reside in the country for a period of up to 18 months (from February 24, 2022, not from the date of entry).

According to Art. 19 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters of 24 May 1993, legal assistance shall not be granted if its granting may cause damage to sovereignty or security or is contrary to the basic principles of the legislation of the requested Contracting Party. Due to the above problems with the application and extension of the criminal law of Ukraine, the question arises whether the application of the Ukrainian criminal law in Poland and the prosecution of persons for the offenses provided for by it, which are not recognized as such under the criminal law of the Republic of Poland, will not be considered as a violation of the sovereignty? In our opinion, this issue could be resolved only under the condition of the sovereign consent of the Republic of Poland, and in the case of such consent – noted in a possible additional agreement.

## **2.5. Are there other international legal acts based on which it is possible to provide international legal assistance in the prosecution of criminal offenses that fall under the jurisdiction of the authorities of Ukraine?**

The provision of international legal assistance in the prosecution of criminal offenses falling within the jurisdiction of the authorities of Ukraine is also possible on the basis of the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 (hereinafter referred to as the Convention)<sup>[8]</sup>, which Ukraine ratified by Law № 44/98-BP of January 16, 1998.

According to Part 1 of Art. 1 of the Convention, the Contracting Parties undertake to afford each other the widest measure of mutual assistance in proceedings in respect of offenses the punishment of which, at the time

<sup>8</sup> European Convention on Mutual Assistance in Criminal Matters, April 20, 1959. <https://rm.coe.int/16800656ce/> [accessed: 11.09.2023].

of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

However, in accordance with paragraph a) of Art. 2 of the Convention, assistance may be refused if the request concerns an offense which the requested Party considers a political offense, an offense connected with a political offense, or a fiscal offense. At the same time, the question of the precise definition of a „political offense” or „an offence connected with a political offence” is referred to the requested party. Similarly, according to paragraph 6, Part 1, Art. 61 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters extradition does not take place if the crime is political. Besides, there is no definition of terms in this Agreement, unlike, for example, in Art. 5 of the Agreement between Ukraine and the Republic of Panama on the extradition of offenders (ratified by Law No. 1716-IV of May 12, 2004), which clearly defines which crimes for this Agreement will not be considered political crimes related to a political crime or crimes for political reasons.

## 2.6. Is the concept of „criminal election offense” covered by the concept of „political offense” or „offence connected with a political offence”?

Since criminal election offenses belong to the sphere of formation of state authorities, it should be understood to what extent they fall under the signs of political offenses. In general, the concept of a political criminal offense and an offense connected with a political offense is not established either in the academic literature<sup>[9]</sup> or in the international practice of applying the Convention and treaties on legal assistance in criminal matters.

Since most extradition agreements do not define a „political crime” („political offence”), in the law enforcement practice of foreign this task is entrusted primarily to the courts. The courts have developed two categories: „pure political offences” and „relative political offences” (or purely and relatively political crimes). Pure political offenses are generally directed against a state’s political organization or government, containing no element of

<sup>9</sup> Jeffrey I. Ross, *The Dynamics of Political Crime* (London-New Delhi: Sage Publications, 2003), 2

a common crime<sup>[10]</sup>. They are also defined as offenses in which the conduct of the subject demonstrates the exercise of freedom of thought, expression of opinions and beliefs (in words, symbolic actions, or writings that do not incite violence), freedom of association, and religious practice in violation of a law designed to prohibit such conduct<sup>[11]</sup>. Purely political crimes include, but are not limited to, treason, espionage, and sedition.

The definition of „relative political criminal offenses” is more problematic, since it covers both political and criminal elements, when the offender commits an ordinary criminal offense for ideological reasons. The parameters of this offense are difficult to formulate because the classification mixes political and criminal elements<sup>[12]</sup>.

The following criteria (tests) are used in the judicial practice of different states:

- the so-called „objective criterion”, according to which the political motives behind the offense do not make it a political crime<sup>[13]</sup>; this test considers as relatively political only an offense that is directly related to the rights of the State and the motives of the accused had been considered irrelevant<sup>[14]</sup>;
- the „incidence” test (used in the Anglo-American system), which requires the act to be incidental and form a part of political disturbances. There must be preliminary evidence that there had been political disturbances in the requesting State. Depending on the

<sup>10</sup> Vincent. DeFabo, „Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law” *American University National Security Law Brief*, No. 2 (2012): 75. <https://digital-commons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1037&context=nslb>.

<sup>11</sup> Ana Muniesa, *The Political Offense Exception to Extradition*, 31 March 2018. <https://www.linkedin.com/pulse/political-offense-exception-extradition-ana-muniesa/> [accessed: 11.06.2023]

<sup>12</sup> Ibidem.

<sup>13</sup> DeFabio, „Terrorist or Revolutionary”, 79; Mark D. Kielsgard, *The Political Offense Exception: Punishing Whistleblowers Abroad*, 14 November 2013. <https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/> [accessed: 11.07.2023].

<sup>14</sup> Kielsgard, *The Political Offense Exception: Punishing Whistleblowers Abroad*.

jurisdiction, the latter can range from mere fractious dissent to shooting wars<sup>[15]</sup>;

- a „proportionality” test that weighs „elements of a general criminal offense” against „the political motives or purpose of the offender”, allowing exceptions for a political criminal offense only in cases where the latter prevails over the former. This test examines the political motivation of the person who committed the offense and the circumstances of the offense, and applies one of two standards: proportionality between means and political ends, or the superiority of the political elements over the general elements of the offense<sup>[16]</sup>.

J.I. Ross divides political crimes into two types according to their targets: oppositional (or anti-systemic) and state (or pro-systemic)<sup>[17]</sup>. Similarly, K.D. Tunnell defines political crime as an illegal offense against the state with the intention of affecting its political or economic policies, or an illegal domestic or international offense by the state and its agents<sup>[18]</sup>.

In order to avoid possible misunderstandings with the reference by the courts of the Republic of Poland of criminal election offenses to political criminal offenses (criminal offenses of a political nature), criminal offenses connected with a political offense, or criminal offenses for political reasons, the remark that criminal election offenses are not regarded by the Contracting States as political, in our opinion, needs to be clearly defined in a possible future agreement between Ukraine and the Republic of Poland.

---

<sup>15</sup> Ibidem; DeFabo, „Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law”, 80-82.

<sup>16</sup> Kielsgard, *The Political Offense Exception: Punishing Whistleblowers Abroad*.

<sup>17</sup> Jeffrey I. Ross, *An Introduction to Political Crime* (Bristol: Policy Press, 2012), 9.

<sup>18</sup> Kenneth D. Tunnell, *Crime, Political*. <https://doi.org/10.1002/9781405165518.wbeosc152>. <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781405165518.wbeosc152>.

## **2.7. What actions can the polish police take on their own initiative to secure order and prevent offenses during elections for public authorities of Ukraine on the territory of the republic of Poland?**

The Polish police maintains law and order on the territory of the country. However, the immunity of the diplomatic institutions of Ukraine in the Republic of Poland does not allow them to perform actions within their boundaries at their own discretion. At the same time, the Polish police can respond to offenses related to elections to the state authorities of Ukraine on the territory of Poland and committed outside the diplomatic institutions of Ukraine in Poland. First of all, it goes about the "obvious" general (not election) offenses (against life and health, against public order such as inflicting bodily harm on election participants, organizing fights, encroachment on the life of an observer, terrorism, arson, theft of documents, etc.). Such actions will be the subject of the response of the Polish police, both on its own initiative and at the request of persons (including citizens of Ukraine, or official observers).

## **3**

### **Possibilities of improvement of cooperation between law enforcement agencies of Ukraine and Poland in countering electoral criminal offenses during Ukrainian external voting committed outside the diplomatic institutions of Ukraine**

The organization of additional election precincts (places) for voting in the Foreign Constituency outside the diplomatic institutions of Ukraine is more than just a managerial (technical) issue. This is primarily the issue of determining their temporary (during the voting) public legal status, because the operation of criminal and criminal procedural legislation of Ukraine with all the resulting jurisdictional problems depends on it. This issue should be resolved taking into account the principles of state sovereignty and non-interference in the internal affairs of the state (Article 7, Paragraph 2

of the UN Charter), because Ukraine organizes elections abroad in the person of authorized authorities (precinct election commissions), ensures their honesty and objective result. That is, the state that conducts external voting needs to ensure the jurisdiction of its legislation's jurisdiction and authority over the voting places. Otherwise, it will be impossible to bring violators of the election process to criminal responsibility either under the law of Ukraine or the law of the Republic of Poland. It would be rational to equate additional voting places for the period of voting, preparation for it and counting of votes by status to the territories of diplomatic institutions of Ukraine. The resolution of this issue is possible only through the agreement between the Republic of Poland and Ukraine. Such an additional agreement may also regulate the procedure of renting additional precincts, cooperation of Polish state authorities and local authorities with diplomatic missions and consulates of Ukraine, etc.

Is it possible to conclude such an agreement, taking into account the fact that it is important for the EU member states to distinguish between national sovereignty and the law of the EU, since the member states have transferred some of their sovereign powers to the EU institutions?

The basic principles of this distribution are laid down by the Treaty on European Union (Maastricht Treaty)<sup>[19]</sup>. This led to a certain legal conflict during its ratification by certain states and resistance of national constitutional courts (of France, Germany, and Spain) to the primacy of European law.

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) delimited competencies between the EU and its member states<sup>[20]</sup>. Accordingly, three types of competences of the reformed European Union appeared: exclusive competences of the European Union, shared competences and supporting competences.

Based on the analysis of part 1 of Art. 2a, Part 2 of Art. 2a, part 2 of Art. 2b, Chapter 1 of the Treaty of Lisbon, the following conclusions can be drawn:

---

<sup>19</sup> *Treaty on European Union (Maastricht Treaty)*, 7 February 1992. <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/maastricht-treaty/> [accessed: 27.09.2023].

<sup>20</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007. <https://eur-lex.europa.eu/eli/treaty/lis/sign#d1e3924-1-1> [accessed: 27.09.2023].

- a. the conclusion of international treaties is the exclusive competence of the EU under certain conditions: when they are concluded on behalf of the entire EU, when they affect the general rules of the EU or change them (the agreement on cooperation between Ukraine and the Republic of Poland in the conduct of elections to the authorities of Ukraine does not fall under this criterion);
- b. the agreement on cooperation between Ukraine and the Republic of Poland on the conduct of elections to the authorities of Ukraine does not fall under the general rules for the conclusion of mixed agreements (in EU law, agreements are called mixed when the object of the international agreement falls not only under the competence of the EU, but also of its member states, such an international agreement (with a third country) is signed by the EU together with the member states. Mixed agreements may also be necessary when the financial obligations under this agreement are their important element, and the financial responsibility rests on the States Parties. Such agreements help to prevent possible problems related to different interpretations by the EU and the Member States concerning the distribution of competence in relations with third countries since the competence of the EU has a steady tendency to expand; third countries often struggle to determine who specifically — the EU or the Member States — has powers on a particular issue);
- c. the area of „freedom, security and justice” belongs to the joint competence of the EU and Poland, therefore, under certain conditions, this area belongs to the sovereignty of the Republic of Poland as a member state of the EU.

These conditions will be outlined below.

In the scope of „police cooperation” Art. 69F of the Chapter 5 of the Title II „General Provisions” of the Treaty of Lisbon states: „The European Parliament and the Council, acting under the ordinary legislative procedure, may establish measures concerning:

- a. the collection, storage, processing, analysis and exchange of relevant information;
- b. support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

- c. common investigative techniques in relation to the detection of serious forms of organised crime”<sup>[21]</sup>.

In the area of „judicial cooperation in criminal matters”, the provisions of Art. 69a of Chapter 4 of Title 2 „General Provisions”<sup>[22]</sup>.

To the extent necessary to facilitate mutual recognition of judgments and sentences and police and judicial cooperation in criminal matters with a cross-border dimension, the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may lay down minimum rules. Such rules should take account of the differences between the traditions and legal systems of the Member States.

They relate to:

- a. the mutual admissibility of evidence between Member States;
- b. the rights of a person in criminal proceedings;
- c. the rights of victims of crimes;
- d. other features of criminal proceedings determined in advance by a decision of the Council; in taking such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adopting the minimum standards referred to in this paragraph shall allow Member States to maintain or introduce a higher level of protection for persons.

This leads to the conclusion: if Poland, by concluding an agreement with Ukraine on providing assistance in holding elections to the state authorities of Ukraine on the territory of the Republic of Poland, does not introduce new standards in a certain range of issues that will worsen the situation of persons, but proceeds (will proceed) on the basis of already established rules in EU law and Polish national law, such a bilateral agreement does not require the maintenance, approval or consent of the EU institutions.

<sup>21</sup> e.g. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, *supra* note, 31.

<sup>22</sup> e.g. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, *supra* note, 31.

## 4 Conclusion

In conditions when, as a result of Russian aggression against Ukraine, about 20% of Ukrainian citizens are abroad, it will be impossible to organize future post-war elections to Ukrainian state authorities abroad under the existing system of election precincts in the foreign constituency on the territory of Ukrainian diplomatic missions and consulates. In such conditions less than 1% of Ukrainian citizens will be able to vote. In such a situation Ukraine is forced to create additional election precincts, however, it cannot do this unilaterally and should start the negotiation process and conclude bilateral agreements at the level of an interstate agreement with states where a significant number of Ukrainians reside.

In such bilateral agreements on assistance to the Ukrainian authorities in the conduct of elections, it is possible to provide for the procedure of providing additional voting premises for rent; interaction of state authorities and local self-government of a European state (the Republic of Poland) with diplomatic missions and consulates of Ukraine; maintaining order at election precincts; equalize the public legal status of the premises for voting at the period of voting to the premises of diplomatic institutions of Ukraine; clarify that criminal election offenses are not considered by the Contracting States to be political or connected with political. The conclusion of such bilateral agreements between Ukraine and the EU member states is possible. It would not require the approval of the EU institutions under the conditions that the EU state in the agreement would proceed from already established standards in EU law and in its national law. The agreement would not introduce new standards that worsen the situation of people.

Potentially, the greatest problems would arise in criminal election offenses committed outside the territory of a diplomatic institution of Ukraine. The bodies of the pre-trial investigation of Poland (or any other European state) are not authorized to start (initiate) criminal prosecution of the persons who committed them. Therefore, in the case of creating additional election precincts outside the territory of diplomatic institutions of Ukraine in the Republic of Poland and not equating them in terms of status to the territory of diplomatic institutions of Ukraine, it will not be possible to bring offenders to justice either under the Criminal code of Ukraine, or under the Penal Code of the Republic of Poland.

## Bibliography

- Collyer Michael, „A geography of extra-territorial citizenship: Explanations of external voting” *Migration Studies*, No. 1 (2014): 55-72. doi:10.1093/migration/mnsoo8. <https://academic.oup.com/migration/article/2/1/55/2567470?login=false&fbclid=IwAR1lT6tw-opFRUpiFV32zGRTLnmuDzAd9ogx-wz6yu8BTvv5-xq1nsZq9Rs4>.
- DeFabio Vincent, „Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law” *American University National Security Law Brief*, No. 2 (2012): 69-104. <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1037&context=nslb>.
- Héjj Dominik, Magdalena Lesińska, Dominik Wilczewski, *Udział diaspor w wyborach krajowych: Przypadek Litwy, Polski i Węgier w ujęciu porównawczym*. Warsaw: University of Warsaw, Centre of Migration Research, 2021.
- Himmelroos Staffan, Johanna Peltoniemi, „External voting rights from a citizen perspective – comparing resident and non-resident citizens’ attitudes towards external voting”. *Scandinavian Political Studies*, No.4 (2021): 463-486. doi: 10.1111/1467-9477.12211. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-9477.12211>.
- Kielsgard Mark D., *The Political Offense Exception: Punishing Whistleblowers Abroad*, 14 November 2013. <https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/>.
- Matiushkova Tetiana P., „Crimes against the electoral rights of citizens in Ukraine: the peculiarities of their committing and investigation” *Law and Safety*, No.1 (2019): 13-27. doi: 10.32631/pb.2019.1.01.
- Muniesa Ana, *The Political Offense Exception to Extradition*, 31 March 2018. <https://www.linkedin.com/pulse/political-offense-exception-extradition-ana-muniesa>.
- Reshetnyak Ihor, „Unnecessary votes: why 99% of the voters of the overseas district did not vote” *Yevropeiska pravda*, 4 April 2019. <https://www.europointegration.com.ua/experts/2019/04/3/7094702/>.
- Ross Jeffrey I., *An Introduction to Political Crime*. Bristol: Policy Press, 2012.
- Ross Jeffrey I., *The Dynamics of Political Crime*. London-New Delhi: Sage Publications, 2003.
- Szulecki Kacper, Marta Bivand Erdal, Ben Stanley, *External Voting The Patterns and Drivers of Central European Migrants’ Homeland Electoral Participation*. Oslo-Warsaw: Palgrave Macmillan, 2023. doi: 10.1007/978-3-031-19246-3.

Tunnell Kenneth D., Crime, Political. doi. 10.1002/9781405165518.wbeosc152. <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781405165518.wbeosc15>.

*Ukraine Refugee Situation.* Operational Data Portal, September 26, 2023. <https://data.unhcr.org/en/situations/ukraine/>.

Решетняк Ігор, „Непотрібні голоси: чому не голосували 99% виборців закордонного округу” Європейська правда, 3 квітня 2019. <https://www.eurointegration.com.ua/experts/2019/04/3/7094702/>.

У Європі зареєстрували вже майже п'ять мільйонів біженців з України, 4 лютого, 2023. <https://www.ukrinform.ua/rubric-society/3665195-u-evropi-zareestruvali-vze-majze-pat-miljoniv-bizenciv-z-ukraini-oon.html>.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>



# The Crime of Genocide as Exemplified by the Holodomor and the Russian Military Aggression Against Ukraine

## Abstract

The authors focus on the elements of the definition of the crime of genocide using the example of the Holodomor and the Russian military aggression against Ukraine. The article presents the relationship between the concept of genocide and its definition in the Rome Statute of the International Criminal Court. However, the main objective of the paper is to point out certain similarities between the actions of Stalin's regime against the Ukrainian nation during the Holodomor genocide and the recent actions within the Russian military aggression against Ukraine, which are supported by genocidal propaganda and therefore, among other aspects, constitute the crime of genocide.

**KEYWORDS:** genocide, Rome Statute of the International Criminal Court, Holodomor, Russian military aggression, Ukraine

**IRYNA KOZAK-BALANIUK**, PhD in law, John Paul II Catholic University of Lublin, ORCID – oooo-ooo2-5946-7882, e-mail: iryna.kozak-balaniuk@kul.pl

**IHOR KOZAK**, associate professor, John Paul II Catholic University of Lublin, ORCID – oooo-ooo2-0960-4797, e-mail: ihor.kozak@kul.pl

## 1 | Introduction

Lemkin's definition of genocide<sup>[1]</sup>, as analyzed in the literature, was transposed into the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948<sup>[2]</sup>. However the concept of cultural genocide was not included and therefore the issue of non-physical or non-biological destruction of protected groups remains relevant. Based on the concept of Raphael Lemkin, Vladislava Bakalchuk analyzed the acts of destruction by the Russian Federation (RF) of the culture and national identity of the Ukrainian people<sup>[3]</sup>. E. Novich defines cultural genocide as the systematic destruction of traditions, values, language and other elements that distinguish one group of people from another<sup>[4]</sup>. Nevertheless, cultural genocide is not limited to destruction of culture. Mechanisms of destruction of culture also relate to the very material existence of the group, disrupting the possibilities of group formation and reproduction of itself as a national-cultural community. Y. Zakharov analyzed the aim, subject, circumstances and composition of the crime of genocide, its motive and direct intention for the Holodomor<sup>[5]</sup>.

Stalin's artificially created Great Famine (Holodomor) of 1932-1933 constitutes a destruction of Ukrainian national group in part, where the most accurate analysis presents the number of 10.5 million Ukrainians who died during the widespread and artificially created famine. Within the Russian military aggression against Ukraine, which actually began in 2014 and February 24, 2022 must be considered as another phase, which includes a full-scale military invasion of the sovereign territory of Ukraine, Russian

<sup>1</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress* (New Jersey: The Lawbook Exchange, Ltd., 2005), 79-89. [https://books.google.com.ua/books/about/Axis\\_Rule\\_in\\_Occupied\\_Europe.html?id=yoin2wOY-WoC&redir\\_esc=y](https://books.google.com.ua/books/about/Axis_Rule_in_Occupied_Europe.html?id=yoin2wOY-WoC&redir_esc=y) [accessed: 2.12.2023].

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted on 9 December 1948.

<sup>3</sup> Vladislava Bakalchuk, „Cultural genocide as international crime committed by the RF in Ukraine” *Strategic Panorama*, (2022): 77. <https://doi.org/10.53679/2616-9460.specialissue.2022.07> [accessed: 2.12.2023].

<sup>4</sup> Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016). <http://hdl.handle.net/1814/43864> [accessed: 2.12.2023].

<sup>5</sup> Yevhen Zakharov, *Conclusion. Legal qualification of the Holodomor of 1932-1933 in Ukraine and the Kuban as a crime against humanity and genocide* (Human Rights Protection Group, 2008). <https://khpg.org/1221206914> [access: 2.12.2023].

soldiers have been committing the most severe international crimes and some of them may constitute the crime of genocide. The relation between Holodomor and the current Russian military aggression which includes action that may constitute crime of genocide has been partially discussed by some experts, for instance Yevhen Zakharov<sup>[6]</sup>, or in other press materials. Nevertheless, there is still the need to analyze this issue in a more complex manner, taking into account as much elements of the crime of genocide as possible. Therefore, the aim of this article is to analyze the Holodomor and the current Russian military aggression against Ukraine in terms of the concept of genocide and its definition established in the Rome Statute of the International Criminal Court<sup>[7]</sup>, identifying its elements. Additionally, the research is to indicate similarities in the actions of the perpetrator during both events that are separated by more than eighty years.

## 2 | The concept of genocide

According to Lemkin the genocide (from the Greek word *genos* – race, and the Latin *occidere* – to kill) was the most serious case of crimes against humanity. Lemkin did not limit the Nazi crime of genocide only to acts of physical extermination<sup>[8]</sup>. He indicated specific spheres of social life in which this crime could be committed: political<sup>[9]</sup>, social<sup>[10]</sup>, cultural<sup>[11]</sup>, economic<sup>[12]</sup>, biological<sup>[13]</sup>, physical<sup>[14]</sup>, religious<sup>[15]</sup>, moral<sup>[16]</sup>. Unfortunately,

<sup>6</sup> Text of the legal analysis available on the following websites: <https://www.atlanticcouncil.org/blogs/ukrainealert/many-ukrainians-see-putins-invasion-as-a-continuation-of-stalins-genocide/>; <https://thehill.com/homenews/administration/4327051-biden-russia-ukraine-war-soviet-era-famine/> [accessed: 13.04.2024].

<sup>7</sup> The Statute of the International Criminal Court, adopted on 17 July 1998, 2187 U.N.T.S. 3 (hereinafter – Rome Statute).

<sup>8</sup> Lemkin, *Axis Rule*, 81.

<sup>9</sup> Ibidem, 82.

<sup>10</sup> Ibidem, 83.

<sup>11</sup> Ibidem, 84.

<sup>12</sup> Ibidem, 85.

<sup>13</sup> Ibidem, 86.

<sup>14</sup> Ibidem, 87-88.

<sup>15</sup> Ibidem, 89.

<sup>16</sup> Ibidem, 89.

Lemkin did not analyze the actions of Soviet Russia toward other nations where genocidal practices could easily be found at that time<sup>[17]</sup>. Maybe if he had done so, today's Russian military aggression against Ukraine and actions that may constitute genocide against the Ukrainian nation would not have happened. Although the term genocide proposed by Lemkin remained flexible enough to also cover the criminal practices of the Soviet system. Lemkin's definition of genocide was included into the Convention on the Prevention and Punishment of the Crime of Genocide and was unanimously adopted<sup>[18]</sup>. Nonetheless, it should be clarified that this article examines the definition of the crime of genocide provided in the Rome Statute, together with its elements established in the document „Elements of Crime” and therefore the issue of the application of the provisions of 1948 Convention to the Holodomor or the current Russian military aggression is not the subject of the analysis in this article.

Genocide is one of the crimes under the jurisdiction of the International Criminal Court. Ukraine has submitted two declarations. The first declaration was submitted by the Ukrainian government in April 2014 and concerned crimes against humanity and war crimes committed on its territory between November 21, 2013 and February 22, 2014<sup>[19]</sup>. Subsequently, on September 8, 2015, the Minister of Foreign Affairs of Ukraine submitted a second declaration, in which the Ukrainian government agreed to the jurisdiction of the ICC over international crimes committed on the territory of Ukraine since February 20, 2014, without an end date<sup>[20]</sup>. It has already been proved that the famine in Ukraine in 1932-1933 meets of the necessary criteria of a crime of genocide<sup>[21]</sup> according to its definition in the Rome Statute of the International Criminal Court of 1998 and a crime of

<sup>17</sup> James J. Martin, *The Man Who Invented «Genocide»: The Public Career and Consequences of Raphael Lemkin* (Torrance, California: Institute for Historical Review, 1984).

<sup>18</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted on 9 December 1948.

<sup>19</sup> The text of the declaration available on the following website: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> [accessed: 2.12. 2023].

<sup>20</sup> The text of the declaration available on the following website: [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine) [accessed: 2.12. 2023].

<sup>21</sup> Volodymyr Vasylenko, Myroslava Antonovych, *The Holodomor of 1932-1933 in Ukraine as a Crime of Genocide under International Law* (Kyiv: Kyiv-Mohyla Academy, 2016), 16.

genocide according to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

### 3 | Definition of the crime of genocide in the Statute of the International Criminal Court

According to Art. 5 of the Rome Statute, the Court's jurisdiction is limited to the following most serious crimes of concern to the international community as a whole: genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute in Art. 6 defines the crime of genocide as „any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. killing members of the group;
- b. causing serious bodily or mental harm to members of the group;
- c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. imposing measures intended to prevent births within the group;
- e. forcibly transferring children of the group to another group”.

This definition of the crime of genocide consists of two elements – *mens rea* and *actus reus*. The *mens rea* element of genocide should not be identified as a general intent to commit that crime, but of a special one – *dolus specialis*<sup>[22]</sup>. *Mens rea* consists therefore of two elements: a general one that could be called „general intent” or *dolus*, and an additional „intent to destroy” a particular group<sup>[23]</sup>. Genocidal intent has been diversely defined,

<sup>22</sup> Sandra Fabijanic Gagro, „Mental and material elements of genocide” *The Lawyer Quarterly*, nr 11 (2021): 45.

<sup>23</sup> Kai Ambos, „What does «intent to destroy» in genocide mean?” *International Review of the Red Cross*, No. 91 (2009): 834. See also: International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 491; Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution’s Application for

inter alia, as an „extended mental element”, an „extended subjective or extra-subjective” criterion<sup>[24]</sup> and an ulterior intent characterized by an „extended [...] mental element or a transcending internal” tendency. The fact that the word „extended” is common to all of these definitions underscores the critical fact that the crime of genocide is often understood as having a dual *mens rea*<sup>[25]</sup>. The issue that has been widely debated in the jurisprudence of international criminal tribunals. In the Akayesu case, the International Criminal Tribunal for Rwanda provided that „intent to destroy” as a „special intent” (or *dolus specialis*) means „the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged”<sup>[26]</sup>. In the Jelisic case the International Criminal Tribunal for the former Yugoslavia underlined that existence of a plan or policy is not a legal element of the crime of genocide, however, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases<sup>[27]</sup>. Additionally, it is important to prove that the perpetrator with his actions intents to destroy a protected population group<sup>[28]</sup>. In case of crime of genocide the term „protected group” means one of the following: national, ethnical, racial or religious. The crime of genocide cannot be therefore committed against sexual minority, if they are of mixed nationalities or races. Ukrainian scholars argue that Putin’s language (for example, the denial of the existence of the Ukrainian state and nation) proves the genocidal intent of every act committed by Russian armed forces on the territory of Ukraine and reflects Russia’s aims, among others forcible transfer along

---

a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (ICC-02/05-01/09), para. 139.

<sup>24</sup> Hans Vest, „A Structure-Based Concept of Genocidal Intent” *Journal of International Criminal Justice*, (2007): 781, 783.

<sup>25</sup> Janine Natalia Clark, „Elucidating the Dolus Specialis: an analysis of ICTY jurisprudence on genocidal intent” *Criminal Law Forum*, nr 26 (2015): 499.

<sup>26</sup> Prosecutor v. Jean-Paul Akayesu, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 498. See also: Prosecutor v. Athanase Seromba, Trial Judgement, Case No. ICTR-2001-66-I, 13 December 2006, paras. 175, 319; Prosecutor v. Juve’nal Kajelijeli, Trial Judgement, Case No. ICTR-98-44A-T, 1 December 2003, para. 803. International Tribunal for the Former Yugoslavia followed similar approach towards the interpretation of “intent to destroy”, “special intent” for instance in the case Prosecutor v. Goran Jelisic, Prosecutor’s Pre-Trial Brief, Case No. IT-95-10-PT, 19 November 1998, para. 3.1.

<sup>27</sup> Prosecutor v. Jelisic, Appeal Judgement, Case No. IT-95-10-A, 5 July 2001, para. 48.

<sup>28</sup> Martin Shaw, „Russia’s genocidal war in Ukraine: radicalization and social destruction” *Journal of Genocide Research*, Vol. 25 (2023): 5-6.

with the process of „russification” of Ukrainian children and the deliberate infliction of conditions of life aimed at the physical destruction of the Ukrainian nation<sup>[29]</sup>. It is important to underline that *ad hoc* tribunal’s and the ICC’s case law confirms that the judicial assessment of genocide is subject to the facts of the individual situation – particularly, the contextual embedding of crime of genocide is formed by its application in individual cases and adapted to the actual legal, political and historical realities<sup>[30]</sup>.

The *actus reus* elements of the crime of genocide represent the forms<sup>[31]</sup>, in which this crime can be committed, namely killing, causing serious bodily or mental harm, inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group – including deportation to another country.

According to the „Elements of Crime”<sup>[32]</sup> document, which explains the structure of crimes that fall under the jurisdiction of the ICC, crime of genocide committed by killing members of the particular group includes the following elements:

- a. the perpetrator killed one or more persons;
- b. such person or persons belonged to a particular national, ethnical, racial or religious group;
- c. the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
- d. the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction<sup>[33]</sup>.

<sup>29</sup> Denis Azarov, Dmytro Koval, Gaiane Nuridzhanian, Volodymyr Venher, „Genocide Committed by the RF in Ukraine: Legal Reasoning and Historical Context” *SSN Papers* (2022): 27.

<sup>30</sup> Marjolein Cupido, „The Contextual Embedding of Genocide: a Casuistic Analysis of the Interplay Between Law and Facts” *Melbourne Journal of International Law*, vol. 15 (2014): 35.

<sup>31</sup> Elizabeth Santalla Vargas, „Una mirada al crimen de genocidio en las jurisdicciones latinoamericanas” *Criminal Law Review*, No. 4 (2010): 63.

<sup>32</sup> Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B (hereinafter – Elements of Crimes).

<sup>33</sup> Elements of Crimes, p. 2.

What concerns genocide committed by forcibly transferring children of one group to another the following elements have to be taken into account:

- a. the perpetrator forcibly transferred one or more persons;
- b. such person or persons belonged to a particular national, ethnical, racial or religious group;
- c. the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
- d. the transfer was from that group to another group;
- e. the person or persons were under the age of 18 years;
- f. the perpetrator knew, or should have known, that the person or persons were under the age of 18 years;
- g. the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction<sup>[34]</sup>.

The above mentioned forms of committing the genocide have a common element – the act must have been committed in the context of a manifest pattern of similar conduct directed against the group or was conduct itself capable of causing such destruction. Consequently, an emerging pattern has to be identified. This element should not be considered as an additional *actus reus* element, but rather as an objective point of reference for determining the intent that accompanied the crime of genocide<sup>[35]</sup>. Additionally, in order to be found guilty of genocide it is sufficient that the perpetrator merely intended “to destroy, in whole or in part, a group, as such”. As a result, the perpetrator need only intend to achieve what he intends, and it does not matter whether he succeeded or not<sup>[36]</sup>.

<sup>34</sup> Elements of Crimes, p. 3.

<sup>35</sup> Claus Kreß, „The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case” *Journal of International Criminal Justice*, No. 2 (2009): 299-302.

<sup>36</sup> Otto Triffterer, „Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such” *Leiden Journal of International Law*, Vol. 14 (2001): 401-402.

## 4 | Holodomor as genocide

Every year, the truth about the Holodomor of 1932-1933 in Ukraine spreads more and more among the Ukrainian and world community. The first Ukrainian legal act that qualified the Holodomor as a crime of genocide was adopted by the Verkhovna Rada of Ukraine on November 28, 2006 and was called „On the Holodomor of 1932-1933 in Ukraine”<sup>[37]</sup>. The investigation of the Holodomor began in May 2009, when the Security Service of Ukraine initiated criminal case No. 475 on the fact of committing genocide in Ukraine in 1932-1933 on the basis of Art. 442 of the Criminal Code of Ukraine<sup>[38]</sup>. When initiating abovementioned criminal case, it was regulated by both national legislation and those international treaties, which, in accordance with Article 9 of the Constitution of Ukraine and Article 3 of the Criminal Code of Ukraine, constitute part of the criminal law of Ukraine. At the World Congress of Researchers of the Holodomor, the genocide of Ukrainians, held on November 7, 2023 held under the title „Unpunished Genocides – Repeated!” it was established that 10.5 million Ukrainians died during 1932-1933, including 4 million children, while 3.5 million Ukrainians died during the mass artificial famine of 1921-1923 and 1.5 million Ukrainians died during the mass artificial famine of 1946-1947<sup>[39]</sup>. The actions of the Ukrainian party regarding the recognition of the Holodomor are actively supported by international organizations and states at the interstate and state levels<sup>[40]</sup>.

All forms of genocide specified in Art. 6 of the Rome Statute of the International Criminal Court can be applied to the Holodomor, especially the fact that during the Holodomor the Soviet authorities deliberately created living conditions for the Ukrainians that were calculated to lead to their at least partial, if not complete, physical destruction<sup>[41]</sup>. The genocide committed by the communist totalitarian regime in 1932-1933 was directed against Ukrainians, who made up the vast majority of the population in

<sup>37</sup> Verkhovna Rada of Ukraine, Law on the Holodomor of 1932-1933.

<sup>38</sup> Holodomor 1932-1933 in Ukraine, materials of criminal case No. 475 (2014):17-21 <http://history.org.ua/LiberUA/978-966-02-6769-5/978-966-02-6769-5.pdf> [accessed: 2.12.2023].

<sup>39</sup> World congress of researchers of the Holodomor-genocide of Ukrainians took place in Kyiv, 2023 <https://umoloda.kyiv.ua/number/0/2006/179422/> [accessed: 2.12.2023].

<sup>40</sup> Worldwide Recognition of the Holodomor as Genocide. Holodomor Museum <https://holodomormuseum.org.ua/en/recognition-of-holodomor-as-genocide-in-the-world/> [accessed: 2.12.2023].

<sup>41</sup> Vasylchenko, Antonovych, *The Holodomor of 1932-1933*, 84-85.

Ukraine (more than 80%). Famine as one of the tools of genocide, along with terror, repression, deportations, executions, was used to create living conditions designed for the physical destruction of Ukrainians, the destruction of the Ukrainian nation and keeping Ukraine within the borders of USSR. The fifth element of the crime of genocide, according to the „Elements of the crime”, is that the genocidal act took place in the context of a series of similar acts directed against a certain group, or was an act that could itself cause such destruction. Holodomor was organized as one of the crimes in a series of other actions aimed at the destruction, in whole or in part, of the Ukrainian nation, and emphasizes that Lemkin presented the Soviet genocide against Ukrainians as the regime's intention to destroy the Ukrainian nation in four stages: 1) the destruction of the national elite – the most prominent minds of the nation, 2) the destruction of the national church – the soul of the nation, 3) the extermination of Ukrainian peasants – the custodians of Ukrainian culture, language, traditions, 4) decomposition of the Ukrainian nation due to mixed families of Ukrainians with other nationalities through resettlement that led to a radical change in the composition of the population<sup>[42]</sup>. It is worth paying attention to the fact that each stage of Stalin's genocide against the Ukrainian nation separately contains particular forms of the crime of genocide. In all four phases of the systematic destruction of the Ukrainian nation, the national character of a protected group (Ukrainians) was decisive, since even the main victims of the Holodomor – starving Ukrainian peasants – are presented as bearers of the national spirit and those traits that make them a cultural group and a nation, not to mention the intelligentsia and the clergy<sup>[43]</sup>. Planning the extreme confiscation of the agricultural products produced by the peasants is equivalent to planning the Holodomor. Thus, it can be argued that the plan to exterminate Ukrainian peasants was disguised as excessive plans for grain procurement (quite large amounts of grain were accumulated in the state reserves of the Indestructible and Mobilization Funds, but this resource was not used to provide aid to starving Ukrainians). When revealing the legal characteristics of the crime of genocide of the Ukrainian nation in 1932-1933, it is necessary to use the national legislation of Ukraine and the norms of international law.

---

<sup>42</sup> Ibidem, 91.

<sup>43</sup> Raphael Lemkin, *Soviet genocide in Ukraine* (Kyiv: Majsternia knyhy, 2009): 208. URL: <https://holodomormuseum.org.ua/publikacija/radyanskiy-genocid-v-ukraini/> [accessed: 2.12.2023].

Genocide is such a crime to which the statute of limitations does not apply. In 2001 Article 442 was introduced to the Criminal Code of Ukraine, which provides for responsibility for the crime of genocide. The fact that the Art. 442 entered into force on September 1, 2001, does not exclude the retroactive effect of the norms of the 1948 Convention and their application to the events in Ukraine in 1932-1933<sup>[44]</sup>.

In addition to military aggression, the RF has been conducting an information war against Ukraine all the time using archival materials too. Professor Victoria Malko points out that the underestimated number of the 3.9 million victims of the 1932-1933 Holodomor<sup>[45]</sup>. Ukrainian demographers of the 1930s or modern historians<sup>[46]</sup> who carried out research on the available new archival materials, established the number of around 10.5 million people that have died as a result of Soviet crimes<sup>[47]</sup>. Recently, scientists prove the failure of the minimum concept of victims imposed by Russia (about 3.9 million deaths). What is more, the judicial review conducted in Ukraine confirmed falsifications and the lack of scientific verification and approval of the method of supporters of the minimum number of victims<sup>[48]</sup>.

Our calculations using the applied model as a method used in both cognitive and practical activities<sup>[49]</sup>, presents the program STELLA<sup>[50]</sup>, which calculates the potential possible population size in Ukraine in 1937. The model uses 35,200,000 people<sup>[51]</sup> lived in 1913, the birth rate as 44.1 and

<sup>44</sup> Vasylchenko, Antonovych, *The Holodomor of 1932-1933*, 138, 149, 152-153, 159.

<sup>45</sup> Viktoria Malko, „Holodomor-genocide. The History of the Number «3.9» and Russian Disinformation” *Radio Svoboda*. <https://www.radiosvoboda.org/a/holodomor-kilkist-zhertv-rosiyska-dezinformatsiya/31604692.html> [accessed: 2.12.2023].

<sup>46</sup> Volodymyr Serhiychuk, *The Holodomor of 1932-1933 as a Genocide of Ukraine* (Vyshhorod: PP, 2016); Olesya Stasiuk, *Essays on the Holodomor* (Kyiv: MarkoBook, 2019); Educational guide for teachers, *The Holodomor of 1932-1933 – Genocide of the Ukrainian Nation* (Kyiv, 2021), 220.

<sup>47</sup> World Congress. <https://umoloda.kyiv.ua/number/o/2006/179422/> [accessed: 2.12.2023].

<sup>48</sup> Oleksandr Petryshyn, Mykola Herasymenko, Olesya Stasiuk, *Genocide of Ukrainians 1932-1933 based on the materials of pre-trial investigations* (Kyiv; Kharkiv: Pravo, 2022), 140.

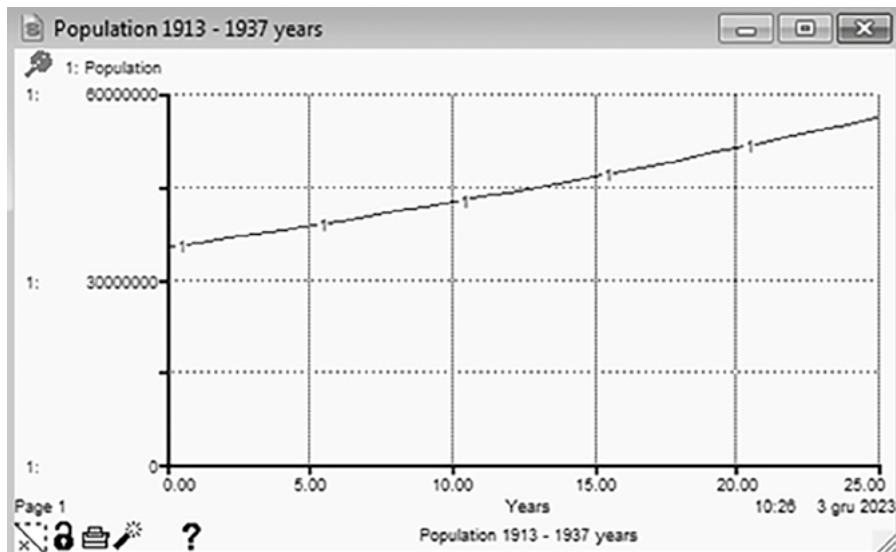
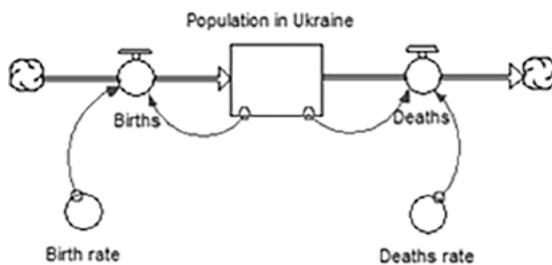
<sup>49</sup> Hanna Wolska, „Model jako forma poznania naukowego Próba zdefiniowania” *Prawo i Więz*, nr 2 (2023).

<sup>50</sup> Ihor Kozak, Vasyl Parpan, Ecological modelling with STELLA software (Ivano-Frankivsk, 2009): 86.

<sup>51</sup> Statistical yearbook of Ukraine (Kyiv, 2005), 359.

death rate as 25.2 people per 1,000 inhabitants<sup>[52]</sup> which were inserted into the model (Fig.).

**Fig. Scheme of the model (top) and potential size (bottom) of the population of Ukraine**



Assuming that the trend of changes in 1913 would have continued, the simulation shows an increase population from 35,200,000 in 1913 to 55,169,640 in 1937 (Fig.). In reality, the population decreased from 1913 to 1937 to 28,926,000 people<sup>[53]</sup>. Therefore, potentially 26,243,640 lives could

<sup>52</sup> Ibidem, 366.

<sup>53</sup> Stanislav Kulchytskyi, *Terror by Hunger as a Tool of Collectivization of Agriculture*. Mat. Int. Conf. „Famine of 1932-1933 in Ukraine: causes and consequences”, 9-10 September 1993. Kyiv (1995): 32.

have been lost in Ukraine from 1913 to 1937. The main reason for this were the famines of 1921, 1932, 1933 with their terrible consequences for the people of Ukraine.

An important number of 64 countries had condemned Holodomor – among them UN member states by the Joint Declaration of 7 November 2003, OECD members in the Joint Declaration of 2007<sup>[54]</sup>. Recently, on 15 December 2022 the European Parliament recognized the artificial famine of 1932-1933 in Ukraine, caused by a deliberate policy of the Soviet regime, as a genocide against the Ukrainian people<sup>[55]</sup>.

## 5 | Actions within Russian military aggression against Ukraine that constitute genocide

During the full-scale Russian military aggression against Ukraine there are a number of actions that can be considered as a part of the planned, deliberate destruction in whole or in part of the Ukrainian nation as such. All systematic actions of the authorities of the RF are designed for the gradual destruction of the Ukrainian people as a nation and the „russification” of Ukraine. After the full-scale invasion on February 24, 2022 the article *What Russia should do with Ukraine?* was published on the website of the Russian state channel RIA Novosti. In the article there was provided a justification for the genocide of Ukrainians. The article contains calls for repression, de-Ukrainization, de-Europeanization and ethnocide of the Ukrainian people<sup>[56]</sup>. The President of Ukraine Volodymyr Zelenskyi said that this article will be one of the evidences for the future tribunal<sup>[57]</sup>.

<sup>54</sup> United Nations General Assembly, Letter of 7 November 2003, A/C.3/58/9.

<sup>55</sup> European Parliament resolution of 15 December 2022, ‘90 years after the Holodomor: recognizing the mass killing through starvation as genocide’ (2022/23001(RSP)), OJ 2023, C 177/14, para. G.

<sup>56</sup> The Kremlin media published an article openly justifying the necessity of genocide in Ukraine <https://web.archive.org/web/20220404121503/https://24tv.ua/kremlivskiy-zmi-viyshla-stattyya-de-vidkrito-obruntovuyetsya-neobhidnist-ni1936412> [accessed: 2.12.2023].

<sup>57</sup> Zelensky about the RIA Novosti article: One of the pieces of evidence for the future tribunal. *Ukrainian Pravda* <https://web.archive.org/web/20220404200508/https://www.pravda.com.ua/news/2022/04/4/7337177/> [accessed: 2.12.2023].

On April 14, 2022 the Verkhovna Rada of Ukraine adopted the Resolution On the Perpetration of Genocide by the RF in Ukraine, recognizing the actions of the RF during the last phase of the military aggression against Ukraine, which began on February 24, 2022 as a genocide of the Ukrainian people<sup>[58]</sup>. It has been indicated that acts of genocide in the actions of the RF are manifested, in particular, in the commission of mass atrocities in the cities of Bucha, Borodyanka, Gostomel, Irpin and others. Since February 2022 to the end of October 2023, 98221 cases of damage or disruption due to military activities were reported in 3401 Ukrainian settlements<sup>[59]</sup>. Based on the collected data<sup>[60]</sup> there can be identified over 1497 cases of ecocide. Invaders not only destroy cities, infrastructure, farms, food, means of livelihood, but also remove Ukrainian books from libraries and homes and destroy them, just as the Nazis did. This is how Russia demonstrated the continuity of its non-humanitarian methods from the Holodomor to the time of the full-scale military aggression against Ukraine. According to the latest estimates, in 2022 a total of 170,000 people in Mariupol were suffering from hunger, while the Russian occupiers did not allow humanitarian workers from Ukraine and international organizations to enter the city to provide necessary assistance. Ukraine's famine was pre-planned by Putin<sup>[61]</sup>.

On March 4, 2022 the UN Human Rights Council established the Independent International Commission of Inquiry on Ukraine<sup>[62]</sup>, whose task is to investigate human rights violations and crimes committed by the RF army on the territory of Ukraine in connection with the beginning of a new stage of aggression armed forces. As of September 10, 2023 the Office of the United Nations High Commissioner for Human Rights recorded

<sup>58</sup> Verkhovna Rada adopted the Resolution on Statement of the Verkhovna Rada of Ukraine, *On the Russian Federation committing genocide in Ukraine*, 2022. <https://web.archive.org/web/20220415104926/https://www.rada.gov.ua/news/rzazom/221778.html> [accessed: 2.12.2023].

<sup>59</sup> Ecodozor. *Analytical bulletin* <https://ecodozor.org/report/report.php?month=2023-10&lang=en> [accessed: 2.12.2023].

<sup>60</sup> Vypadky potentsiinoi shkody dovkilliu, sprychyneni rosiiskoiu ahresiieiu. <https://ecoaction.org.ua/warmap.html>. [accessed: 2.12.2023].

<sup>61</sup> Putin could face new war crime case as evidence suggests starvation of Ukraine was pre-planned. *Independent*. <https://www.independent.co.uk/news/world/europe/putin-grain-theft-ukraine-russia-latest-b2447644.html> [accessed: 2.12.2023].

<sup>62</sup> United Nations General Assembly Resolution adopted on 4 March 2022, A/HRC/RES/49/1.

27,149 civilian casualties, including 9,614 killed and 17,535 wounded<sup>[63]</sup>. However, the actual number is undoubtedly higher, since the experts of the Investigative Commission did not manage to reach all the locations where gross violations of human rights and crimes against the civilian population were committed on the territory of Ukraine. According to the report of the United Nations High Commissioner for Human Rights 6,204,600 people have left the territory of Ukraine (as of October 3, 2023), while 5,088,000 are internally displaced (as of June 2023)<sup>[64]</sup>. The United Nations Office for the Coordination of Humanitarian Affairs estimated that 17.6 million people in Ukraine are in need of humanitarian assistance, and humanitarian access to areas affected by hostilities remains significantly hampered<sup>[65]</sup>. The commission collected new evidence of violations of international human rights law and international humanitarian law and crimes committed by Russian soldiers. The Commission investigated unlawful attacks using explosive weapons, including rocket fire and their impact on civilians, torture, sexual and gender-based violence, and the displacement and deportation of Ukrainian children. It is virtually impossible to estimate the size of the territory affected by military operations. The RF shells civilian objects in various cities, towns and villages almost every day, which means that, in the opinion of other countries, the international armed conflict as a result of Russian armed aggression is spreading to the entire territory of Ukraine and there is a risk of suffering serious harm as a result of the widespread use of violence against the civil population.

Lemkin defined two phases of cultural genocide<sup>[66]</sup>: the first is the destruction of the national model of the oppressed group; the second is the imposition of the national model of the oppressor. The analysis of the first phase of the Russian cultural genocide against Ukraine can be seen through the prism of the policy of „russification” of Ukrainian society. In 1932-1933 Russians were brought into so-called re-settlement procedure to the households of Ukrainians who died during Holodomor. This act greatly influenced the demography of the Eastern part of Ukraine and the language residents of these regions speak. One of the arguments

<sup>63</sup> Report of the Independent International Commission of Inquiry on Ukraine, 19 October 2023, A/78/540, s. 4.

<sup>64</sup> Report of the Independent International Commission of Inquiry on Ukraine, 19 October 2023, A/78/540, s. 4.

<sup>65</sup> Informacja dostępna na stronie: <https://reports.unocha.org/en/country/ukraine/> [accessed: 4.11.2023].

<sup>66</sup> Lemkin, *Axis Rule*, 79-95.

of Russian propaganda justifying the reason of full-scale invasion on Ukrainian sovereign territory was the liberation of people residing in Eastern part of Ukraine who speak Russian and as a result they are persecuted by Ukrainian authorities. In fact, these regions were the ones that Russian army destroyed most and where most people suffered or died. The formation of Ukrainian statehood since the declaration of independence in 1991 was accompanied by overcoming the consequences of the colonial policy of the Soviet Union towards Ukraine, which Lemkin called genocide as early as 1944<sup>[67]</sup>. The failure of the international community to recognize and condemn the Soviet Union's genocide against Ukraine led to systematic revanchist efforts by the RF to preserve colonial claims to the Ukrainian nation – its culture, identity, historical past, and territory. The RF considered Ukraine as a zone of its influence and actively opposed attempts made by Ukrainians towards the establishment and development of its own national culture and identity in all spheres of public life. This confrontation was carried out in accordance with the concept of the „Russian world” (руссского мира) – an illiberal model of the influence of the „soft” power of the RF<sup>[68]</sup>, which was based on an instrumental approach to achieving the RF's own goals and consisted in preserving its dominant influence in the post-Soviet sphere, with the aim of restoring the Soviet Union. The application of the cultural influence of the RF was actually aimed at creating favorable conditions for a full-scale occupation. Measures of „russification” of Ukraine are used by the RF to prepare for its further territorial conquest, just as it was carried out in the east of Ukraine and in the Crimea<sup>[69]</sup>. Since the establishment of the RF control over the temporarily occupied territory of Crimean Autonomous Republic, the attack on Ukrainian culture and identity has been carried out through the tools of the policy of ethnocide<sup>[70]</sup>, as well as the capture of 14,000 cultural monuments, 54 museums, 300,000 museum objects, 6 historical and cultural

<sup>67</sup> Lemkin, Soviet genocide (2009). <https://holodomormuseum.org.ua/publikacija/radyanskiy-genocid-v-ukraini/>.

<sup>68</sup> Marlene Laruelle, „Russia's Soft Power: Sources, Targets, and Channels of Influence” *Russia.NEI.Visions*, 122 (2021): 20.

<sup>69</sup> Amos Fox, „Russo-Ukrainian Patterns of Genocide in the Twentieth Century” *Journal of Strategic Security*, No. 4 (2021): 66. <https://digitalcommons.usf.edu/jss/vol14/iss4/4>.

<sup>70</sup> Kateryna Rashevská, „Ethnocide and cultural genocide in Crimea: fiction or objective reality?” *Voice of Crimea*. (2022). <https://culture.voicecrimea.com.ua/uk/etnotsyd-ta-kulturnyj-henotsyd-u-krymu-vyhodky-chy-ob-iektyvna-realnist/> [accessed: 2.12.2023].

reserves located on the territory of the Crimean Peninsula. The provisions of the concept of cultural genocide, developed by Lemkin, are most fully reflected in international law regarding the forced transfer of children from one group to another. This aspect of the cultural genocide of the RF in Ukraine should be considered primarily with regard to orphans and children deprived of parental care from the temporarily occupied territories of Ukraine. This is the reason why International Criminal Court on 17 March 2023 issued warrants of arrest for Vladimir Putin (President of the RF), and Maria Lvova-Belova (Commissioner for Children's Rights in the Office of the President of the RF) for as they are considered suspected of committing the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the RF, in prejudice of Ukrainian children<sup>[71]</sup>. Lemkin also illustrates the mechanism of depriving children of their identity through the educational system of the occupying authorities without removing them from the family circle that doing RF through the integration of children into the Russian educational process, and implements a policy of replacing the identity of minors.

Due to the gravity and the scale of the crimes committed by the Russian army on the territory of Ukraine, as a result of the unprovoked military aggression against Ukraine, there appeared the need of establishing a special criminal tribunal for Russian crimes in Ukraine, even though those crimes, except for the crime of aggression, fall under the jurisdiction of International Criminal Court. As a result, on 3 April 2024 the Political Declaration of the Ministerial Conference on Restoring Justice for Ukraine held in the Hague (at seat of the International Criminal Court) was signed by 44 states. In the text of the declaration 44 states agreed to express the support for the establishment of a special tribunal for the crime of aggression and initiatives to use frozen Russian assets for the benefit of Ukraine<sup>[72]</sup>.

<sup>71</sup> Press release available on the following website: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [accessed: 2.12.2023].

<sup>72</sup> Information available on the following website: <https://www.pravda.com.ua/eng/news/2024/04/3/7449398/> [accessed: 13.04.2024].

## 6 | Conclusion

There are a number of similarities between the actions of Stalin's regime directed against Ukrainians during the Holodomor and the actions within the ongoing Russian military aggression against Ukraine. First of all, in addition to killing Ukrainians, causing serious bodily or mental harm to Ukrainians, deliberately inflicting on conditions of life of the Ukrainian nation calculated to bring about its physical destruction at least in part, and forcibly transferring Ukrainian children, both Holodomor and the ongoing Russian military were and are supported with evident signs of genocidal intent (intent to destroy Ukrainians) in public speeches or publicly available sources. Second of all, in both cases Russia carried out particular „russification” actions, whose aim was either to reestablish Russians and Russian speakers from Soviet Russia in those parts of Ukraine and households that were left by millions of Ukrainians that had died during the Holodomor or to change Ukrainians self-identity during the ongoing Russian military aggression by: sending Ukrainians from occupied territories to infiltration camps, forcing Ukrainians to accept Russian citizenship, forcible transfer and deportation of Ukrainian children to other parts of occupied territories or to Russia along with changing their identity, including citizenship. Third of all, Stalin's Russia was and today's Russian regime still is targeting Ukrainian civilians, civilian infrastructure (hospitals, schools, universities, resident buildings, etc) and destroys the whole cities in order to make it impossible for Ukrainians to re-establish their life there, and in this way, influence the future demographics on these territories, in the way that there will be no Ukrainian residents. As a result, both the Holodomor and the ongoing Russian military aggression against Ukraine were planned and constitute genocide and had or will have long-term negative effects on Ukrainian nation. Holodomor had seriously changed the demographic situation in the eastern parts of Ukraine, which had a significant impact on the Ukrainian political situation, while through the ongoing Russian military aggression, the Russian regime is pursuing similar goals, but using different, more technologically advanced means

## Bibliography

- Clark Janine Natalia, „Elucidating the *Dolus Specialis*: an analysis of ICTY jurisprudence on genocidal intent” *Criminal Law Forum*, nr 26 (2015): 497-531.
- Cupido Marjolein, „The Contextual Embedding of Genocide: a Casuistic Analysis of the Interplay Between Law and Facts” *Melbourne Journal of International Law*, nr 15 (2014): 1-36.
- Educational guide for teachers, *The Holodomor of 1932-1933 – Genocide of the Ukrainian Nation*. Kyiv; 2021.
- Fox Amos, „Russo-Ukrainian Patterns of Genocide in the Twentieth Century” *Journal of Strategic Security*, nr 4 (2021): 56-71.
- Kreß Claus, „The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case” *Journal of International Criminal Justice*, nr 7 (2009): 297-306.
- Lemkin Rafael, „Axis Rule in Occupied Europe: Laws of Occupation. Analysis of Government – Proposals for Redress” *Washington, D.C.: Carnegie Endowment for International Peace*, (1944): 79-95.
- Lemkin Raphael, *Soviet genocide in Ukraine*. Kyiv: Majsternia knyhy, 2009.
- Serhiychuk Volodymyr, *The Holodomor of 1932-1933 as a Genocide of Ukraine*. Vyshhorod: PP, 2016.
- Shaw Martin, „Russia’s genocidal war in Ukraine: radicalization and social destruction” *Journal of Genocide Research*, nr 25 (2023): 1-19.
- Triffterer Otto, „Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such” *Leiden Journal of International Law*, nr 14 (2001): 399-408.
- Vest Hans, „A Structure-Based Concept of Genocidal Intent” *Journal of International Criminal Justice*, (2007): 781-797.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>



SZYMON BOGUCKI

# Decyzja polityczna jako pozakonstytucyjny instrument ochrony państwa – wizja Carla Schmitta

**The Political Decision as an Extra-Constitutional Instrument  
of State Protection: Carl Schmitt's Vision**

Decisions play an important role in the process of state governance and management. Contemporary literature emphasizes the importance of administrative decisions, analyzes their nature and function, and places them against the background of the constitutional principles of a democratic constitutional state. Carl Schmitt's writings contain original reflections on political decisions, to which the author assigns a legal value. He regards them as sources of law superior to norms. He thus modifies the theory of decisionism. According to Schmitt, norms do not fulfill their function in states that have never existed before (exceptional, unique states). Through an analysis of Carl Schmitt's texts, the author attempts to reconstruct the idea of the political decision as an extraordinarily coordinated instrument responsible for the protection of the state and the constitution.

**SŁOWA KLUCZOWE:** decyzja, Carl Schmitt, dyktatura, decyzjonizm, norma.

**KEYWORDS:** decision, Carl Schmitt, dictatorship, decisionism, the norm.

**SZYMON BOGUCKI**, student prawa, Uniwersytet Szczeciński,  
ORCID – oooo-ooo2-8615-9914, e-mail: szybogucki@gmail.com

## 1 | Wstęp

W ostatnich latach w piśmiennictwie polskim w zauważalny sposób wzrosło zainteresowanie intelektualną spuścizną Carla Schmitta<sup>[1]</sup>. Przyczyniło się do tego bez wątpienia udostępnienie części jego dzieł w rodzimym przekładzie polskiemu czytelnikowi. Udało się tym samym przełamać naukowy bojkot Schmitta, któremu przez lata (niekiedy wcale niebezpodstawnie) przypinano łatkę poplecznika nazistów oraz bezdusznego koniunkturalisty<sup>[2]</sup>. Nawet najzagorzalsi przeciwnicy niemieckiego prawnika nigdy nie zdobyli się jednak na to, by odmówić mu świeżości myśli, ogromnej pracowitości, sugestyności w prowadzonej argumentacji oraz oryginalności wielu z głoszonych poglądów.

Wśród licznych interesujących koncepcji autorstwa Schmitta znajduje się jego wizja decyzji politycznej<sup>[3]</sup>. Autor widzi w niej najważniejszy element polityki i funkcjonowania państwa, który swoje urzeczywistnienie

<sup>1</sup> Literatura dotycząca Carla Schmitta, jaka pojawiła się na przestrzeni ostatnich lat w Polsce, jest niezwykle bogata. W pierwszej kolejności należy zwrócić uwagę na przekłady autorskich dzieł Schmitta. Por. m.in.: Carl Schmitt, „Polityczny romantyzm”, [w:] *Rewolucja konserwatywna w Niemczech 1918–1933*, red. Wojciech Kunicki (Poznań: Wydawnictwo Poznańskie, 1999), 139–156; Carl Schmitt, „Etyka państwowia i państwo pluralistyczne” *Kronos*, nr 2 (2010): 71–82; Carl Schmitt, *Teologia Polityczna i inne pisma*, tłum. Marek A. Cichocki (Warszawa: Aletheia, 2012); Carl Schmitt, *Nauka o konstytucji*, tłum. Magdalena Kurkowska, Robert Marszałek (Warszawa: Teologia Polityczna, 2014); Carl Schmitt, *Legalność i prawomocność*, tłum. Bogdan Baran (Warszawa: Aletheia, 2015); Carl Schmitt, *Dyktatura od źródeł nowożytnej idei suwerenności do proletariackiej walki klas*, tłum. Kinga Wudarska, (Warszawa: Fundacja Augusta Hrabiego Cieszkowskiego, 2016). Odnotować należy również obecność znacznej ilości monografii odnoszących się do intelektualnej spuścizny Schmitta. Por. m.in.: Łukasz Święcicki, *Carl Schmitt i Leo Strauss. Krytyka pozytywizmu prawniczego w niemieckiej myśli politycznej* (Radzymin: Von Borowiecky, 2015); Jerzy Zajadło, *Schmitt*, (Sopot: Arche, 2016); Adam Wielomski, *W poszukiwaniu Katechona. Teologia Polityczna Carla Schmitta* (Radzymin: Von Borowiecky, 2017); Adam Wielomski, *Katolik–Prusak–Nazista. Sekularyzacja w biografii ideowej Carla Schmitta* (Radzymin: Von Borowiecky, 2019); Arkadiusz Górnisiewicz, *Wojna i nomos. Carl Schmitt o problemie porządku światowego* (Kraków: Universitas, 2019); etc.

<sup>2</sup> W literaturze nie brak negatywnych opinii na temat Schmitta. Por. Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003).

<sup>3</sup> Por. Helmut Schelsky, „Der »Begriff Des Politischen« und die Politische Erfahrung der Gegenwart: Überlegungen zur Aktualität von Carl Schmitt” *Der Stat*, nr 22 (1983): 321–345; Ernst Vollrath, „Wie ist Carl Schmitt an seinen Begriff des Politischen gekommen” *Zeitschrift für Politik*, nr 2 (1989): 151–168.

zajduje w woli suwerena. Zaskakujące może się wydawać, że choć teoria ta kształtowała się stopniowo w latach dwudziestych XX wieku, to Schmitt nie stworzył jej na polityczne zamówienie. Obserwując rozwój gospodarki oraz kryzysy raz po raz rozdzierające Niemcy w pierwszych latach istnienia Republiki Weimarskiej, wskazał instrument pozwalający uniknąć paraliżu państwa w sytuacjach skrajnych<sup>[4]</sup>. Ówczesne organy władzy, na czele z prezydentem von Hindenburgiem, zignorowały wizje Schmitta.

Skwapliwie skorzystali z nich natomiast twórcy III Rzeszy<sup>[5]</sup>. Akt „decyzji” w stanie nadzwyczajnym – dowodził Carl Schmitt – jest dalece ważniejszy niż system czy normy prawne<sup>[6]</sup>. Jak pisał: „Idea prawna nie może urzeczywistnić się sama z siebie, bowiem nie zawiera żadnych wskazówek co do osoby, która mogłaby ją w praktyce zastosować. U podstaw każdego przekształcenia leży *autoritatis interpositio*”<sup>[7]</sup>.

## 2 | Triada Schmitta

Życiorys Carla Schmitta to jedna z najbardziej skomplikowanych prawniczych biografii XX wieku. Na współczesnych ocenach jego osobistych wyborów oraz naukowego dorobku bez wątpienia zaważył fakt, że w roku 1933 dołączył do NSDAP, której pozostał wierny aż do ostatnich chwil istnienia hitlerowskich Niemiec<sup>[8]</sup>. Jego dorobek jest przy tym zdumiewający. Zasłynął jako wybitny profesor prawa, filozof nauk prawnych i konstytucjonalista<sup>[9]</sup>, a jego myśl odcisnęła wyraźne piętno na światowym

<sup>4</sup> Por. Antonii Czubiński, *Rewolucja w Niemczech 1918-1919* (Poznań: Wydawnictwo Poznańskie, 1977), 60-92.

<sup>5</sup> Na temat sporu Carla Schmitta z prawnikami z SS pisał m.in. Viktor Winkler. Por. Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft* (Hamburg: Dr. Kovač, 2014), 279-282.

<sup>6</sup> Por. Wielomski, *Katolik-Prusak-Nazista*, 292; Adam Wielomski, *Konserwatyzm - główne idee, nurty i postacie* (Warszawa: Fijorr Publishing, 2007), 214-217; Franciszek Ryszka, *Państwo stanu wyjątkowego* (Wrocław: Zakład Narodowy im. Ossolińskich, 1985), 119-123; Jerzy Krasuski, *Historia Rzeszy Niemieckiej 1871-1945* (Poznań: Wydawnictwo Poznańskie, 1985), 267-268.

<sup>7</sup> Por. Schmitt, *Teologia Polityczna i inne pisma*, 74.

<sup>8</sup> Por. Reinhard Mehring, *Carl Schmitt: A Biography* (Oxford: John Wiley & Sons, 2014).

<sup>9</sup> Por. Wielomski, *Katolik-Prusak-Nazista*, 17.

dziedzictwie jurydycznym. Człowiek uważany za akuszera totalitaryzmu włożył znaczący wkład w nowoczesną myśl konstytucyjną<sup>[10]</sup>.

Jednym z najdonioślejszych osiągnięć naukowych niemieckiego prawnika było nadanie nowej treści pojęciu „teologii politycznej” (*das Politische Theologie*), a także zredefiniowanie „pojęcia polityczności” (*der Begriff des Politischen*). Działania te były wypadkową kampanii, jaką po roku 1921 Carl Schmitt prowadził przeciw liberalnej wizji prawa. Innym zagadnieniem przewijającym się w jego piśmiennictwie, które nierozerwalnie wiązało się z władzą państwową oraz z systemem prawnym, było znaczenie decyzji w prawie państwowym. Wątek ten rozwiniemy jeszcze niżej.

W ówczesnych koncepcjach Schmitta kluczową rolę odgrywa oryginalne podejście do takich pojęć, jak polityczność, suwerenność oraz stan nadzwyczajny. W dyskursie poświęconym istocie decyzji w systemie prawnym ogromne znaczenie przypisane zostało pojęciu suwerenności. Według niemieckiego jurysty słynna fraza Jeana Bodina: *la souverainete est la puissance absolue et perpetuelle d'une Republique* („suwerenność jest absolutną i nieustającą władzą Rzeczypospolitej”<sup>[11]</sup>) nie powinna determinować sposobu rozumienia tego, czym suwerenność jest. Schmitt zarzuca słabość tradycyjnemu ujęciu w słowach: „fundamentalne znaczenie definicji Bodina polega właśnie na tym, że suwerenność traktowała jako niepodzielną jedność i ostateczne rozwiązywanie kwestii władzy w państwie”<sup>[12]</sup>. Tymczasem suwerenność to nie czcze pojęcie marginalne dla prawa, ale odnosząca się do „kwestii ostatecznych”<sup>[13]</sup> pierwszorzędna cecha państwa.

Kolejnym z terminów złączonych z decyzjonistyczną recepcją prawa jest pojęcie polityczności. Carl Schmitt pisze: „dobrze pojęta polityczność oznacza jedynie stopień intensywności pewnej jedności”<sup>[14]</sup>. Zatem stanowi ona swego rodzaju wskaźnik, papierek lakiemowy, który wyznacza skalę homogeniczności określonej grupy. Taka definicja polityczności ściśle wiąże się z heglowską narracją przyjętą przez Schmitta oraz z wyobrażeniem państwa, które góruje nad prawem, etyką czy jednostką<sup>[15]</sup>. Należy podkreślić, że tego rodzaju ujęcie państwa toodejście od trendów, jakie

<sup>10</sup> Por. Jacob Taubes, „Carl Schmitt- apokaliptyk w służbie kontrrewolucji” *Kronos*, nr 2 (2010): 47-59.

<sup>11</sup> Jean Bodin, *Sześć ksiąg o Rzeczypospolitej*, tłum. Zygmunt Izdebski (Warszawa: Państwowe Wydawnictwo Naukowe, 1958), 88.

<sup>12</sup> Schmitt, *Teologia Polityczna i inne pisma*, 48.

<sup>13</sup> Ibidem, 45.

<sup>14</sup> Ibidem, 238.

<sup>15</sup> Por. Wielomski, *Katolik-Prusak-Nazista*, 55.

panowały w naukach prawnych na początku XX wieku. Schmitt przełamał neokantowsko-liberalną wizję prawa<sup>[16]</sup>, głoszącą, że „państwo jest tylko porządkiem prawnym i nie może zostać zanegowane ani ze względu na swoją treść moralną, ani przez decyzję polityczną”<sup>[17]</sup>.

Odnoszenie do sposobu pojmowania „stanu nadzwyczajnego” pisze zaś Schmitt: „Normalność o niczym nie świadczy, wyjątek świadczy o wszystkim; reguła istnieje tylko dzięki wyjątkom. Wyjątki są wyrazem prawdziwego życia, przełamującym rzeczywistość skostniałą w mechanicznej powtarzalności”<sup>[18]</sup>. Autor odnosi się do „zamykania” stanów nadzwyczajnych (czy by być dokładniejszym „stanów bez nazwy”) w dialektyce aktów normatywnych. Dla niemieckiego prawnika taka kwalifikacja jest *par excellence* bezcelowa. Należy sobie bowiem zadać pytanie: w jaki sposób ustawodawca miałby ogarnąć aktem normatywnym wszelkie rodzaje stanów nadzwyczajnych? Oczywiście jest to niemożliwe<sup>[19]</sup>. Wyjątki są *clou* podejmowania decyzji, która to stanowi o suwerenności władzy. Jeżeli władza nie jest w stanie podejmować decyzji w sytuacji krytycznej, to należy stwierdzić, że nie jest ona suwerenna.

### 3 | Decyzjonizm Schmitta

Decyzjonistycznych wizji Carla Schmitta nie da się zrozumieć, a tym bardziej uzasadnić, bez przyjrzenia się społeczno-politycznemu tłu, które towarzyszyło ich powstaniu. Powersalskie Niemcy były targane poważnymi wewnętrznymi problemami<sup>[20]</sup>. Naocznym świadkiem chaosu, jaki

<sup>16</sup> Por. Hans Kelsen, *Czysta teoria prawa*, tłum. Rafał Szubert (Warszawa: Lexis Nexis, 2014), 409.

<sup>17</sup> Wielomski, *Katolik-Prusak-Nazista*, 286.

<sup>18</sup> Schmitt, *Teologia Polityczna i inne pisma*, 55.

<sup>19</sup> Pokazała to choćby sytuacja pandemiczna, kiedy to, nie mając środków konstytucyjnych, rząd ratował się rozporządzeniami. Por. m.in.: Rozporządzenie Rady Ministrów z dnia 19 marca 2021 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, Dz. U. 2021 r., poz. 512. Doświadczenia pandemii SARS-CoV-2 potwierdzają aktualność wyżej zacytowanej wypowiedzi Schmitta. W nowoczesnym państwie, w którym medycyna jest na poziomie zaawansowanym i powszechnie dostępnym zabrakło środków prawnych, aby przystosować się do takiego „stanu bez nazwy”.

<sup>20</sup> Por. Krasuski, *Historia Rzeszy Niemieckiej*, 215–217.

zapanował wówczas w kraju, był młody Carl Schmitt. To wtedy nabrął on odrazy do „politycznych romantyków”, których utożsamiał z liberałami. Swoje stanowisko wyłuszczył w monografii zatytułowanej *Polityczny romantyzm (Politische Romantik)*<sup>[21]</sup>. Odciągnął się w nim od wątłych, melancholijnych romantyków, którzy wszystko sprowadzają do estetyki. Przeciętnego przedstawiciela znienawidzonej grupy charakteryzował słowami: „Wszystko jest w stanie dowolnie zrozumieć i dowolnie tolerować, gdyż wszystko może być dla niego materiałem jego estetycznej ekspresji. »Nauczyciel ekspresji« nie jest zdolny do innego przeciwieństwa niż kontrast estetyczny. Nie są dlań możliwe ani logiczne rozróżnienia, ani moralne sądy wartościujące, ani polityczne rozstrzygnięcia”<sup>[22]</sup>. Romantyków uważało za ludzi niezdolnych do podjęcia decyzji. Widział w nich wiecznych nonkonformistów, którzy bez względu na okoliczności zawsze znajdują się w opozycji.

W 1922 roku ukazało się jedno z najgłośniejszych dzieł niemieckiego prawnika pt. *Teologia polityczna*<sup>[23]</sup>. Schmitt podjął w nim bezkompromisową polemicę z klasykami neokantowskiej szkoły prawa. Wśród podważanych przezeń autorytetów znaleźli się między innymi Hans Kelsen<sup>[24]</sup>, Hugon Krabbe<sup>[25]</sup>, Kurt Wolzendorff<sup>[26]</sup> i Erich Kaufmann<sup>[27]</sup>. Kelsenowi

<sup>21</sup> Carl Schmitt, *Politische Romantik* (Berlin: Duncker & Humblot, 1998).

<sup>22</sup> Schmitt, „Polityczny Romantyzm”, 144.

<sup>23</sup> Carl Schmitt, *Politisches Theologie* (Berlin: Duncker & Humblot, 2015).

<sup>24</sup> Hans Kelsen (ur. 11.10.1881 r. w Pradze, Austro-Węgry; zm. 19.04.1973 r. w Berkeley, Kalifornia, Stany Zjednoczone Ameryki) – profesor prawa na Uniwersytecie Wiedeńskim, czołowy przedstawiciel normatywizmu, twórca „Czystej Teorii Prawa” oraz jeden z opracowujących konstytucję austriacką z 1920 roku. Mianowany dożywotnim członkiem Trybunału Konstytucyjnego w Austrii.

<sup>25</sup> Hugon Krabbe (ur. 3.02.1857 r. w Lejdzie, Holandia; zm. 4.02.1936 tamże) – profesor prawa, jeden z najznamienitszych holenderskich filozofów prawa znany ze swojego zainteresowania teorią państwa i suwerenności. Uważany jest za jednego z prekursorów myśli Hansa Kelsena. Krabbe zidentyfikował państwo i prawo, twierdząc, że prawo stanowe i międzynarodowe są częścią jednolitego systemu normatywnego. W przeciwieństwie do Kelsena tożsamość państwa określał jako wyniki ewolucji.

<sup>26</sup> Kurt Wolzendorff (ur. 12.04.1882 w Nassau; zm. 21.03.1921 w Halle) – niemiecki profesor prawa państwowego na Uniwersytecie w Królewcu. Autor m.in. rozpraw dotyczących prawa państwowego, prawa konstytucyjnego oraz nauki o państwie.

<sup>27</sup> Erich Kaufmann (ur. 21 września 1880 w Demmin; zm. 11 listopada 1972 w Heidelbergu) – prawnik i jeden z czołowych ekspertów prawa konstytucyjnego i prawa międzynarodowego okresu weimarskiego i wczesnej Republiki Federalnej. W sporze o weimarską konstytucję opowiedział się jako przeciwnik pozytywistycznego neokantyzmu. Kaufmann był zwolennikiem klasycznego prawa

oraz Krabbemu wytnął, że ich założenie o możliwości zniknięcia z życia państwowego sytuacji ekstremalnej czy wyjątkowej jest całkowicie odwrane od rzeczywistości. Przypomniał im, że przecież nawet u Bodina pojęcie suwerenności ściśle wiąże się z możliwością wystąpienia stanu wyjątkowego<sup>[28]</sup>. W polemice postawił również pytanie: „jak dalece suweren jest związany regułami prawa i do jakiego stopnia musi liczyć się z wolą stanów?”<sup>[29]</sup>. Schmitt przyjął, że w stanie wyższej konieczności naturalne zasady przestają wiązać suwerena. Jest to ważne szczególnie w odniesieniu do podjęcia decyzji o stanie wyjątkowym oraz tego, kto określa, jakie przesłanki spełniają warunek wprowadzenia tegoż stanu. Niezwiązanie suwerena w sytuacji wyjątkowej „normalnymi normami” jest szczególnie charakterystyczne dla schmittańskiej doktryny decyzjonistycznej. Wyraźnie wskazuje na jej praktyczny wymiar.

W omawianej monografii Schmitt odnosi się również do relacji pomiędzy decyzją i normą. Wyvodzi: „Nawet pojęcie porządku prawnego – stosowane bez namysłu jako coś oczywistego – zawiera w sobie te dwa sprzeczne elementy prawne, decyzję i normę”<sup>[30]</sup>. Zaraz jednak dodaje: „Jednak nawet porządek prawnego, tak jak każda inna forma porządku, nie opiera się na normie, lecz na decyzji”<sup>[31]</sup>. Dla Schmitta nie ulega wątpliwości, że porządek zależy od decyzji. Normy prawne to skutek działania podjętego przez ustawodawcę opierającego się o zasadę legalności. Tymczasem decyzje podejmowane w stanie nadzwyczajnym to prawo stanowione i kreowane przez wolę suwerena. Woli owej przypisuje Schmitt pełnię władzy (*plenitudo potestatis*). W innym miejscu wskazuje: „autorytetu państwa nie da się oddzielić od wartości państwa”<sup>[32]</sup>. Autorytet państwa utożsamia zaś z autorytetem suwerena. To suweren bierze odpowiedzialność za państwo w sensie praktycznym i formalnym. Relatywistyczne neokantowskie założenie, iż można całkowicie wykluczyć z dyskursu o ludzkim życiu stany nadzwyczajne i na tym budować wizje funkcjonowania państwa, jest dla Schmitta absurdem.

---

naturalnego oraz ontologicznego i metafizycznego spojrzenia na prawo. W czasach nazistowskich był prześladowany ze względu na pochodzenie (pochodził z rodziny wyznania mojżeszowego).

<sup>28</sup> Por. Schmitt, *Theologia Polityczna i inne pisma*, 47.

<sup>29</sup> Ibidem, 47.

<sup>30</sup> Ibidem, 49.

<sup>31</sup> Ibidem, 49.

<sup>32</sup> Schmitt, *Theologia Polityczna i inne pisma*, 69.

W toczonej polemice szczególnie wiele miejsca poświęcił Carl Schmitt teoriom Hansa Kelsena. Zarzucał mu, że wiele spraw kluczowych dla bytu państwa próbuje Kelsen ominąć negacją. Jako przykład wskazał kelsenowski stosunek do pojęcia suwerenności<sup>[33]</sup>:

Kelsen rozprawia się z pojęciem suwerenności, po prostu je negując. Wniosek jego rozumowania jest taki: „Pojęcie suwerenności należy całkowicie wyrównać”. W rzeczy samej jest to typowa, stara, liberalna negacja państwa na rzecz prawa oraz ewidentny przykład zignorowania oczywistego problemu stosowania prawa<sup>[34]</sup>.

Stosunek Schmitta do tego problemu jest inny. Według niego kwestią walki o suwerenność jest pojęcie decyzji politycznej. Na niej opiera wizje władzy dyktatorskiej: nieograniczonej i omnipotentnej. Ma ona chronić społeczeństwo przed nie-ładem, który Schmitt utożsamia z brakiem decyzji. Reaktywność władzy nie stanowi więc złamania prawa. Przeciwnie – chroni państwo, suwerenność i porządek prawnym<sup>[35]</sup>. W końcu ta konstatacja doprowadza do Bonaldowskiej analogii: „Jeden Bóg na niebie – jeden suweren w państwie”<sup>[36]</sup>.

<sup>33</sup> Por. Antoni Peretiatkowicz, „Teoria Prawa i Państwa H. Kelsena” *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, nr 4 (1937): 445-508.

<sup>34</sup> Schmitt, *Teologia Polityczna i inne pisma*, 61.

<sup>35</sup> To kluczowe zagadnienie władzy dyktatorskiej per analogiam połączyć trzeba z władzą Bożą. Tenże pogląd był inspirowany augustyńską myślą fideistyczną, według której taką właśnie nieograniczoną władzę Boga dostrzec można w każdym aspekcie świata a przede wszystkim w możliwości ingerencji w *ius naturale*. Choć fideiści nie zajmowali się teorią państwowości, to w pracach Schmitta można odnaleźć wiele analogii do wszechmocnego i wszechgarniącego Boga. Te paralele miały służyć przeszczepieniu wizji omnipotentnego Stwórcy na kanwę państwową, w postaci analogii takich jak wszechmocny Bóg- wszechmocny suweren. Por. Wielomski, *Katolik-Prusak-Nazista*, 139.

<sup>36</sup> Wielomski *Katolik-Prusak-Nazista*, 145.

## 4 | System legalności i praworządności w państwie prawodawczym

W roku 1932 Schmitt opublikował krótkie studium zatytułowane *Legalność i Prawomocność* (*Legalität und Legitimität*)<sup>[37]</sup>. „Charakteryzuję – pisał w niej – dzisiejszą sytuację wewnętrzną Niemiec od strony prawa państwowego i konstytucyjnego jako »zapaść parlamentarnego państwa prawodawczego“<sup>[38]</sup>. Za źródło słabości systemu parlamentarnego uznał konflikt między władzą ustawodawczą a sądowniczą. Dostrzegł w nim źródło niszczącego państwo antagonizmu. Obie strony sporu rościły sobie bowiem prawo do tego, by autorytarnie i wyłącznie stanowić o tym, czym jest mityczna „legalność“.

Spór ten doprowadza najpierw do chaosu, a następnie do stanu, w którym nikt nie posiada dostatecznej mocy do podjęcia decyzji. Tymczasem z punktu widzenia funkcjonowania państwa podejmowanie bieżących decyzji ma charakter absolutnie kluczowy. Jeżeli suweren nie może decydować o państwie, wtenczas traci nad nim kontrolę i powstaje anarchia. Schmitt gorzko kwituje:

Uzasadnienie takiego bytu państwowego tkwi w powszechnej legalności wszelkiego państwowego sprawowania władzy. Zamknięty system legalności uzasadnia wymogi posłuszeństwa i to, że uchyla się wszelkie prawo do oporu. Specyficzną formą przejawiania się prawa jest tu przepis prawny, a specyficzny uzasadnieniem państwowej przemocy – legalność<sup>[39]</sup>.

Schmitt jest surowy w swych ocenach. Oczywiście widzi, że państwo prawodawcze legitymizuje swoją władzę pojęciem „legalności“ i że tkwi w nim cały system hierarchii, podporządkowania oraz podziału kompetencji. W pluralizmie, będącym integralną częścią takiego rodzaju państwa, widzi czynnik osłabiający strukturę wspólnoty politycznej. Jak zauważa:

Nowsze anglosaskie teorie państwa (szczególnie interesujące są te autorstwa G.D.H. Cole'a oraz Harolda I. Laskiego<sup>[40]</sup>) mieniają się „pluralistycznymi“.

<sup>37</sup> Carl Schmitt, *Legalität und Legitimität* (München und Leipzig: Duncker & Humblot, 1932).

<sup>38</sup> Schmitt, *Legalność i prawomocność*, 7.

<sup>39</sup> Ibidem, 9.

<sup>40</sup> Por. George D.H. Cole, *The World of Labour. A Discussion of the Present and Future of Trade Unionism*. 4th ed. (London: G. Bell and Sons Ltd., 1920).

W ten sposób chcą nie tylko zanegować państwo jako najwyższą, wszechogarniającą jedność, lecz przede wszystkim jego etyczne roszczenia do bycia szczególnym rodzajem więzi społecznej, wyższym od jakichkolwiek innych stowarzyszeń, w ramach których ludzie żyją<sup>[41]</sup>.

Pluralistyczne parlamentarne państwo prawa to według Schmitta słaba, niezdolna do spełniania swoich podstawowych zadań organizacja polityczna, która jest wystawiona tak na ataki z zewnątrz, jak i najgorsze z możliwych ataki wewnętrzne czyli – wojny domowe.

„Na przeciwnie biegunie państwa prawodawczego znajduje się państwo rządowe, które charakterystyczny wyraz znajduje w *wysokiej osobistej woli i autorytarnym rozkazie rządzącej głowy państwa*”<sup>[42]</sup>. Tym samym nad niezdolnym do samostanowienia (lub w najlepszym wypadku słabym i powolnym) państwem prawa stawia Schmitt twór, któremu nadaje nazwę państwa rządowego. Decyzje podejmowane są tam sprawnie przez wszechmocnego suwerena, który swoimi dyspozycjami kreuje rzeczywistość państwową, a także oddziałuje na sprawy międzynarodowe. W interesie takiego absolutnego władcy jest, aby państwo opierało się o grupę o jednorodnym charakterze. Wielość niesie bowiem za sobą zawsze ryzyko rozpadu, a jego zaistnienie generuje różnorakie konflikty:

W rzeczywistości po rozpadzie jedności państwa rozmaite grupy społeczne same dokonują odpowiednich rozstrzygnięć, kierując się własnymi interesami grupowym. Natomiast w przypadku jednostki, jak pokazuje doświadczenie, nie ma innej przestrzeni wolności niż ta, którą zapewnia jej silne państwo<sup>[43]</sup>.

Według Schmitta istnieją sytuacje, w których dyktatura może cieszyć się przymiotem legalności i nie naruszać zasad praworządności. „Podobnie jak działanie w obronie koniecznej, dyktatura to zawsze nie tylko akcja, lecz także kontrakcja”<sup>[44]</sup> argumentuje niemiecki prawnik. Ma na myśl działania nastawione na obronę wspólnoty i państwoowości, a także zachowanie istniejącego ładu społecznego. Celem nadzorżennym jest całkowite spacyfikowanie wrogów, a także – paradoksalnie – ochrona dotychczas

<sup>41</sup> Schmitt, „Etyka państwową i państwo pluralistyczne”.

<sup>42</sup> Idem, *Legalność i prawomocność*, 10.

<sup>43</sup> Idem, „Etyka państwową i państwo pluralistyczne”, 75.

<sup>44</sup> Idem, *Dyktatura*, 169.

istniejącego porządku prawnego. Aby uratować ustanowiony wcześniej ład, w rękach suwerena należy zgromadzić pełnię władzy, bo tylko wtedy będzie mógł skutecznie stanąć na jej straży.

## 5 | Rola decyzji w teorii dyktatury

Kiedy Schmitt tworzył swoją wizję dyktatury i uzasadniał jej wyższość nad innymi „legalnymi” ustrojami państwowymi, świat nie był jeszcze obciążony potwornym dziedzictwem, jaki pozostały po sobie XX-wieczne totalitaryzmy. Współczesny czytelnik niejednokrotnie zdziwi się częstotliwością, z jaką Schmitt posługuje się argumentami o charakterze teologicznym oraz ilością nawiązań do struktury oraz modelu funkcjonowania Kościoła<sup>[45]</sup>. Dla niemieckiego prawnika najważniejszym przymiotem dyktatury jest wolna i nieograniczona możliwość podejmowania decyzji politycznych. Te dwa czynniki w teorii państowej Carla Schmitta są ze sobą nierozerwalnie związane.

Jednym ze źródeł inspiracji Schmitta są poglądy XIX-wiecznego hiszpańskiego katolickiego kontrrewolucjonisty Juana Donoso Cortesa, który argumentował:

nie chodzi tu, jak powiedziałem wcześniej, o wybór między wolnością a dyktaturą; gdyby chodziło o wybór między wolnością, a dyktaturą, to głosowałbym za wolnością, jak wszyscy, którzy tu siedzimy. Chodzi o to, i na tym zakończę, by dokonać wyboru między dyktaturą insurekcji a dyktaturą Rządu; w takim wypadku wybieram dyktaturę Rządu jako mniej uciążliwą i mniej uwłaczającą. [...] Chodzi o wybór między dyktaturą odgórną i dyktaturą oddolną; ja wybieram tę, która przychodzi z góry, ponieważ przychodzi z obszarów czystszych i jaśniejszych; chodzi na koniec o wybór między dyktaturą sztyletu i dyktaturą szabli; wybieram dyktaturę szabli, ponieważ jest szlachetniejsza<sup>[46]</sup>.

<sup>45</sup> Por. idem, *Teologia Polityczna i inne pisma*, 105-140.

<sup>46</sup> Juan Donoso Cortés, *O katolicyzmie, liberalizmie i socjalizmie*, tłum. Marta Wójtowicz-Wcisło (Kraków: Ośrodek Myśli Politycznej, 2018), 316.

Słabość, jaką Carl Schmitt okazuje XIX-wiecznym doktrynom kontrrewolucyjnym, jest zauważalna, jednak podziw jego nigdy nie przerodził się w bezkrytyczne uwielbienie. Nie był aż tak naiwny. Doskonale zdawał sobie sprawę, że nie ma powrotu do *ancien régime'u*. Świadomość ta skłoniła go do zbudowania własnej wizji dyktatury. Od ulubionych autorów zaczerpnął wiele. Donojską wizję eksponującą wartość zdecydowanego działania w warunkach nadzwyczajnych zaadaptował i ukształtował na nowo.

Dziś jedyną prawomocnością jest posiadanie siły i psychiczna zdolność suverena do brutalnego użycia przemocy wobec buntowników. Legitymistyczna monarchia umarła. Zdolność do decyzji politycznej i pacyfikacji tłumów za pomocą grenadierów i kartaczy jest jedynym uprawomocnieniem panowania politycznego<sup>[47]</sup>.

Z takim ujęciem w pełni zgadzał się Carl Schmitt.

W Schmitttańskiej wizji dyktatury kluczową rolę odgrywa specyficznie ujęta forma decyzji politycznej. To ona, a nie system norm konstytuuje wszechogarniającą rzeczywistość państwową. Decyzje kształtują prawo państwowie, a w stanie nadzwyczajnym są prawem. Ich jedynym twórcą i egzekutorem jest suweren. Schmitt podkreśla:

To, że każda dyktatura obejmuje wyjątek od normy, nie oznacza losowej negacji dowolnej normy. Wewnętrzna dialektyka pojęcia dyktatury polega na tym, że negowana jest ta norma, której obowiązywanie w historyczno-politycznej rzeczywistości dyktatura ma zapewnić<sup>[48]</sup>.

Dlatego dyktatura to nie wyjąta spod prawa samowola obejmującego urząd suwerena, ale legalna władza, która w ramach istniejącego prawa przywraca porządek. Dyktator w tym kontekście nie sprawuje *pouvoir constituant*, ale *pouvoir constitué*. Nie kształtuje nowego systemu prawnego czy państwowego, ale mocą swoich decyzji politycznych w warunkach ekstraordinaryjnych zaprowadza ład. Pojęcie decyzji w wizji Carla Schmitta można oprzeć o trzy kluczowe terminy takie jak: suwerennosć, polityczność oraz stan nadzwyczajny.

<sup>47</sup> Wielomski, *Katolik-Prusak-Nazista*, 147.

<sup>48</sup> Schmitt, *Dyktatura*, 15.

## 6 | Podsumowanie

Schmittańskie spojrzenie na pozakonstytucyjne instrumenty ochrony państwa jest wciąż aktualne. Według Carla Schmitta pojęcie decyzji jest niezbędnym czynnikiem do przywracania ładu w razie wystąpienia stanów nadzwyczajnych. Decyzja to porządek, ponieważ jest działaniem, a więc odpowiedią na zadane pytanie, reakcją na wydarzenia i w końcu jednoznacznym odpowiedziem się „za lub przeciw”. Schmittańskie ujęcie nie pozostawia miejsca na syntezy. Nie ulega wątpliwości, że decyzja polityczna w rozważaniach niemieckiego jurysty była niezbywalnym atrybutem suwerena. W warunkach stanu nadzwyczajnego decyzją właśnie zaprowadzał on ład i przywracał porządek konstytucyjny. O tym, czy zachodzi tenże stan przesyądza ostatecznie ten, w którego rękach ogniskuje się władza do podjęcia decyzji politycznej, a która sprawdza się do odpowiedzi na pytanie: Kiedy kończy się porządek społeczny, i zaczyna się wojna wszystkich ze wszystkimi<sup>[49]</sup>.

## Bibliografia

- Bodin Jean, *Sześć ksiąg o rzeczypospolitej*, tłum. Zygmunt Izdebski. Warszawa: Państwowe Wydawnictwo Naukowe, 1958.
- Cole George D.H., *The World of Labour. A Discussion of the Present and Future of Trade Unionism*. 4th ed. London: G. Bell and Sons Ltd., 1920.
- Cortés Juan Donoso. *O katolicyzmie, liberalizmie i socjalizmie*, tłum. Marta Wójcik-Wcisło. Kraków: Ośrodek Myśli Politycznej, 2018.
- Czubiński Antonii, *Rewolucja w Niemczech 1918-1919*. Poznań: Wydawnictwo Poznańskie, 1977.
- Górnisiewicz Arkadiusz, *Wojna i nomos. Carl Schmitt o problemie porządku światowego*. Kraków: Universitas, 2019.
- Kelsen Hans, *Czysta teoria prawa*, tłum. Rafał Szubert. Warszawa: Lexis Nexis, 2014.
- Krasuski Jerzy, *Historia Rzeszy Niemieckiej 1871-1945*. Poznań: Wydawnictwo Poznańskie, 1985.
- Mehring Reinhard, *Carl Schmitt: A Biography*. Oxford: John Wiley & Sons, 2014.
- Müller Jan-Werner, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*. New Haven: Yale University Press, 2003.

<sup>49</sup> Ibidem, 15.

- Peretiatkowicz Antoni, „Teoria Prawa i Państwa H. Kelsena” *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, nr 4 (1937): 445-508.
- Ryszka Franciszek, *Państwo stanu wyjątkowego*. Wrocław: Zakład Narodowy im. Ossolińskich, 1985.
- Schelsky Helmut, „Der »Begriff Des Politischen« und die Politische erfahrung der gegenwart: Überlegungen zur Aktualität von Carl Schmitt“ *Der Stat*, nr 22 (1983): 321-345.
- Schmitt Carl, „Etyka państwową i państwo pluralistyczne” *Kronos*, nr 2 (2010): 71-82.
- Schmitt Carl, „Polityczny romantyzm”, [w:] *Rewolucja Konserwatywna w Niemczech 1918-1933*, red. Wojciech Kunicki. 139-156. Poznań: Wydawnictwo Poznańskie, 1999.
- Schmitt Carl, *Dyktatura od źródeł nowożytnej idei suwerenności do proletariackiej walki klas*, tłum. Kinga Wudarska. Warszawa: Fundacja Augusta Hrabiego Cieszkowskiego, 2016.
- Schmitt Carl, *Legalität und Legitimität*. München und Leipzig: Duncker & Humblot, 1932.
- Schmitt Carl, *Legalność i prawomocność*, tłum. Bogdan Baran. Warszawa: Aletheia, 2015.
- Schmitt Carl, *Nauka o konstytucji*, tłum. Magdalena Kurkowska, Robert Marszałek. Warszawa: Teologia Polityczna, 2014.
- Schmitt Carl, *Politische Romantik*. Berlin: Duncker & Humblot, 1998.
- Schmitt Carl, *Politische Theologie*. Berlin: Duncker & Humblot, 2015.
- Schmitt Carl, *Teologia Polityczna i inne pisma*, tłum. Marek A. Cichocki. Warszawa: Aletheia, 2012.
- Święcicki Łukasz, *Carl Schmitt i Leo Strauss. Krytyka pozytywizmu prawniczego w niemieckiej myśli politycznej*. Radzymin: Von Borowiecky, 2015.
- Taubes Jacob, „Carl Schmitt- apokaliptyk w służbie kontrrewolucji” *Kronos*, nr 2 (2010): 47-59.
- Vollrath Ernst, „Wie ist Carl Schmitt an seinen Begriff des Politischen gekommen“ *Zeitschrift für Politik*, nr 2 (1989): 151-168.
- Wielomski Adam, *Katolik-Prusak-Nazista. Sekularyzacja w biografii ideowej Carla Schmitta*. Radzymin: Von Borowiecky, 2019.
- Wielomski Adam, *Konserwatyzm – główne idee, nurty i postacie*. Warszawa: Fijorr Publishing, 2007.
- Wielomski Adam, *W poszukiwaniu Katechona. Teologia polityczna Carla Schmitta*. Radzymin: Von Borowiecky, 2017.
- Winkler Viktor, *Der Kampf gegen die Rechtswissenschaft*. Hamburg: Dr. Kovač, 2014.
- Zajadło Jerzy, *Schmitt*. Sopot: Arche, 2016.



MICHAŁ GRUDECKI

# Prawnokarna ocena prób samobójczych

## Criminal Assessment of Suicide Attempts

The paper is devoted to the criminal assessment of suicide attempts. The author analyzes suicide attempts in terms of whether such behavior fulfills the premises of a crime. He proves that the behavior of a suicide attempt is a criminal act that fulfills the characteristics of the crime of attempted homicide. Due to the intentional violation of the inalienable legal interest, which in the Polish legal system is human life, in a manner contrary to the socially accepted rules of dealing with this interest, the degree of social harmfulness of an attempted suicide will usually exceed the threshold of insignificance. Attempted suicide, however, is not a crime, because at the time of the act, the would-be suicide is not guilty due to the abnormal motivational situation in which he found himself. Nevertheless, his act is unlawful, and therefore people who save a suicide and thus violate his legal interests, act legally, using the justifications of necessary defense. In the author's opinion, the lack of the right to commit suicide while at the same time violating the criminal protection of life (e.g. necessary defense, permitted abortion or freedom from compulsory treatment) proves the inconsistency of the Polish legal system.

**SŁOWA KLUCZOWE:** prawo karne,  
bezprawność, wina, próba  
samobójcza, życie

**KEYWORDS:** criminal law,  
justification, excuse, suicide attempt,  
life

**MICHAŁ GRUDECKI**, doktor nauk prawnych, Uniwersytet Śląski w Katowicach,  
ORCID – oooo-ooo2-5185-3770, e-mail: michal.grudecki@us.edu.pl

## 1 | Wprowadzenie

Zagadnienie zakończenia ludzkiego życia, zwłaszcza spowodowane dobrowolnie przez dzierżyciela tego dobra<sup>[1]</sup>, od dawna fascynuje badaczy różnych dyscyplin nauk, budząc przy tym niemałe emocje<sup>[2]</sup>. Z samobójstwem wiążą się bowiem zarówno problemy filozoficzno-etyczne czy teologiczne, jak i socjologiczne, psychologiczne oraz prawne. Mając na względzie te ostatnie, warto wskazać tezę Marka Mozgawy i Pawła Bachmata, zgodnie z którą do sfery wiedzy powszechniej przynależy fakt, iż osoby dopuszczające się nieudanych prób samobójczych nie są karane na podstawie norm współczesnego prawa karnego<sup>[3]</sup>. Teza ta nie budzi wątpliwości – osoby, które przeżyły próbę samobójczą nie podlegają odpowiedzialności karnej. Istotnym jest jednak udzielenie odpowiedzi na pytanie – dlaczego?

W związku z powyższym należy dokonać analizy próby samobójczej z perspektywy norm prawa karnego, aby ustalić czy zachowanie niedoszłego samobójcy jest czynem, a następnie czy cechuje się bezprawnością, karygodnością oraz czy jego sprawcy można przypisać winę. Któregoś z tych elementów musi bowiem brakować, skoro próba samobójcza nie jest traktowana przez wymiar sprawiedliwości jako przestępstwo. Nie wystarczy bowiem stwierdzenie, którego dokonuje Jarosław Warylewski, że „[...] bezkarność usiłowania samobójstwa [...] wynika ze względów celowościowych, kryminalnopolitycznych, a nie uznania, że nie jest to czyn społecznie szkodliwy”<sup>[4]</sup>. Należy ustalić, dlaczego czyn ten nie podlega karze, skoro jest – jak słusznie zauważa Warylewski – społecznie szkodliwy.

<sup>1</sup> Zob. Michał Grudecki, „Zgoda dzierżyciela dobra na nietypowe zachowania seksualne” *Czasopismo Prawa Karnego i Nauk Penalnych*, z. 3 (2019): 85.

<sup>2</sup> Tak też Brunon Hołyst, *Samobójstwo. Przypadek czy konieczność* (Warszawa: Państwowe Wydawnictwo Naukowe, 1983), 17; Rajnhardt Kokot, „Z problematyki karalnego doprowadzenia do samobójstwa – uwagi na tle ustawowych znamion art. 151 k.k. Część I” *Nowa Kodyfikacja Prawa Karnego*, nr 35 (2015): 13.

<sup>3</sup> Marek Mozgawa, Paweł Bachmat, „Crime of Persuasion to Commit or Assistance in the Commission of Suicide under Article 151 CC” *Ius Novum*, nr 2 (2017): 62. Zob. też Brian L. Mishara, David. N. Weisstub, „The Legal Status of Suicide: A Global Review” *International Journal of Law and Psychiatry*, nr 44 (2016): 54-74; Marek Kulik, „Odpowiedzialność karna za podżeganie lub pomocnictwo do samobójstwa w wybranych państwach”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 118; Konrad Burdziak, *Samobójstwo w prawie polskim* (Warszawa: Wolters Kluwer, 2019), 118-119.

<sup>4</sup> Jarosław Warylewski, „W sprawie prawnokarnego postrzegania eutanazji” *Państwo i Prawo*, nr 3 (1999): 77. Tak też Jarosław Tekliński, „Czy człowiek ma prawo do samobójstwa?” *humanistika*, t. II (2018): 101.

Ustalenie, którego elementu brakuje w strukturze przestępstwa nie ma wartości istotnej wyłącznie dla dogmatyki prawa karnego, lecz jest ważne również dla praktyki<sup>[5]</sup>. Udzielenie odpowiedzi na to pytanie pomoże rozstrzygnąć szereg dalszych wątpliwości prawnych związanych z samobójstwami, m.in. zagadnienie dopuszczalności przeciwdziałania próbom samobójczym w sposób wypełniający znamiona typów czynów zabronionych przeciwko dobrom prawnym samobójcy dobrą, co ma istotne znaczenie dla wszystkich stojących przed decyzją – ratować czy nie ratować osobę zamierzającą targnąć się na własne życie<sup>[6]</sup>? Istotne w praktyce jest także rozstrzygnięcie, czy samobójcy przysługuje prawo do obrony koniecznej przed działaniami osób spieszających im na pomoc<sup>[7]</sup>.

Na wstępie warto zatem postawić hipotezę, w świetle której zachowanie samobójcy, który przeżył targnięcie się na własne życie wypełnia znamiona typu z art. 13 § 1 w zw. z art. 148 § 1 Kodeksu karnego. Samobójca usiłuje wszak zabić człowieka – samego siebie, godząc w dobro prawne, którym nie może swobodnie dysponować<sup>[8]</sup>. Hipoteza ta pozwoli prowadzić dalszą analizę prawnikarną w oparciu o tzw. model (strukturę) przestępstwa, a w zasadzie pozostałe jego elementy, począwszy od bezprawności. Wypełnienie znamion typu czynu zabronionego jest równoznaczne z mieszczeniem się zachowania sprawcy w zakresie normowania norm sankcjonowanej (złamaniem zakazu danego zachowania), dekodowanej z przepisu stanowiącego typ i wskazuje na bezprawność zachowania, lecz jej nie przesąduje<sup>[9]</sup>. Bezprawnością karną jest bowiem zgodność czynu z ustawowymi znamionami (zachowanie mieszczące się w zakresie normowania normy sankcjonowanej przy jednoczesnym niezaistnieniu sytuacji kontratypowej (zachowanie mieszczące się zakresie zastosowania normy sankcjonowanej)<sup>[10]</sup>.

<sup>5</sup> Michał Grudecki, „Pandemiczna klauzula dobrego Samarytanina – kontratyp, ekskulpat czy przepis „martwy”?” *Horyzonty Polityki*, t. XIII (2022): 142.

<sup>6</sup> Andrzej Wąsek, *Prawnikarna problematyka samobójstwa* (Warszawa: Państwowe Wydawnictwo Naukowe, 1982), 28.

<sup>7</sup> Wąsek, *Prawnikarna*, 28.

<sup>8</sup> O życiu jako dobru prawnym, którym człowiek nie może dysponować – zob. Michał Grudecki, *Kontratypy pozaustawowe w polskim prawie karnym* (Warszawa: C.H. Beck, 2021), 339.

<sup>9</sup> Michał Grudecki, Olga Sitarz, *Prawo karne i prawo wykroczeń. Skrypt* (Warszawa: Difin, 2022), 32.

<sup>10</sup> Grudecki, Sitarz, *Prawo*, 31-32; Leszek Wilk, „Rozdział VI. Bezprawność i wina”, [w:] *Prawo karne. Część ogólna, szczególna i wojskowa*, red. Teresa Dukiet-Nagórská (Warszawa: Lexis Nexis, 2010), 108-109.

Nie budzi wątpliwości fakt, że w polskiej nauce prawa karnego konkuruje kilka ujęć struktury przestępstwa<sup>[11]</sup>. Tekst ten nie ma jednak na celu przesądzenia, która z nich jest właściwa. Analiza zostanie przeprowadzona więc w oparciu o jedną z koncepcji czteroelementowych, zgodnie z którą przestępstwem jest czyn bezprawny, karygodny i zawiniony<sup>[12]</sup>. Teoria ta zdaje się być najwłaściwszą w świetle regulacji art. 1, 2, 7 i 9 k.k.<sup>[13]</sup>.

Niniejszy artykuł nie będzie poświęcony szczegółowym rozważaniom na temat definiowania samobójstwa, czy dokonywaniu analizy ustawowych znamion typów czynów zabronionych z art. 151 k.k. (namowa lub pomoc w samobójstwie) i z art. 150 k.k. (zabójstwo eutanatyczne). Na ten temat wypowiedziano się w doktrynie dość wyczerpująco. Jego celem jest nie także szczegółowe przedstawienie przyczyn i motywów samobójstw, jak również dokonanie oceny samobójstwa z innej niż prawnokarna perspektywy. Wszystkie rozważania dotyczyć będą prób samobójczych podejmowanych przez dorosłe i niepozbawione wolności osoby tak, by uniknąć interesujących, lecz leżących na uboczu podejmowanego tematu zagadnień ocen prawnych samobójstwa dzieci i młodzieży oraz osób osadzonych czy podlegających służbie wojskowej. Kwestie te mogą podlegać prawnokarnej analizie w odrębnym opracowaniu.

Na potrzeby prowadzonych badań przyjęta zostanie definicja samobójstwa zaproponowana przez Andrzeja Wąska, wykorzystująca nomenklaturę karnistyczną<sup>[14]</sup>. Zgodnie z nią:

[...] można określić samobójstwo jako zadanie sobie śmierci poprzez bezpośrednie lub pośrednie działanie lub zaniechanie działania, jeżeli sprawca – ofiara chciała tego skutku lub przewidując możliwość jego nastąpienia godziła się nań<sup>[15]</sup>.

<sup>11</sup> Piotr Kardas, „O relacjach między strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi” *Czasopismo Prawa Karnego i Nauk Penalnych*, nr 4 (2012): 25.

<sup>12</sup> Tak Grudecki, Sitarz, *Prawo*, 30; Marian Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* (Warszawa: Państwowe Wydawnictwo Naukowe, 1990), 65.

<sup>13</sup> Lech Gardocki, „Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym” *Annales Universitatis Mariae Curie-Skłodowska. Sectio G*, nr 2 (2013): 30.

<sup>14</sup> Definicja Wąska aprobowana jest także przez Teklińskiego, „Czy”, 99.

<sup>15</sup> Wąsek, *Prawnokarna*, 13. Ciekawą, choć nieco skomplikowaną definicję samobójstwa podaje również Burdziak, *Samobójstwo*, 45–46.

Próba dokonana przez Wąska jest modyfikacją najpopularniejszej (klasycznej)<sup>[16]</sup> definicji samobójstwa autorstwa Durkheima, który za czyn ten uważa:

[...] każdy przypadek śmierci, który bezpośrednio lub pośrednio wynika z pozytywnego lub negatywnego działania ofiary, która wiedziała, że da ono taki rezultat<sup>[17]</sup>.

## 2 | Prawna ocena samobójstwa – stanowisko doktryny i orzecznictwa

Zdecydowana większość przedstawicieli doktryny opowiada się za uznaniem bezkarności prób samobójczych. Ich zdaniem kryminalizacja tego zachowania nie realizuje funkcji prawa karnego (prewencji indywidualnej oraz generalnej czy sprawiedliwościowej), jak również jest sprzeczna z zasadą humanitaryzmu<sup>[18]</sup>. Zagrożenie karą nie jest w stanie skutecznie odstraszyć potencjalnego samobójcę od swojego czynu<sup>[19]</sup>. Można też społkać się z poglądem, w świetle którego samobójstwo jest zachowaniem prawnie irrelevantnym<sup>[20]</sup>.

<sup>16</sup> Zuzanna Gądzik, „Prawnikarna ocena samobójstwa” *Roczniki Nauk Prawnych*, nr 3 (2012): 138.

<sup>17</sup> Émile Durkheim, *Samobójstwo. Studium z socjologii*, tłum. Krzysztof Wakar (Warszawa: Oficyna Naukowa, 2006): 51.

<sup>18</sup> Marian Cieślak, „§ 37”, [w:] *System Prawa Karnego. O przestępstwach w szczególności*, red. Igor Andrejew (Wrocław: Zakład Narodowy im. Ossolińskich, 1985), 373–374; Katarzyna Doroszewska, „Samobójstwo wspomagane w prawie polskim oraz niemieckim. Uwagi na tle wyroku Federalnego Trybunału Konstytucyjnego” *Konteksty Społeczne*, nr 2 (2020): 249; Jacek Malczewski, „Problemy z prawną kwalifikacją lekarskiej pomocy do samobójstwa” *Prokuratura i Prawo*, nr 11 (2008): 22; Kokot, „Z problematyki”, 17–19; Michał Grudecki, „Wybrane prawnokarne aspekty prób samobójczych, nakłaniania do samobójstwa oraz pomocy w samobójstwie” *Wojskowy Przegląd Prawniczy*, nr 2 (2019): 63–64; Tekliński, „Czy”, 100.

<sup>19</sup> Malczewski, „Problemy”, 22.

<sup>20</sup> Mozgawa, Bachmat, „Crime”, 62; Przemysław Konieczniak, „W sprawie eutanatycznej pomocy do samobójstwa (Na marginesie sporu J. Warylewski – K. Poklewski-Koziell)” *Państwo i Prawo*, nr 5 (1999): 75.

Jednym z głównych argumentów przedstawicieli nauki opowiadających się przeciwko uznaniu czynu samobójcy za wypełniający znamiona typu z art. 13 § 1 w zw. z art. 148 § 1 k.k. jest fakt istnienia typizacji z art. 151 k.k. Tłumaczą oni, że przy takiej kwalifikacji do oddania prawnokarnej zawartości czynów opisanych w art. 151 k.k. wystarczałaby konstrukcja podżegania (art. 18 § 2 k.k.) i pomocnictwa (art. 18 § 3 k.k.) do zbrodni z art. 148 § 1 k.k. [21]. Zdaniem Konrada Burdziaka bezpośredni zakaz targnięcia się na własne życie stałby w sprzeczności z konstytucyjną zasadą proporcjonalności<sup>[22]</sup>:

- a. nie będąc narzędziem przydatnym do zwalczania samobójstw, gdyż norma zakazująca targnięcia się na własne życie nie mogłaby wpływać na motywację suicydenta;
- b. nie będąc narzędziem niezbędnym do zwalczania samobójstw, gdyż można stosować mniej inwazyjne środki przeciwdziałania samobójstwom;
- c. nie będąc dedykowanym ochronie żadnej z grup dóbr prawnych wymienionych w art. 31 ust. 3 Konstytucji RP.

Ponadto, jak zauważa Przemysław Konieczniak, ustawodawca mógł wyrazić dezaprobatę wobec samobójstwa bezpośrednio je kryminalizując bądź posługując się formułą odstąpienia od wymierzenia kary<sup>[23]</sup>. Również według Andrzeja Zolla zamach samobójczy nie realizuje znamion żadnego z typów czynów zabronionych<sup>[24]</sup>.

Bezkarność prób samobójczych nie oznacza – w świetle poglądów niektórych reprezentantów doktryny – prawa człowieka do samobójstwa,

<sup>21</sup> Łukasz Pohl, „Kierowanie wykonaniem samobójstwa oraz polecenie jego wykonania w polskim prawie karnym (analiza de lege lata i postulaty de lege ferenda)”, [w:] *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga Jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, red. Aneta Michalska-Warias, Ireneusz Nowikowski, Joanna Piórkowska-Flieger (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2011), 526; Konrad Burdziak, „Samobójca czy zabójca? Kilka słów na temat statusu samobójstwa w polskim prawie karnym” *Wojskowy Przegląd Prawniczy*, nr 4 (2014): 136–138; Burdziak, *Samobójstwo*, 123–125.

<sup>22</sup> Całość za Burdziak, *Samobójstwo*, 125.

<sup>23</sup> Konieczniak, „W sprawie”, 77.

<sup>24</sup> Andrzej Zoll, „Komentarz do art. 151”, [w:] *Kodeks karny. Część szczególna*, t. II, *Komentarz do art. 117–211a*, red. Włodzimierz Wróbel, Andrzej Zoll (Warszawa: Wolters Kluwer, 2017), 320.

lecz wyłącznie to, że sprawca zamachu na własne życie nie zostanie ukarany<sup>[25]</sup>. Zdaniem Wąska polska doktryna od lat sprzeciwia się uznaniu prawa człowieka do samobójstwa, nie wyrażając takiego zakazu wprost, lecz przez przyjęcie założenia o konieczności absolutnego przeszkadzania samobójstwu<sup>[26]</sup>. Praktyka pokazuje, że samobójców ratuje się nawet wbrew ich ujawnionej woli, a niedokonanie tego może grozić odpowiedzialnością karną z art. 162 § 1 k.k.<sup>[27]</sup>. Wąsek zauważa również, że gdyby człowiek miał prawo do samobójstwa, to nikłe uzasadnienie miałaby kryminalizacja namowy do samobójstwa i pomocy w samobójstwie (art. 151 k.k.)<sup>[28]</sup>. Podobny argument wywodzi z art. 150 § 1 k.k., typizującego tzw. zabójstwo eutanatyczne, pisząc, że człowiek nie może zrzec się prawnokarnej ochrony swojego życia<sup>[29]</sup>. Wskazuje się, że życie ludzkie ma tak dużą wartość, iż jego dzierżyciel nie może nim swobodnie dysponować<sup>[30]</sup>. Zdaniem Gądzika ze względu na fakt, iż samobójstwo godzi pośrednio w społeczeństwo, powinno być zwalczane wszystkimi sposobami<sup>[31]</sup>.

Wąsek zwraca jednak uwagę, że skoro nie istnieje ani nakaz, ani zakaz samobójstwa, to powinno być ono czynem dozwolonym prawnie<sup>[32]</sup>. Wskazuje ponadto na istniejącą w naszym systemie prawnym kardynalną zasadę wolności chorego od przymusu leczenia, sugerując, że zakaz stosowania przymusowych czynności leczniczych oznacza *de facto* prawo decydowania o własnym życiu i śmierci, czyli to samo, co prawo do samobójstwa<sup>[33]</sup>. Uznanie, że obywatel ma prawny obowiązek życia, a nie prawo do życia, stanowiłoby według Wąska zaprzeczenie prawa człowieka do dysponowania swoją osobą<sup>[34]</sup>. W podobnym tonie wypowiada się Jarosław Tekliński,

<sup>25</sup> Tak Malczewski, „Problemy”, 25; Monika Płatek, „Prawna natura samobójstwa. Od anomii po autonomię”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 256–257.

<sup>26</sup> Wąsek, *Prawnikarna*, 15; Magdalena Budyn-Kulik, „Doprowadzenie i pomoc do samobójstwa w polskim kodeksie karnym”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 64–65.

<sup>27</sup> Wąsek, *Prawnikarna*, 26; Malczewski, „Problemy”, 25; Budyn-Kulik, „Doprowadzenie”, 65.

<sup>28</sup> Wąsek, *Prawnikarna*, 29.

<sup>29</sup> Ibidem, 36.

<sup>30</sup> Malczewski, „Problemy”, 22; Gądzik, „Prawnikarna”, 139.

<sup>31</sup> Gądzik, „Prawnikarna”, 139.

<sup>32</sup> Wąsek, *Prawnikarna*, 15–16. Tak też chyba twierdzi Tekliński, „Czy”, 102 oraz Płatek, „Prawna”, 254.

<sup>33</sup> Wąsek, *Prawnikarna*, 23.

<sup>34</sup> Ibidem, 22.

wywodząc prawo do samobójstwa z obowiązku poszanowania konstytucyjnie chronionej nietykalności cielesnej oraz wolności osobistej<sup>[35]</sup>. Autor ten uważa, że „akceptacja tezy o istnieniu zasady wolności chorego od przymusu leczenia oznacza *de facto* przyznanie człowiekowi prawa do popełnienia samobójstwa”<sup>[36]</sup>. Ostatecznie jednak J. Tekliński opowiada się przeciwko prawu człowieka do samobójstwa, biorąc pod uwagę skutki, które akt ten wyrządza członkom społeczeństwa<sup>[37]</sup>.

### 3 | Samobójstwo jako czyn człowieka i jako czyn bezprawny

Nie można mieć wątpliwości, że zachowanie samobójcy spełnia przesłanki uznania za czyn człowieka w rozumieniu prawa karnego. Jest ono uewnętrzne i stanowi wynik woli człowieka, mającego prymarną wolność działania bądź zaniechania – sterowania swoją wolą<sup>[38]</sup>. W trakcie niewymuszonych prób samobójczych nie ma miejsca przymus bezwzględny, akty te nie są wynikiem odruchów bezwarunkowych, jak również nie zachodzą w stanach wyłączających obiektywną możliwość działania<sup>[39]</sup>. Statystyczny samobójca nie działa również w stanie fizjologicznej niemożności kontrolowania organizmu i jest zdolny do odbierania bodźców psychicznych z zewnątrz<sup>[40]</sup>. W typowym przypadku targnięcia się na własne życie nie zachodzą zatem żadne okoliczności uniemożliwiające przypisanie zachowania samobójcy cechy czynu. Kluczowe jest zatem udzielenie odpowiedzi na pytanie, czy czyn ten jest bezprawny.

Jak już zostało wspomniane, ustalenie bezprawności karnej wymaga przesądzenia zgodności czynu sprawcy z zakresem normowania oraz zakresem zastosowania normy sankcjonowanej. Sytuacja ta ma miejsce wówczas, gdy czyn ten wypełnia znamiona danego typu czynu zabronionego

<sup>35</sup> Tekliński, „Czy”, 103-104.

<sup>36</sup> Ibidem, 107.

<sup>37</sup> Ibidem, 121.

<sup>38</sup> Grudecki, Sitarz, Prawo, 31; Jerzy Lachowski, Andrzej Marek, *Prawo karne. Zarys problematyki* (Warszawa: C.H. Beck, 2021), 68.

<sup>39</sup> Grudecki, Sitarz, Prawo, 52; Burdziak, *Samobójstwo*, 42.

<sup>40</sup> Grudecki, Sitarz, Prawo, 52; Lachowski, Marek, *Prawo karne*, 68.

i jednocześnie nie realizuje znamion żadnego kontratypu. Z przepisu art. 148 § 1 k.k. można zdekodować normę sankcjonowaną o treści: „zakazuje się zabijać ludzi”; ujmując prościej: „nie wolno zabijać człowieka”. Zakres zastosowania jest wyznaczony przez podmiot oraz przez okoliczności, w których się aktualizuje. W przypadku normy dekodowanej z przepisu art. 148 § 1 k.k. podmiotem tym są wszyscy ludzie, zaś aktualizacja następuje w każdym przypadku usiłowania lub dokonania pozbawienia życia poza sytuacjami opisanymi przez okoliczności wyłączające bezprawność (kontratypy). Należy zastanowić się, czy nieudana próba samobójcza mieści się w zakresie normowania i zastosowania tejże normy, a więc czy łamie zakaz usiłowania zabijania człowieka.

Aby móc stwierdzić, że czyn człowieka mieści się w zakresie normowania normy sankcjonowanej, niezbędne jest przypisanie realizacji znamion typu czynu zabronionego, z którego dana norma jest dekodowana. Typ z art. 148 § 1 k.k. jest typem powszechnym, a zatem jego sprawcą – zarówno usiłowania, jak i dokonania – może być każdy człowiek, w tym samobójca. Znamię podmiotu jest spełnione. Zabójstwo jest przestępstwem umyślnym, które może zostać popełnione w obu postaciach zamiaru. Samobójca chce pozbawić siebie życia, a więc działa w zamiarze bezpośrednim, wypełniając znamię podmiotowe. Godzi we własne życie – życie ludzkie, które jest chronione opisywanym typem. Wypełnia w ten sposób znamię przedmiotu ochrony. W przypadku nieudanej próby samobójczej usiłuje zabić siebie – człowieka – realizując poza znamieniem skutku (śmierci) pozostałe opisane w typie z art. 148 § 1 k.k. znamiona strony przedmiotowej („zabija człowieka”). Ustawodawca, typizując przestępstwo zabójstwa nie posługuje się wszak określeniem: „kto zabija drugiego człowieka”. Najistotniejszym jest jednak kwestia, czy samobójca usiłując pozbawić się istnienia, czyni to z naruszeniem reguł postępowania z dobrem w postaci ludzkiego życia.

Jednym ze znamion strony przedmiotowej jest „niedochowanie przez sprawcę reguł postępowania z dobrem, które konkretyzuje znamię czasownikowe wszystkich typów”<sup>[41]</sup>. Jest to znamień negatywne każdego typu czynu zabronionego. Reguły te są dyrektywami współwyznaczającymi zakres normowania normy sankcjonowanej, wskazującymi na dozwolony sposób obcowania z dobrami prawnymi<sup>[42]</sup>. Reguły wynikają zarówno z aktów normatywnych, zasad „sztuki” danego zawodu czy podejmowanej czynności, jak również ludzkiego doświadczenia, będąc wyrazem

<sup>41</sup> Grudecki, Sitarz, *Prawo*, 37; Grudecki, *Kontratypy*, 186.

<sup>42</sup> Grudecki, Sitarz, *Prawo*, 37; Grudecki, *Kontratypy*, 551.

społecznej akceptowalności opłacalności zachowań<sup>[43]</sup>. Jednym z czynników wpływających na kształt reguł postępowania z dobrem prawnym jest świadomie oraz swobodnie wyrażona przed rozpoczęciem realizacji znamion oraz niewycofana w trakcie czynu zgoda dysponenta dobrem na jego naruszenie<sup>[44]</sup>.

Aby zgoda mogła przekształcić reguły postępowania z dobrem tak, by zezwalały one na jego naruszenie, musi zostać dotyczyć naruszenia dobra, którego jest dysponentem. Trafnie zauważa Borys Kadyszewski: „Nie do pogodzenia bowiem z fundamentalnymi prawami podstawowymi byłaby sytuacja, w której to jednostka ma prawo do wyrażenia zgody na naruszenie tych dóbr, które miałyby społeczną wartość, w tym znaczeniu, że są to dobra wyłącznie ponadindywidualne, których zachowaniem zainteresowany jest ogół społeczeństwa”<sup>[45]</sup>. Należy zatem odpowiedzieć na pytanie, czy własne życie, w które godzi zamachowiec, jest dobrem indywidualnym czy ponadindywidualnym. Od tego zależy, czy zgoda na jego pozbawienie będzie wpływała na kształt reguł postępowania z dobrem, a tym samym na dekompletację strony przedmiotowej typu z art. 148 § 1 k.k.

Wydaje się, że nie ma racji Wąsek, pisząc w kontekście samobójstwa, że „zniszczenie lub uszkodzenie dobra, którego jest się wyjątkowym posiadaczem jest bezkarne na ogólnych zasadach”<sup>[46]</sup>. Fakt, zgodnie z którym człowiek nie jest wyjątkowym dysponentem dobra prawnego w postaci własnego życia jest przesądzony przez ustawodawcę w drodze typizacji z art. 150 k.k.<sup>[47]</sup>. Człowiek nie ma prawa dysponować własnym życiem – jest jego dzierżycielem, a nie dysponentem<sup>[48]</sup>. Prawo do życia jest bowiem w świetle polskiego systemu prawa prawem nadprzyrodzonym i niezbywalnym<sup>[49]</sup>. Uzasadnieniem takiego traktowania życia ludzkiego może być teza, zgodnie z którą człowiek żyje nie tylko dla samego siebie, lecz jako istota społeczna musi uwzględniać potrzeby innych ludzi (np. rodziny, współpracowników)

<sup>43</sup> Grudecki, Sitarz, *Prawo*, 37; Grudecki, *Kontratypy*, 551.

<sup>44</sup> Por. Grudecki, *Kontratypy*, 552.

<sup>45</sup> Borys Kadyszewski, „Instytucja zgody dysponenta dobrem na przykładzie zabiegów ubezpłaniających” *Roczniki Administracji i Prawa XXI*, z. 3 (2021): 89.

<sup>46</sup> Wąsek, *Prawnokarna*, 48.

<sup>47</sup> Grudecki, *Kontratypy*, 339; Grudecki, *Wybrane*, 75-76.

<sup>48</sup> Zoll, „Art. 151”, 319.

<sup>49</sup> Jolanta Pacian, „Obowiązek prawnej ochrony życia i zdrowia a eutanazja, kryptanazja i wspomagane samobójstwo” *Przegląd Prawa Publicznego*, nr 2 (2016): 20. Nie oznacza to jednak, że jego prawnokarna ochrona jest absolutna. Zob. Teresa Dukiet-Nagórcka, „Esej o prawie do decydowania o niektórych przejawach życia osobistego” *Nowa Kodyfikacja Prawa Karnego*, t. XLIII (2017): 86.

związane z nim samym<sup>[50]</sup>. Jak zauważa Arnold Gubiński, ogół posiada interes w zachowaniu ludzi przy życiu ze względu na „[...] niepowtarzalność każdej jednostki ludzkiej, więzy rodzinne, społeczne, przyjaźni, jej wartość jako twórcy dóbr materialnych lub duchowych”<sup>[51]</sup>. Zaś zdaniem Leszka Lernella, każda śmierć człowieka (zarówno naturalna jak i wskutek czynu zabronionego) jest społecznie szkodliwa, gdyż „[...] wyrywa człowieka na zawsze z orbity stosunków społecznych”<sup>[52]</sup>. W piśmieństwie można też napotkać pogląd, w świetle którego samobójstwo wykracza przeciwko zasadom współżycia społecznego<sup>[53]</sup>. Życie ludzkie ma bowiem doniosłe znaczenie społeczne na płaszczyźnie utylitarnej, ekonomicznej i emocjonalnej<sup>[54]</sup>. Samobójca wyrządza społeczeństwu szkodę, gdyż swoim czynem uchyla się od obowiązków, które ciążą na nim wobec tego społeczeństwa<sup>[55]</sup>.

Powyższe rozważania prowadzą do wniosku, iż wyrażenie zgody na pozbawienie własnego życia przez samobójcę nie modyfikuje reguł postępowania z dobrem w postaci tegoż życia. Czyn samobójcy wypełnia zatem wszystkie znamiona typu czynu zabronionego z art. 148 § 1 k.k. – oczywiście oprócz skutku, gdyż analizujemy nieudaną próbę samobójczą z perspektywy odpowiedzialności za usiłowanie zabójstwa (art. 13 § 1 w zw. z art. 148 § 1 k.k.), mieszczącą się w zakresie normowania normy sankcjonoowanej zakazującej usiłowania pozbawienia życia człowieka. Nie sposób również wskazać żadnego kontratypu, który ograniczyłby w przypadku próby samobójczej zakres zastosowania opisywanej normy sankcjonoowanej. Samobójca nie działa wszak w obronie koniecznej (art. 25 § 1 k.k.), nie poświęca też swojego życia celem uchylenia niebezpieczeństwa grożącego dobru cenniejszemu (stan wyższej konieczności – art. 26 § 1 k.k.).

<sup>50</sup> Michał Grudecki, Mateusz Sajkowski, „Suicide from the Joint Perspective of Canon Law and Polish Law” *Acta Iuris Stetinensis*, nr 3 (2020): 32; Cieślak, „§ 37”, 373.

<sup>51</sup> Arnold Gubiński, *Wyłączenie bezprawności czynu. O okolicznościach uchylających społeczną szkodliwość czynu* (Warszawa: Uniwersytet Warszawski, 1961), 80. Tak też Cieślak, „§ 37”, 373.

<sup>52</sup> Leszek Lernell, *Zagadnienia związku przyczynowego w prawie karnym* (Warszawa: Wydawnictwo Prawnicze, 1961), 85.

<sup>53</sup> Wąsek, *Prawnikarna*, 19.

<sup>54</sup> Kokot, „Z problematyki”, 17. Podobnie Brunon Hołyś, *Przywrócić życiu* (Warszawa: Państwowe Wydawnictwo Naukowe, 1991), 191.

<sup>55</sup> Tadeusz Ślipko, „Pojęcie samobójstwa bezpośredniego i pośredniego w świecie współczesnych dyskusji” *Roczniki Filozoficzne*, nr 2 (1964): 105; Eugeniusz Bielicki, *Psychospołeczne uwarunkowania samobójstw dokonanych: studium oparte na badaniach przeprowadzonych w województwie bydgoskim i obejmujące lata 1970–1974* (Bydgoszcz: Wydawnictwo Uczelniane WSP, 1978), 8.

Samobójca nie działa wszak w obronie koniecznej (art. 25 § 1 k.k.), nie poświęca też swojego życia celem uchylenia niebezpieczeństwa grożącego dobru cenniejszemu (stan wyższej konieczności – art. 26 § 1 k.k.), którego to niebezpieczeństwa nie można inaczej uniknąć. Wydaje się bowiem, że nie sposób uznać prawa do samostanowienia za dobro cenniejsze od życia. Próba samobójcza nie wypełnia ponadto znamion kontratypu, tzw. eksperymentu (art. 27 k.k.), czy innych kontratypów pozakodeksowych, np. działania w ramach uprawnień bądź obowiązków.

Powыższe rozważania prowadzą do wniosku, że targnięcie się na własne życie jest czynem bezprawnym<sup>[56]</sup>. Podsumowując – samobójca przekracza normę sankcjonowaną zakazującą usiłowania pozbawienia życia jakiegokolwiek człowieka, którą można dekodować z przepisów art. 13 § 1 w zw. z art. 148 § 1 k.k. Żaden kontratyp nie ogranicza zakresu zastosowania tejże normy<sup>[57]</sup>. Zachowanie niedoszłego samobójcy mieści się też w zakresie normowania omawianej normy, gdyż realizuje on znamiona wspomnianego typu czynu zabronionego, w tym znamię negatywne, nie postępując zgodnie z przyjętymi regułami postępowania z dobrem w postaci ludzkiego życia<sup>[58]</sup>. Reguły te nakazują poszanowanie życia, nie zezwalając w tym przypadku na jego naruszenie. Wymagane jest również wystąpienie związku przyczynowego pomiędzy czynem samobójcy a zdarzeniem bezpośrednio zagrażającym jego życiu. Stąd też nie sposób wykluczyć realizacji znamion zbrodni z art. 13 § 1 w zw. z art. 148 § 1 k.k. przez niedoszłego samobójcę, który nie występował bezpośrednio przeciwko własnemu życiu, lecz pośrednio, przykładowo prowokując policjanta do oddania strzału w jego kierunku<sup>[59]</sup>.

Samobójstwo nie może zostać potraktowane jako zachowanie społecznie akceptowalne w ramach kategorii zachowań luksusowych<sup>[60]</sup>, gdyż straty, które generuje dla społeczeństwa, znacznie przewyższają jedynie zysk w postaci poszanowania prawa jednostki do samostanowienia. Nie można zatem porównać próby samobójczej z innymi ryzykownymi zachowaniami, akceptowanymi przez społeczeństwo przy zachowaniu zasad ostrożności, które minimalizują płynące wobec ludzkiego życia lub zdrowia zagrożenie (np. sporty ekstremalne, nietypowe zachowania seksualne czy zabiegi

<sup>56</sup> Zoll, „Art. 151”, 319.

<sup>57</sup> Zob. nt. tej konstrukcji Grudecki, *Kontratypy*, 547.

<sup>58</sup> Zob. nt. tej konstrukcji Grudecki, *Kontratypy*, 547.

<sup>59</sup> Przykład podany przez Burdziaka, *Samobójstwo*, 43.

<sup>60</sup> Zob. o zachowaniach luksusowych Grudecki, *Kontratypy*, 164-165.

medycyny estetycznej). Samobójstwo wciąż pozostaje negatywnie oceniane przez część polskiego społeczeństwa, będąc swoistym tematem tabu<sup>[61]</sup>. Trudno zatem twierdzić, że może być społecznie akceptowane, a jego usiłowanie nie naruszać panujących w społeczeństwie reguł postępowania z ludzkim życiem. Co więcej, można podać w wątpliwość tezę, zgodnie z którą prawo do samobójstwa wypływa z prawa do samostanowienia<sup>[62]</sup>.

## 4 | Samobójstwo jako czyn karygodny

Zostało przyjęte, że w związku z obiektywną – bezwzględną – wartością ludzkiego życia zamachy samobójcze są czynami bezprawnymi<sup>[63]</sup>. Nie ulega wątpliwości, że czyn bezprawny, wypełniający znamiona typu czynu zabronionego, jest jednocześnie zachowaniem społecznie szkodliwym<sup>[64]</sup>. Istotna jest wyłącznie odpowiedź na pytanie czy stopień tej społecznej szkodliwości jest wyższy niż znikomy tak, by móc uznać je za karygodne.

Ocena stopnia społecznej szkodliwości jest dokonywana w każdej sprawie indywidualnie, z perspektywy kwantyfikatorów z art. 115 § 2 k.k. Znikomość społecznej szkodliwości wynikać może z wypadkowej elementów składających się na tę szkodliwość<sup>[65]</sup>, powodując, że generalnie naganny czyn *in concreto* nie wykazuje tej cechy. Kryteria te mogą oddziaływać w różną stronę, a wysokie natężenie jednego wiązać się z niskim nataniem drugiego<sup>[66]</sup>. Społeczna szkodliwość przestępstwa *in genere* (w zasadzie społeczne niebezpieczeństwo), odzwierciedlona m.in. w ustutowym zagrożeniu karą, nie przesąduje o niemożności uznania braku karygodności konkretnego czynu realizującego znamiona tego typu<sup>[67]</sup>,

<sup>61</sup> Doroszewska, „Samobójstwo”, 248; Płatek, „Prawna”, 235-243.

<sup>62</sup> Zob. wyrok ETPCz z dnia 29 kwietnia 2002 r. Pretty przeciwko Wielkiej Brytanii, 2346/02 w: Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999-2004, red. Marek Antoni Nowicki (Kraków: Zakamycze, 2005), 160.

<sup>63</sup> Por. Kokot, „Z problematyki”, 17.

<sup>64</sup> Grudecki, Kontratyty, 133.

<sup>65</sup> Wyrok SN z dnia 28 sierpnia 2003 r., III K 45/03, LEX nr 152023; Paweł Daniluk, „Ocena społecznej szkodliwości czynu” Prokuratura i Prawo, nr 6 (2011): 129; Dominik Zając, „Stopień społecznej szkodliwości jako okoliczność rzutująca na wymiar kary” Państwo i Prawo, nr 11 (2017): 67.

<sup>66</sup> Zając, „Stopień”, 63.

<sup>67</sup> Daniluk, „Ocena”, 128-129.

w tym usiłowania samobójstwa kwalifikowanego z art. 13 § 1 w zw. z art. 148 § 1 k.k. Będzie to jednak bardzo trudne.

Samobójca godzi w добро prawne o ogromnej wartości, naruszając jednocześnie w sposób rażący reguły postępowania z nim, co zdecydowanie zwiększa społeczną szkodliwość jego czynu. Trudno wyobrazić sobie większe przekroczenie zasad ostrożności w stosunku do życia niż umyślne, bezpośrednie działanie przeciwko niemu.

Niełatwym w ocenie jest natomiast wpływ motywacji samobójcy na społeczną szkodliwość nieudanej próby samobójczej. Ów wpływ musi być bowiem oceniany z uwzględnieniem systemu wartości panującego w społeczeństwie<sup>[68]</sup>. Jak zostało wspomniane, samobójstwo nadal pozostaje negatywnie oceniane przez część polskiego społeczeństwa, będąc swoistym tematem tabu<sup>[69]</sup>. Motywy, a w zasadzie przyczyny, z powodu których człowiek godzi we własne życie, bywają różne. Specjalisci podkreślają, że są nimi m.in. choroby psychiczne czy choroby nieuleczalne, stosowanie uzywek, problemy życiowe (zawód miłosny, pogorszenie sytuacji ekonomicznej czy nawet utrata środków do życia, utrata osoby bliskiej)<sup>[70]</sup>. Próba samobójcza może być wreszcie demonstracją, dokonaną w różnym celu np. manipulacji innymi osobami czy zwróceniem na siebie uwagi<sup>[71]</sup>. Motywem samobójstwa może być wreszcie nie tyle niechęć do egzystencji jako takiej, ale do życia, które w danym momencie ma suicydent np. w związku z konkretnymi problemami, które jawią mu się jako nie do pokonania. Każdy z tych motywów *in concreto* podlega ocenie, a jego na wpływ na społeczną szkodliwość próby samobójczej będzie odmienny.

Trzeba też pamiętać, że sposób i okoliczności czynu muszą być również oceniane w świetle kontekstu kulturowego<sup>[72]</sup>. Wpływ na zmniejszenie bądź zwiększenie stopnia społecznej szkodliwości będzie miał zatem wybór metody odebrania sobie życia. To samo trzeba stwierdzić odnośnie do miejsca, w którym samobójstwo zostanie dokonane. Przykładowo większy wpływ na społeczną szkodliwość nieudanej próby samobójczej będzie miało jej dokonanie w domu, w którym znajdują się dzieci, mogące natknąć

<sup>68</sup> Zając, „Stopień”, 67.

<sup>69</sup> Doroszewska, „Samobójstwo”, 248; Płatek, „Prawna”, 235-243.

<sup>70</sup> Beata Kosiba, Wioletta Przybyszewska, Ireneusz Sołtyszewski, „Wybrane aspekty zachowań samobójczych” *Journal of Modern Science*, nr 1 (2017): 96-97.

<sup>71</sup> Marta Makara-Studzińska, „Wybrane zagadnienia z problematyki suicydologii” *Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia. Sectio I*, nr 17 (2001): 227.

<sup>72</sup> Zając, „Stopień”, 65.

się na suicydenta, będącego dla nich osobą bliską czy rzucenie się pod pociąg. W tym drugim przypadku czyn suicydenta wywołać może traumę u maszynisty, pasażerów, świadków czy ratowników medycznych. Taki czyn może być rozpatrywany także z perspektywy istotnej dla artykułu kwestii odpowiedzialności suicydenta za usiłowanie zabójstwa, gdyż zdarzają się rzadkie przypadki, w których potrącenie przez pociąg nie okaże się śmiertelne<sup>[73]</sup>.

W trakcie oceny stopnia społecznej szkodliwości trzeba także zwrócić uwagę na rozmiary wyrządzonej lub grożącej szkody bądź krzywdy<sup>[74]</sup>. Próba samobójcza niesie ze sobą groźbę wyrządzenia największej dla człowieka krzywdy, jaką jest pozbawienie życia. Jest to również poważne naruszenie obowiązku życia, który ciąży na każdym człowieku, co wynika z omówionej aksjologii polskiego systemu prawa. Życie ludzkie jest wartością ponadindywidualną, więc samobójca godząc w nie, krzywdzi nie tylko siebie, ale i osoby, dla których jego życie jest cenne (rodziny, przyjaciół, znajomych, pracodawcę czy państwo *in genere*). Warto też zwrócić uwagę, że samobójca działa najczęściej w zamiarze bezpośrednim pozbawienia siebie życia. Z tą postacią zamiaru należy wiązać wyższy stopień społecznej szkodliwości<sup>[75]</sup>.

Wydaje się zatem, że można wskazać więcej argumentów przemawiających przeciwko uznaniu nieudanego targnięcia się na własne życie za czyn pozbawiony cechy karygodności. Naruszenie dobra prawnego – życia ludzkiego – nawet przez jego dzierżyciela posiada znaczny ładunek społecznej szkodliwości<sup>[76]</sup>. Teza ta obarczona może być jednak obarczona błędem uogólnienia, ponieważ ocena karygodności dokonywana jest w konkretnym przypadku, a nie *in genere*. Istotne przy opisywanej ocenie będą zwłaszcza indywidualne motywy popełnienia samobójstwa, a także okoliczności samej próby. Trzeba też pamiętać, że generalnie społeczna szkodliwość usiłowania jest niższa niż dokonania m.in. ze względu na niewystąpienie przestępniego skutku<sup>[77]</sup>. Stąd też nie sposób jednoznacznie przesądzić czy przestępcość zachowania usiłującego popełnić samobójstwo nie może zostać w niektórych stanach faktycznych wyłączona na mocy art. 1 § 2 k.k.

<sup>73</sup> <https://moje-gniezno.pl/99971/23-latek-rzucił-się-pod-pociąg-przezyl-i-trafił-do-szpitala1/>. [dostęp: 06.03.2024].

<sup>74</sup> Zając, „Stopień”, 67.

<sup>75</sup> Ibidem; Daniluk, „Ocena”, 133.

<sup>76</sup> Kokot, „Z problematyki”, 17.

<sup>77</sup> Wyrok SN z dnia 31 października 2017 r., V KK 201/17, LEX nr 2413829.

W takiej sytuacji, zgodnie z art. 17 § 1 pkt 3 k.p.k. postępowania karnego nie wszczyna się, a wszczęte umarza.

## 5 | Samobójstwo jako czyn zawiniony

Anormalną sytuacją motywacyjną nazywamy ekstremalny stan faktyczny, w którym sprawca działa pod silnym naciskiem psychicznym<sup>[78]</sup>. Jak trafnie zauważa Magdalena Kowalewska-Łukuć:

nacisk ten powoduje, że sytuacja, w jakiej znalazł się sprawca, wykracza poza granice wymagalności zachowania zgodnego z prawem i tym samym nie sposób wymagać, by dał on posłuch normie prawnej. W konsekwencji anormalna sytuacja motywacyjna ma wyłączać możliwość przypisania sprawcy winy<sup>[79]</sup>.

Podstawą braku możliwości postawienia zarzutu winy i tym samym uznania zachowania za przestępstwo jest art. 1 § 3 k.k.

Niektóre badania wskazują, że blisko 80% osób dokonujących prób samobójczych pragnie być uratowanymi, a odratowani samobójcy w większości przypadków nie ponawiają swoich prób<sup>[80]</sup>. W psychice osób decydujących się targnąć na własne życie rozgrywa się prawdziwy dramat – często chcą oni jednocześnie żyć i umrzeć<sup>[81]</sup>. Trudno im świadomie podjąć racjonalną decyzję<sup>[82]</sup>. Jednocześnie wypełniają oni znamiona typu czynu zabronionego z art. 13 § 1 w zw. z art. 148 § 1 k.k., jak również są pokrzywdzonymi własnym czynem<sup>[83]</sup> – na naruszenie dobra prawnego w postaci życia wszak nie mogą wyrazić skutecznej zgody. Od osób znajdujących się w takim stanie – przeżywających ogromny kryzys psychiczny przygaszający instynkt życia<sup>[84]</sup> – nie sposób wymagać wierności normie sankcjonowanej z art. 148

<sup>78</sup> Magdalena Kowalewska-Łukuć, „Zabójstwo eutanatyczne jako anormalna sytuacja motywacyjna” *Acta Iuris Stetinensis*, nr 3 (2021): 24.

<sup>79</sup> Kowalewska-Łukuć, „Zabójstwo”, 24.

<sup>80</sup> Wąsek, *Prawnikarnia*, 32-33.

<sup>81</sup> Ibidem, 32.

<sup>82</sup> Gądzik, „*Prawnikarnia*”, 152.

<sup>83</sup> Tekliński za Wąskiem widzi w samobójcy ofiarę. Zob. Tekliński, „*Czy*”, 99-100.

<sup>84</sup> Wąsek, *Prawnikarnia*, 34.

§ 1 k.k. zakazującej zabijania człowieka – w tym samego siebie. Samobójca znajduje się często w tak anormalnej sytuacji motywacyjnej, że będzie za wszelką cenę pragnął zrealizować swój rzeczywisty zamiar, wybierając miejsce, czas i skuteczną metodę zamachu tak, by nikt mu nie przeszkodził<sup>[85]</sup>. Nie powstrzyma go przed tym żadna norma prawnia. W związku z tym samobójcom nie sposób przypisać winy w chwili czynu.

Jak zauważa Wąsek, karanie osoby, która podjęła próbę samobójczą jest niehumanitarne, gdyż została ona już „pokarana” przez życie, skoro zdecydowała się na taki krok<sup>[86]</sup>. Decyzja o samobójstwie jest tragedią desperata<sup>[87]</sup>, jakże zatem można wymagać od niego w takiej chwili dochowania wierności prawu? Niehumanitarne, bezsensowne, sprzeczne z celami kary i będące niczym nieusprawiedliwionym aktem ciemienia, jest ukaranie sprawcy, który nie miał „[...] możliwości podjęcia decyzji takiej, jakiej wymaga od niego prawo lub nie miał możliwości postąpienia zgodnie z tak podjętą decyzją [...]”<sup>[88]</sup>. W takich sytuacjach zgodnie z art. 1 § 3 k.k. nie można przypisać winy w chwili czynu, gdyż fałszywy byłby humanizm prawa karnego wymagający pod groźbą kary posłuchu dla normy prawnej nakazującej dalszą egzystencję od osoby, która straciła chęć do życia<sup>[89]</sup>.

Oczywiście nie należy każdorazowo utożsamiać kryzysowej sytuacji psychicznej, w której znajduje się osoba gotowa targnąć się na własne życie, z kodeksowym stanem niepoczytalności. Nie da się jednak wykluczyć wystąpienia sytuacji, w której podejmujący próbę samobójczą z powodu różnorodnych zaburzeń psychicznych<sup>[90]</sup> nie będzie w stanie rozpoznać

<sup>85</sup> Ibidem, 28; Cieślak, „§ 37”, 374; Budyn-Kulik, „Doprowadzenie”, 66-67.

<sup>86</sup> Wąsek, *Prawnikarna*, 48.

<sup>87</sup> Małczewski, „Problemy”, 23.

<sup>88</sup> Jarosław Majewski, Piotr Kardas, „O dwóch znaczeniach winy w prawie karnym” *Państwo i Prawo*, nr 10 (1993): 72; Kokot, „Z problematyki”, 19; Mozgawa, Bachmat, „Crime”, 62.

<sup>89</sup> Wąsek, *Prawnikarna*, 48.

<sup>90</sup> Zob. Andrzej Lebiedowicz, „Samobójstwo w ujęciu wielopłaszczyznowym” *Wojskowy Przegląd Prawniczy*, nr 3 (2013): 91-92; Jan Chodkiewicz, Joanna Miniszewska, „Ból psychiczny a występowanie myśli samobójczych” *Psychiatria i Psychologia Kliniczna*, nr 1 (2014): 38; Gądzik, „Prawnikarna”, 137; Bronon Hołyś, „Zainteresowania psychiatrii samobójstwem” *Suicydologia*, t. VII (2015): 31-48; Marcin Olajossy, „Psychiatryczne aspekty samobójstwa; od statystyki po aktywną prewencję”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 396; Wioletta Tuszyńska-Bogucka, „Etiologia samobójstwa w opinii publicznej”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 405-407.

znaczenia swojego czynu lub pokierować swoim postępowaniem<sup>[91]</sup>. Czynnikami powodującymi samobójstwa są m.in. depresja, alkoholizm, schizofrenia, choroba afektywna dwubiegunkowa czy osobowość typu *borderline*<sup>[92]</sup>. W takiej sytuacji nie będzie możliwe przypisanie mu winy za czyn z art. 13 § 1 w zw. z art. 148 § 1 k.k. na podstawie art. 31 § 1 k.k. Orzeczenie w takiej sytuacji środka zabezpieczającego w postaci pobytu w zakładzie psychiatrycznym (art. 93g § 1 w zw. z art. 93c pkt 1 k.k.) nie będzie sprzeczne z zasadami panującymi w demokratycznym państwie prawa, gdyż na mocy art. 23 ust. 1 u.o.z.p.<sup>[93]</sup> możliwe jest przyjęcie do szpitala psychiatrycznego osoby bez jej zgody w sytuacji, gdy z powodu choroby zagraża własnemu życiu lub zdrowiu.

## 6 | Podsumowanie

Zdaniem Wąska w samobójstwie jako akcie arcyłudzkim tkwi przejaw wolności człowieka<sup>[94]</sup>. Przeprowadzona analiza zdaje się jednak zaprzeczać temu stwierdzeniu. Człowiek ma nie tylko prawo żyć, lecz i obowiązek. Wypada zgodzić się z J. Warylewskim, że:

[...] polskie prawo karne odmawia człowiekowi prawa do śmierci, uznając, że życie ludzkie jest dobrem, którego znaczenia nie można rozpatrywać jedynie w kategoriach indywidualnych. Ma ono również wartość społeczną i nikt nie powinien swoim życiem dysponować w sposób dowolny<sup>[95]</sup>.

W związku powyższym wypełnia znamiona przestępstwa z art. 13 § 1 w zw. z art. 148 § 1 k.k. także ten, kto podejmuje próbę samobójczą. Jego

<sup>91</sup> Tak twierdzi Wąsek, *Prawnokarna*, s. 48. Zob. podobnie Cieślak, „§ 37, 374; Kokot, „Z problematyki”, 19.

<sup>92</sup> Małgorzata Stefaniuk, „Samobójstwo jako zjawisko społeczne – pojęcie i rodzaje”, [w:] *Samobójstwo*, red. Marek Mozgawa (Warszawa: Wolters Kluwer, 2017), 16. Zob. więcej Olajossy, „Psychiatryczne”, 396–397; Tuszyńska-Bogucka, „Etiologia”, 405, 408, 411.

<sup>93</sup> Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego, tekst jedn. Dz. U. z 2022 r., poz. 2123 (dalej: u.o.z.p.).

<sup>94</sup> Wąsek, *Prawnokarna*, 30.

<sup>95</sup> Warylewski, „W sprawie”, 78. Bardzo podobnie Pacian, „Obowiązek”, 20.

czyn mieści się w zakresie normowania tej normy. Nie sposób znaleźć kontratypów – okoliczności, które ograniczyłyby zakres zastosowania opisywanej normy. Oznacza to, że czyn samobójcy jest bezprawny.

Nie sposób zgodzić się z prezentowaną w niniejszym artykule koncepcją Burdziaka, zdaniem którego bezpośredni zakaz samobójstwa nie spełnia wymogów przewidzianych w art. 31 ust. 3 Konstytucji RP. Pierwsze dwa zarzuty, które wskazuje Burdziak można wszak odnieść w stosunku do zakazu zabójstwa *in genere*. W wielu przypadkach norma sankcjonowana z art. 148 § 1 k.k. nie wpływa na motywację sprawców (np. zabójców psychopatycznych czy zabójców w afekcie), jak również można znaleźć inne sposoby przeciwdziałania zabójstwom. Wątpliwa jest także teza o tym, że zakaz samobójstwa służący ochronie moralności publicznej byłby „nazbyt wydumany”, zwłaszcza w świetle wskazanych argumentów nt. społecznej wartości życia każdej jednostki.

Można mieć ponadto wątpliwości co do słuszności tezy Magdaleny Budyn-Kulik, która uważa, że w przypadku dokonania samobójstwa zachodziłaby konieczność wymierzenia kary sprawcy, który pozbawił się życia<sup>96</sup>. Jeżeli sprawca zmarł w wyniku próby samobójczej, konieczności tej nie będzie, wszak zgodnie z art. 17 § 1 pkt 5 k.p.k.<sup>97</sup> postępowania karnego wówczas się nie wszczyna<sup>98</sup>. Jeżeli zaś przeżył, wymierzenie kary za czyn z art. 13 § 1 w związku z art. 148 § 1 k.k. będzie niemożliwe, gdyż na podstawie art. 17 § 1 pkt 2 k.p.k. postępowania karnego nie wszczyna się, jeśli ustawa stanowi, że sprawca nie popełnia przestępstwa. Zaś na mocy art. 1 § 3 k.k. nie popełnia przestępstwa sprawca czynu zabronionego, jeżeli nie można mu przypisać winy w czasie czynu. Niedoszłemu samobójcy tej winy przypisać nie sposób. Z tego powodu nie może on również ponosić odpowiedzialności za inne przestępstwa przeciwko życiu lub zdrowiu, których znamiona wypełnił swoją nieudaną próbą samobójczą, jak np. ciężki uszczerbek na zdrowiu (art. 156 § 1 k.k.) czy narażenie na bezpośrednie niebezpieczeństwo utraty życia albo ciężkiego uszczerbku na zdrowiu (art. 160 § 1 k.k.). W niektórych przypadkach, o czym była mowa, brak przestępności czynu i tym samym brak wszczęcia postępowania karnego

<sup>96</sup> Magdalena Budyn-Kulik, „§ 4”, [w:] *System Prawa Karnego*, t. X, *Przestępstwa przeciwko dobrom indywidualnym*, red. Jarosław Warylewski (Warszawa: C.H. Beck, 2016), 140.

<sup>97</sup> Mozgawa, Bachmat, „Crime”, 62.

<sup>98</sup> Tak też Warylewski, „W sprawie”, 77; Tekliński, „Czy”, 99.

na mocy art. 17 § 1 pkt 2 k.p.k., będzie wynikał ze znikomej społecznej szkodliwości nieudanej próby samobójczej (art. 1 § 2 k.k.).

Odnosząc się do zarzutu zbedności art. 151 k.k., należy podnieść, że ustawodawca pragnął w ten sposób ograniczyć zakres kryminalizacji oddziaływania na potencjalnego samobójcę, uznając, iż namowa do samobójstwa i pomoc w samobójstwie są zachowaniami o niższym stopniu społecznego niebezpieczeństwa od nakłaniania do zabójstwa i pomocy w zabójstwie<sup>[99]</sup>. Może też o tym świadczyć posłużenie się przez niego znamieniem „namawia” zamiast zwrotu charakteryzującego podżeganie – „nakłania”. Stąd też nie można zarzucać prezentowanej w niniejszym artykule interpretacji – jak chcą tego Burdziak<sup>[100]</sup> czy Pohl<sup>[101]</sup> – występowania przeciwko paradygmatowi racjonalnemu ustawodawcy.

Brak przestępności i tym samym karalności niedoszłego samobójcy najczęściej wynika z niemożności przypisania mu winy za naruszenie normy sankcjonowanej dekodowanej z art. 13 § 1 w zw. z art. 148 § 1 k.k. Każdy człowiek, który dokonuje próby samobójczej, znajduje się w anormalnej sytuacji motywacyjnej, tracąc naturalny instynkt życia. Od takiej osoby nie sposób wymagać wierności wymogom normie zakazującej zabijania człowieka. Szczególna sytuacja motywacyjna w każdym przypadku wyłącza możliwość postawienia zarzutu, czyli uniemożliwia przypisanie winy (art. 1 § 3 k.k.)<sup>[102]</sup>.

Nie można także zapomnieć, że mogą zdarzyć się również takie próby samobójcze, których społeczna szkodliwość zostanie oceniona jako znikoma, po kompleksowej analizie z wykorzystaniem zamieszczonych w art. 115 § 2 k.k. kwantyfikatorów. Różna jest bowiem motywacja samobójców, jak i odmienne okoliczności samych prób. W niektórych przypadkach mogą one przeważyć nad pozostałymi czynnikami wpływającymi na karygodność. Jeżeli społeczna szkodliwość czynu zostanie uznana za znikomą, nieudana próba samobójcza nie będzie stanowiła przestępstwa usiłowania zabójstwa (art. 1 § 2 k.k.).

Warto też zwrócić uwagę, że nieprzyznanie jednostce prawa do samobójstwa wiąże się jednocześnie z możliwością przypisania odpowiedzialności

<sup>99</sup> W tym tonie wypowiada się także Budyn-Kulik, „§ 4”, 140 czy pośrednio Cieślak, „§ 37”, 374.

<sup>100</sup> Burdziak, „Samobójca”, 138; Burdziak, *Samobójstwo*, 124-125.

<sup>101</sup> Pohl, „Kierowanie”, 526.

<sup>102</sup> Mariusz Zelek, „Wina w prawie karnym i w prawie deliktów – przyczynek do dyskusji na temat tożsamości pojęcia winy w prawie polskim” *Acta Iuris Stetinensis*, nr 2 (2019): 116; Kowalewska-Łukuć, „Zabójstwo”, 24.

karnej na podstawie art. 162 § 1 k.k. temu, kto samobójstwu nie przeszkodził, mogąc to uczynić bez narażenia siebie lub innej osoby na niebezpieczeństwo utraty życia albo ciężkiego uszczerbku na zdrowiu<sup>[103]</sup>. Samo działanie w celu zapobiegnięcia samobójstwu może realizować znamiona typów czynów zabronionych naruszenia nietykalności cielesnej, pozbawienia wolności, zmuszania, naruszania miru domowego czy nawet spowodowania uszkodzenia ciała bądź rozstroju zdrowia<sup>[104]</sup>. Uznanie targnięcia się na własne życie za czyn bezprawny skutkuje jednakże przyznaniem osobom ratującym samobójców prawa do obrony koniecznej<sup>[105]</sup>. Jednocześnie usiłujący popełnić samobójstwo nie mogą legalnie przeciwstawić się tym, którzy działają w celu ratowania ich życia – przeciwko zachowaniom niebezprawnym wszak obrona konieczna nie przysługuje.

Zaprezentowana interpretacja ukazuje sprzeczność w systemie ochrony życia w Polsce<sup>[106]</sup>. Mamy wszak do czynienia z brakiem prawa do samobójstwa przy jednoczesnej wolności od przymusu leczenia czy występowaniu prawa kobiety ciążarnej do odmowy zgody na aborcję w sytuacji, w której kontynuacja ciąży lub poród zagrażają jej życiu<sup>[107]</sup>. Istnieje zatem konieczność kontynuowania pogłębianej dyskusji na temat racjonalnego kształtu ochrony ludzkiego istnienia, prowadzącej być może do zmian w tym zakresie. Nie można przecież zaprzeczyć, że prawnokarna ochrona życia nie jest absolutna, o czym świadczy dopuszczalność jego pozbawienia w drodze aborcji czy kontratypu obrony koniecznej<sup>[108]</sup>. Warto też zauważać, że Europejski Trybunał Praw Człowieka akceptuje decyzje poszczególnych państw o legalizacji eutanazji, a zatem niejako zgadza się z tym, iż „[...] prawo do prywatności obejmuje prawo do wyboru momentu

<sup>103</sup> Wąsek, *Prawnokarna*, 25; Warylewski, *W sprawie*, 77; Gądzik, *Prawnokarna*, 150–151. Odmienne Konrad Burdziak, „Czy samobójstwo jest czynem zabronionym (czynem zabronionym pod groźbą kary?) Rozważania na tle Kodeksu karnego z 1997 roku (ze szczególnym uwzględnieniem art. 162 § 1 k.k.)”, [w:] *Problematyka umierania i śmierci w perspektywie medyczno-kulturowej*, red. Jan Hartman, Marta Szabat (Warszawa: Wolters Kluwer, 2016), 156 i nast.; Burdziak, *Samobójstwo*, 128–132; Konieczniak, „*W sprawie*”, 76.

<sup>104</sup> Wąsek, *Prawnokarna*, 28.

<sup>105</sup> Zoll, „*Komentarz*”, 319; Kokot, „Z problematyki”, 17–18. Odmienne, powołując się na stan wyższej konieczności – Gądzik, „*Prawnokarna*”, 152.

<sup>106</sup> O tej sprzeczności pisze także Dukiet-Nagórská, „*Esej*”, 85.

<sup>107</sup> Por. Wąsek, *Prawnokarna*, 41; Dukiet-Nagórská, „*Esej*”, 85.

<sup>108</sup> Grudecki, Sajkowski, „*Suicide*”, 32; Rafał Citowicz, *Prawnokarne aspekty ochrony życia człowieka a prawo do godnej śmierci* (Warszawa: Kodeks, 2006): 27–28.

i formy zakończenia życia [...]”<sup>[109]</sup>. Stąd też prawnokarna ochrona życia powinna zostać złagodzona również w przypadkach, w których nie chce jej sam dzierżyciel tego najcenniejszego dobra. Nie jest bowiem korzystna dla społeczeństwa sytuacja, w której system prawa w zakresie życia nie kiedy zezwala na swobodne decyzje dotyczące unicestwienia tego dobra prawnego, a w innych przypadkach prawa mu tego odmawia<sup>[110]</sup>.

## Bibliografia

- Bielicki Eugeniusz, *Psychospołeczne uwarunkowania samobójstw dokonanych: studium oparte na badaniach przeprowadzonych w województwie bydgoskim i obejmujące lata 1970-1974*. Bydgoszcz: Wydawnictwo Uczelniane WSP, 1978.
- Budyn-Kulik Magdalena, „§ 4”, [w:] *System Prawa Karnego*, t. X, *Przestępstwa przeciwko dobrom indywidualnym*, red. Jarosław Warylewski. 140-156. Warszawa: C.H. Beck, 2016.
- Budyn-Kulik Magdalena, „Doprowadzenie i pomoc do samobójstwa w polskim kodeksie karnym”, [w:] *Samobójstwo*, red. Marek Mozgawa. 63-87. Warszawa: Wolters Kluwer, 2017.
- Burdziak Konrad, „Czy samobójstwo jest czynem zabronionym (czynem zabronionym pod groźbą kary?) Rozważania na tle Kodeksu karnego z 1997 roku (ze szczególnym uwzględnieniem art. 162 § 1 k.k.)”, [w:] *Problematyka umierania i śmierci w perspektywie medyczno-kulturowej*, red. Jan Hartman, Marta Szabat. 151-167. Warszawa: Wolters Kluwer, 2016.
- Burdziak Konrad, „Samobójca czy zabójca? Kilka słów na temat statusu samobójstwa w polskim prawie karnym” „Wojskowy Przegląd Prawniczy”, nr 4 (2014): 130-143.
- Burdziak Konrad, *Samobójstwo w prawie polskim*. Warszawa: Wolters Kluwer, 2019.
- Chodkiewicz Jan, Miniszewska Joanna, „Ból psychiczny a występowanie myśli samobójczych” *Psychiatria i Psychologia Kliniczna*, nr 1 (2014): 37-42.
- Cieślak Marian, „§ 37.”, [w:] *System Prawa Karnego. O przestępstwach w szczególności*, red. Igor Andrejew. 371-385. Wrocław: Zakład Narodowy im. Ossolińskich, 1985.
- Cieślak Marian, *Polskie prawo karne. Zarys systemowego ujęcia*. Warszawa: Państwowe Wydawnictwo Naukowe, 1990.

<sup>109</sup> Dukiet-Nagórnska, „Esej”, 94.

<sup>110</sup> Ibidem, 85.

- Citowicz Rafał, *Prawnokarne aspekty ochrony życia człowieka a prawo do godnej śmierci*. Warszawa: Kodeks, 2006.
- Danieluk Paweł, „Ocena społecznej szkodliwości czynu” *Prokuratura i Prawo*, nr 6 (2011): 127-136.
- Doroszewska Katarzyna, „Samobójstwo wspomagane w prawie polskim oraz niemieckim. Uwagi na tle wyroku Federalnego Trybunału Konstytucyjnego” *Konteksty Społeczne*, nr 2 (2020): 246-265. <https://doi.org/10.17951/ks.2020.8.2.246-265>.
- Dukiet-Nagórnska Teresa, „Esej o prawie do decydowania o niektórych przejawach życia osobistego” *Nowa Kodyfikacja Prawa Karnego*, t. XLIII (2017): 83-97.
- Durkheim Émile, *Samobójstwo. Studium z socjologii*, tłum. Krzysztof Wakar. Warszawa: Oficyna Naukowa, 2006.
- Gardocki Lech, „Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym” *Annales Universitatis Mariae Curie-Skłodowska. Sectio G*, nr 2 (2013): 29-40. <https://dx.doi.org/10.17951/g.2013.60.2.29>.
- Gądzik, Zuzanna. „Prawnokarna ocena samobójstwa” *Roczniki Nauk Prawnych*, nr 3 (2012): 137-161. <https://ojs.tnkul.pl/index.php/rnp/article/view/7891>.
- Grudecki Michał, „Pandemiczna klauzula dobrego Samarytanina – kontratyp, ekskulpatant czy przepis «martwy»?” *Horyzonty Polityki*, t. 13 (2022): 139-158. <https://doi.org/10.35765/hp.2210>.
- Grudecki Michał, „Wybrane prawnokarne aspekty prób samobójczych, nakłaniania do samobójstwa oraz pomocy w samobójstwie” *Wojskowy Przegląd Prawniczy*, nr 2 (2019): 60-80. <https://www.gov.pl/web/prokuratura-krajowa/wpp-numer-2-2019>.
- Grudecki Michał, „Zgoda dzierżyciela dobra na nietypowe zachowania seksualne” *Czasopismo Prawa Karnego i Nauk Penalnych* XXIII, z. 3 (2019): 85-103. <https://www.czpk.pl/index.php/zeszyty-archiwum/michal-grudecki-zgoda-dzierzy-ciela-dobra-na-nietypowe-zachowania-seksualne>.
- Grudecki Michał, *Kontraty typ pozaustawowe w polskim prawie karnym*. Warszawa: C.H. Beck, 2021.
- Grudecki Michał, Mateusz Sajkowski, „Suicide from the Joint Perspective of Canon Law and Polish Law”, *Acta Iuris Stetinensis*, nr 3 (2020): 23-39. <https://doi.org/10.18276/ais.2020.31-02>.
- Grudecki Michał, Olga Sitarz, *Prawo karne i prawo wykroczeń. Skrypt*. Warszawa: Difin, 2022.
- Gubiński Arnold, *Wyłączenie bezprawności czynu. O okolicznościach uchylających społeczną szkodliwość czynu*. Warszawa: Uniwersytet Warszawski, 1961.
- Hołyś Brunon, *Przywrócenie życiu*. Warszawa: Państwowe Wydawnictwo Naukowe, 1991.

- Hołyst Brunon, *Samobójstwo. Przypadek czy konieczność*. Warszawa: Państwowe Wydawnictwo Naukowe, 1983.
- Hołyst Brunon. „Zainteresowania psychiatrii samobójstwem” *Suicydologia*, t. VII (2015): 31-48.
- Kadyszewski Borys, „Instytucja zgody dysponenta dobrem na przykładzie zabiegówubezpieczających” *Roczniki Administracji i Prawa XXI*, z. 3 (2021): 87-97. <https://doi.org/10.5604/01.3001.0015.7555>.
- Kardas Piotr, „O relacjach między strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi” *Czasopismo Prawa Karnego i Nauk Penalnych XVI*, nr 4 (2012): 5-63. <https://www.czpk.pl/index.php/zeszyty-archiwum/zeszyt-2012-4>.
- Kokot Rajnhardt, „Z problematyki karalnego doprowadzenia do samobójstwa – uwagi na tle ustawowych znamion art. 151 k.k. Część I” *Nowa Kodyfikacja Prawa Karnego*, nr 35 (2015): 13-26. [https://repozytorium.uni.wroc.pl/Content/118505/PDF/o3\\_Kokot\\_R\\_Z\\_problematyki\\_karalnego\\_doprowadzenia\\_do\\_samobojstwa\\_uwagi\\_na\\_tle\\_ustawowych\\_znamion\\_art\\_151\\_kk\\_Czesc\\_I.pdf](https://repozytorium.uni.wroc.pl/Content/118505/PDF/o3_Kokot_R_Z_problematyki_karalnego_doprowadzenia_do_samobojstwa_uwagi_na_tle_ustawowych_znamion_art_151_kk_Czesc_I.pdf).
- Konieczniak Przemysław, „W sprawie eutanatycznej pomocy do samobójstwa (Na marginesie sporu J. Warylewski – K. Poklewski-Kozięł)” *Państwo i Prawo*, nr 5 (1999): 72-78.
- Kosiba Beata, Wioletta Przybyszewska, Ireneusz Sołtyszewski, „Wybrane aspekty zachowania samobójczych” *Journal of Modern Science*, nr 1 (2017): 83-111. <https://www.joms.wsge.com/Wybrane-aspekty-zachowan-samobojczych,79763,o,2.html>.
- Kowalewska-Łukuć Magdalena, „Zabójstwo eutanatyczne jako anormalna sytuacja motywacyjna” *Acta Iuris Stetinensis*, nr 3 (2021): 23-35. <https://doi.org/10.18276ais.2021.35-02>.
- Kulik Marek, „Odpowiedzialność karna za podżeganie lub pomocnictwo do samobójstwa w wybranych państwach”, [w:] *Samobójstwo*, red. Marek Mozgawa. 119-144. Warszawa: Wolters Kluwer, 2017.
- Lachowski Jerzy, Andrzej Marek, *Prawo karne. Zarys problematyki*. Warszawa: C.H. Beck, 2021.
- Lebiedowicz Andrzej, „Samobójstwo w ujęciu wielopłaszczyznowym” *Wojskowy Przegląd Prawniczy*, nr 3 (2013): 82-102.
- Lernell Leszek, *Zagadnienia związku przyczynowego w prawie karnym*. Warszawa: Wydawnictwo Prawnicze, 1961.
- Majewski Jarosław, Piotr Kardas, „O dwóch znaczeniach winy w prawie karnym” *Państwo i Prawo*, nr 10 (1993): 69-79.
- Makara-Studzińska Marta, „Wybrane zagadnienia z problematyki suicydologii” *Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia. Sectio I*, nr 17 (2001): 219-231.

- Malczewski Jacek, „Problemy z prawną kwalifikacją lekarskiej pomocy do samobójstwa” *Prokuratura i Prawo*, nr 11 (2008): 20–35. <https://www.gov.pl/web/prokuratura-krajowa/numer-11-2008>.
- Mishara Brian L., David N. Weissstub, „The legal status of suicide: A global review” *International Journal of Law and Psychiatry*, nr 44 (2016): 54–74.
- Mozgawa Marek, Paweł Bachmat, „Crime of Persuasion to Commit or Assistance in the Commission of Suicide under Article 151 CC” *Ius Novum*, nr 2 (2017): 61–82. <https://iusnovum.lazarski.pl/iusnovum/article/view/937>.
- Olajossy Marcin, „Psychiatryczne aspekty samobójstwa; od statystyki po aktywną prewencję”, [w:] *Samobójstwo*, red. Marek Mozgawa. 395–402. Warszawa: Wolters Kluwer, 2017.
- Pacian Jolanta, „Obowiązek prawnej ochrony życia i zdrowia a eutanazja, kryptanazja i wspomagane samobójstwo” *Przegląd Prawa Publicznego*, nr 2 (2016): 19–30.
- Płatek Monika, „Prawna natura samobójstwa. Od anomii po autonomię”, [w:] *Samobójstwo*, red. Marek Mozgawa. 223–266. Warszawa: Wolters Kluwer, 2017.
- Pohl Łukasz, „Kierowanie wykonaniem samobójstwa oraz polecenie jego wykonania w polskim prawie karnym (analiza de lege lata i postulaty de lege ferenda)”, [w:] *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga Jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, red. Aneta Michałska-Warias, Ireneusz Nowikowski, Joanna Piórkowska-Flieger. 523–530. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2011.
- Stefaniuk Małgorzata, „Samobójstwo jako zjawisko społeczne – pojęcie i rodzaje”, [w:] *Samobójstwo*, red. Marek Mozgawa. 13–42. Warszawa: Wolters Kluwer, 2017.
- Ślipko Tadeusz, „Pojęcie samobójstwa bezpośredniego i pośredniego w świetle współczesnych dyskusji” *Roczniki Filozoficzne*, nr 2 (1964): 57–75.
- Tekliński Jarosław, „Czy człowiek ma prawo do samobójstwa?” *humanistika*, t. II (2018): 11–26. <https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-18eab304-9375-464ba224f233295a2941>.
- Tuszyńska-Bogucka Wioletta, „Etiologia samobójstwa w opinii publicznej”, [w:] *Samobójstwo*, red. Marek Mozgawa. 403–422, Warszawa: Wolters Kluwer, 2017.
- Warylewski Jarosław, „W sprawie prawnokarnego postrzegania eutanazji” *Państwo i Prawo*, nr 3 (1999): 75–78.
- Wąsek Andrzej, *Prawnikarna problematyka samobójstwa*. Warszawa: Państwowe Wydawnictwo Naukowe, 1982.
- Wilk Leszek, „Rozdział VI. Bezprawność i wini”, [w:] *Prawo karne. Część ogólna, szczególna i wojskowa*, red. Teresa Dukiet-Nagórnska. 107–116, Warszawa: Lexis Nexis, 2010.

Zając Dominik, „Stopień społecznej szkodliwości jako okoliczność rzutująca na wymiar kary” *Państwo i Prawo*, nr 11 (2017): 56-69.

Zelek Mariusz, „Wina w prawie karnym i w prawie deliktów – przyczynek do dyskusji na temat tożsamości pojęcia winy w prawie polskim” *Acta Juris Stetinensis*, nr 2 (2019): 109-126. <https://doi.org/10.18276/ais.2019.26-08>.

Zoll Andrzej, „Komentarz do art. 151”, [w:] *Kodeks karny. Część szczególna*, t. II, *Komentarz do art. 117-211a*, red. Włodzimierz Wróbel, Andrzej Zoll. 319-324. Warszawa: Wolters Kluwer, 2017.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

KATARÍNA IŽOVÁ, LUDVÍK JUŘÍČEK, KATEŘINA BOČKOVÁ,  
DAVID ANTHONY PROCHÁZKA

# Analysis of the Effectiveness of Prevention Programmes Aimed at Eradicating Juvenile Delinquency in Slovakia: Comparative Study of Different Approaches within Criminological and Pedagogical Methods

## Abstract

Crime prevention among students of secondary vocational schools is a key challenge for the education system in Slovakia. This paper focuses on analysing the effectiveness of various prevention programmes that have been implemented to reduce juvenile delinquency in these schools. The comparative study focuses on the effectiveness of different approaches using both criminological and pedagogical methods. The effort is to identify which programmes and strategies are the most successful and can serve as models for other schools and institutions. Research is based on data obtained from police statistics, questionnaire surveys, and expert analyses, which allows deep insight into the issue and contributes to a better understanding and solution of juvenile delinquency in the secondary school environment.

**KATARÍNA IŽOVÁ**, PhD, DTI University (Dubnica nad Váhom, Slovakia),  
ORCID – oooo-ooo3-3331-771X, izova@dti.sk

**LUDVÍK JUŘÍČEK**, PhD, DTI University (Dubnica nad Váhom, Slovakia),  
ORCID – oooo-ooo2-9974-1743, ludvik.juricek@gmail.com

**KATEŘINA BOČKOVÁ**, PhD, DTI University (Dubnica nad Váhom, Slovakia),  
ORCID – oooo-ooo2-3728-628X, e-mail: bockova@dti.sk

**DAVID ANTHONY PROCHÁZKA**, PhD, Faculty of Military Leadership, University  
of Defence (Brno, Czech Republic), ORCID – oooo-ooo2-1007-8907,  
d.a.prochazka@gmail.com

KEYWORDS: crime prevention, vocational secondary schools, Slovakia, effectiveness analysis, prevention programmes, comparative study

## 1 | Introduction

School and its environment play a fundamental role in a child's development, influencing its physical and mental growth, as well as its knowledge and character traits. After the family, the school is the second most important educational factor. As Shakuntala Devi, known for her mathematical prowess, once said:

Education is not just about going to school and getting a degree. It is about expanding your knowledge and accepting life's truths<sup>[1]</sup>.

This quote underscores the importance of school not only as a place to acquire academic knowledge, but also for the development of moral values and social skills, which are key to the future life of each child. Therefore, the school environment is responsible for creating a safe and supportive space where pupils can develop their skills and learn appropriate social norms. Interpersonal relationships, building positive moral competences, a sense of justice, mutual respect and tolerance, as well as a sense of security, are key aspects of this process.

Negative human behaviour is complex and multifaceted, making it difficult to fully eliminate it. Everyday school life can involve a variety of negative phenomena, from bullying to more serious delinquency. Therefore, it is necessary to develop effective tools for prevention. Prevention programmes must be continuously updated and adapted to changing needs and circumstances. It is important that these programmes are not only focused on academic aspects, but also on the moral and social development of pupils. The goal is to ensure that future secondary school graduates are not only well educated, but also morally strong individuals who can integrate into work and social life without problems.

---

<sup>1</sup> Shakuntala Devi, *Book of numbers* (Orient Paperbacks, 2006).

Given the statistics on crime in Slovakia<sup>[2]</sup>, it is obvious that it is necessary to raise the level and update the preventive measures in secondary vocational schools. Therefore, this article focusses on the prevention of criminal acts, while the secondary vocational school itself should play a key role as an educational institution. Implementing effective prevention programmes is essential to creating a safe and supportive school environment that will allow pupils to reach their full potential and become valued members of society.

## 2 | Literature Review

Delinquency among secondary vocational school pupils represents a significant problem that affects not only the pupils themselves, but also the school environment and the wider community. This is evidenced by the number of professional book outputs devoted to the given topic in Czechia and Slovakia, when these publications focus on the various strategies that Slovakia and Czechia use to prevent juvenile delinquency, mention specific projects and initiatives that have been introduced in schools and communities, and evaluate their effectiveness. Equally important is the identification of social and economic factors that contribute to juvenile delinquency<sup>[3]</sup>. These publications primarily examine the influence of family history, education, and socioeconomic status on the likelihood of juvenile involvement in criminal activity.

Scientific articles and studies dealing with this issue are also worth mentioning. Among the most significant, we can include the study by

<sup>2</sup> Štatistika kriminality v Slovenskej republike, 2023. <https://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml>.

<sup>3</sup> Tatiana Tomčíková, *Kriminalita mládeže* (Banská Bystrica: Univerzita Mateja Bela v Banskej Bystrici, Pedagogická fakulta, 2012); Jaroslav Oberuč, Gustav Ušiak, Pavel Sečka, *Kriminalita mládeže* (Strážnice: Veřejnosprávní vzdělávací institut o.p.s., 2016); Jana Firstová, *Kriminalita mládeže v sociálních souvislostech* (Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2014); Zdeněk Martínek, *Agresivita a kriminalita školní mládeže* (Praha: Grada Publishing as, 2009); Ivana Zoubková, *Kontrola kriminality mládeže* (Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2002); Jakub Chromý, *Kriminalita páchaná na mládeži: aktuální jevy a nová právní úprava v České republice* (Praha: Linde, 2010); Eva Moravcová, Zuzana Podaná, Jiří Buriánek, *Delikvence mládeže: trendy a souvislosti* (Praha: Triton, 2015).

Vávrová<sup>[4]</sup>, which describes various types of crimes committed by juveniles, highlighting that their aggressive behaviour may be due to faster physical, but slower psychological development, lack of sports activities, and the influence of violent computer games. Next Čonka and Čonková<sup>[5]</sup>, who analyse the causes of juvenile delinquency, offer various preventive approaches. The authors focus on prevention in the school environment and propose pedagogical strategies to reduce criminal activity among pupils.

The analysis of the School Portal website<sup>[6]</sup> emphasises the role of domestic violence as a key factor that can lead to aggressive and criminal behaviour among young people, identifies the mechanisms of how domestic violence affects the psyche of children are identified, and this portal proposes intervention programmes aimed at supporting victims of domestic violence.

The fact that juvenile delinquency is a real global problem is clearly confirmed by, for example, Fazilov<sup>[7]</sup>, Polglase and Lambie<sup>[8]</sup>, Ullman et al.<sup>[9]</sup> or Caulfield et al.<sup>[10]</sup>. The study by Young et al.<sup>[11]</sup> provides a comprehensive review of different interventions for juvenile delinquency around the world. It highlights the mixed effectiveness of multisystemic therapy (MST)

<sup>4</sup> Vanda Vávrová, „Za brutalitou mladostvých je aj domácí násilie” *Pravda*. 2016. <https://spravy.pravda.sk/domace/clanok/380920-za-bratalitou-mladistvych-je-aj-domace-nasilie/>.

<sup>5</sup> Peter Čonka, Andrea Čonková, „Kriminalita mladistvých a možnosti jej prevencie” *Pedagogika.sk*, No. 3 (2015): 160-175.

<sup>6</sup> Prevencia sociálno-patologických javov, 2024, <https://www.minedu.sk/prevencia-socialno-patologickych-javov/>.

<sup>7</sup> Gavrát Fazilov, „Youth Crime: The Main Problems and Ways to Solve Them” *Академические исследования в современной науке*, No. 13 (2024): 175-178.

<sup>8</sup> Liam Polglase, Ian Lambie, „A Sharp Decline in Youth Crime: Reviewing Trends in New Zealand’s Youth Offending Rates Between 1998 and 2019” *Current Issues in Criminal Justice*, No. 1 (2024): 42-62. <https://doi.org/10.1080/10345329.2023.2236730>.

<sup>9</sup> Rebecca Ullman, Stephanie T. Lereya, Frances Glendinning, Jessica Deighton, Ania Labno, Sarah Liverpool, Jessica Edbrooke-Childs, „Constructs Associated with Youth Crime and Violence Amongst 6–18-Year-Olds: A Systematic Review of Systematic Reviews” *Aggression and Violent Behavior*, 75 (2024): 101906. <https://doi.org/10.1016/j.avb.2023.101906>.

<sup>10</sup> Laura Caulfield, Sharon Brooks-Wilson, Jo Booth, Mark Monaghan, „Engaging Parents to Reduce Youth Violence: Evidence from a Youth Justice Board Pathfinder Programme” *Crime Prevention and Community Safety*, No. 4 (2023): 401-426. <https://doi.org/10.1057/s41300-023-00190-4>.

<sup>11</sup> Susan Young, Blair Greer, Ray Church, „Juvenile Delinquency, Welfare, Justice and Therapeutic Interventions: A Global Perspective” *BJP Psych Bulletin*, No. 1 (2017): 21-29. <https://doi.org/10.1192/pb.bp.115.052274>.

in different countries, suggesting that outcomes can vary significantly depending on the context and local approaches to juvenile justice. The study also discusses motivational interviewing and mindfulness-based interventions as promising approaches for substance abusers in juvenile offenders, highlighting the need for more research in these areas. Simões et al.<sup>[12]</sup> discuss various factors that contribute to juvenile delinquency, such as family dynamics, peer influence, and socioeconomic conditions. It also evaluates different prevention and intervention programmes, highlighting the importance of tailoring these programmes to the specific needs and contexts of the juvenile populations they serve. Enzmann et al.<sup>[13]</sup> present data from the second international study on self-report delinquency. This research provides insight into the patterns of youth delinquency in different countries, exploring the relationship between delinquency, victimisation, and police data. It underscores the importance of comparative research in understanding the global dimensions of juvenile delinquency and the effectiveness of various interventions. The study by DeLisi<sup>[14]</sup> examines the link between violent video games and juvenile delinquency. This study finds a correlation between exposure to violent video games and increased delinquent behaviour, suggesting the need for more research on the impact of media consumption on juvenile behaviour.

Not only the aforementioned studies and sources, but many others collectively contribute to a deeper understanding of juvenile delinquency and the effectiveness of various intervention strategies globally. They highlight the complexity of juvenile delinquency and the need for context-specific approaches to prevention and rehabilitation. In addition, they discuss not only the content of delinquency and crime, but also a number of individual

---

<sup>12</sup> Mário Simões, Joana Martins, Ana Paula Monteiro, Isabel Cristina Relva, „Juvenile Delinquency”, [in:] *The Palgrave Handbook of Global Social Problems* (Cham: Springer International Publishing, 2024), 1-24. [https://doi.org/10.1007/978-3-030-68127-2\\_29-1](https://doi.org/10.1007/978-3-030-68127-2_29-1).

<sup>13</sup> Dirk Enzmann, Ineke H. Marshall, Martin Killias, Jan Junger-Tas, Majone Steketee, Beata Gruszczynska, „Self-Reported Youth Delinquency in Europe and Beyond: First Results of the Second International Self-Report Delinquency Study in the Context of Police and Victimization Data” *European Journal of Criminology*, No. 2 (2010): 159-183. <https://doi.org/10.1177/1477370809358018>.

<sup>14</sup> Matt DeLisi, Michael G. Vaughn, Douglas A. Gentile, Craig A. Anderson, Jeffrey J. Shook, „Violent Video Games, Delinquency, and Youth Violence: New Evidence” *Youth Violence and Juvenile Justice*, No. 2 (2013): 132-142. <https://doi.org/10.1177/1541204012460874>.

theories about the causes of delinquent activity that have been developed since the 18th century”<sup>[15]</sup>.

On the subject of preventing or eliminating juvenile delinquency, the scientific literature is much poorer in knowledge and mostly contains general lessons that are repeated over and over again. It may be that creating a truly functioning preventive programme so that it works properly is extremely difficult and it is even more difficult to control its operation. Longer-term research is needed in individual areas, such as regions or cities.

It is obvious that it is necessary to start preventing delinquency as early as possible.

Preventive activity has the highest chance of success among juveniles. The so-called social pathological phenomena can appear already in preschool or at the beginning of school age. These phenomena include, for example, lying, defiance, petty theft, running away from home, etc. among young people. The existence of these phenomena may be a harbinger of a so-called delinquency career in some individuals<sup>[16]</sup>.

An addiction career usually begins at a young age with the first crime. This is also why it is necessary for every state to have a sophisticated crime prevention system<sup>[17]</sup>.

A criminal act, as a name for human illegal activity, is not only the behaviour of an individual expressed in law, but an activity that actually interferes with human coexistence, disrupting and degrading the perceived level in a significant way, causing damage that can be expressed financially. Non-property damage is often larger and more extensive, and the process of returning it to the state before the crime was committed is more lengthy and demanding<sup>[18]</sup>.

<sup>15</sup> Helena Válková, Josef Kuchta, Jana Hulmáková, *Základy kriminologie a trestní politiky* (C.H. Beck, 2019), 53.

<sup>16</sup> Eva Moravcová, Zuzana Podaná, Jiří Buriánek, *Delikvence mládeže: trendy a souvislosti* (Praha: Triton, 2015), 13.

<sup>17</sup> Helena Válková, Josef Kuchta, and Jana Hulmáková, *Základy kriminologie a trestní politiky* (C.H. Beck, 2019), 398.

<sup>18</sup> Vladimír Kratochvíl, „Případ, trestný čin, společenská škodlivost a vina v trestním právu“ *Právník*, No. 7 (2015); Jakub Drápal, „Ukládání trestů v případě jejich kumulace: Jak trestat pachatele, kteří spáchali další trestný čin předtím, než vykonali dříve uložené tresty“ *Jurisprudence*, 2 (2020); Piotr Bogdalski, Waldemar Jarczewski, „Crime and Criminality-Problems of Definition, the Ability

In the calendar year 2022, a total of almost 51,000 crimes were committed, and the total damage caused by such activities was calculated at 689,143,000 euros in Slovakia<sup>[19]</sup>. However, it is important to point out that these astronomical figures represent only those crimes and offences that were reported or discovered, properly registered and investigated. One can only guess how many crimes and delinquencies went undetected.

Offences were committed by an offender described in the criminal proceedings as a juvenile, i.e. the offender was 14 years old and under 18 years of age. A total of 696 offences were committed by minors, i.e. those under the age of 14<sup>[20]</sup>. In general, we can say that in 2022, children under the age of 18 committed a total of almost 2,500 crimes, which is about 5% of all registered crimes in Slovakia. If we divide the aggregate figures into types of crime, we find that in 2022, children committed 260 violent crimes, the largest representation being the crime of bodily harm. In the area of moral crime, 338 acts were committed, the largest of which was the crime of sexual abuse. Property crime, which was committed by up to 1,425 offenders who did not exceed 18 years of age, has the highest representation in the form of theft. Other crimes are distributed between economic crime and other types of crime.

The calendar year 2022 and the crimes that were committed during it can also be assessed from a point of view in which we focus not on the perpetrators, but on the victims. Of the total number of crimes, up to 1,017 cases involved a person under the age of 18, of whom 565 were between the ages of 14 and 18, and 452 crimes were committed against children under the age of 14. From the point of view of the type of crime, there were 355 violent crimes committed against children, 497 moral crimes and 63 property crimes, in which, as in the case of the monitored object of the perpetrators, the crimes of bodily harm, sexual abuse and theft have the highest representation. Table 1 provides an overview of the various statistical indicators

---

to Analyze this Issue in Conceptual and Structural Terms" *Przegląd Strategiczny*, 16 (2023): 103-115. <https://doi.org/10.14746/ps.2023.1.8>; Holly Nguyen, Rachel McNealey, Kyle J. Thomas, „The Contextual Generality of Crime: Workplace and Street Crime" *Journal of Research in Crime and Delinquency*, (2023). <https://doi.org/10.1177/00224278231166073>;

<sup>19</sup> Štatistika kriminality v Slovenskej republike, 2023. <https://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml>.

<sup>20</sup> Ibidem.

**Table 1.****Criminal acts committed in 2022 in Slovakia (own processing)**

	<b>Violent criminal acts / Harm to health</b>	<b>Moral criminal acts / Sexual abuse</b>	<b>Property criminal acts / Theft</b>
Crime committed by children	260 / 90	338 / 202	1425 / 1164
Crime committed against children	355 / 99	497 / 449	63/63

In 2023, 41,788 criminal acts were committed in Slovakia, and the total damage caused is estimated at 332,257,000 euros<sup>[21]</sup>. Of these, the three most monitored types of crime, violent, moral, and property criminal acts, represent a total of almost 23,500 criminal acts. Dividing the aforementioned criminal acts into the indicators we monitor, that is, into criminal activity committed by children and criminal activity committed against children, we find that 1,886 children committed any crime and 868 children were in the position of an abused person<sup>[22]</sup>.

Of the total number of crimes committed by children during the period, 175 crimes were of a violent nature, of which 81 were classified as intentional bodily harm. Moral crimes were committed by 280 offenders under the age of 18, of which up to 160 were of a sexual nature, and property crimes were committed by 1,130 juvenile and minor offenders. Of the above number of property crimes, 921 were thefts. This was followed by 295 violent crimes against children, of which 94 were assaults, 422 moral crimes, of which 368 were sexual assaults, and 52 property crimes, of which all 52 were thefts.

For the sake of simplicity and transparency, we have edited the statistical indicators in Table 2.

<sup>21</sup> Štatistika kriminality v Slovenskej republike, 2023. <https://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml>.

<sup>22</sup> Ibidem.

**Table 2.****Criminal acts committed in 2023 in Slovakia (own processing)**

	<b>Violent criminal acts / Harm to health</b>	<b>Moral criminal acts / Sexual abuse</b>	<b>Property criminal acts / Theft</b>
Crime committed by children	175 / 81	280 / 160	1130 / 921
Crime committed against children	295 / 94	422 / 368	52 / 52

Statistics clearly show the need to pay more attention to the field of prevention in secondary vocational schools, to strengthen the building of knowledge and skills in the field of law, which can be understood as a tool of protection. At the same time, it can be seen as a warning finger that, by acquiring at least basic knowledge of the legal field, warns the potential offender that the action being prepared is a crime, that the interest he/she is about to attack is protected by valid law, that its protection is enforceable in the sense of the law, and that its violation can be sanctioned.

Prevention of juvenile delinquency is a key aspect of the effort to reduce criminal activity among young people and, at the same time, to support their healthy development and integration into society. Effective prevention strategies can include a variety of approaches, from educational programmes to community initiatives. Eliminating juvenile delinquency is a complex task that requires a systematic approach and the cooperation of all interested parties. Preventive programmes that combine pedagogical, social, and legal strategies are shown to be the most effective. Long-term, well-implemented programmes can make a significant contribution to creating a safe and supportive school environment in which students can develop to their full potential.

For research on the prevention of juvenile delinquency in Slovakia, several relevant sources and studies can be found that deal with this problem. The Ministry of the Interior of the Slovak Republic provides comprehensive information on crime prevention, including specific measures aimed at young people. The aim of these measures is to reduce the level and severity of crime and social pathological phenomena and to increase the feeling of security among residents and visitors. Various documents and strategies related to crime prevention are available on the website of the Ministry of the Interior.

The Institute for Criminology and Social Prevention offers publications and studies that focus on a systemic approach to the prevention of juvenile delinquency. One of the important studies is the analysis of the Early Intervention System (SVI), which attempts a systemic approach to the prevention of delinquent behaviour in children and adolescents at risk. This publication by the authors Štěchová and Večerka<sup>[23]</sup> provides a detailed overview of the effectiveness of these interventions.

These sources provide important information and data for an in-depth study of youth crime prevention and offer concrete examples of successful strategies and programmes that can be applied not only in Slovakia, but also in a wider context.

The prevention of juvenile delinquency is an important issue that has been addressed by scientific studies from different perspectives. Some key studies and approaches to the prevention of juvenile delinquency are presented below:

- Seattle Social Development Project (SSDP): This project examined the long-term effects of youth-focused prevention programmes, such as developing skills and fostering social connections<sup>[24]</sup>. This project has shown that strengthening protective factors can reduce the risk of criminal behaviour among young people.
- Fast Track Project: This project focused on the long-term effects of interventions aimed at children with social and behavioural problems<sup>[25]</sup>. This project has shown that systematic intervention and support at an early age can reduce the risk of antisocial behaviour and crime in later life.
- Blueprints for Violence Prevention: This programme evaluates various prevention programmes in terms of their effectiveness and efficiency. Provides an overview of proven programmes that reduce the risk of criminal behaviour among young people based on empirical evidence<sup>[26]</sup>.

<sup>23</sup> Štěchová, Markéta, Kazimír Večerka. *Systémový přístup k prevenci kriminality mládeže* (Praha: Institut pro kriminologii a sociální prevenci, 2014).

<sup>24</sup> Seattle Social Development Project, 2023. <https://www.wsipp.wa.gov/Benefit-Cost/Program/70>.

<sup>25</sup> Fast Track Project, 2024. <https://fasttrackproject.org/>.

<sup>26</sup> Sharon Mihalic, et al. *Blueprints for violence prevention* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2004). <https://doi.org/10.1037/e302992005-001>

- Multisystemic Therapy (MST): MST is an intervention programme that focusses on adolescents with behavioural problems and their families<sup>[27]</sup>. This programme has shown that MST can reduce recidivism and improve family relationships.

Each of these programmes brings valuable knowledge about how preventive measures can be used to influence and reduce juvenile crime. These findings are further supported by long-term scientific research, and the relevant results are published in the studies of Hawkins et al.<sup>[28]</sup>, Farrington and Welsh<sup>[29]</sup>, Lösel and Farrington<sup>[30]</sup>, Farrington and Ttofi<sup>[31]</sup>, Petrosino et al.<sup>[32]</sup>, Van der Knaap and Vermunt<sup>[33]</sup>, Sweeten and Steinberg<sup>[34]</sup>, Vassallo et al.<sup>[35]</sup>,

<sup>27</sup> Multisystemic Therapy, 2024. <https://www.mstservices.com/>

<sup>28</sup> David J. Hawkins, Richard F. Catalano, Janet Y. Miller, „Risk and Protective Factors for Alcohol and other Drug Problems in Adolescence and Early Adulthood: Implications for Substance Abuse Prevention” *Psychological Bulletin*, No. 1 (1992): 64-105. <https://doi.org/10.1037/0033-2909.112.1.64>.

<sup>29</sup> David P. Farrington, Brandon C. Welsh, *Saving Children from a Life of Crime: Early Risk Factors and Effective Interventions* (Oxford: Oxford University Press, 2007). <https://doi.org/10.1093/acprof:oso/9780195304091.001.0001>.

<sup>30</sup> Fridrich Lösel, David P. Farrington, „Direct Protective and Buffering Protective Factors in the Development of Youth Violence” *American Journal of Preventive Medicine*, No. 2S1 (2012): 8-S23. <https://doi.org/10.1016/j.amepre.2012.04.029>.

<sup>31</sup> David P. Farrington, Maria M. Ttofi, „School-Based Programs to Reduce Bullying and Victimization” *Campbell Systematic Reviews*, No. 1 (2009): 1-90. <https://doi.org/10.4073/csr.2009.6>.

<sup>32</sup> Anthony Petrosino, Carolyn Turpin-Petrosino, James O. Finckenauer, „Well-Meaning Programs Can Have Harmful Effects! Lessons from Experiments of Programs Such as Scared Straight” *Crime & Delinquency*, No. 3 (2000): 354-379. <https://doi.org/10.1177/0011128700046003006>.

<sup>33</sup> Leontien M. Van der Knaap, Jeroen K. Vermunt, „Reconsidering the Measurement of Delinquency: Moving Toward a General Deviance Scale” *Criminology*, No. 3 (2007): 449-483.

<sup>34</sup> Gary Sweeten, Alex R. Piquero, Laurence Steinberg, „Age and the Explanation of Crime, Revisited” *Journal of Youth and Adolescence*, No. 6 (2013): 921-938. <https://doi.org/10.1007/s10964-013-9926-4>.

<sup>35</sup> Suzanne Vassallo, Daryl Smart, Ann Sanson, Sarah Cockfield, Alexandria Harris, Annie McIntyre, „Risk and Protective Factors for Different Intensities of Adolescent Substance Use: When Does the Prevention Paradox Apply?” *Drug and Alcohol Review*, No. 3 (2010): 278-287.

Gawrych<sup>[36]</sup> or Porubčanová and Paternáková<sup>[37]</sup>. These highly cited publications cover a wide range of topics and approaches to the prevention of juvenile delinquency, including risk and protective factors, the effectiveness of school programmes and the critical evaluation of various prevention initiatives. Each article focuses on different aspects and approaches to this important issue. From more up-to-date sources, Campie<sup>[38]</sup> should be mentioned, whose article focusses on the role of family and community in the prevention of juvenile delinquency based on a global review of evidence. Next, Shi and Cheung<sup>[39]</sup> researched various components of SEL programmes and their effectiveness in improving youth behaviour and reducing violence. Olsson et al.<sup>[40]</sup> dealt with the effectiveness of interventions in early childhood in the prevention of youth delinquent behavior, and Orlando and Farrington<sup>[41]</sup> observed the long-term effects of mentoring programmes on juvenile delinquent behaviour.

Therefore, we believe that it is more than necessary to take such measures and steps that will arouse interest in the observance of the law and raise the moral values of students at secondary vocational schools to such an extent that we will be able to suppress illegal activities in their infancy by means of adequate and timely prevention, and not only by sanctioning the perpetrators. The success of repressive units should be expressed in

<sup>36</sup> Roman Gawrych, „Usefulness of the Theory of the Organizational Cycle in Managerial and Professional Work” *Prawo i Więz*, No. 2 (2024): 409-431. <https://doi.org/10.36128/PRIW.VI49.913>.

<sup>37</sup> Dáša Porubčanová, Lenka Pasternáková, „Influence of Socially Disadvantaged Environment on Aggressiveness of Pupils at Primary Schools” *Acta Educationis Generalis*, 8.1 (2018): 104-115. <https://doi.org/10.2478/atd-2018-0007>.

<sup>38</sup> Patricia Campie, „Five Evidence-Based Takeaways Policymakers Need to Know About Preventing Youth Violence”, 2020. <https://www.air.org/resource/field/five-evidence-based-takeaways-policymakers-need-know-about-preventing-youth-violence>. [accessed: 28.06.2024].

<sup>39</sup> Jiannong Shi, Alan C. Cheung, „Effective Components of Social Emotional Learning Programs: A Meta-Analysis” *Journal of Youth and Adolescence*, No. 4 (2024): 755-771. <https://doi.org/10.1007/s10964-024-01942-7>.

<sup>40</sup> Tina M. Olsson, Niklas Långström, Therése Skoog, Cecilia Andrée Löfholm, Lina Leander, Anna Brolund, Knut Sundell, „Systematic Review and Meta-Analysis of Noninstitutional Psychosocial Interventions to Prevent Juvenile Criminal Recidivism” *Journal of Consulting and Clinical Psychology*, No. 6 (2021): 514.

<sup>41</sup> Maria S. Orlando, David P. Farrington, „Prevention of Youth Offending and Recidivism”, [in:] Maria S. Orlando, David P. Farrington, *Understanding and Preventing Recidivism of Young Offenders in Argentina* (Cham: Springer, 2024), 71-86. [https://doi.org/10.1007/978-3-031-54146-9\\_6](https://doi.org/10.1007/978-3-031-54146-9_6).

the degree of citizens' sense of security, not in the ratio of solved criminal acts to the overall idea.

### 3 | Material and Methods

The main objective of the research is to identify the relationship and connection between theoretical knowledge from the field of law, especially general concepts of normative legal acts and key concepts from the field of criminal law, and the personal experience of illegal activity of selected secondary vocational school students. Furthermore, with their experience in the implementation of preventive programmes, which are mainly organised by the Slovak Police, and in this context to define the status of secondary schools in Slovakia.

We will achieve the above by using qualitative and quantitative research based on the analysis of the current state of the problem solved in particular secondary schools and at the same time on the analysis of the preventive activities of the Police Force of the Slovak Republic as the primary repressive security force of the state. By comparing the detected state with current statistics of committed criminal acts, we determine those criminal acts that most often occur among juveniles aged 14 to 19, where they appear in a given illegal proceeding as the injured party or as the perpetrator of the given act. Thus, on the basis of the results of the questionnaire survey, we will determine the level of theoretical knowledge in the field of criminal law and find out the experience of secondary school students with illegal activities, which the legislation defines as criminal offences in terms of the applicable standards.

In addition, the following secondary objectives were formulated in relation to our research process in order to achieve relevant results:

- using a self-constructed knowledge test to find the level of normative legal acts with regard to the Criminal Code and selected criminal acts, which according to the Slovak Republic statistical tables of the Police Force are most often committed by juveniles 14 to 19 years of age (secondary school pupils),

- using a self-constructed questionnaire to find out the actual performance of preventive programmes in Slovak secondary schools and to find out the real experiences of pupils with illegal activities,
- to compare the level of knowledge, empirical experience, and actually implemented preventive programmes.

Based on the determined primary aim and its partial components, we defined a number of problems, which we summarised in several research questions.

- RQ1: Do secondary school pupils know the term „criminal act” and its characteristic features and the basic differences between a crime, a misdemeanor, or generally antisocial and illegal activity?
- RQ2: Do secondary school pupils have a dedicated teaching space for issues in the field of criminal law? Are they interested in learning about this issue?
- RQ3: Do secondary school pupils have personal experience with illegal activities, either as a victim or as a suspect/perpetrator?
- RQ4: Do secondary school pupils know the preventive programmes of the police force and participate in some preventive measures? If so, was this prevention useful to them and did it bring new knowledge?

In the context of the current state of the solved issue determined by the objective of our research, we established the following research assumptions.

- A1: Secondary school pupils do not have a sufficient level of theoretical knowledge in the field of criminal law and illegal activities.
- A2: The empirical experience of secondary school pupils with selected types of crime will be at a high level, but without sufficient theoretical awareness and naming of the problem.
- A3: Preventive activities carried out simultaneously in secondary schools, despite the wide-spectrum scope, do not cover specific pressing problems, which creates space for increasing crime in juveniles.

The research, which used a knowledge test and a structured questionnaire focusing on pupils' experiences of illegal activities and preventive activities, approached a relatively consistent sample of secondary school pupils. The secondary schools surveyed provide general and specialised

education and train the next working generation of today's teenagers. They develop moral values and instil basic principles of proper behaviour, thereby influencing their future paths in both their professional and personal lives.

The schools and their educational programmes attended by the surveyed pupils are comparable and of identical quality. Similarly, the sample of pupils is comparable, with an average age of  $M = 17.3$  years.

We obtained sufficient initial data based on the summary results of 100 knowledge tests and 100 questionnaires. We evaluated a total of 1,200 questions with 3,600 possible answers, which we can compare with the analysis of preventive activities organised by the Police Force of the Slovak Republic thus providing a comprehensive picture of the impact of preventive activities in secondary schools.

By comparing and analysing the results obtained, we can determine the causal relationship between legal knowledge, experience of illegal acts, and the need for targeted prevention at specific times and places. This will improve the effectiveness of preventive measures and reduce the negative impact of crimes committed by and against secondary school pupils.

The questionnaire consisted of 20 closed items with 5 possible answers, determining agreement or expressing positive, neutral or negative attitudes towards the given item. The scoring was done as follows: each test was assessed individually, determining the percentage success rate, with each question having an equal proportional weight towards the total. Then each anonymously completed individual test was aggregated and the success rate for each secondary school was evaluated.

The questionnaire was divided into two main parts: the first part, item no. 1-10 and 17, addressed pupils' experiences with illegal activities. The second part, items no. 11-16, reflecting the experiences with preventive activities in secondary schools organised by the Slovak Republic Police force. Items no. 18-20 were supplementary, expressing interest in working with the Police of the Slovak Republic.

Evaluation and processing of the responses to the questionnaire, similar to the knowledge test, were performed individually for each questionnaire, evaluating the responses that expressed positive, negative, and neutral attitudes toward the given item. Subsequently, a content analysis of individual responses was conducted for each secondary school. After processing the data for individual schools, their mutual comparison was performed, and a comprehensive summary was compiled.

## 4 | Results and discussion

The overall average percentage pass rate for all knowledge tests was 66.2%, which corresponds to almost 800 correct answers. These statistics represent a mathematical calculation based on the number of questions and the number of correct answers, without considering the type of question or any other aspect.

Furthermore, these statistics provide an answer to the key question RQ1, in which we state that students in vocational secondary schools understand the concept of a „criminal act” and its characteristics, as well as the basic differences between a criminal act, a misdemeanour and generally antisocial and illegal behaviour. However, this knowledge is not enough.

The first area of the questionnaire survey (items no. 1-10 and no. 17) focused on the pupils’ experiences with illegal activities. The summary results of this section are processed in Table 3.

**Table 3.**

**Aggregate number of responses to items focused on pupils’ experience with illegal activities (own processing)**

	Yes	Rather yes	Do not know	Rather not	Not
Item No.1	83	7	3	4	4
Item No.2	24	36	19	21	4
Item No.3	20	6	11	21	43
Item No.4	18	9	17	16	42
Item No.5	9	5	5	12	69
Item No.6	8	2	1	4	83
Item No.7	31	10	26	12	22
Item No.8	21	13	11	18	40
Item No.9	23	18	23	16	24
Item No.10	21	1	1	1	75
Item No.17	17	11	13	18	40

By conducting a comprehensive analysis of the questionnaire survey, we found that up to 83 out of the total 100 pupils had definitely encountered the term „criminal act” in their lives, and another 7 pupils chose the option „rather yes”. Thus, we can state that 90% of secondary school pupils understand the meaning of the term „criminal act” and have encountered it during their lives. A total of 60 pupils indicated in the questionnaire that

they believe that they have sufficient theoretical knowledge in the field of criminal law to differentiate their activities within the limits of the law.

Although this is a relatively high number and we cannot undermine its value, we must point out the other side of this finding: 40 pupils reported that they cannot accurately assess their activities in real-time and therefore cannot ensure that they stay within the legal boundaries. This is crucial since ignorance of the law is not considered a mitigating factor, let alone a justification for illegal behaviour. Therefore, we need to increase the number of positive responses in this area.

The exact opposite of the desired state is represented by item 3, which asked whether the pupils had ever been a victim of a criminal offence. Although negative responses predominated, 26 pupils around the age of 17 years had this experience. Mathematically, this means that every fourth secondary school pupil has been the victim of a crime.

Item No. 4 investigated the opposite position in the process of illegal behaviour. A total of 58 pupils denied ever having engaged in any illegal behaviour, while 27 pupils anonymously admitted to having done so.

Item No. 5 assessed intentional violations of current laws in Slovakia. In this case, the responses „rather not” and „not”, which we interpret as negative responses, prevailed. A total of 81 pupils responded in this way.

Whether a pupil had ever been sanctioned for illegal behaviour was explored in Item No. 6, where we received 87 negative responses and only 8 pupils answered definitively „yes”. In practice, sanctions are imposed for activities that can be classified as at least a misdemeanour. Various forms of sanctions can also be imposed for committing a criminal act.

Item No. 7 examined the perception and indirect experience of illegal behaviour. Positive and negative responses to this item were relatively balanced, with a ratio of 41:34 in favour of positive responses, supplemented by the neutral response „I don’t know”, which may indicate a lack of interest in their surroundings and events.

Two items, No. 8 and No. 9, focused on experience with illegal behaviour as a witness, mostly yielded negative responses. Therefore, pupils do not have significant personal experience as witnesses and did not assess whether the behaviour in question was a misdemeanour or a crime. The difference between positive and negative responses was not large, and potential prevention activities need to address this area to ensure that pupils, if they find themselves in such a situation, know how to react and have theoretical knowledge of how memory traces are used in criminal proceedings and related processes.

We enquired about the pupils' experiences with the police by obtaining the aforementioned memory traces in Item No. 10, where we wanted to know if the pupils had ever been interrogated. Only 22 pupils confirmed such an experience, 76 denied it, and 2 selected the option „I don't know”. The last item related to experiences with illegal behaviour examined whether pupils had ever helped to clarify or uncover any illegal activity during their lives. Being helpful in clarifying or uncovering does not necessarily mean being a witness or being interrogated, so we included this aspect as a separate item in the questionnaire survey. Only 17 pupils directly answered „yes”, and another 11 leaned towards the option „rather yes”.

The second part of the questionnaire survey (items 11-16) focused specifically on the pupils' experiences of preventive activities and we have summarised the results in Table 4 below.

**Table 4.**  
**Summary of responses to items focused on pupils' experiences with preventive activities (own processing)**

	Yes	Rather yes	Do not know	Rather not	Not
Item No.11	18	7	15	14	47
Item No.12	20	7	44	16	14
Item No.13	17	24	49	4	6
Item No.14	13	16	43	9	20
Item No.15	20	27	32	7	14
Item No.16	41	30	17	9	4

We began addressing the issue of experiences with preventive activities in Item No. 11, where we asked pupils if they had participated in a preventive event. The evaluation of this item from the analysis of the first school alone was quite alarming. As we continued to analyse other schools, it became clear that this was not an anomaly of one school, but that the current state of preventive activities in secondary schools is at a very low level. This is evidenced by the fact that of a total of 100 pupils, 61 gave a negative response, meaning that they had not participated in any preventive activity. If we add 15 neutral answers of „I don't know”, we get an alarming result of only 25 positive answers.

A neutral character prevailed in Item No. 12, where 44 pupils indicated that they did not know if the school, as an educational institution, organises preventive activities. The second most common response was negative,

with 30 pupils. The fewest responses, a total of 27, were in the options „yes” and „rather yes”. A similar neutral character was maintained in Item No. 13, where the response „I don’t know” to the question about the benefit of preventive activities was chosen by 49 pupils.

Item No. 14 examined the relationship between participation in a preventive activity and its subsequent influence on individual behaviour. Again, the option „I don’t know” was chosen by 43 pupils, 29 pupils denied any influence, and 29 pupils confirmed that the preventive activity had affected their subsequent behaviour. Taking into account the number of pupils who positively responded to participation in a preventive activity and comparing it with the positive response to this item, we can say that the preventive activity had a direct impact on the subsequent conscious behaviour of each participant. This comparison is purely mathematical, but highlights and directly points to the urgent need to organise preventive activities.

Item No. 15 investigated whether the preventive activity was a way for pupils to gain new knowledge, and nearly half, 47 pupils, chose positive answer options. Given the significantly lower number of pupils who reported participating in a preventive activity, we can assume that some positive responses were given without direct experience, based on the assumption that the activities would be beneficial if they attended them. We could neither confirm nor refute this during the analysis; it is a logical inference without tangible evidence.

The last item, No. 16, which focused on experiences with preventive activities, was designed for pupils to express agreement or disagreement with a given statement. Up to 71 pupils agreed that secondary school, as an educational institution, significantly positively influences the mindset of young people and is a substantial preventive tool against committing crimes.

Despite the not entirely positive results, we answered research question RQ4 by concluding that pupils are not aware of the preventive programmes of the Police of the Slovak Republic and do not participate in any preventive activities.

## 5 | Evaluation of research questions

From the evaluation of the knowledge tests, it is clear that the question, which is a prototype of a general law question and appears first in the test: „The Constitution of the Slovak Republic is?” with the correct answer „the highest law of the state”, received the most correct answers. Along with this question, questions from the category of general law overall achieved a high number of correct answers, which indicates a well-set content standard for subjects that cover the basics of law, fundamental legal norms, the functioning of the state, and similar topics.

On the other hand, except for one instance where this question was second to last in terms of the number of correct answers, Question No. 11, which asked who is considered a child under the Criminal Code, had the fewest correct answers. The Criminal Code, which represents the substantive aspect of the criminal justice system in the Slovak Republic, is perceived as a highly specialised area of knowledge, and its teaching is not included in the types of secondary schools that participated in our research. Although this question achieved only 4 correct answers out of 20 in some cases, no question was qualified without a correct answer, which we can evaluate as an indication that secondary school pupils have some, albeit very shallow, knowledge in this area. Therefore, we answer research question RQ2 by stating that, based on the results of the knowledge test, secondary school pupils have allocated classroom space to issues in the field of criminal law and are interested in knowledge on this topic. However, this space is not systematically used and does not clearly lead to the prevention of illegal behaviour.

The analysis of the part of the questionnaire that focused on pupils' experiences of illegal activities clearly showed that, despite their young age and almost carefree school life, pupils have sufficient personal experience of illegal activities, regardless of their nature, severity or position in them, thus providing a clear answer to research question RQ3.

Although we cannot close the doors of reality to illegal activities, such behaviour, and especially its effects on society, should not be part of their lives to such an extent. This fact can significantly influence their moral development, attitudes, and opinions. Not to mention personal experiences with illegal activities as victims, where the impact on the psyche of a person aged 17.3 years is extensive and significantly affects the normal development of their personality.

Taking into account their intellectual maturity and the level of theoretical knowledge in the field of general law and the specialised field of criminal law, which we verified with the knowledge test, the clear result of our survey is the need for a comprehensive and complete innovation of preventive activities in educational institutions of the assessed level. This includes the targeted content, the quantitative aspect and the overall reconstruction of its implementation.

## 6 | Assumptions verification

To verify Assumption A1: „Secondary school pupils do not have a sufficient level of theoretical knowledge in the field of criminal law and illegal activities”, we can use the answers to the research questions RQ1 and RQ2.

To verify Assumption A2: „The empirical experience of secondary school pupils with selected types of crimes will be at a high level, but without sufficient theoretical awareness and naming of the problem”, we can use the answers to research questions RQ2 and RQ3.

The evaluation of part of the research focused on pupils’ experiences with illegal activities clearly showed that pupils have sufficient personal experiences with this negative manifestation of human behaviour. This fact can significantly influence their moral development, attitudes, and opinions. Not to mention personal experiences with illegal activities as victims, where the impact on the psyche of a 17-year-old is extensive and significantly affects the normal development of his personality. It is therefore more than necessary to maximise prevention activities and to structure them according to real needs and to target them in terms of time and content, so that their effectiveness achieves real and measurable results. On this basis, we can confirm the validity of Assumptions A1 and A2.

Assumption A3: „Preventive activities carried out simultaneously in secondary schools, despite the wide spectrum scope, do not cover specific pressing problems, which creates space for increasing crime in juveniles” was evaluated through the answers to research question RQ4.

We found that the current state of preventive activities in selected secondary schools is at a very low level, as evidenced by the fact that of 100 pupils, 61 gave negative answers, indicating that they had not participated in any preventive activity. If we add 15 neutral responses of „I don’t

know”, the alarming result is only 25 positive responses. The relationship between participation in a preventive activity and its subsequent influence on individual behaviour was examined in item No. 14, where „I don't know” option prevailed. It was chosen by 43 pupils, 29 pupils refuted the influence, and another 29 confirmed that the preventive activity had an impact on their subsequent behaviour. Taking into account the number of pupils who answered positively to participating in a preventive activity and comparing it with the positive response to this item, we can state that the preventive activity had a direct impact on the subsequent behaviour of each participant. This comparison is purely mathematical exercise but highlights and directly points to the urgent need for preventive activities. Item No. 15 examined whether the preventive activity was a way for pupils to acquire new knowledge, and almost half, 47 pupils, gave positive answers. Given the significantly lower number of pupils who reported participating in a preventive activity, we can assume that positive responses were expressed without direct experience, based on conditioning, that is, they would be beneficial if they participated. We were unable to confirm or refute this fact in any way during the analysis; it is a logical inference without tangible evidence. The last item that focusses on the experience with preventive activities was designed for pupils to express agreement or disagreement with the presented statement. Up to 71 pupils agree that secondary school significantly influences the thinking of juveniles and is a significant preventive tool against committing crimes. This means that assumption A3 is also confirmed.

By comparing all the data obtained, we concluded that it is unequivocally necessary to increase preventive activities conducted in secondary schools and at the same time modify them to cover those criminal offences that, according to statistics, are most frequently committed by pupils and have the most significant negative impact on the pupils themselves.

The analysis of the collected data showed that the Police of the Slovak Republic currently has more than 20 different forms or topics of active preventive activities, which, however, are more or less only passive paper descriptions of possible preventive activities. The questionnaire focused on pupils' experiences with preventive activities clearly expressed a very low participation of pupils in such forms of education and presentation of police work. This fact was the most alarming finding in the entire survey, and the absolute disproportion between the number of preventive activities in the Police Forces' portfolio and the real experience of pupils clearly points to the need for rapid reconstruction of prevention. Lectures,

real-life demonstrations and the presentation of the most frequently committed crimes with a description of the modus operandi can significantly increase interest in this social phenomenon in an engaging way, and at the same time actively influence their moral values and level of education in the area studied.

Secondary schools, as educational institutions, do not have the means and competencies that fall under the police force, and therefore the need for mutual cooperation and interactivity is the right key to eliminate illegal behaviour. A young, educated, value-oriented, and morally pure individual should be the „product” that leaves the ranks of secondary schools and becomes an active and beneficial member of society.

From the analysis and subsequent comparison, it follows that prevention, in order to be a tool that eliminates illegal behaviour, must move from the textbook to real implementation among pupils. Adapting to pupils’ thinking and using their own language to highlight those problems that can and often do directly affect them, whether it involves minor violations of the law or violent, moral, or property-related criminal acts, which do not avoid secondary school pupils, as evidenced by crime statistics published by the Police Force of the Slovak Republic.

## 7 | Conclusion

A school, as an educational and formative institution supported by the education of the police force, represents an effective tool to reduce illegal activities in society. Harmonising the school schedule with activities from the Slovak Police Prevention Department creates an efficient means of suppressing crime based on knowledge and education. Both institutions, school and police, must combine their theoretical knowledge and practical skills to achieve a common goal: to ensure safety and order through young, educated and promising individuals.

Without an active preventive policy in schools, the incidence of illegal activities cannot be expected to decrease, as schools have a significant influence on the mindset of juveniles and are an important preventive tool. Just as the main goal of local governments is a satisfied citizen, the goal of schools is an educated and useful graduate for society. The task of

the Police of the Slovak Republic is to contribute to the creation of a safe environment that allows for a dignified life.

Although the success of prevention activities cannot be measured precisely, it is clear that it is essential to continue the trend towards prevention. It is necessary to develop moral and legal awareness and to regularly update preventive activities. The combination of these preventive measures with repressive measures aims to achieve a society in which the police do not have to intervene in everyday life, but rather monitor its peaceful course.

Educational programmes aimed at preventing juvenile delinquency, implemented in schools and supported by police activities, play a crucial role in shaping responsible and law-abiding citizens. Through education, young people can be provided with the tools and knowledge necessary to identify and avoid risky situations, thereby contributing to a general reduction in crime.

It is important that schools and police forces continue to develop and strengthen their partnerships. By working together, they can create a comprehensive approach to crime prevention that not only increases safety but also promotes positive social change. The combined efforts of these institutions help to create a stable and safe society where young people have the opportunity to develop in a safe and supportive environment.

In conclusion, the integration of education and policing initiatives is a crucial step towards effective crime prevention. This requires not only joint planning and implementation of prevention programmes, but also continuous evaluation and adaptation of strategies based on the current needs and challenges of society.

## Bibliography

- Bogdalski Piotr, Waldemar Jarczewski, „Crime and Criminality—Problems of Definition, the Ability to Analyze this Issue in Conceptual and Structural Terms” *Przegląd Strategiczny*, 16 (2023): 103–115. <https://doi.org/10.14746/ps.2023.1.8>.
- Campie Patricia, Five Evidence-Based Takeaways Policymakers Need to Know About Preventing Youth Violence, 2020. <https://www.air.org/resource/field/five-evidence-based-takeaways-policymakers-need-know-about-preventing-youth-violence>.

- Caulfield Laura, Sharon Brooks-Wilson, Jo Booth, Mark Monaghan, „Engaging Parents to Reduce Youth Violence: Evidence from a Youth Justice Board Pathfinder Programme” *Crime Prevention and Community Safety*, No. 4 (2023): 401-426. <https://doi.org/10.1057/s41300-023-00190-4>.
- Chromý Jakub, *Kriminalita páchaná na mládeži: aktuální jevy a nová právní úprava v České republice*. Praha: Linde, 2010.
- Čonka Peter, Andrea Čonková, „Kriminalita mladistvých a možnosti jej prevencie” *Pedagogika. sk*, No. 3 (2015): 160-175.
- DeLisi Matt, Michael G. Vaughn, Douglas A. Gentile, Craig A. Anderson, Jeffrey J. Shook, „Violent Video Games, Delinquency, and Youth Violence: New Evidence” *Youth Violence and Juvenile Justice*, No. 2 (2013): 132-142. <https://doi.org/10.1177/1541204012460874>.
- Devi Shakuntala. *Book of numbers*. Orient Paperbacks, 2006.
- Drápal Jakub, „Ukládání trestů v případě jejich kumulace: Jak trestat pachatele, kteří spáchali další trestný čin předtím, než vykonali dříve uložené tresty” *Jurisprudence*, 2 (2020).
- Enzmann Dirk, Ineke H. Marshall, Martin Killias, Jan Junger-Tas, Majone Steketee, Beata Gruszczynska, „Self-Reported Youth Delinquency in Europe and Beyond: First Results of the Second International Self-Report Delinquency Study in the Context of Police and Victimization Data” *European Journal of Criminology*, No. 2 (2010): 159-183. <https://doi.org/10.1177/1477370809358018>.
- Farrington David P., Brandon C. Welsh, *Saving Children from a Life of Crime: Early Risk Factors and Effective Interventions*. Oxford: Oxford University Press, 2007. <https://doi.org/10.1093/acprof:oso/9780195304091.001.0001>.
- Farrington David P., Maria M. Ttofi, „School-Based Programmes to Reduce Bullying and Victimization” *Campbell Systematic Reviews*, No. 1 (2009): 1-90. <https://doi.org/10.4073/csr.2009.6>.
- Fast Track Project, 2024. <https://fasttrackproject.org/>.
- Fazilov Gayrat, „Youth Crime: The Main Problems and Ways to Solve Them” *Академические исследования в современной науке*, No. 13 (2024): 175-178.
- Firstová Jana, *Kriminalita mládeže v sociálních souvislostech*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2014.
- Gawrych Roman, „Usefulness of the Theory of the Organizational Cycle in Managerial and Professional Work” *Prawo i Więz*, No. 2 (2024): 409-431. <https://doi.org/10.36128/PRIWVI49.913>.
- Hawkins J. David, Richard F. Catalano, Janet Y. Miller, „Risk and Protective Factors for Alcohol and other Drug Problems in Adolescence and Early Adulthood: Implications for Substance Abuse Prevention” *Psychological Bulletin*, No. 1 (1992): 64-105. <https://doi.org/10.1037/0033-2909.112.1.64>.

- Kratochvíl Vladimír, „Případ, trestný čin, společenská škodlivost a vina v trestním právu” *Právnik*, No. 7 (2015).
- Lösel Friedrich, David P. Farrington, „Direct Protective and Buffering Protective Factors in the Development of Youth Violence” *American Journal of Preventive Medicine*, No. 2S1 (2012): 8-S23. <https://doi.org/10.1016/j.amepre.2012.04.029>.
- Martínek Zdeněk, *Agresivita a kriminalita školní mládeže*. Praha: Grada Publishing as, 2009.
- Mihalic Sharon et al. *Blueprints for violence prevention*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2004. <https://doi.org/10.1037/e302992005-001>.
- Moravcová Eva, Zuzana Podaná, Jiří Buriánek. *Delikvence mládeže: trendy a souvislosti*. Praha: Triton, 2015.
- Multisystemic Therapy*, 2024. <https://www.mstservices.com/>.
- Nguyen Holly, Rachel McNealey, Kyle J. Thomas, „The Contextual Generality of Crime: Workplace and Street Crime” *Journal of Research in Crime and Delinquency*, (2023). <https://doi.org/10.1177/00224278231166073>.
- Oberů Jaroslav, Gustav Ušiak, Pavel Sečka. *Kriminalita mládeže*. Strážnice: Veřejnosprávní vzdělávací institut o.p.s., 2016.
- Olsson Tina M., Niklas Långström, Therése Skoog, Cecilia Andrée Löfholm, Lina Leander, Anna Brolund, Knut Sundell, „Systematic Review and Meta-Analysis of Noninstitutional Psychosocial Interventions to Prevent Juvenile Criminal Recidivism” *Journal of Consulting and Clinical Psychology*, No. 6 (2021): 514.
- Orlando Maria S., David P. Farrington, „Prevention of Youth Offending and Recidivism”, [in:] Maria S. Orlando, David P. Farrington, *Understanding and Preventing Recidivism of Young Offenders in Argentina* (Cham: Springer, 2024), 71-86. [https://doi.org/10.1007/978-3-031-54146-9\\_6](https://doi.org/10.1007/978-3-031-54146-9_6).
- Porubčanová Dáša, Lenka Pasternáková, „Influence of Socially Disadvantaged Environment on Aggressiveness of Pupils at Primary Schools” *Acta Educationis Generalis*, 8.1 (2018): 104-115. <https://doi.org/10.2478/atd-2018-0007>.
- Petrosino Anthony, Carolyn Turpin-Petrosino, James O. Finckenauer, „Well-Meaning Programmes Can Have Harmful Effects! Lessons from Experiments of Programmes Such as Scared Straight” *Crime & Delinquency*, No. 3 (2000): 354-379. <https://doi.org/10.1177/0011128700046003006>.
- Polglase Liam, Ian Lambie, „A Sharp Decline in Youth Crime: Reviewing Trends in New Zealand’s Youth Offending Rates Between 1998 and 2019” *Current Issues in Criminal Justice*, No. 1 (2024): 42-62. <https://doi.org/10.1080/10345329.2023.2236730>.

- Prevencia sociálno-patologických javov*, 2024. <https://www.minedu.sk/prevencia-socialno-patologickych-javov/>.
- Seattle Social Development Project*, 2023. <https://www.wsipp.wa.gov/BenefitCost/Program/70>.
- Shi Jiannong, Alan C. Cheung, „Effective Components of Social Emotional Learning Programmes: A Meta-Analysis” *Journal of Youth and Adolescence*, No. 4 (2024): 755-771. <https://doi.org/10.1007/s10964-024-01942-7>.
- Simões Mário, Joana Martins, Ana Paula Monteiro, Isabel Cristina Relva, „Juvenile Delinquency”, [in:] *The Palgrave Handbook of Global Social Problems*. 1-24. Cham: Springer International Publishing, 2024. [https://doi.org/10.1007/978-3-030-68127-2\\_29-1](https://doi.org/10.1007/978-3-030-68127-2_29-1).
- Sweeten Gary, Alex R. Piquero, Laurence Steinberg, „Age and the Explanation of Crime, Revisited” *Journal of Youth and Adolescence*, No. 6 (2013): 921-938. <https://doi.org/10.1007/s10964-013-9926-4>.
- Štatistika kriminality v Slovenskej republikę, 2023. <https://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml>.
- Štěchová Markéta, Kazimír Večerka. *Systémový přístup k prevenci kriminality mládeže*. Praha: Institut pro kriminologii a sociální prevenci, 2014.
- Tomčíková Tatiana, *Kriminalita mládeže*. Banská Bystrica: Univerzita Mateja Bela v Banskej Bystrici, Pedagogická fakulta, 2012.
- Ullman Rebecca, Stephanie T. Lereya, Frances Glendinnin, Jessica Deighton, Ania Labno, Sarah Liverpool, Jessica Edbrooke-Childs, „Constructs Associated with Youth Crime and Violence Amongst 6-18-Year-Olds: A Systematic Review of Systematic Reviews” *Aggression and Violent Behavior*, 75 (2024): 101906. <https://doi.org/10.1016/j.avb.2023.101906>.
- Válková Helena, Josef Kuchta, Jana Hulmáková. *Základy kriminologie a trestní politiky*. C.H. Beck, 2019.
- Van der Knaap, Leontien M., Jeroen K. Vermunt, „Reconsidering the Measurement of Delinquency: Moving Toward a General Deviance Scale” *Criminology*, No. 3 (2007): 449-483.
- Vassallo Suzanne, Daryl Smart, Ann Sanson, Sarah Cockfield, Alexandria Harris, Annie McIntyre, „Risk and Protective Factors for Different Intensities of Adolescent Substance Use: When Does the Prevention Paradox Apply?” *Drug and Alcohol Review*, No. 3 (2010): 278-287.
- Vávrová Vanda, „Za brutalitou mladostvých je aj domácí násilie” *Pravda*, 2016. <https://spravy.pravda.sk/domace/clanok/380920-za-brutalitou-mladistvych-je-aj-domace-nasilie/>.

Young Susan, Blair Greer, Ray Church, „Juvenile Delinquency, Welfare, Justice and Therapeutic Interventions: A Global Perspective” *BJP Psych Bulletin*, No. 1 (2017): 21-29. <https://doi.org/10.1192/pb.bp.115.052274>.

Zoubková Ivana, *Kontrola kriminality mládeže*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2002.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

# The System of Factors Determining the Prevention and Counteraction of Corruption in Estonia

## Abstract

The aim of the paper is to develop a system of factors that have influenced anti-corruption processes in Estonia. The factors that have contributed to the progress and the factors that hinder Estonia from achieving zero corruption are identified. Special aspects of anti-corruption reforms in Estonia at the institutional level are identified. The methodological basis of the research is neo-institutionalism and axiological analysis; they allowed to construct a system of factors of two types: (1) those that contributed/contribute to the anti-corruption progress of Estonia (2) those that hamper Estonia's advance towards zero corruption.

**KEYWORDS:** Estonia, corruption, prevention and counteraction of corruption, anti-corruption policy, anti-corruption values

**NATALIIA KHOMA**, ScD in Political Science, Lviv Polytechnic National University,  
ORCID – oooo-ooo2-2507-5741, e-mail: nataliia.m.khoma@lpnu.ua

**IHOR VDOVYCHYN**, ScD in Political Science, Ivan Franko National University of Lviv,  
ORCID – oooo-ooo2-3210-7684, e-mail: ihor.vdovychyn@lnu.edu.ua

## 1 | Introduction

Nowadays, Estonia is not only the most successful country in the region of Central and Eastern Europe and the post-Soviet space in terms of numerous development parameters, but it is also rapidly strengthening its position

in the EU. This state of affairs, as evidenced by a number of indices of democratic transformation, expresses mainly upward dynamics. Certain problems of adjustment to democratic standards are now evident in Estonia but the large-scale progress made over the last three decades cannot be disregarded.

One of the areas where Estonia is making advances is the prevention and combat of corruption. This refers primarily to petty, bureaucratic corruption, and to a lesser extent – political corruption, high-level corruption. Progress in anti-corruption is consistent and steady, which makes Estonia a unique case, as in most of the new EU Member States in Central and Eastern Europe, as well as in the post-Soviet states, the progressive dynamic is either insignificant or volatile. In many countries, the anti-corruption progress made in certain years has been replaced by recession or prolonged stagnation.

Estonia's progress in fighting corruption is best illustrated by its position in the Corruption Perceptions Index. Almost every year, Transparency International records an improvement in Estonia's position. If in 2012 Estonia scored 64 points, in 2020 – already 75 points. However, according to the results of 2021, the positions worsened (74 points; for comparison, the EU average is 66 points out of 100 possible). The case of Estonia in 2021 is special, because although the country lost one point in a year, it still made progress against the background of other countries: Estonia rose from the 17th to 13th place in the ranking. However, this rise is not so much the result of Estonia's progress as it is the result of the stagnation of other countries that were previously in higher positions than Estonia (Australia, Austria, Belgium, Canada, etc.). According to the results of the 2022 index, Estonia dropped to 14th place, although the result (74 points) was maintained.

In the 2023 Corruption Perceptions Index, Estonia achieved its highest score since 2012 and is currently ranked 12th in the world. In a European comparison, Estonia is one of the two countries whose score has slightly improved in one year. Estonia scored 76 points. This is a very high score, especially considering that in 2023 anti-corruption efforts either stagnated or regressed in more than three-quarters of the countries assessed.

Despite these fluctuations in the Corruption Perceptions Index, Estonia can be included in the small group of countries that have made progress in preventing and fighting corruption over the past decade<sup>[1]</sup>. This is

<sup>1</sup> Anatolijs Krivins, Andrejs Vilks, Aldona Kipane, „Corruption perception trends: European Union countries. Access to science, business, innovation in the

important because, on a global scale, progress in combating corruption is not observed; even the most successful democracies have delayed the anti-corruption progress, especially in the public sector.

Nonetheless, Estonia manages to control corruption better than not only other young EU democracies in Central and Eastern Europe, but also countries with long-term EU membership and developed democratic traditions (Greece, Italy, Spain, Portugal, France, etc.). Certainly, neither the small territory of the state (45 thousand sq. km) nor the small population (1.3 million people) can explain this. The explanation of Estonia's success story should be sought in a number of reasons, first and foremost institutional and value-based.

Estonia is currently positioned as a state that has „demonstrated a remarkable transition from highly corrupt regimes to less corrupt environments”<sup>[2]</sup>. The fact that the problems exist, even if they seem insignificant against the background of failed anti-corruption strategies of many countries, may be evidenced by the message of former Estonian Kersti Kaljulaid: „Let us make an honest, caring, corruption-free and self-confident Estonia”. She called on Estonia to release itself of corruption and said: „Corruption cripples development, and government leaders’ concessions to chummy businesspeople drives away honest entrepreneurs. In the end, we lose both our own and those who once praised Estonia’s fair business climate and moved their operations here because of it”<sup>[3]</sup>. It is clear from these messages that corruption-free Estonia is so far a goal, but not yet a reality, although the achieved anti-corruption successes may give the false impression of the already stable high standards of integrity of government, business and citizens.

An objective analysis involves identifying not only the factors of success, but also the factors that slow down the movement towards zero corruption. Evidently, even in such a successful country as Estonia today, there are vulnerable zones to corruption, legislative gaps, some problems with tolerating corruption, etc. It is important to take into account the fact that

---

digital economy” *ACCESS Journal: Access to Science, Business, Innovation in Digital Economy*, No. 1 (2024): 63.

<sup>2</sup> Alexander Kupatadze, „Accounting for Diverging Paths in Most Similar Cases: Corruption in Baltics and Caucasus” *Crime, Law and Social Change*, No. 2 (2017): 188.

<sup>3</sup> Helen Wright, *Let us make an honest, caring, corruption-free and self-confident Estonia*, <https://news.err.ee/1608121357/let-us-make-an-honest-caring-corruption-free-and-self-confident-estonia>.

corruption is taking on new forms, which must be properly addressed by both state and non-state actors.

Therefore, on the one hand, it is necessary to explain the nature of such steady progress of Estonia in the fight against corruption against the background of less successful strategies of other states. On the other hand, it is essential to find out the reasons that hinder Estonia's achievement of zero tolerance for corruption. A number of research questions arise. What factors have positively/negatively influenced the processes of preventing and combating corruption in Estonia? Are these factors unique, characteristic of the Estonian case only? What are the problems in the field of corruption and counteraction to it in Estonia today? Are the actions of the Estonian state and non-state actors sufficient to counteract corruption challenges? Do the values of Estonians meet the democratic standards regarding intolerance for corruption? In general, several open issues on corruption and anti-corruption in Estonia actualize the study of the country's experience and evaluation of its anti-corruption policy.

## 2 | Research methodology

The study of Estonia is an important part of the comparative analysis of democratic transformation in the post-totalitarian states of Central and Eastern Europe. The methodological basis of the study is primarily neo-institutionalism and axiological analysis. Neo-institutionalism provides an opportunity to assess the extent of corruption and the effectiveness of mechanisms to minimize it through the efforts of state and non-state actors in Estonia. Axiological analysis is used to study the representation of anti-corruption values in the political and legal culture of Estonians. Therefore, the research aims to clarify the specifics of institutional reforms in Estonia in terms of preventing and combating corruption, as well as to examine how values at the level of the establishment and the population influence/influence the effectiveness of anti-corruption strategies, the emergence of new corruption challenges. The synthesis of neo-institutionalism and axiological analysis made it possible to construct a system of factors of two types: (1) those that contributed/contribute to Estonia's anti-corruption progress; (2) those that slow down Estonia's movement towards zero corruption.

The analysis of historiography shows that Estonia has been studied primarily in the context of democratic transition, fulfilment of the Copenhagen criteria, and adaptation to EU standards. Corruption as an important component of these processes has also been the focus of research, but the study of Estonia's anti-corruption experience needs to be deepened, especially in the context of the dynamic emergence of new corruption risks.

### 3

## Anti-corruption reforms of the post-Soviet transformation period and fulfilment of EU membership criteria

Estonia has long positioned itself as part of the West. This has happened historically. Let us consider at least a few facts. Estonian peasants were freed from serfdom at the beginning of the 19th century, much earlier than in the Russian Empire; by the mid-19th century they were already establishing their own farms. Estonia's democratization has been influenced by its long-standing relations with Finland and the possibility (since 1958) of watching Finnish television. In addition, during the Soviet period there was a regular ferry service for Finnish tourists to Tallinn. All this was a small window to Europe that other Soviet republics did not have<sup>[4]</sup>.

The scale of corruption that existed in the early 1990s, and schemes for obtaining undue benefits inherited from the USSR, could become a tangible deterrent to the democratization of Estonia. There were risks of such a threatening trend for young democracies as state capture<sup>[5]</sup>, one of the most dangerous manifestations of political corruption. However, it should be noted that the risks of state capture in Estonia were still lower than in Latvia<sup>[6]</sup> and Lithuania. The Baltic region also faced the problem of

<sup>4</sup> Li Bennich-Björkman, „State Capture in the Baltics: Identity, International Role Models and Network Formation”, [w:] *The Baltic Sea Region: Cultures, Politics, Societies*, red. Witold Maciejewski (Uppsala: The Baltic University Press, 2002), 345–369.

<sup>5</sup> Ibidem.

<sup>6</sup> Khoma Natalia, Ihor Vdovychyn, „Slow Strengthening of Latvia's Resilience in Preventing and Combating Corruption: an Analysis of Causes” *Przegląd Wschodnioeuropejski*, No. 1 (2023): 87–100.

the shadow economy (grey area) for years<sup>[7]</sup>] and Estonia had to respond to this challenge.

The potential benefits that Estonia and its communities could gain after proclaiming independence, through minimizing corrupt practices, were clear<sup>[8]</sup>. Critical assessments of Estonia by the West were taken into account, as a result of which the country was quickly described as a success story<sup>[9]</sup>. Consequently, Estonia began to be considered a state that rapidly moved from particularism to transparent governance<sup>[10]</sup>. The prospect of Estonia's EU membership was particular stimulus for anti-corruption reforms.

There was a consensus in the Estonian political establishment that the window of opportunity for the state would close fast, therefore the changes should be as quick and radical as possible. Immediately from the beginning of the development of an independent state, the Estonian government was consistent in its task of transforming Estonia into a European state with a free market economy, liberal way of governing, and strong emphasis on individual freedom. Certainly, there was little intra-elite polarization in the political elite at various stages of the development of the independent state, but consensus was reached on Estonia's main goals and vectors of development.

The situation with systemic corruption in Estonia was changed by the framework conditions for the functioning of the state apparatus, initiated by Prime Minister Mart Laar in 1992-1995. The status of the Estonian language as the state language changed the requirements for civil servants. Large-scale personnel changes took place: Russian-speaking officials brought up under the Soviet regime were replaced by young and resolutely pro-European Estonians. This destroyed decades-old Soviet corruption networks. Simultaneously, a rigorous judicial reform was carried out, as a result of which most of the „old” judges were replaced. Laar

<sup>7</sup> Frank Wadsworth, Swartz Brenda, Jerry Wheat, „Corruption in the Baltic State Region” *International Business & Economics Research Journal*, No. 2 (2010): 109-116.

<sup>8</sup> Beverley Earle, „Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What is to be Done” *Beverley Earle Cornell International Law Journal*, No. 3 (2000): 483-513.

<sup>9</sup> Anton Steen, „Do Elite Beliefs Matter? Elites and Economic Reforms in the Baltic States and Russia”, [in:] *Comparative Studies of Social and Political Elites*, ed. Fredric Engelstad, Trygve Gulbrandsen (Bingley: Emerald Group Publishing Limited, 2006), 79-102.

<sup>10</sup> Alina Mungiu-Pippidi, *Corruption as Social Order, World Development Report Background Paper* (Washington: World Bank, 2017).

---

recalls in his memoirs that old apparatchiks found it hard to adapt to the new requirements:

If you have based your entire career not on honest work but on lies and deceit, then it is unrealistic to expect that you will now start to change. The state apparatus [...] can only transplant corruption and „telephone rights” from the old system to the new one<sup>[11]</sup>.

As there was a huge public demand in Estonia for the removal from power of Soviet-born personnel, Prime Minister Laar's reforms under the slogan „Prats puhtaks!” („Clear the place!”), were supported and became the basis for preventing and combating, above all, bureaucratic, judicial corruption. Therefore, such changes became possible due to the political will of the Estonian leadership to replenish the country's leading elite with personnel not related to corruption and the old elite, as well as due to public support for these processes.

An important factor in the success of the reforms was the fact that at the beginning of post-totalitarian modernization in Estonia, the elite was quite nationally oriented, despite the fact that the Soviet government had carried out continuous repression. Particularly, one of the largest purges against the Estonian national elite took place in 1949-1953, as part of the Sovietization of the Baltic states<sup>[12]</sup>. However, as of the end of the 1980s, ethnic Estonians held 82.2 percent of administrative managerial positions<sup>[13]</sup>. For comparison: at the same time in Latvia, only 63.1 percent of administrative managerial posts were held by ethnic Latvians<sup>[14]</sup>.

---

<sup>11</sup> Mart Laar, *Little country that could* (St. Edmundsbury: St. Edmundsbury Press, 2002).

<sup>12</sup> Romuald Misiūnas, Rein Taagepera, *The Baltic States. Years of Dependence. 1940-1990* (London: Hurst and Company, 1993); Aleksandras Shtromas, „The Baltic States as Soviet Republics: Tensions and Contradictions”, [in:] *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania*, ed. Graham Smith (New York: St. Martin's Press, 1994), 86-117.

<sup>13</sup> Alexander Kupatadze, „Accounting for Diverging Paths in Most Similar Cases: Corruption in Baltics and Caucasus” *Crime, Law and Social Change*, No 2 (2017):198.

<sup>14</sup> Graham Smith, Assland Aadne, Richard Mole, „Statehood, Ethnic Relations and Citizenship in the Baltic States. The National Self-Determination of Estonia, Latvia and Lithuania”, [w:] *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania*, ed. Graham Smith (New York: St. Martin's Press, 1994), 181-205.

After the collapse of the USSR, the Estonian elite was still relatively young and therefore more courageous in its decisions, willing to take risks, with strong motivation and the ability to see alternative solutions. It was a new type of elite, most of whom had little management experience, and they made mistakes. Yet, that elite was not long captive to the Soviet past, did not preserve or reproduce examples of Soviet political and legal culture. In our opinion, the small number of representatives of the old nomenklatura elite in the power of independent Estonia became a decisive factor in the further anti-corruption progress of this state.

It is worth noting the importance not only of the young Westernized reformers coming to power, but also of their solidarity. The Estonian elite set itself the task of moving away from „Sovietness” and any resemblance to Russia. The strong integration of the national elite was not least due to the Estonians’ fear of a possible restoration of the supremacy of Russia in the former empire. Thus, successful reforms in Estonia were led by a structurally and ideologically cohesive, young political elite without a communist legacy. This ensured a consensus on the goals and a high level of organization within the elite<sup>[15]</sup>.

The personnel reform in Estonia was complemented by other innovations, including: (1) the introduction of proportional taxation, which simplified tax administration, economically stimulated the reduction of shadow operations, and consequently the elimination of destructive informal practices of corruption; (2) the transition from the authorization model of regulating the activities of business agents (the powers of the official are almost unlimited in terms of issuing permits for a particular activity) to notification and control (most permits are issued by „tacit” consent, and the control functions of officials are clearly and comprehensively defined by law).

The level of corruption in Estonia was also influenced by lustration. It was not carried out in its pure form, but after 1991 the model of national-state lustration was actually implemented through the legislative regulation of the institution of citizenship. The de-sovietization and de-nomenclature of state power was carried out through national-state lustration, which created the conditions for a comprehensive fight against corruption.

The presence of a large Estonian diaspora in the Nordic countries, especially Sweden, was also a favorable factor for successful democratic

<sup>15</sup> Aleksander Kupatadze, „Accounting for Diverging Paths in Most Similar Cases: Corruption in Baltics and Caucasus” *Crime, Law and Social Change*, No 2 (2017): 199.

transformation. This facilitated adaptation to Western models during the transition period of the 1990s<sup>[16]</sup>. The Estonian diaspora in the Scandinavian countries was much larger than that of Latvians or Lithuanians. This also promoted more „Nordic identity” of Estonia and political elites often emphasized that „Estonia is a Nordic country”<sup>[17]</sup>.

Thus, even at the start of post-Soviet democratization, it was possible to dramatically reduce the influence of the old guard in the post-transition milieu and hence to neutralize its destructive capability to openly or latently undermine reforms. The rapid transition from particularism to transparent methods of governance was due to the destruction of Soviet corruption networks in the 1990s, nation-state lustration, large-scale staff rotation, and the cleansing of the judiciary. Subsequently, bureaucratic corruption was minimized through the introduction of e-government.

Estonia’s radical break since independence with all that was associated with the USSR and Russia contributed to a significant weakening of the collusive and corrupt networks that linked top politicians and big business. The break with the past opened up opportunities for the younger generation to take leadership positions in government and accelerate the pro-democratic transformation of state and society. In addition, the then relatively young Estonian elite was characterized by ideological solidarity, a high level of interpersonal trust, a democratic political and legal culture, and a strong political will to build a democratic state. This was crucial not only for the design of reforms, but also for their practical implementation.

Estonia’s success in preventing and combating corruption is conditioned by the government’s strong separation from the Soviet past and its focus on integration with the West. For Estonia, the desire to join the EU became a major catalyst for reforms in all spheres of life, including the fight against corruption<sup>[18]</sup>.

The transition to e-government has had a significant impact on minimizing corruption in Estonia. Researchers have repeatedly pointed out the link between corruption and digital technology and demonstrated the

<sup>16</sup> Ole Nørgaard, Lars Johannsen, Mette Skak, H. Sørensen René, *The Baltic States after Independence* (Cheltenham: Edward Elgar Publishing, 1999).

<sup>17</sup> Aleksander Kupatadze, „Accounting for Diverging Paths in Most Similar Cases: Corruption in Baltics and Caucasus” *Crime, Law and Social Change*, No. 2 (2017): 202.

<sup>18</sup> Mert Kartal, „Accounting for the bad apples: the EU’s impact on national corruption before and after accession”. *Journal of European Public Policy*, No 6 (2014): 941-959.

influence of e-government in reducing corruption<sup>[19]</sup>. The main argument is e-government. E-government ensures high transparency and thus reduces corruption. E-government drives out corrupt officials, at least middle and lower level officials. According to the former president of Estonia T.H. Ilves „you can't bribe a computer”<sup>[20]</sup>. However, we must keep in mind that e-government is about minimizing one type of corruption – bureaucratic.

The decentralized X-Road data exchange system has been operating in Estonia since 2001. Thanks to it, 99 percent of public services are now available to individuals and legal entities online; you can use more than 3 thousand types of public services. The most important result of the X-Road project in terms of reducing corruption is the creation of a decentralized system, where no official or institution can fully control the system on its own. Citizens interact directly with the authorities in the virtual online dimension, where corrupt schemes are not allowed. The e-government introduced by Estonia became a model for other countries to choose a governance model that would minimize corruption schemes. The EU has long recognized the unconditional benefits of e-government long ago, both in terms of fighting corruption and preventing various inequalities<sup>[21]</sup>. Let us agree that e-government does prevent corruption in Estonia<sup>[22]</sup>, but this was made possible primarily by the increased importance of the rule of law.

It is equally important to pay attention to the technological tools developed in Estonia to prevent and combat corruption. These include digital public services, crowdsourcing platforms, whistleblowing tools, transparency portals, distributed ledger technology, and artificial intelligence, etc.

<sup>19</sup> Thomas Andersen, „E-Government as an anti-corruption strategy” *Information Economics and Policy*, No. 3 (2009): 201-210; Nars G. Elbahnasawy, „E-Government, Internet Adoption, and Corruption: An Empirical Investigation” *World Development*, 57 (2014): 114-126; Jaannus Karv, *E-Government and its ability to reduce corruption. The case of Estonia* (Lund: Lund University, 2015); Chon-Kyun Kim, „Anti-Corruption Initiatives and E-Government: A Cross-National Study” *Public Organizations Review*, No. 3 (2014): 385-396; Krishan Satish, Teo Thompson S.H., Vivien K.G. Lim, „Examining the Relationships Among Egovernment Maturity, Corruption, Economic Prosperity and Environmental Degradation: A Cross-Country Analysis”. *Information & Management*, No. 8 (2013): 638-649.

<sup>20</sup> The Estonian Example - Q&A with Toomas Hendrik Ilves *The Ripon Forum*, No. 1 (2013): 8.

<sup>21</sup> Commission of the European Communities, *i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All* (Brussels: European Commission, 2006).

<sup>22</sup> Seiam Dina Ali, Doaa Salman, „Examining the Global Influence of E-Governance on Corruption: a Panel Data Analysis” *Future Business Journal*, No. 29 (2024): 1-13.

However, while positively assessing their potential, it should be taken into account that the same technologies „can also provide new corruption opportunities through the dark web, cryptocurrencies, or the misuse of technologies such as centralised databases”<sup>[23]</sup>. The mere fact that Estonia applies new technological tools would not automatically lead to strong anti-corruption results. Successful prevention and counteraction of corruption is a complex process that today requires a system of reforms (technological, institutional, value-based).

It is worth mentioning that unlike most Central and Eastern European countries, Estonia does not have a dedicated anti-corruption body. The Ministry of Justice is in charge of the preparation of the national anti-corruption strategy and oversees and coordinates the reporting on the Action Plan for the Anti-corruption Strategy. The Anti-Corruption Select Committee exercises parliamentary scrutiny over the implementation of anti-corruption measures and the Political Party Funding Supervision Committee oversees political parties’ funding. The Corruption Crime Bureau of the National Criminal Police is a specialized unit responsible for carrying out investigations on corruption cases and the Internal Security Service is responsible for investigating corruption offences committed by higher state officials and higher local government officials in six larger municipalities. The Prosecutor’s Office supervises and directs pre-trial criminal investigation proceedings on corruption offences and it represents the public prosecution in courts.

The Ministries of Justice and Finance, the police, the prosecutor’s office, a special parliamentary committee, and other authorities are responsible for preventing and counteracting the informal destructive institution of corruption.

Along with the institutional reforms, it became clear that Estonians would have to rethink their values if they wanted to achieve the same high standard of living as the peoples of Northern and Western Europe<sup>[24]</sup>. This was especially relevant on the eve of Estonia’s completion of the European integration process. Since 1995, the main focus was on institutional reforms aimed at meeting the Copenhagen criteria. Instead, attention to changes in

<sup>23</sup> Adam Isabelle, Mihály Fazekas. „Are emerging technologies helping win the fight against corruption? A review of the state of evidence” *Information Economics and Policy*, 57, article 100950 (2021).

<sup>24</sup> Rein Taagepera, „Baltic values and corruption in comparative context” *Journal of Baltic Studies*, No. 3 (2002): 243-258.

the values of the population was insufficient, yet values change very slowly, and therefore require considerable attention from state and non-state institutions<sup>[25]</sup>. This resulted in a line of demarcation between Estonia (and other young democracies) and those EU Member States that had a strong democratic tradition.

## 4 | New challenges in preventing and combating corruption at the post-integration phase

It is noteworthy that Estonia did not stop anti-corruption reforms after joining the EU. In contrast, most of the Central and Eastern European countries that joined the EU in the last waves of enlargement show the opposite effect. Their control of corruption decreased after gaining the desired EU membership<sup>[26]</sup>.

After the great enlargement of the EU in 2004, it quickly became clear that the mere fact of Estonia's accession to the EU did not result in the complete destruction of corrupt practices, the overcoming of corruption pragmatism and the achievement of zero tolerance for corruption. After the completion of Estonia's accession to the EU, various destructive practices persisted to some extent, especially top-corruption, political corruption, functioning of various destructive networks, etc.<sup>[27]</sup>.

In this context, the results of the special 2020 Eurobarometer survey on corruption are informative. 60 percent of Estonian respondents consider corruption to be widespread (on average in the EU – 71 percent). 14 percent of respondents feel personally affected by corruption in everyday life (on average in the EU – 26 percent). 44 percent of business companies consider

<sup>25</sup> Natalia Khoma, Oleksii Kokoriev, „Deconsolidation of Liberal Democracy in the Baltic States. The Issue of Compliance with the EU Standards at Institutional and Value Levels” *Romanian Journal of European Affairs*, No. 1 (2021): 54.

<sup>26</sup> Mert Kartal, „Accounting for the Bad Apples: the EU’s Impact on National Corruption Before and After Accession”. *Journal of European Public Policy*, No. 6 (2014): 941–959.

<sup>27</sup> Santiago Villaveces-Izquierdo, Catalina Uribe Burcher, *Illicit Networks and Politics in the Baltic States* (Stockholm: International Institute for Democracy and Electoral Assistance, 2013).

corruption to be widespread (63 percent on average in the EU), while 9 percent of companies consider corruption to be a problem in doing business (37 percent on average in the EU). 37 percent of respondents believe that there are enough successful mechanisms to deter people from corrupt practices (36 percent on average in the EU). 46 percent of companies believe that individuals and legal entities caught for bribing high-ranking officials are punished appropriately (31 percent on average in the EU)<sup>[28]</sup>.

One of the factors negatively affecting the further democratization of Estonia is external influences. This is mainly the destructive influence of Russia, its numerous poisonous propaganda campaigns<sup>[29]</sup>. The consequence of such influence is the increased vulnerability of the Baltic States to various destructive informal practices, one of which is corruption<sup>[30]</sup>. The Russian factor is rightly interpreted as a powerful obstacle to the liberation of young democracies from corruption in as short a time as possible. However, it is important to note that Russia's destructive influence, despite the force of its overt and covert pressure, a combination of hard and soft power tactics, has not been able to change Estonia's strategic direction – the democratic, pro-European one.

Despite its successes, Estonia still has some work to do in preventing and combating corruption, as evidenced by periodic revelations of corruption among top Estonian officials.. For example, at the end of 2020, the Minister of Education and Research of Estonia, a member of the Estonian Centre Party Mailis Reps resigned due to misappropriation of budget funds. Also at the beginning of 2021, the government of J. Ratas resigned against the background of allegations of corruption. There were numerous corruption cases in the Centre Party involving sponsors' funds in exchange for loans to support business in the pandemic. On January 12, 2021, the Centre Party as a legal entity, as well as five individuals were suspected of corruption. The prompt investigation of this case and the prosecution of the perpetrators are believed to be a reputable challenge for the Estonian authorities at the moment. Also in the context of the last mentioned corruption case, it is important to note that corruption and emergencies (such as the Covid-19

<sup>28</sup> European Union, *Special Eurobarometer 502*. [https://data.europa.eu/data/datasets/s2247\\_92\\_4\\_502\\_eng?locale=en](https://data.europa.eu/data/datasets/s2247_92_4_502_eng?locale=en).

<sup>29</sup> Natalia Khoma, Oleksii Kokoriev, „Deconsolidation of Liberal Democracy in the Baltic States. The Issue of Compliance with the EU Standards at Institutional and Value Levels” *Romanian Journal of European Affairs*, No. 1 (2021): 55.

<sup>30</sup> Agnė Grigas, *Legacies, Coercion and Soft Power: Russian Influence in the Baltic States* (London: Chatham House, 2012).

pandemic) feed off each other. The large financial flows involved in fighting the pandemic, the need to disburse these funds quickly, etc., create a favorable environment for corruption.

Cases of top corruption are often the result of investigations by whistleblower journalists. For example, one of the recent cases was the investigation by the Estonian portal Eesti Ekspress (March 2024). It resulted in the resignation of the Estonian Minister of Justice Kalle Laanet and the initiation of an official investigation by law enforcement agencies. This example shows the importance of the role of non-state actors, especially the media, in preventing and countering corruption.

The Estonian government is currently implementing a long-term strategy until 2035<sup>[31]</sup>. It does not directly address the task of combating corruption, but the implementation of all its tasks is possible only with the transparency of decisions of state institutions and complete intolerance of corruption in its various forms. Also in early 2021, Estonia adopted a new anti-corruption strategy for 2021–2025<sup>[32]</sup>. It determines the areas of concern: transparency of state and local government, fair business environment, investigation of corruption cases, protection of whistleblowers, and awareness raising. Combating illicit funding is a priority for the Estonian government.

In recent years, Estonia has been at the epicenter of money laundering scandals involving foreign banks. Money that needed to be legalized from Russia, Azerbaijan, Uzbekistan and other post-Soviet countries entered the EU banking system through branches of European banks, including those in Estonia. Three large Nordic banks (Denmark's Danske Bank and Sweden's Swedbank and SEB) were involved in this situation. Therefore, it is obvious that one of the priority areas for the Estonian authorities in preventing and combating corruption should continue to be the improvement of anti-money laundering mechanisms and broader measures to combat financial crime.

The need to increase the transparency of the Estonian public administration is mainly due to gaps in the legislation. This was particularly evident during the Covid-19 pandemic and first manifested itself in the area of public procurement. Lobbying also remains semi-transparent,

<sup>31</sup> Public of Estonia Government, Estonia 2035. <https://valitsus.ee/strateegia-eesti-2035-arengukavad-ja-planeering/strateegia/materjalid>.

<sup>32</sup> Ministry of Justice Republic of Estonia, Anti-Corruption Action Plan 2021–2025. <https://www.korruptsioon.ee/et/node/28774>.

although the government recently (March 2021) approved a rule requiring top officials to report on meetings with lobbyists. However, a number of issues related to lobbying remain unresolved, and the state does not assign responsibilities to lobbyists.

Gaps in Estonian legislation are gradually being closed. An example is the recent introduction of the „revolving doors” principle for those who completed public service. This amendment was made to the Civil Service Act. The law contains provisions according to which an official who is released from office may not become, within one year from the day of release, a connected person with a legal person in private law over which the official has exercised direct or constant supervision during the last year. Among the latest anti-corruption measures at the state level in Estonia, it is worth noting the creation of an open governance road map and the abolition of the so-called roof money.

In Estonia, there is a strong link between political parties and the companies that support them. A certain dependence of parties on business sponsors poses corruption risks. This aspect of political corruption in Estonia is noticeable as the costs of election campaigns are constantly increasing, but membership fees, donations from small sponsors (party, election crowdfunding) are not popular. There is also insufficient control over the financing of political parties, which requires a revision of the legislation on political parties.

There are also procedural problems. Not all corruption cases can be brought to a guilty verdict. In some cases, the prosecutor's office is unable to bring a high-level corruption case to trial, even when there is evidence to do so. The most notorious example of this is the corruption case of the former mayor of Tallinn, the leader of the Center Party, E. Savisaar. This refers to obtaining by E. Savisaar an illegal reward of about 300 thousand euros from four entrepreneurs for providing land for construction, procurement through the state budget, extending the contract with the city to rent real estate in the historic part of Tallinn and more. The politician himself believes that the case is a persecution of him as an „agent of influence” of Russia on Estonian politics. After a long trial, the case against E. Savisaar was closed (December 2018) due to the health condition of the defendant (while the health condition did not become an obstacle to participate in the local elections in 2021). It is known that only one person was prosecuted in this case, and the other defendants were acquitted. Most notably, the biggest corruption cases of 2021-2022 are connected with the Centre Party: suspicions about the former Minister of Education Mailis

Reps, and the already mentioned resignation of the government of Jüri Ratas due to corruption suspicions in the Centre Party, and the detention of the former Minister of Interior Ain Seppik, etc.

Also in the part of procedural problems it is worth to point out the difficulties with the seizure of property acquired through corruption at the stage of investigation, trial. During the proceedings, this property „disappears” or „significantly decreases”. This fact intensified the discussion on the expediency of initiating the procedure of seizing the assets of the person involved in the corruption case already at the stage of investigation.

Not only institutional, but also value issues remain with regard to politicians, civil servants and ordinary citizens. There have been cases where the corrupt or unethical behavior of a candidate for elective office did not become an obstacle to being elected. In general, it seems that the issues of integrity of politicians, top officials, and political parties are often intensified not by the efforts of state institutions, but by public pressure and journalistic investigations.

The problems of various destructive practices also exist in local authorities. Conflicts of interest arise, which in the worst case can escalate into corruption. Corruption is often the result of ignorance on the part of local leaders. While various anti-corruption trainings are often held for officials in the capital, such events are less intensive for local government representatives, or participation at the local level is ignored.

The problems caused by the low political and legal culture with regard to corruption are exacerbated by insufficient control and supervision of local governments. Outside the capital, the public and the media do not exert such pressure as to preventing and combating corruption at the local level. Small municipalities are characterized by the lack of public pressure and even some concealment of illegal actions (toleration), which are qualified as corrupt. In general, many anti-corruption problems lie in the field of political and legal culture of the population, insufficient awareness of the qualification of certain actions as corruption. It is important to change the values of the population in the direction of the formation of a high political and legal culture of a democratic model, in which zero tolerance of corruption will take the lead.

The issue of adequate protection of whistleblowers remains acute. Currently, Estonian law provides for rather limited tools to protect whistleblowers, which cannot guarantee their privacy and the inadmissibility of pressure on whistleblowers and their families. Another problem is that the attitude of Estonian society towards whistleblowers is not very

favorable. It is assumed that the problem is rooted in the rejection of Soviet denunciation practices. The fact that Estonia has not yet implemented a comprehensive system of protection for whistleblowers was pointed out by the European Commission in a report on the rule of law in Estonia<sup>[33]</sup>.

There is still a problem of doing business that would meet the standards of ethics, integrity of business. At present, high ethical standards, the ability to manage risks, prevent conflicts of interest, etc. are more characteristic of companies that are subsidiaries, branches of Western (especially Nordic) business structures. Therefore, it is necessary to work on the implementation of high ethical standards of doing business, the formation of good corporate behavior.

Concurrently, some constructive steps have been taken to de-corrupt the business environment. In particular, at the government's initiative, local companies can conduct an online corruption risk assessment and receive recommendations on how to make their business more corruption-resistant. Also in 2019, the government launched a series of e-learning training projects to prevent conflicts of interest for public sector employees. The training materials are freely available on YouTube video hosting. It can be assumed that Estonia's anti-corruption policy is aimed at raising public awareness, although it does not currently fully cover all groups. This vector of anti-corruption policy is extremely important, because the success of institutional reforms depends on the values of the population.

A distinctive feature of Estonians is that most of them do not perceive corruption as part of their standards of conduct. This leads us to believe that the relatively low level of corruption in Estonia is due to the characteristics of the culture and values. Indeed, Estonia makes efforts to strengthen respect for the law and intolerance of all forms of corruption. Information on conflicts of interest, forms of corruption, opportunities to prevent and counteract them at the levels of both the citizen and the state is disseminated in various ways. Namely, the Estonian Anti-Corruption Strategy 2013-2020 prioritized the „promoting awareness of corruption” and further determined tasks such as the “improving transparency of decisions and actions”<sup>[34]</sup>.

<sup>33</sup> European Commission, 2020 *Rule of Law Report Country Chapter on the rule of law situation in Estonia*. European Commission staff working document. [https://ec.europa.eu/info/sites/default/files/ee\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/default/files/ee_rol_country_chapter.pdf).

<sup>34</sup> Estonian Ministry of Justice, *Estonian Anti-Corruption Strategy 2013-2020*. <https://www.korruptsioon.ee/en/anti-corruption-activity/anti-corruption-strategy-2013-2020>.

The overall corruption decline in Estonia caused a gradual reduction in public anxiety associated with corrupt practices. This is specified by the results of studies conducted by Eesti Uuringukeskus OÜ and Norstat Eesti AS<sup>[35]</sup>.

At the same time, the education of anti-corruption values among young people remains an important issue. Today's schoolchildren in democratic Estonia are fortunate not to have experienced corruption, unlike the older generations. Hence, corruption is not discussed in educational institutions in the way that could train young people to recognize it. Simultaneously, in order to increase the transparency of Estonian society and government, it is essential to raise young people's awareness of the nature, destructive effects of corruption, and the importance of civic activism.

According to the Estonian Ministry of Justice, the number of corruption crimes was declining for a long time, but in 2020 there was a slight increase in the number of illegal actions with a corruption component, most often in the field of medicine (corrupt links between doctors and manufacturers of pharmaceutical products or medical devices; corruption schemes of medical staff with patients, etc.). Most corruption offenses are recorded in the public sector and local governments<sup>[36]</sup>. Covid-19, in particular, has created new corruption risks and conflicts of interest, especially in the public sector. For example, the need to quickly purchase medical supplies, transport them to designated service points, ensure quick customs clearance of imported medicines, mobilize additional medical staff, etc. – all of which pose corruption risks. In Estonia, cases of forgery of vaccination certificates by healthcare workers in exchange for illicit benefits were also reported.

It should also be borne in mind that not only are the mechanisms for preventing and combating corruption being modernized, but corruption itself is taking on new forms. This requires any state, even the one that is as successful in anti-corruption as Estonia, to possess the skills to quickly identify and respond to new illegal actions aimed at obtaining illicit benefits.

<sup>35</sup> Eesti elanikkonna turvalisuse uuring. <https://www.politsei.ee/files/Ujudise/2020/ppa-raport-0412.pdf?88f9c15a20>.

<sup>36</sup> Kuritegevus Eestis 2019. <https://www.kriminaalpoliitika.ee/kuritegevuse-statistika/korruptsioon.html>.

## 5 | Conclusion

Although Estonia ranks high in the Corruption Perceptions Index, the differences with the least corrupt countries (Denmark, Finland and Sweden) are striking. There is a clear need to address gaps in legislation that allow corruption and impunity. There is also a need to promote anti-corruption values more widely in society, and to raise awareness among different groups about corruption and how to respond to it. The most vulnerable sectors to corruption are public procurement, lobbying, money laundering and health care. There are also procedural difficulties, especially in the confiscation of property obtained through corruption. The whistleblower protection law has not yet been adopted, although it has been considered by the Estonian parliament for a long time. Also, amendments to the Political Parties Act and communication with lobbyists at the level of the Parliament and local governments are still to come.

It is evident that during all the years of independence, Estonia's state institutions were characterized by a strong political will to build a democratic state free of corruption. However, the main emphasis was put on institutional reforms, while the formation of a high anti-corruption culture among the population was given relatively less attention. Nevertheless, a sustainable result in minimizing corrupt practices can be achieved only if institutional reforms are synchronized with measures aimed at forming a developed democratic political and legal culture of the population. Otherwise, any significant political events (change of the ruling party, intensification of destructive external influences, etc.) may increase the risk of increasing corrupt practices (at all levels - from household to top-level corruption).

The analysis allowed modeling the system of factors that constructively and destructively influenced (after the declaration of independence) and influenced (at the stage of EU membership) the processes of preventing and combating corruption in Estonia.

Constructive factors contributing to the anti-corruption reforms in the period from the declaration of independence to EU accession include:

- the historically formed identification of Estonia and Estonians with the West;
- the public sphere in Estonia was not as repressed during the communist period as in other countries;

- the presence of a significant number of representatives of the Estonian national elite in the leadership during Gorbachev's perestroika, despite the repression of the Soviet period;
- the active removal from power of representatives of the former Soviet elite, which destroyed established corruption schemes, and the accession to power of the young Westernized political elite;
- strong political will of the Estonian elite to carry out reforms;
- use of the window of opportunity (radical reforms launched immediately in the first years of independence);
- rapid consolidation of the Estonian political elite on the vector of state development and the content of reforms, strong motivation to join NATO and the EU;
- support from the West and the large Estonian diaspora in the Nordic countries;
- the reluctance of the majority of Estonians to tolerate corruption.

Constructive factors that contributed to anti-corruption reforms at the stage of EU membership include:

- EU membership: ratification of anti-corruption legislative instruments established within the EU, implementation of the recommendations of the Group of States against Corruption, etc.;
- development of e-government. Today, Estonia is a leader in the development of e-government, which affects the level of corruption<sup>[37]</sup>);
- using of the potential of information technology as a tool for preventing and countering corruption. Estonia is constantly testing new tools and mechanisms to influence corruption risks<sup>[38]</sup>).

The destructive factors that hindered the anti-corruption progress during the interval between the independence and EU accession include:

<sup>37</sup> Sheryazdanova Gulmira, Roza Nurtazina, Bibigul Byulegenova, Indira Rystina. „Correlation Between E-Government and Corruption Risks in Kazakhstan” *Utopía y Praxis Latinoamericana*, No. 7 (2020): 45.

<sup>38</sup> Halai Andrii, Viktoriia Halai, Roksolana Hrechaniuk, Kateryna Datsko. Digital Anti-Corruption Tools and Their Implementation in Various Legal Systems Around the World. *SHS Web of Conferences* 100, article 03005 (2021): 4.

- attention paid primarily to institutional reforms and relatively little to the formation of new values among citizens (anti-corruption values);
- external destructive influences, first of all from Russia (they remain to this day).

The destructive factors that slowed down the anti-corruption progress at the stage of EU membership include:

- the relationship between political parties and the business that sponsors them; underdeveloped electoral, party crowdfunding and other transparent forms of political party financing;
- the difficulty of eradicating political corruption (top-corruption, corruption among political parties);
- gaps in legislation (lobbying, public procurement, etc.);
- imperfections in criminal procedure law, which lead to the avoidance of liability of corruption suspects, difficulties in seizing the assets of those involved in corruption cases;
- problems in the political culture of Estonian voters, which are manifested in the electoral support of political actors suspected of corruption;
- low awareness among citizens, especially at the level of local self-government, of the risks of corruption and the qualification of certain actions as corrupt;
- insufficient state protection of whistleblowers, low public support for whistleblowers;
- issues of adherence to business ethics by business entities, non-compliance of business conduct with ethical standards of the competitive environment.

At first glance, it may seem that Estonia is an example of a successful rapid transition to transparent governance, honest business, maximum intolerance of corruption by citizens, and so on. In reality, however, Estonia's path to zero corruption, government transparency, and other high democratic standards is not complete. There are still unresolved issues in the area of preventing and combating corruption, and new challenges are emerging. These processes are far from complete and require great will and effort from both the public and private sectors.

## Bibliografy

- Adam Isabelle, Mihály Fazekas, „Are emerging technologies helping win the fight against corruption? A review of the state of evidence”, *Information Economics and Policy*, article 100950 (2021). <https://doi.org/10.1016/j.infoecopol.2021.100950>
- Andersen Thomas, „E-Government as an anti-corruption strategy” *Information Economics and Policy*, No 3 (2009): 201–210. <https://doi.org/10.1016/j.infoecopol.2008.11.003>.
- Bennich-Björkman Li, „State capture in the Baltics: Identity, International Role Models and Network Formation”, [w:] *The Baltic Sea Region: Cultures, Politics, Societies*, ed. Witold Maciejewski. 345–369. Uppsala: The Baltic University Press, 2002.
- Commission of the European Communities, *i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All*. Brussels: European Commission, 2006.
- Earle Beverley, „Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What is to be Done Beverley Earle” *Cornell International Law Journal*, No. 3 (2000): 483–513. <https://scholarship.law.cornell.edu/cilj/vol33/iss3/3/>.
- Eesti elanikkonna turvalisuse uuring. <https://www.politsei.ee/files/Uudised/2020/ppa-raport-0412.pdf?88f9c15a20>.
- Elbahnsawy Nars G. „E-Government, Internet Adoption, and Corruption: An Empirical Investigation” *World Development*, 57 (2014): 114–126. <https://doi.org/10.1016/j.worlddev.2013.12.005>.
- Estonian Ministry of Justice, *Estonian Anti-Corruption Strategy 2013–2020*. <https://www.korruptsioon.ee/en/anti-corruption-activity/anti-corruption-strategy-2013-2020>.
- Estonian Police and Border Guard Board, *Eesti elanikkonna turvalisuse uuring*. <https://www.politsei.ee/files/Uudised/2020/ppa-raport-0412.pdf?88f%209c15a20>.
- European Commission, *2020 Rule of Law Report Country Chapter on the rule of law situation in Estonia. European Commission staff working document*. [https://ec.europa.eu/info/sites/default/files/ee\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/default/files/ee_rol_country_chapter.pdf).
- European Union, *Special Eurobarometer 502*. [https://data.europa.eu/data/datasets/s2247\\_92\\_4\\_502\\_eng?locale=en](https://data.europa.eu/data/datasets/s2247_92_4_502_eng?locale=en).
- Grigas Agnė, *Legacies, Coercion and Soft Power: Russian Influence in the Baltic States*. London: Chatham House, 2012.
- Halai Andrii, Viktoriia Halai, Roksolana Hrechaniuk, Kateryna Datsko, „Digital Anti-Corruption Tools and Their Implementation in Various Legal Systems

- “Around the World” *SHS Web of Conferences*, article 03005 (2021): 1-7. <https://doi.org/10.1051/shsconf/202110003005>.
- Kartal Mert, „Accounting for the Bad Apples: the EU’s Impact on National Corruption Before and After Accession” *Journal of European Public Policy*, No. 6 (2014): 941-959. <https://doi.org/10.1080/13501763.2014.910820>.
- Karv Jaannus, *E-Government and its ability to reduce corruption. The case of Estonia*. Lund: Lund University, 2015.
- Khoma Natalia, Ihor Vdovychyn, „Slow Strengthening of Latvia’s Resilience in Preventing and Combating Corruption: an Analysis of Causes” *Przegląd Wschodnioeuropejski*, No. 1 (2023): 87-100. <https://doi.org/10.31648/pw.9024>.
- Khoma Natalia, Oleksii Kokoriev, „Deconsolidation of Liberal Democracy in the Baltic States. The Issue of Compliance with the EU Standards at Institutional and Value Levels” *Romanian Journal of European Affairs*, No. 1 (2021): 39-57. <https://doi.org/10.5281/zenodo.10950009>.
- Kim Chon-Kyun, „Anti-Corruption Initiatives and E-Government: A Cross-National Study” *Public Organizations Review*, No. 3 (2014): 385-396. <https://doi.org/10.1007/s11115-013-0223-1>.
- Kravins Anatolijs, Andrejs Vilks, Aldona Kipane, „Corruption perception trends: European Union countries. Access to science, business, innovation in the digital economy” *ACCESS Journal: Access to Science, Business, Innovation in Digital Economy*, No. 1 (2024): 58-67. [https://doi.org/10.46656/access.2024.5.1\(4\)](https://doi.org/10.46656/access.2024.5.1(4)).
- Kupatadze Aleksander, „Accounting for Diverging Paths in Most Similar Cases: Corruption in Baltics and Caucasus” *Crime, Law and Social Change*, No. 2 (2017): 187-208. <https://doi.org/10.1007%2Fs10611-016-9658-y>.
- Kuritegevus Eestis, <https://www.kriminaalpoliitika.ee/kuritegevuse-statistika/korruptsioon.html>, 2019.
- Laar Mart, *Little country that could*. St. Edmundsbury: St. Edmundsbury Press, 2002.
- Ministry of Justice Republic of Estonia, *Anti-Corruption Action Plan 2021-2025*. <https://www.korruptsioon.ee/et/node/28774>.
- Misiūnas Romuald, Rein Taagepera. *The Baltic States. Years of Dependence. 1940-1990*. London: Hurst and Company, 1993.
- Mungiu-Pippidi Alina, *Corruption as Social Order, World Development Report Background Paper*. Washington: World Bank, 2017.
- Nørgaard Ole, Johannsen Lars, Skak Mette, René H. Sørensen, *The Baltic States After Independence*. Cheltenham: Edward Elgar Publishing, 1999.
- Public of Estonia Government, „*Estonia 2035*”. <https://valitsus.ee/strateegia-eesti-2035-arengukavad-ja-planeering/strateegia/materjalid>.
- Satish Krishan, Teo Thompson S.H., Vivien K.G. Lim, „Examining the relationships among egovernment maturity, corruption, economic prosperity and

- environmental degradation: A cross-country analysis" *Information & Management*, No. 8 (2013): 638-649. <https://doi.org/10.1016/j.im.2013.07.003>.
- Seiam Dina Ali, Doaa Salman, „Examining the global influence of e-governance on corruption: a panel data analysis" *Future Business Journal*, No. 29 (2024): 1-13. <https://doi.org/10.1186/s43093-024-00319-3>.
- Sheryazdanova Gulmira, Roza Nurtazina, Bibigul Byulegenova, Indira Rystina. „Correlation Between E-Government and Corruption Risks in Kazakhstan" *Utopía y Praxis Latinoamericana*, No. 7 (2020): 40-48. <https://doi.org/10.5281/zenodo.4009592>.
- Shtromas Aleksandras, „The Baltic States as Soviet Republics: Tensions and Contradictions", [in:] *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania*, ed. Graham Smith. 86-117. New York: St. Martin's Press, 1994.
- Smith Graham, Assland Aadne, Richard Mole, „Statehood, Ethnic Relations and Citizenship in the Baltic States. The national self-determination of Estonia, Latvia and Lithuania", [in:] *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania*, ed. Graham Smith. 181-205. New York: St. Martin's Press, 1994.
- Steen Anton, „Do Elite Beliefs Matter? Elites and Economic Reforms in the Baltic States and Russia", [in:] *Comparative Studies of Social and Political Elites*, ed. Fredric Engelstad and Trygve Gulbrandsen. 79-102. Bingley: Emerald Group Publishing Limited, 2006.
- Taagepera Rein, „Baltic Values and Corruption in Comparative Context" *Journal of Baltic Studies*, No 3 (2002): 243-258. <https://doi.org/10.1080/01629770200000081>.
- The Estonian Example – Q&A with Toomas Hendrik Ilves. *The Ripon Forum* 47, No. 1 (2013): 4-9.
- Villaveces-Izquierdo Santiago, Catalina Uribe Burcher, *Illicit Networks and Politics in the Baltic States*. Stockholm: International Institute for Democracy and Electoral Assistance, 2013.
- Wadsworth Frank, Brenda Swartz, Jerry Wheat. „Corruption in the Baltic State Region" *International Business & Economics Research Journal*, No. 2 (2010): 109-116. <https://doi.org/10.19030/iber.v9i2.527>.
- Wright Helen, *Let us Make an Honest, Caring, Corruption-Free and Self-Confident Estonia*. <https://news.err.ee/1608121357/let-us-make-an-honest-caring-corruption-free-and-self-confident-estonia>.



TOMASZ BĄKOWSKI

# Lokalizacja instalacji odnawialnego źródła energii na podstawie decyzji o warunkach zabudowy

## Location of the Renewable Energy Sources Installation Based on the Decision on Building Conditions

This article presents a problem related to the interpretation of the provisions of the Spatial Planning and Development Act regarding the possibility of locating a renewable energy source installation on the basis of a decision on building conditions. The main issue is to answer the question whether it is possible or not to determine the building conditions for the project of locating a renewable energy sources installation with an installed capacity of more than 500 kW and freestanding photovoltaic devices with an installed electrical capacity of more than 1000 kW on agricultural land of classes V, VI, VIz and wasteland. If so, whether it depends on the existence of appropriate regulations adopted in the compensation land for development in the structure plan of the municipality? The analysis carried out leads to the conclusion that it is possible to determine the location of the installation of renewable energy sources installation by means of a decision on the conditions of construction, irrespective of the regulations adopted in the balancing plan of the municipality on the land for development and the capacity of this installation.

**SŁOWA KLUCZOWE:** decyzja o warunkach zabudowy, studium uwarunkowań i kierunków zagospodarowania gminy, odnawialne źródła energii

**KEYWORDS:** decision on building conditions, balancing land for development in the municipality's structure plan, Renewable Energy Sources

**TOMASZ BĄKOWSKI**, profesor nauk prawnych, Uniwersytet Gdańskiego,  
ORCID – 0000-0002-9363-2124, e-mail: tomasz.bakowski@ug.edu.pl

## Uwagi wstępne dotyczące stanu prawnego

Poniższe rozważania odnoszą się do stanu prawnego sprzed nowelizacji ustawy z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (dalej: „u.p.z.p.”)<sup>[1]</sup>, dokonanej ustawą z dnia 7 lipca 2023 r. o zmianie ustawy o planowaniu i zagospodarowaniu przestrzennym oraz niektórych innych ustaw (dalej: „nowelizacja”)<sup>[2]</sup>, za sprawą której międy innymi dotychczasowa prawa konstrukcja decyzji o warunkach zabudowy została w znaczący sposób przeformułowana, zaś instytucję studium uwarunkowań i kierunków zagospodarowania przestrzennego zastąpiono planem ogólnym gminy. Zważywszy jednak na treść przepisów przejściowych, w szczególności art. 59<sup>[3]</sup> oraz art. 65<sup>[4]</sup> nowelizacji, przewidujących stosowanie dotychczasowych przepisów dotyczących wydawania decyzji o warunkach zabudowy w sprawach wszczętych i niezakończonych decyzją ostateczną przed dniem wejścia w życie nowelizacji (to jest

<sup>1</sup> Tekst jedn.: Dz. U. z 2022 r. poz. 503 ze zm.

<sup>2</sup> Dz. U. z 2023 r. poz. 1688.

<sup>3</sup> Zgodnie z art. 59 nowelizacji: „1. Do spraw dotyczących ustalenia lokalizacji inwestycji celu publicznego lub wydania decyzji o warunkach zabudowy, wszczętych i niezakończonych decyzją ostateczną przed dniem wejścia w życie niniejszej ustawy, stosuje się przepisy ustawy zmienianej w art. 1 w brzmieniu dotychczasowym. 2. Do spraw dotyczących ustalenia lokalizacji inwestycji celu publicznego lub wydania decyzji o warunkach zabudowy, wszczętych od dnia wejścia w życie niniejszej ustawy i przed dniem utraty mocy studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy w danej gminie: 1) stosuje się przepisy art. 54 oraz art. 61 ust. 1 pkt 1, ust. 2, 3 i 5a ustawy zmienianej w art. 1 w brzmieniu dotychczasowym; 2) nie stosuje się przepisów art. 61 ust. 1 pkt 1a i ust. 1a ustawy zmienianej w art. 1.”.

<sup>4</sup> W myśl art. 65 nowelizacji: „1. Studia uwarunkowań i kierunków zagospodarowania przestrzennego gmin zachowują moc do dnia wejścia w życie planu ogólnego gminy w danej gminie, jednak nie dłużej niż do dnia 31 grudnia 2025 r., i stosuje się do nich przepisy dotychczasowe. 2. Do spraw opracowania i uchwalania studiów uwarunkowań i kierunków zagospodarowania przestrzennego gminy albo ich zmian stosuje się przepisy ustawy zmienianej w art. 1 w brzmieniu dotychczasowym, jeżeli: 1) przed dniem wejścia w życie niniejszej ustawy wystąpiono o opinię i uzgodnienia projektów tych studiów albo ich zmian; 2) zmiana tych studiów dotyczy wyłącznie lokalizacji inwestycji celu publicznego lub 3) zmiana tych studiów dotyczy wyłącznie lokalizacji inwestycji w zakresie gospodarowania strategicznymi zasobami naturalnymi kraju w rozumieniu ustawy z dnia 6 lipca 2001 r. o zachowaniu narodowego charakteru strategicznych zasobów naturalnych kraju (Dz. U. z 2018 r., poz. 1235) lub działalności, o której mowa w art. 21 ust. 1 pkt 1 i 2a ustawy z dnia 9 czerwca 2011 r. – Prawo geologiczne i górnicze (Dz. U. z 2023 r., poz. 633)”.

przed 24 września 2023 r.) oraz zachowanie mocy studiów uwarunkowań i kierunków zagospodarowania przestrzennego gminy do dnia wejścia w życie planu ogólnego gminy w danej gminie, jednak nie dłużej niż do dnia 31 grudnia 2025 r. i stosowanie do nich przepisów sprzed nowelizacji, zasadne jest przyjęcie, że kwestie podniesione w niniejszym opracowaniu nie utraciły i jeszcze przez pewien czas nie utracą na aktualności. Praktyka stosowania prawa w zakresie ustalania warunków zabudowy oraz administracyjna i sądowa kontrola jego legalności dają podstawy do uznania, że przedstawiona materia będzie się odnosić do spraw lokalizacji instalacji odnawialnych źródeł energii, na których ostateczne zakończenie trzeba będzie poczekać jeszcze kilka lat.

Z kolei z perspektywy procesu stanowienia aktów prawa miejscowego, do której to kategorii należą wprowadzone nowelizacją plany ogólne gminy, oraz towarzyszących mu okoliczności natury organizacyjno-technicznej, uwarunkowań społecznych i gospodarczych, wysoce prawdopodobną i bynajmniej nie precedensową będzie konieczność ustawowego przedłużenia terminu zachowania mocy obowiązującej ustaleń studiów uwarunkowań i kierunków zagospodarowania przestrzennego gminy, o którym mowa w art. 65 ust. 1 nowelizacji.

Wypada też zwrócić uwagę na ponadczasowe konteksty przedstawionego w niniejszym opracowaniu swoistego studium przypadku, zwłaszcza na te, które wiążą się z nazbyt częstymi (nie)prawidłowościami, występującymi we współczesnej legislacji.

## 1 | Wprowadzenie

Środowiskowe, gospodarcze, a ostatnio również i geopolityczne uwarunkowania sprawiają, że wykorzystywanie energii pochodzącej z źródeł odnawialnych nadal zyskuje na znaczeniu. Znajduje to swoje odzwierciedlenie zarówno w prawnych uregulowaniach zasad i warunków wykonywania działalności w zakresie wytwarzania energii elektrycznej z odnawialnych źródeł energii, jak również lokalizacji i budowy instalacji służących do jej wytwarzania. Ocena jakości tych uregulowań nie jest jednoznaczna, a szereg rozwiązań budzi uzasadnione wątpliwości. Potwierdzają to liczne publikacje poświęcone różnym problemom wyłaniającym się zarówno w procesie stosowania prawa, jak i stanowieniu aktów generalnych przez

organy administracji publicznej, w tym w szczególności miejscowych planów zagospodarowania przestrzennego<sup>[5]</sup>.

Częste zmiany w porządku prawnym obejmującym kwestie lokalizacji i budowy instalacji służących wytwarzaniu odnawialnych źródeł energii oraz prowadzenia działalności polegającej na jej wytwarzaniu mogą również świadczyć o tym, że i ustawodawca dostrzega wagę i konieczność wspierania rozwoju tego sektora gospodarki energetycznej, poprzez sprzyjające mu uregulowania prawne. Jednak doświadczenia ostatnich dwóch dekad pokazują, że stopień doskonałości tychże uregulowań pozostawia jeszcze wiele do życzenia. Skatalogowanie i szczegółowa analiza przyczyn niedostatków legislacyjnych trapiących regulacje odnoszące się do materii odnawialnych źródeł energii dalece wykracza poza ramy niniejszego opracowania, choć niewątpliwie jest przedmiotem teoretycznie i praktycznie doniosłym, a co za tym idzie, godnym głębszej refleksji. Przy czym nawet bez kompleksowej kwerendy można przyjąć z dużą dozą prawdopodobieństwa, że powody niedoskonałości legislacyjnej we wskazanym zakresie mają charakter uniwersalny, w tym znaczeniu, że dotyczą również innych dziedzin objętych regulacją prawną. Powodami tymi są dekonsolidacja przedmiotu regulacji oraz wprowadzanie do obrotu prawnego nowych rozwiązań, często o charakterze „punktowym” bez należytego uwzględnienia istniejących już przepisów składających się na system obowiązującego prawa<sup>[6]</sup>. Nierzadko ów drugi powód wiąże się bądź jest wynikiem pierwszego.

<sup>5</sup> Zob. m.in.: Anna. Fogel, „Lokalizacja urządzeń wytwarzających energię ze źródeł odnawialnych wobec «dobrego sąsiedztwa», [w:] Wojciech Federczyk, Anna Fogel, Agata Kosieradzka-Federczyk, *Prawo ochrony środowiska w procesie inwestycyjno-budowlanym* (Warszawa: Wolters Kluwer, 2015), 122-124; Paweł Kretowicz, „Planistyczne uwarunkowania i bariery lokalizacji instalacji odnawialnych źródeł energii” *Samorząd Terytorialny*, nr 10 (2016): 38-41; Monika Przybylska-Cząstkiewicz, „Planowanie przestrzenne w gminie po wejściu w życie ustawy z dnia 20 maja 2016 r. o inwestycjach w zakresie elektrowni wiatrowych” *Casus*, nr 84 (2017): 15-19; Paweł Daniel, Krzysztof Smoliński, „Lokalizacja farm fotowoltaicznych przy braku miejscowego planu zagospodarowania przestrzennego” *Nieruchomości@*, nr 1 (2022): 79-97, doi: 10.5604/01.3001.0015.8070; Maciej Kruś, Kamil Tychmanowicz, „Agrofotowoltaika jako narzędzie ochrony gruntów rolnych” *Samorząd Terytorialny*, nr 7-8 (2022): 122-129.

<sup>6</sup> Szerzej na ten temat zob. Tomasz Bąkowski, „Niedoskonałości legislacji administracyjnej (przykłady, konsekwencje, źródła i poszukiwanie sposobu sanacji)”, [w:] *Prawo administracyjne dziś i jutro*, red. Jacek Jagielski, Marek Wierzbowski (Warszawa: Wolters Kluwer, 2018), 573-585.

Odnosząc się do prawnej regulacji kwestii odnawialnych źródeł energii należy przypomnieć, że materia ta była pierwotnie ujęta w ustawie podstawowej, którą dla energetyki (jako takiej) jest ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne<sup>[7]</sup>. Wyrazem dekonsolidacji Prawa energetycznego było między innymi uchwalenie ustawy z dnia 20 lutego 2015 r. o odnawialnych źródłach energii (dalej: „u.o.z.e.”)<sup>[8]</sup>. Przepisy u.o.z.e. nie obejmowały jednak swoim zakresem lokalizacji i budowy instalacji służących wytwarzaniu odnawialnych źródeł energii, które po części podlegały odpowiednio reżimowi przepisów u.p.z.p. oraz ustawy z dnia 7 lipca 1994 r. – Prawo budowlane<sup>[9]</sup>, po części zaś tak zwanym specustawom, to jest ustawie z dnia 20 maja 2016 r. o inwestycjach w zakresie elektrowni wiatrowych<sup>[10]</sup> oraz ustawie z dnia 17 grudnia 2020 r. o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych<sup>[11]</sup>.

Z kolei przykładem „punktowych” zmian, są przepisy u.p.z.p. dotyczące lokalizacji urządzeń wytwarzających energię z odnawialnych źródeł energii, a mianowicie art. 10 ust. 2a u.p.z.p., dodany przez art. 2 pkt 1 ustawy z dnia 6 sierpnia 2010 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy o planowaniu i zagospodarowaniu przestrzennym<sup>[12]</sup>, który stanowi, że: „Jeżeli na obszarze gminy przewiduje się wyznaczenie obszarów, na których rozmieszczone będą urządzenia wytwarzające energię z odnawialnych źródeł energii o mocy zainstalowanej większej niż 500 kW, a także ich stref ochronnych związanych z ograniczeniami w zabudowie oraz zagospodarowaniu i użytkowaniu terenu, w studium ustala się ich rozmieszczenie, z wyłączeniem: 1) wolnostojących urządzeń fotowoltaicznych, o mocy zainstalowanej elektrycznej nie większej niż 1000 kW zlokalizowanych na gruntach rolnych stanowiących użytki rolne klas V, VI, VII i nieużytki - w rozumieniu przepisów wydanych na podstawie art. 26 ust. 1 ustawy z dnia 17 maja 1989 r. – Prawo geodezyjne i kartograficzne; 2) urządzeń innych niż wolnostojące” oraz art. 61 ust. 3 u.p.z.p., który po zmianie przez art. 4 pkt 2 ustawy z dnia 19 lipca 2019 r. o zmianie ustawy o odnawialnych źródłach energii oraz niektórych innych ustaw<sup>[13]</sup> z dniem 29 sierpnia 2019 r., stanowi, że: „Przepisów ust. 1 pkt 1 i 2 nie stosuje się do

<sup>7</sup> Obecnie tekst jedn.: Dz. U. z 2024 r., poz. 266 ze zm.

<sup>8</sup> Dz. U. z 2015 r., poz. 478; obecnie tekst jedn.: Dz. U. z 2023 r., poz. 1436 ze zm.

<sup>9</sup> Tekst jedn.: Dz. U. z 2023 r., poz. 682 ze zm.

<sup>10</sup> Tekst jedn.: Dz. U. z 2024 r., poz. 317 ze zm.

<sup>11</sup> Tekst jedn.: Dz. U. z 2024 r., poz. 182 ze zm.

<sup>12</sup> Dz. U. Nr 155, poz. 1043.

<sup>13</sup> Dz. U. z 2019 r., poz. 1524.

linii kolejowych, obiektów liniowych i urządzeń infrastruktury technicznej, a także instalacji odnawialnego źródła energii w rozumieniu art. 2 pkt 13 ustawy z dnia 20 lutego 2015 r. o odnawialnych źródłach energii”<sup>[14]</sup>.

## 2 | Sedno problemu

Na tle przywołanych powyżej przepisów art. 10 ust. 2a oraz art. 61 ust. 3 u.p.z.p. powstaje zarówno praktyczny, jak i teoretyczny problem istnienia ich ewentualnej wzajemnej relacji w przypadkach, w których wnioski o ustalenie warunków zabudowy dotyczą zamierzenia polegającego na lokalizacji instalacji odnawialnego źródła energii o mocy zainstalowanej większej niż 500 kW oraz wolnostojących urządzeń fotowoltaicznych, o mocy zainstalowanej elektrycznej powyżej 1000 kW, zlokalizowanych na gruntach rolnych stanowiących użytki rolne klas V, VI, VIz i nieużytki.

Problem ten wiąże się z prawnym charakterem studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy (dalej: „studium”) oraz decyzji o warunkach zabudowy.

Otoż studium, którego celem jest określenie polityki przestrzennej gminy, w tym lokalnych zasad zagospodarowania przestrzennego, zgodnie z art. 9 ust. 5 u.p.z.p., nie jest aktem prawa miejscowego. Oznacza to, że ustalenia przyjęte w studium nie są źródłami powszechnie obowiązującego prawa w rozumieniu art. 87 Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (dalej: „Konstytucja RP”)<sup>[15]</sup>. W literaturze i orzecznictwie studium jest określane jako akt polityki przestrzennej gminy<sup>[16]</sup>, koordynujący ustalenia planów miejscowych, a także promujący obszary

<sup>14</sup> W brzmieniu zmienionym z dniem 30 października 2021 r. przez art. 5 pkt 2 ustawy z dnia 17 września 2021 r. o zmianie ustawy o odnawialnych źródłach energii oraz niektórych innych ustaw (Dz. U. z 2021 r., poz. 1873).

<sup>15</sup> Dz. U. Nr 78, poz. 483 ze zm. Zgodnie z art. 87 Konstytucji RP: „1. Źródłami powszechnie obowiązującego prawa Rzeczypospolitej Polskiej są: Konstytucja, ustawy, ratyfikowane umowy międzynarodowe oraz rozporządzenia. 2. Źródłami powszechnie obowiązującego prawa Rzeczypospolitej Polskiej są na obszarze działania organów, które je ustanowiły, akty prawa miejscowego”.

<sup>16</sup> Zob. m.in. wyroki NSA z: 8.10.2015 r., II OSK 340/14, LEX nr 2002662; 24.11.2015 r., II OSK 718/14, LEX nr 2002231; 22.06.2020 r., II OSK 43/20, LEX nr 3084976.

atrakcyjne inwestycyjnie lub turystycznie<sup>[17]</sup> oraz stanowiący aksjologiczne podstawy działań planistycznych na terenie gminy<sup>[18]</sup>. Studium z uwagi na brzmienie art. 9 ust. 4 u.p.z.p.<sup>[19]</sup>, jest określane mianem aktu kierownictwa wewnętrznego<sup>[20]</sup>, chociaż wskazuje się również na pośrednie oddziaływanie ustaleń studium na prawa i obowiązki podmiotów zewnętrznych w stosunku do administracji<sup>[21]</sup>.

Z kolei decyzja o warunkach zabudowy, mimo dyskusji nad jej deklaratorynością czy też konstytutywnością, rolą jaką pełni w systemie aktów planowania i zagospodarowania przestrzennego oraz uznaniowym czy związanym charakterem<sup>[22]</sup> oraz niezależnie od przypisywanej jej daleko idącej specyfiki względem innych decyzji administracyjnych<sup>[23]</sup>, jest decyzją rozstrzygającą sprawę do jej istoty w rozumieniu art. 104 § 2 ustawy z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego<sup>[24]</sup>, a więc indywidualnym i konkretnym aktem stosowania prawa.

Przy tak rozumianych instytucjach studium i decyzji o warunkach zabudowy istotne (zarówno od strony praktycznej, jak i teoretycznej) staje się udzielenie odpowiedzi na pytanie o to, czy ustalenie warunków zabudowy dla zamierzenia polegającego na lokalizacji instalacji odnawialnego źródła energii o mocy zainstalowanej większej niż 500 kW oraz wolnostojących urządzeń fotowoltaicznych, o mocy zainstalowanej elektrycznej powyżej 1000 kW, zlokalizowanych na gruntach rolnych stanowiących użytki rolne

<sup>17</sup> Planowanie i zagospodarowanie przestrzenne. Komentarz, red. Zygmunt Niewiadomski (Warszawa: C.H. Beck, 2023), 86.

<sup>18</sup> Por. Tomasz Bąkowski, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz* (Kraków: Zakamycze, 2004), 54.

<sup>19</sup> Zgodnie z tym przepisem: „Ustalenia studium są wiążące dla organów gminy przy sporządzaniu planów miejscowych”.

<sup>20</sup> Zob. m.in. Zygmunt Niewiadomski, *Planowanie przestrzenne. Zarys systemu* (Warszawa: Lexis Nexis, 2003), 91; Paweł Sosnowski w: Paweł Sosnowski, Krzysztof Buczyński, Joanna Dziedzic-Bukowska, Jacek Jaworski, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz* (Warszawa: Lexis Nexis 2014), 70.

<sup>21</sup> Niewiadomski, *Planowanie i zagospodarowanie*, 63. Podobnie Zdzisław Kostka, Jacek Hyla, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz i przepisy wykonawcze* (Gdańsk: Ośrodek Doradztwa i Doskonalenia Kadru Sp. z o. o. 2004), 21. Zob. też m.in. wyroki NSA z: 11.09.2012 r., II OSK 1573/12, LEX nr 1251832; 31.05.2017 r., II OSK 2298/15, LEX nr 2351692; 27.05.2020 r., II OSK 3087/19, LEX nr 3099442.

<sup>22</sup> Zob. stanowiska zaprezentowane w pracy zbiorowej: *Rozprawa z decyzją o warunkach zabudowy*, red. Tomasz Bąkowski (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego 2022).

<sup>23</sup> Wyrok NSA z 23.08.2018 r., II OSK 2084/16, LEX nr 2738403.

<sup>24</sup> T. j.: Dz. U. z 2024 r., poz. 572.

klas V, VI, VIz i nieużytki, jest czy też nie jest możliwe, a jeżeli jest, to czy zależy ono od istnienia odpowiednich ustaleń studium w tym zakresie.

## 3 | Hipotezy

Odpowiedzi na postawione pytanie należy poszukiwać na drodze weryfikacji trzech hipotez. Według pierwszej, ustalenie warunków zabudowy dla wskazanego powyżej przedsięwzięcia nie jest możliwe, ponieważ wyznaczenie obszaru dla tego typu inwestycji następuje wyłącznie w miejscowym planie zagospodarowania przestrzennego. Zgodnie z drugą hipotezą, ustalenie warunków zabudowy dla instalacji odnawialnego źródła energii o mocy wyższej niż wskazana w art. 10 ust. 2a u.p.z.p., jest możliwa, ale tylko wtedy, gdy w studium zostało ustalone rozmieszczenie tychże instalacji.

Wreszcie w myśl trzeciej hipotezy na wydanie decyzji o warunkach zabudowy, której przedmiotem jest lokalizacja instalacji odnawialnego źródła energii o wymienionych wyżej parametrach, jest możliwe niezależnie od przyjęcia w obowiązującym studium ustaleń, o których mowa w art. 10 ust. 2 u.p.z.p.

## 4 | Weryfikacja

Za pierwszą hipotezą zdaje się przemawiać głównie uzasadnienie do projektu ustawy o zmianie ustawy o odnawialnych źródłach energii oraz niektórych innych ustaw<sup>[25]</sup>, w którym to zmianę art. 61 ust. 3 u.p.z.p., polegającą na dodaniu w tym przepisie wyłączającym stosowanie art. 61 ust. 1 pkt 1 i 2 u.p.z.p. instalacji odnawialnego źródła energii w rozumieniu art. 2 pkt 13 u.o.z.e. zamieszczono w pkt 5 zatytułowanym „Zliberalizowanie zasad budowy małych instalacji oraz mikroinstalacji OZE”<sup>[26]</sup>. Tym samym

<sup>25</sup> Uzasadnienie to jest zawarte w Druku nr 3656 z dnia 9 lipca 2019 r., zamieszczonego na stronie internetowej. <https://orka.sejm.gov.pl/Druki8ka.nsf/o/F52CE4E541BD66D8C125843A002F746E/%24File/3656.pdf>.

<sup>26</sup> Taką też argumentację zastosowano m.in. w wyroku NSA z 9.12.2020 r., II OSK 3705/19, LEX nr 3130321.

lokalizacja instalacji odnawialnego źródła energii na podstawie decyzji o warunkach zabudowy jest możliwa, ale jedynie wówczas gdy instalacja ta nie będzie przekraczać mocy, wskazanej w art. 10 ust. 2a u.p.z.p.

O trafności drugiej z postawionych hipotez ma świadczyć ratio legis ustawy<sup>[27]</sup>, wyrażająca się systemowej metodzie wykładni, zgodnie z którą przy rekonstrukcji znaczenia treści art. 61 ust. 3 u.p.z.p. należy uwzględnić treść pozostałych przepisów u.p.z.p., w tym art. 10 ust. 2a<sup>[28]</sup>, który uzależnia lokalizację i realizację instalacji większej niż 500 kW oraz wolno-stojących urządzeń fotowoltaicznych, o mocy zainstalowanej elektrycznej powyżej 1000 kW, zlokalizowanych na gruntuach rolnych stanowiących użytki rolne klas V, VI, VIz i nieużytki, od ujęcia tychże zamierzeń inwestycyjnych w ustalenach studium.

Z kolei za uznaniem, że ustalenia studium nie wiążą przy wydawaniu decyzji o warunkach zabudowy dla instalacji odnawialnego źródła energii z wyłączeniem wymogów, o których mowa w art. 61 ust. 1 pkt 1 i 2 u.p.z.p., niezależnie od planowanej mocy tejże instalacji i odpowiednich ustaleń przyjętych w studium, przemawia przede wszystkim redakcja art. 61 ust. 3 u.p.z.p., w którym nie wprowadzono ograniczeń w tym zakresie. Zatem przepis ten sam w sobie nie przysparza wątpliwości interpretacyjnych.

Trzeba jednak wziąć pod uwagę, że wrażenie braku przeszkód do dokonania prawidłowej rekonstrukcji obowiązującej normy za pomocą wykładni językowej może okazać się wrażeniem błędym. Dlatego też wypada przychylić się do postulatu głoszonego w doktrynie i orzecznictwie sądowoadministracyjnym weryfikacji znaczenia przepisów przez inne rodzaje wykładni nawet wtedy, gdy wykładnia językowa doprowadzi do ustalenia jednego językowo możliwego znaczenia normy<sup>[29]</sup>. Pozajęzykowe metody wykładni należy bowiem traktować jako „współdziałające” z metodą wykładni językowej<sup>[30]</sup>. Służą one nie tylko modyfikacji wyniku uzyskanego przy użyciu metody językowej, ale mogą też posłużyć wzmacnieniu jego uzasadnia.

Uwzględniając zatem przy wykładni art. 61 ust. 3 u.p.z.p. (tak jak przy argumentacji drugiej z postawionych hipotez) metodę systemową, należałoby zakwestionować poprawność zestawienia tego przepisu z art. 10

<sup>27</sup> Igor Zachariasz w: Hubert Izdebski, Igor Zachariasz, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz* (Warszawa: Wolters Kluwer, 2013), 115–116.

<sup>28</sup> Zob. wyrok przywołyany w przypisie nr 24.

<sup>29</sup> Jerzy Wróblewski, „Wykładnia prawa”, [w:] Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa* (Warszawa: Państwowe Wydawnictwo Naukowe 1986), 444.

<sup>30</sup> Wyrok NSA z 24.01.2017 r., I OSK 731/15, LEX nr 2248054.

ust. za u.p.z.p. Mimo że oba wymienione przepisy są zawarte w tej samej ustawie, jednakże z uwagi na różnice jakie dzielą prawny charakter decyzji o warunkach zabudowy i studium, za błędne należy uznać odwoływanie się do art. 10 ust. za u.p.z.p. w celu odkodowania właściwej treści art. 61 ust. 3 u.p.z.p. Studium, jako akt kierownictwa wewnętrznego, określa politykę przestrzenną gminy i wiąże wewnętrznie organy gminy przy sporządzaniu i uchwalaniu planów miejscowych. Jego ustalenia nie mogą i w świetle przepisów u.p.z.p. nie stanowią materialnoprawnej podstawy do rozstrzygania przez organ administracji publicznej w sprawie indywidualnej. Wprawdzie ustawodawca w kilku przypadkach uzależniał treść uprawnień i obowiązków kształtujących prawną sytuację podmiotów spoza systemu administracji publicznej od ustaleń studium<sup>[31]</sup> (co zresztą spotykało się ze zdecydowaną krytyką w piśmiennictwie<sup>[32]</sup>), nie usprawiedliwia to jednak wykorzystywania systemowej metody wykładni do poszerzania wpływu aktu charakterze wewnętrznym również na treść decyzji o warunkach zabudowy.

Decyzja o warunkach zabudowy, zgodnie z art. 4 ust. 2 u.p.z.p. (w brzmieniu sprzed nowelizacji), określa sposoby zagospodarowania i warunki zabudowy terenu w przypadku braku miejscowego planu zagospodarowania przestrzennego. Jej treść jest wypadkową ogólnego porządku planistycznego kształtowanego przez ustawy oraz inne akty normatywne o powszechnej mocy obowiązującej<sup>[33]</sup>. Zatem ustalenia zawarte w studium nie mogą z uwagi na ich wewnętrzny charakter wiązać organu wydającego decyzję administracyjną. Ta bowiem jest wydawana na podstawie przepisów powszechnie obowiązujących, co znajduje swoje potwierdzenie od początku lat osiemdziesiątych w orzecznictwie sądowoadministracyjnym<sup>[34]</sup>. Stąd też między innymi w orzecznictwie zdecydowanie przeważa

<sup>31</sup> Zob. m.in.: art. 41 ust. 4 pkt 2 ustawy z dnia 21 marca 1985 r. o drogach publicznych (t. j.: Dz. U. z 2022 r., poz. 1693 ze zm.); art. 7 ust. 2 i art. 29 ust. 1 ustawy z dnia 9 czerwca 2011 r. – Prawo geologiczne i górnicze (t. j.: Dz. U. z 2022 r., poz. 1072 ze zm.).

<sup>32</sup> Zob. m.in.: Marek Szewczyk, „Treść i forma studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy oraz miejscowego planu zagospodarowania przestrzennego”, [w:] Zbigniew Leoński, Marek Szewczyk, Maciej Kruś, *Prawo zagospodarowania przestrzeni* (Warszawa: Wolters Kluwer, 2019), 251–255.

<sup>33</sup> Por. Zygmunt Niewiadomski, „Gmina wobec zjawisk rozpraszania i koncentracji zabudowy (odpowiedzialność prawodawcy miejskiego za stan patologicznej zabudowy)”, [w:] Prawne problemy rozpraszania i koncentracji zabudowy, red. Tomasz Bąkowski (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego 2018), 27.

<sup>34</sup> Wyrok NSA z 6.02.1981 r., SA 819/80, ONSA 1981, nr 1, poz. 6.

pogląd o braku związania treści decyzji o warunkach zabudowy ustaleniami studium<sup>[35]</sup>.

Ponadto, na co słusznie zwraca uwagę Wiesław Kisiel, istota relacji, a raczej jej braku, pomiędzy studium a decyzją o warunkach zabudowy tkwi w art. 61 ust. 1 u.p.z.p. rozpoczynającym się od słów: „Wydanie decyzji o warunkach zabudowy jest możliwe jedynie w przypadku łącznego spełnienia następujących warunków”, po których te warunki te zostają wymienione, przy czym pośród nich nie ma warunku zgodności tej decyzji z ustaleniami studium<sup>[36]</sup>.

Z tych też względów dokonywanie rekonstrukcji treści art. 61 ust. 3 u.p.z.p. poprzez odwołanie się do art. 10 ust. 2a u.p.z.p. nie można uznać za właściwe zastosowanie systemowej metody wykładni prawa. Systemową wykładnię art. 61 ust. 3 u.p.z.p. należy oprzeć na przepisach określających zasady ustalania warunków zabudowy ujętych w rozdziale 5 u.p.z.p., ale przede wszystkim na przepisach rozdziału 1 u.p.z.p. zawierającego zasady planowania i zagospodarowania przestrzennego, będące odzwierciedleniem podstawowych zasad konstytucyjnych odnoszących się do wolności i praw człowieka i obywatela. Wywodzona z art. 2, art. 21, art. 31, art. 64 Konstytucji RP wolność zabudowy poprzez powiązanie z przepisami u.p.z.p. <sup>[37]</sup> powinna prowadzić do jej urzeczywistnienia w procesie stosowania prawa.

Ocena treść art. 61 ust. 3 u.p.z.p., dokonana z perspektywy tych unormowań, zdaje się potwierdzać rezultat uzyskany przy użyciu językowej metody wykładni. Skoro bowiem ustawodawca w zbiorze przepisów

<sup>35</sup> Zob. m.in.: wyroki NSA z: 31.03.2008 r., II OSK 317/07, LEX nr 490164; 3.04.2008 r., II OSK 1888/07, LEX nr 470928; 30.10.2009 r., II OSK 1728/08, LEX nr 571933; 30.10.2009 r., II OSK 1728/08, LEX nr 571933; 30.10.2009 r., II OSK 1728/08, LEX nr 571933; 23.06.2010 r., II OSK 1025/09, LEX nr 706910; 23.09.2011 r., II OSK 413/11, LEX nr 1132126; 27.06.2013 r., II OSK 543/12, LEX nr 1559809; 24.02.2016 r., II OSK 1553/14, LEX nr 2114323; 19.05.2016 r., II OSK 2176/15, LEX nr 2083437. Odmienne stanowisko zostało zaprezentowane m.in. w wyroku NSA z 6.08.2009 r., II OSK 1250/08, LEX nr 552846.

<sup>36</sup> Wiesław Kisiel, „Relacja między studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy oraz decyzją o warunkach zabudowy (uwagi do głosy Jerzego Kopyry)” *Samorząd Terytorialny*, nr 11 (2011): 83.

<sup>37</sup> Zgodnie z art. 6 ust. 2 u.p.z.p.: „Każdy ma prawo, w granicach określonych ustawą, do: 1) zagospodarowania terenu, do którego ma tytuł prawny, zgodnie z warunkami ustalonymi w miejscowym planie zagospodarowania przestrzennego albo decyzji o warunkach zabudowy i zagospodarowania terenu, jeżeli nie narusza to chronionego prawem interesu publicznego oraz osób trzecich; 2) ochrony właściwego interesu prawnego przy zagospodarowaniu terenów należących do innych osób lub jednostek organizacyjnych”.

obejmujących przesłanki ustalania warunków zabudowy nie dokonuje rozróżnień z punktu widzenia mocy instalacji odnawialnych źródeł energii, to w myśl reguły *lege non distingue* oraz kierując się zasadą wolności zabudowy, organy stosujące te przepisy oraz sądy kontrolujące ich stosowanie również nie powinny tego czynić.

Przy jednoznacznym brzmieniu art. 61 ust. 3 u.p.z.p. nie znajduje też dostatecznej racji odwoływanie się do wskazanego powyżej uzasadnienia projektu ustawy z 19 lipca 2019 r. Poza tym gdyby ustawodawca zamierzał ograniczyć lokalizacje instalacji odnawialnych źródeł energii na podstawie decyzji o warunkach zabudowy do „małych instalacji oraz mikroinstalacji OZE”, to nie byłoby prawnych przeszkoł do wprowadzenia takiego ograniczenia wprost w art. 61 ust. 3 u.p.z.p. Wypada też wskazać, że jakkolwiek można przy dokonywaniu wykładni przepisów wspierać się posiłkowo uzasadnieniem do projektu ustawy, to jednak należy mieć świadomość tego, że uzasadnienie to nie jest wypowiedzią ustawodawcy, lecz projektodawcy. Zatem uzasadnieniu temu daleko jest do miana wykładni autentycznej.

Dotychczasowe uwagi przemawiają za pozytywną weryfikacją trzeciej z wyżej przedstawionych hipotez, a co za tym idzie, dają podstawy do uznania możliwości ustalenia w drodze decyzji o warunkach zabudowy lokalizacji instalacji odnawialnego źródła energii z wyłączeniem wymogów przewidzianych w art. 61 ust. 1 pkt 1 i 2 u.p.z.p. (oczywiście przy zachowaniu pozostałych wymogów przewidzianych w u.p.z.p. sprzed nowelizacji oraz w przepisach odrębnych) niezależnie od ustaleń przyjętych w studium oraz od limitów mocy przewidzianych w art. 10 ust. 2a u.p.z.p.

Za dodatkowy argument, wzmacniający ten właśnie kierunek interpretacji, można by uznać rozwiązania zastosowane przy lokalizacji obiektów handlowych o powierzchni sprzedaży powyżej 2000 m<sup>2</sup>, które nie zostały przyjęte w odniesieniu do lokalizacji instalacji odnawialnych źródeł energii. Otóż według art. 10 ust. 3a u.p.z.p., jeżeli na terenie gminy przewiduje się lokalizację obiektów handlowych o powierzchni sprzedaży powyżej 2000 m<sup>2</sup>, w studium określa się obszary, na których mogą być one sytuowane. Zgodnie zaś z 10 ust. 3b u.p.z.p., lokalizacja obiektów, o których mowa w ust. 3a, może nastąpić wyłącznie na podstawie miejscowego planu zagospodarowania przestrzennego.

Skoro więc ustawodawca zastrzegł, że lokalizacja obiektów handlowych o powierzchni sprzedaży powyżej 2000 m<sup>2</sup> jest możliwa jedynie w okolicznościach, gdy obszary, na których mogą być te obiekty sytuowane zostaną określone w studium, jednak tylko wtedy, gdy jest dokonywana na podstawie ustaleń planu miejscowego, zaś w przypadku instalacji odnawialnego

źródła energii o mocy wyższej niż wskazana w art. 10 ust. 2a u.p.z.p., brakuje analogicznego ograniczenia do jej lokalizowania wyłącznie na podstawie ustaleń planu miejscowego, to nie ma też jakichkolwiek powodów do domniemywania istnienia takiego ograniczenia.

## Bibliografia

- Bąkowski Tomasz, „Niedoskonałości legislacji administracyjnej (przykłady, konsekwencje, źródła i poszukiwanie sposobu sanacji)”, [w:] *Prawo administracyjne dziś i jutro*, red. Jacek Jagielski, Marek Wierzbowski. 573-585. Warszawa: Wolters Kluwer, 2018.
- Bąkowski Tomasz, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*. Kraków: Zakamycze, 2004.
- Daniel Paweł, Krzysztof Smoliński, „Lokalizacja farm fotowoltaicznych przy braku miejscowego planu zagospodarowania przestrzennego” *Nieruchomości@*, nr 1 (2022): 79-92. doi: 10.5604/01.3001.0015.8070.
- Fogel Anna, Lokalizacja urządzeń wytwarzających energię ze źródeł odnawialnych wobec «dobrego sąsiedztwa», [w:] Wojciech Federczyk, Anna Fogel, Agata Kosieradzka-Federczyk, *Prawo ochrony środowiska w procesie inwestycyjno-budowlanym*. 122-124. Warszawa: Wolters Kluwer, 2015.
- Izdebski Hubert, Igor Zachariasz, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*. Warszawa: Wolters Kluwer, 2013.
- Kisiel Wiesław, „Relacja między studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy oraz decyzją o warunkach zabudowy (uwagi do glosy Jerzego Kopyry)” *Samorząd Terytorialny*, nr 11 (2011): 80-84.
- Kostka Zdzisław, Jacek Hyla, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz i przepisy wykonawcze*. Gdańsk: Ośrodek Doradztwa i Doskonalenia Kadr, 2004.
- Kretowicz Paweł, „Planistyczne uwarunkowania i bariery lokalizacji instalacji odnawialnych źródeł energii” *Samorząd Terytorialny*, nr 19 (2016): 33-50.
- Kruś Maciej, Kamil Tychmanowicz, „Agrofotowoltaika jako narzędzie ochrony gruntów rolnych” *Samorząd Terytorialny*, nr 7-8 (2022): 122-130.
- Niewiadomski Zygmunt, „Gmina wobec zjawisk rozpraszczenia i koncentracji zabudowy (odpowiedzialność prawodawcy miejscowego za stan patologicznej zabudowy)”, [w:] *Prawne problemy rozpraszczenia i koncentracji zabudowy*, red. Tomasz Bąkowski. 23-32. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego 2018.

Niewiadomski Zygmunt, *Planowanie przestrzenne. Zarys systemu*. Warszawa: Lexis Nexis, 2003

Paweł Sosnowski, Krzysztof Buczyński, Joanna Dziedzic-Bukowska, Jacek Jaworski, *Ustawa o planowaniu i zagospodarowaniu przestrzennym Komentarz*. Warszawa: Lexis Nexis 2014.

*Planowanie i zagospodarowanie przestrzenne. Komentarz*, red. Zygmunt Niewiadomski. Warszawa: C.H. Beck, 2023.

Przybylska-Cząstkiewicz Monika, „Planowanie przestrzenne w gminie po wejściu w życie ustawy z dnia 20 maja 2016 r. o inwestycjach w zakresie elektrowni wiatrowych” *Casus*, nr 84 (2017): 15-20.

*Rozprawa z decyzją o warunkach zabudowy*, red. Tomasz Bąkowski. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego 2022.

Szewczyk Marek, „Treść i forma studium uwarunkowań i kierunków zagospodarowania przestrzennego gminy oraz miejscowego planu zagospodarowania przestrzennego”, [w:] Zbigniew Leoński, Marek Szewczyk, Maciej Kruś, *Prawo zagospodarowania przestrzeni*. 251-287. Warszawa: Wolter Kluwer, 2019.

Wróblewski Jerzy, „Wykładnia prawa”, [w:] Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa*. 436-452. Warszawa: Państwowe Wydawnictwo Naukowe 1986.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

BEATA BARAN-WESOŁOWSKA

# Model organizacyjno-podmiotowy wojskowego postępowania dyscyplinarnego w perspektywie ustawy o obronie Ojczyzny

## Organizational and Subjective Model of Military Disciplinary Proceedings in the Perspective of the Homeland Defense Act

The paper presents the organizational and subjective model of military disciplinary proceedings. The article analyzes the interiorization and exteriorization stages of the process. In this study, the author also examines the submodel of the office based on the disciplinary authority exercised by internal entities called disciplinary superiors.

**SŁOWA KLUCZOWE:** postępowanie dyscyplinarne, żołnierz, odpowiedzialność dyscyplinarna, przełożony dyscyplinarny

**KEYWORDS:** disciplinary proceedings, soldier, disciplinary liability, disciplinary superior

**BEATA BARAN-WESOŁOWSKA**, doktor habilitowany nauk prawnych, profesor Akademii Humanitas, ORCID – 0000-0001-6298-228X, e-mail: beata.baran@gmail.com

## Uwagi wstępne

Uchwalona dnia 11 marca 2022 r. ustawa o obronie Ojczyzny nadała nowy kształt wojskowemu postępowaniu dyscyplinarnemu. W moim przekonaniu warto procedurą tę przedstawić w ujęciu modelowym. Opracowanie

to zostanie zatem poświęcone modelowi organizacyjno-podmiotowemu procedury dyscyplinarnej żołnierzy. Zanim jednak przejdę do charakterystyki konkretnych regulacji normatywnych w ujęciu modelowym warto poświęcić nieco uwagi aspektom metodologicznym ich tworzenia. *Ab initio* warto zdefiniować proces kształtowania modeli<sup>[1]</sup>. W tej materii punktem wyjścia będzie zapatrywanie Stanisława Waltosia, że model to „[...] zespół podstawowych elementów pewnego układu pozwalający na odróżnienie go od innych układów”<sup>[2]</sup>. Istotą kształtowania tak pojmowanego modelu jest stworzenie symplifikacji pozwalającej przedstawić modelowy przedmiot z pominięciem jego cech, które zostały uznane za nieistotne na danym poziomie analitycznym. Tego rodzaju ujęcie jest w swej istocie oparte na idealizacyjnej teorii nauki<sup>[3]</sup>. W efekcie procesów selekcyjnych konstruowane modele cechuje pewien pierwiastek subiektywizmu. W swej istocie mają one charakter generalizujący, przedstawiając w sposób wyidealizowany organizację, statykę i kinetykę mechanizmów dyscyplinarnych. Pozwala to uchwycić najistotniejsze fakty rzucające na funkcjonowanie wojskowych organów dyscyplinarnych oraz podmiotów sprawujących nad nimi kontrolę.

Kierując się kryterium organizacyjno-podmiotowym<sup>[4]</sup>, a to konkretne charakterem prawnym organów orzekających w sprawach dyscyplinarnych w wymiarze ogólnoteoretycznym, można je pogrupować w dwa podstawowe modele o cechach homologicznych, a to sądowy i pozasądowy. W ramach tego pierwszego sprawy dyscyplinarne należą do kognicji sądów w znaczeniu materialnym (konstytucyjnym). Z kolei model pozasądowy to taki układ proceduralny, w którym władza dyscyplinarna należy do innych organów niż sądy w znaczeniu materialnym. W tym miejscu warto

<sup>1</sup> Por. Jerzy Wróblewski, *Sądowe stosowanie prawa* (Warszawa: Państwowe Wydawnictwo Naukowe, 1988), 34–36.

<sup>2</sup> Stanisław Waltoś, *Model postępowanie przygotowawczego na tle prawnoporównawczym* (Warszawa: Państwowe Wydawnictwo Naukowe 1968), 9.

<sup>3</sup> Por. Leszek Nowak, *Wstęp do idealizacyjnej teorii nauki* (Warszawa: Państwowe Wydawnictwo Naukowe 1977), passim. Por. też Andrzej Klawiter, Krzysztof Łastowski, „Leszek Nowak i jego koncepcje nauki, filozofii społecznej i metafizyki” *Studia Metodologiczne*, nr 31 (2013): 31–34.

<sup>4</sup> W doktrynie prawa dyscyplinarnego zazwyczaj wyróżnia się trzy modele władzy dyscyplinarnej, a to: przełożonych dyscyplinarnych, rozdzieloną pomiędzy zwierzchników służbowych i niezawisłe komisje (sądys) dyscyplinarne oraz niepodzielną władzę komisji (sądów dyscyplinarnych). Por. zwłaszczka Katarzyna Cegler-ska-Piłat, „Pojęcie i cechy charakterystyczne odpowiedzialności dyscyplinarnej w prawie polskim” *Studia Prawnicze*, nr 2 (2015): 127 i powołana tam literatura.

podkreślić, że obok homogenicznych modeli uzasadnionym wydaje się wyróżnienie modeli hybrydowych (heterogenicznych), w ramach których funkcjonują na różnych etapach zarówno organy pozasądowe, jak i sądowe.

Analizując w odniesieniu do obowiązujących procedur rozstrzygania spraw w systemie prawa dyscyplinarnego warto w kontekście powyższej delimitacji podkreślić, że została ona oparte na założeniach idealnych<sup>[5]</sup>, zawierających pierwiastek symplifikacji, co w swych konsekwencjach może generować wątpliwości z przypisaniem konkretnej procedury dyscyplinarnej do wyróżnionego modelu. W praktyce zawsze istnieje możliwość zaistnienia w ramach konkretnej sprawy rozmaitych wariantów, na przykład ze względów na dyferencjację trybów postępowania oraz zróżnicowanie statusu służbowego obwinionego.

Wskażane wyżej podmiotowe warianty orzecznictwa dyscyplinarnego mają przymiot uniwersalnych, w tym sensie, iż mogą być one stosowane do wszystkich procedur dyscyplinarnych, oczywiście także wojskowych. *Prima facie* należy podkreślić, że w modelu służbowym określonym w ustawie ooO orzekają organy dyscyplinarne, posiadające *ex lege* status przełożonego dyscyplinarnego, funkcjonującego w hierarchicznie ukształtowanej strukturze Sił Zbrojnych RP. Uwaga ta odnosi się zarówno do przełożonych dyscyplinarnych pierwszej, jak i drugiej instancji, przy czym w płaszczyźnie hierarchicznej dotyczy to przełożonych wszystkich tworzących strukturę Sił Zbrojnych RP<sup>[6]</sup>, w tym także intermediacyjnego<sup>[7]</sup> i centralnego. Wyjątkiem od tego modelu – potwierdzającym regułę – są nieliczne sytuacje, gdy w sprawach dyscyplinarnych orzekają organy funkcjonujące poza strukturami służbowymi, jednak zawsze działające w ramach resortu obrony narodowej (art. 358 ust 1 pkt 1 ustawy ooO). *De lege lata* mamy więc tej materii do czynienia w pierwszych dwóch fazach procedury z orzecznictwem o charakterze interioryzacyjnym, które w toku dalszych wywodów zostało szczegółowo omówione w ramach zasady interioryzacji.

W ujęciu normatywnym interioryzacyjną fazę procedury dyscyplinarnej można zakwalifikować jako postępowanie prejurysdykcyjne o charakterze obligatoryjnym. Jego podstawową cechą jest służbowy („gabinetowy”)

<sup>5</sup> Por. Nowak, *Wstęp do idealizacyjne*, 62 i nast.

<sup>6</sup> Por. art. 358 ust. 1 pkt 2-6 ustawy ooO

<sup>7</sup> Pojęcie „intermediacyjny” zostało utworzone w oparciu łacińskie słowo „*intermedius*” co oznacza „pośredni” – *Słownik wyrazów obcych i zwrotów obcojęzycznych*, red. Władysław Kopaliński (Warszawa: Wiedza Powszechna, 1975), 339. Mam tu na myśli organy dyscyplinarne formacji policyjnych znajdujące się w strukturze orzeczeń pomiędzy organami lokalnym a centralnymi.

model rozstrzygania spraw dyscyplinarnych przez przełożonych dyscyplinarnych funkcjonujących w ramach struktur sił zbrojnych. Poza zaletami o charakterze funkcjonalnym (np. sprawność i szybkość rozpoznania sprawy) niesie on ze sobą istotne zagrożenia, w szczególności dla obiektywizmu i bezstronności orzecznictwa dyscyplinarnego. Należy mieć zwłaszcza na uwadze niebezpieczeństwo wpływania na przełożonych dyscyplinarnych przez przełożonych służbowych. Tego rodzaju ingerencja w swych konsekwencjach może godzić w trafność rozstrzygnięcia dyscyplinarnego i naruszać standardy sprawiedliwości proceduralnej.

Analizując *sine ira et studio* zagadnienia o charakterze modelowym nieco uwagi pragnę poświęcić także aspektowi *stricto proceduralnemu* wojskowego postępowania dyscyplinarnego. Punktem wyjścia będzie w tej materii przyjęcie założeń analogicznych jak w nauce postępowania karnego i w efekcie wyróżnienia mechanizmów proceduralnych o charakterze śledczym i kontradyktoryjnym<sup>[8]</sup>. Pozostają one w ścisłej koincydencji z służbowym („gabinetowym”) modelem rozstrzygania spraw dyscyplinarnych. Na etapie wewnętrznosłużbowym (interioryzacyjnym) w procedurze wojskowej dominują pierwiastki inkwizycyjne, które są immanentnie skorelowane z gabinetowym modelem orzecznictwa dyscyplinarnego. Oczywiście nadmiernie uproszczoną jest konstatacja, że w tej fazie procedury występują wyłącznie elementy inkwizycyjne. Subsydiarnie ustawa ooO przewiduje również mechanizmy kontradyktoryjne (np. art. 392 ustawy ooO statuanty prawo do obrony). *De lege ferenda* mają one jednak w wojskowej procedurze dyscyplinarnej charakter drugoplanowy. Zasadniczy ciężar prowadzenie konkretnej sprawy spoczywa na organach dyscyplinarnych, co odpowiada istocie modelu służbowego („gabinetowego”). W sposób odmienny jest natomiast ukształtowana faza sądowa wojskowych spraw dyscyplinarnych, którą cechuje kontradyktoryjność. W tym opracowaniu będzie ona jednak omawiana jedynie subsydiarnie w kontekście zasad postępowania dyscyplinarnych. Swoje rozważania skupię bowiem na zasadach obowiązujących w fazie interioryzacyjnej procedur dyscyplinarnych.

<sup>8</sup> Por. Andrzej Murzynowski, *Istota i zasady procesu karnego* (Warszawa: Państwowe Wydawnictwo Naukowe 1994), 172 i nast.; Paweł Hofmański w: *System prawa karnego procesowego. Zasady procesu karnego*, t. III, cz. 1, red. Paweł Wiliński (Warszawa: Lexis Nexis, 2014), 638 i nast.

## 1 | Interioryzacyjny etap wojskowego postępowania dyscyplinarnego

Podstawowym wymiarem w sferze normatywnej modelu służbowego w płaszczyźnie proceduralnej jest zasada interioryzacji. To dyrektywa w myśl, której wojskowe postępowanie dyscyplinarne toczy się w ramach struktur służbowych i przed organami działającymi z ramienia Sił Zbrojnych RP. Zanim przejdę do analizy merytorycznej pragnę bliżej wyjaśnić nazwę tej zasady. Jej etymologia została przeze mnie zaczerpnięta z angielskiego pojęcia „interior” oznaczającego wnętrze<sup>[9]</sup> bądź środek. W mojej ocenie pojęcie to trafnie odzwierciedla specyfikę wojskowych postępowań dyscyplinarnych cechującą model służbowy.

Przechodząc do merytorycznej analizy zagadnienia, tematykę zasady interioryzacji rozpoczęnę od aspektu podmiotowego. Jak już wcześniej wspomniałam, z funkcjonalnego punktu podstawowe znaczenie wśród organów dyscyplinarnych posiadają przełożeni dyscyplinarni. To oni realizują władztwo dyscyplinarne we wszystkich stadiach i etapach procedury. W świetle dyrektywy *lege non distingue* jest oczywiste, że dotyczy to zarówno przełożonych dyscyplinarnych pierwszej, jak i drugiej instancji oraz wojskowych organów orzekających w ramach procedury wznowieniowej.

Podejmując bliżej analizę zagadnienia, w pierwszej kolejności należy przybliżyć status przełożonych dyscyplinarnych orzekających w pierwszej instancji, ze względu na ich z funkcjonalnego punktu widzenia centralne miejsce w systemie orzecznictwa dyscyplinarnego Sił Zbrojnych. W tym opracowaniu podmioty te zostaną stypologizowane według kryterium funkcjonalnego. W mojej ocenie ono najtrajniej scharakteryzuje ich pozycję i kognicję wewnętrzorganizacyjną.

W ujęciu modelowym opartym o idealizacyjną teorię nauki proponuję wyróżnić przełożonych dyscyplinarnych szczebla:

- podstawowego (dowódca jednostki wojskowej – art. 358 ust 1 pkt. 6 ustawy ooO)<sup>[10]</sup>,

<sup>9</sup> Por. *Wielki słownik angielsko-polski, English-Polish Dictionary*, t. I, M, red. Jadwiga Linde-Usiekiewicz (Warszawa: Wydawnictwo Naukowe PWN, 2004), 621.

<sup>10</sup> Por. § 2 ust. 3 rozp. o AW.

- centralnego – np. Naczelnego Dowódcy Sił Zbrojnych, Szef Sztabu Generalnego Wojska Polskiego, dowódcy rodzajów Sił Zbrojnych, dowódcy wojsk, Komendant Główny Żandarmerii Wojskowej, Dowódca Garnizonu Warszawa, Szef Inspektoratu Wsparcia Sił Zbrojnych, Szef Służby Kontrwywiadu Wojskowego, Szef Służby Wywiadu Wojskowego, szef instytucji krajowej, do której żołnierz został oddelegowany (art.358 ust 1 pkt 2-4 ustawy ooO),
- specjalnego – np. dowódca polskiego kontyngentu wojskowego lub doraźnie sformowanego zgrupowania zadaniowego wydzielonego do realizacji zadań w kraju i poza jego granicami (art. 358 ust. 1 pkt 5 ustawy ooO).

Zasada interioryzacji funkcjonuje również w systemie wojskowego prawa dyscyplinarnego w odniesieniu do przełożonych dyscyplinarnych orzekających na etapie drugoinstancyjnym (art. 358 ust 2 ustawy ooO). Swoistym odstępstwem od zasady interioryzacji wojskowego postępowania dyscyplinarnego jest natomiast mechanizm prawny, w którym orzecznictwo odwoławcze (drugoinstancyjne) sprawuje minister kierujący resortem (art. 358 ust 3 ustawy ooO). Nie narusza to jednak istoty zasady interioryzacji postępowania dyscyplinarnego, ponieważ sprawa dyscyplinarna rozstrzygana jest wewnątrz resortu obrony narodowej. Przejawem tej zasady jest też mechanizm kompetencyjny, w którym żołnierz, któremu powierzono pełnienie obowiązków na danym stanowisku posiada władzę dyscyplinarną przysługującą żołnierzowi powołanemu bądź mianowanemu na to stanowisko (art. 358 ust 5 ustawy ooO). Zakres jego kompetencji odpowiada władzy dyscyplinarnej przysługującej osobie zastępcowej. W pełnym zakresie podmiotowym zasada interioryzacji odnosi się natomiast do rzeczników dyscyplinarnych. Osoby piastujące te funkcje są wyznaczane spośród żołnierzy zawodowych (art. 386 ust 2 ustawy ooO).

Mechanizmem realizacyjnym zasady interioryzacji jest instytucja rozstrzygnięcia sporów kompetencyjnych pomiędzy przełożonymi dyscyplinarnymi. *Verba legis* jest ona przewidziana tylko w art. 359 ust 3 ustawy ooO. Ów przepis stanowi, że spory o właściwość w sprawach dyscyplinarnych między przełożonymi dyscyplinarnymi rozstrzyga wyższy przełożony dyscyplinarny. Z argumentu *lege non distingue* wnioskuję, że norma ta ma zastosowanie zarówno do sporów kompetencyjnych o charakterze pozytywnym, jak i negatywnym. Tego rodzaju regulację normatywną uważam za użyteczną także z punktu widzenia zasady sprawności wojskowego postępowania dyscyplinarnego.

Uniwersalny mechanizm hierarchicznego podporządkowania w ramach zasady interioryzacji przejawia się w ramach służbowych procedur dyscyplinarnych w postaci dwóch uniwersalnych mechanizmów proceduralnych, a to dewolutywności (dewolucji) oraz substytucyjności (substytucji). Nauka postępowania karnego<sup>[11]</sup> nadaje im rangę naczelnich zasad organizacyjnych w prokuraturze. Ze swej strony reprezentują zapatrywanie, że dewolucja i substytucja w wojskowym postępowaniu dyscyplinarnym stanowią immanentny element zasady interioryzacji. Za tego rodzaju ujęciem przemawiają przede wszystkim wzgłydy funkcjonalne w ramach proceduralnej kinetyki.

Istota dewolutywności w ramach zasady interioryzacji w wojskowym postępowaniu dyscyplinarnych polega na tym, że przełożony dyscyplinarny wyższego szczebla jest uprawniony do przejęcia całości sprawy bądź przeprowadzenia niektórych lub tylko konkretnej, czynności. W ujęciu modelowym dewolutywność może być rozmaicie klasyfikowana. Jeżeli zastosujemy kryterium hierarchii służbowej<sup>[12]</sup> uprawnione jest wyróżnienie dewolucji bezpośredniej (np. art. 389 ust. 1 ustawy ooO) gdy sprawę przyjmuje bezpośredni przełożony nad przełożonym dyscyplinarnym bądź też pośredniej, gdy przełożony dyscyplinarny zajmuje w hierarchii służbowej miejsce wyższe o więcej niż jeden szczebel służbowy.

W ramach omawianej procedury dyscyplinarnej żołnierzy możliwa jest też inna typologizacja dewolutywności. Uprawnionym wydaje się też podział oparty o charakter norm prawnych ją realizujących, a to: na dewolucję bezwzględną (obligatoryjną) oraz dewolucję względową (fakultatywną). Ta pierwsza ma zastosowanie w sytuacji, gdy ustawa *expressis verbis* obliguje wyższego przełożonego dyscyplinarnego do przejęcia sprawy, zaś druga, gdy decyzję w tej materii pozostawia do jego uznania. Na podstawie art. 358 ust 6 ustawy ooO mamy do czynienia z tym drugim rodzajem, gdy Minister Obrony Narodowej oraz podmioty, o których mowa w ust. 1 pkt 2-4, mogą do dnia wydania postanowienia o zamknięciu postępowania dowodowego wszczętego przez innego przełożonego dyscyplinarnego, jeżeli uzna to za uzasadnione okolicznościami sprawy przejąć prowadzenie postępowania dyscyplinarnego.

<sup>11</sup> W ramach procedury karnej zob. w tej materii Marian Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* (Warszawa: Państwowe Wydawnictwo Naukowe 1971), 247-250. Zasady te nie zostały natomiast wyróżnione w *Systemie prawa karnego procesowego*, *passim*.

<sup>12</sup> Por. wyrok NSA z dnia 12 lutego 2016r., I OSK 2199/14, t. 3, LEX nr 2114258.

Z natury rzeczy tego rodzaju ogólne przesłanki mają silny pierwiastek ocenności, pozostawiający ministrowi szeroki margines swobody decyzyjnej. W rachubę wchodzą tu zarówno zaistniałe w konkretnej sprawie czynniki podmiotowe, jak chociażby specjalny status służbowy obwinionego żołnierza lub też działanie z motywacji zasługującej na szczególne potępienie. Przy podejmowaniu decyzji o przejęciu sprawy Minister Obrony Narodowej powinien brać pod uwagę także istniejące w niej przesłanki przedmiotowe, jak np. poważne następstwa przewinienia dyscyplinarnego dla bezpieczeństwa państwa lub życia bądź zdrowia obywateli, dysfunkcjalizacji pracy Sił Zbrojnych RP lub naruszenie dobrego imienia służby.

W ramach modelu służbowego wojskowego postępowania dyscyplinarnego uprawnionym wydaje się też wyróżnienie mechanizmu proceduralnego substytucji<sup>[13]</sup>. Jej istota polega na tym, że przełożony dyscyplinarny zleca przeprowadzenie całości bądź części postępowania swojemu podwładnemu. Mechanizm ten jest immanentnie skorelowany z podporządkowaniem służbowym o charakterze hierarchicznym w strukturach Sił Zbrojnych RP.

W ustawie ooO w art. 358 ust 8 mamy do czynienia z substytucją fakultatywną. Ma ona miejsce, gdy przełożony dyscyplinarny na mocy konkretnej normy pragmatyki jest uprawniony („może”) przekazać sprawę swemu podwładnemu. Analizowany przepis stanowi, że Minister Obrony Narodowej oraz osoby, o których mowa w ust. 1 pkt 2-4, mogą w formie pisemnej upoważnić inną osobę do załatwiania spraw dyscyplinarnych w jego imieniu w ustalonym zakresie. Przepisy te jako normy kompetencyjne o charakterze szczególnym nie mogą być rozszerzająco interpretowane, ani w wymiarze podmiotowym, ani też przedmiotowym. Tego rodzaju opcja interpretacyjna jest oparta na uniwersalnej regule wykładni *exceptiones non sunt excendenda*. Art. 358 ust 8 ustawy ooO nie statuuje explicite przesłanek przekazania sprawy. Nie oznacza to w mojej ocenie pełnej dowolności przełożonego dyscyplinarnego. Uważam, że w każdym przypadku powinna istnieć konkretna przyczyna odstąpienia od ustawowo określonej kognicji organu dyscyplinarnego. Może mieć ona charakter aksjologiczny (np. dobro służby), funkcjonalny (np. przyspieszenie toku postępowania ze względu na miejsce lub sposób dokonania przewinienia dyscyplinarnego) czy wreszcie ekonomiczny (np. niższe koszty postępowania). Wykładnia ta ma swe oparcie w zasadzie praworządności i tym samym, ogranicza niebezpieczeństwo woluntaryzmu proceduralnego

<sup>13</sup> Por. Cieślak, *Polska procedura*, 247 i 248.

w ramach władztwa dyscyplinarnego i tym samym nieuzasadnione wysługiwanie się podwładnymi w ramach zhierarchizowanej służbowej władzy dyscyplinarnej.

Z punktu widzenia stosowania instytucji substytucji istotnym zagadnieniem jest jej aspekt temporalny. Konkretnie rzecz ujmując chodzi o to, na jakim etapie postępowania dyscyplinarnego przełożony może przekazać sprawę organom niższemu w hierarchii służbowej. Na podstawie tekstuowej wykładni art. 358 ustawy ooO uprawnionym jawi się zatem stwierdzenie, że substytucja<sup>[14]</sup> – zarówno pełna, jak i ograniczona – może nastąpić do czasu wydania orzeczenia dyscyplinarnego w danej instancji.

Immanentnym przymiotem służbowego modelu postępowania dyscyplinarnego jest zasada monokratyczności (jednoosobowości). W wojskowym postępowaniu dyscyplinarnym polega ona na tym, że organ dyscyplinarny działa w składzie jednego żołnierza<sup>[15]</sup>. W świetle postanowień ustawy ooO oznacza to, że uprawnień tych nie mają osoby, które nie posiadają statusu żołnierza i są zatrudnione w strukturach sił zbrojnych na podstawie umowy o pracę lub umowy cywilnoprawnej.

Przechodząc do konkretnego ujęcia zasady monokratyczności (jednoosobowości) do celów dalszych rozważań formułuje wstępную tezę, że w wojskowym postępowaniu dyscyplinarnym dominują mechanizmy jednoosobowego orzecznictwa. Dotyczy to wszystkich organów dyscyplinarnych, nie tylko przełożonych dyscyplinarnych pierwszoinstancyjnych, ale również drugoinstancyjnych. Mechanizm ten niewątpliwie z prakseologicznego punktu widzenia usprawnia przebieg postępowania dyscyplinarnego, ale może skutkować poważnymi ograniczeniami w zakresie bezstronności orzecznictwa i w efekcie rzutować na stosowanie zasady trafnej reakcji dyscyplinarnej.

Podobny mechanizm obowiązuje w orzecznictwie organów drugoinstancyjnych w postępowaniach dyscyplinarnych. Tam także o sprawie rozstrzyga jednoosobowo żołnierz zawodowy lub funkcjonariusz ministerstwa obrony narodowej przez którego dana służba jest nadzorowana. Bezpośredni związek z zasadą jednoosobowości mają mechanizmy wyznaczania konkretnych żołnierzy do prowadzenia konkretnej sprawy,

<sup>14</sup> Zastosowanie mechanizmów substytucji w sposób wadliwy (np. brak stosownego upoważnienia) może być podstawą uchylenia orzeczenia dyscyplinarnego. Skarżący będzie mógł bowiem zasadzie wywodzić, że w sprawie orzekał nieuprawniony organ.

<sup>15</sup> Por. Cieślak, *Polska procedura*, 255.

co *explicite* kształtuje faktyczną władzę dyscyplinarną. W odniesieniu do przełożonych dyscyplinarnych ma to zazwyczaj miejsce na mocy norm rangi ustawowej.

Zasada jednoosobowości w szerokim zakresie odnosi się także do realizacji funkcji ścigania przewinień przez rzeczników dyscyplinarnych. W tym miejscu warto podkreślić, że mechanizm desygnowacyjny obowiązuje w ustawie ooO jako reguła przy wyznaczaniu (powoływaniu) rzeczników dyscyplinarnych (art. 386 ust 2). W efekcie w modelu służbowym wojskowej procedury dyscyplinarnej obowiązuje w pełnym zakresie zasada monokratyczności.

W strukturze modelu organizacyjno-personalnego wojskowego postępowania dyscyplinarnego warto jeszcze zwrócić uwagę na wniosek o ponowne rozpatrzenie sprawy z art. 407 ust 2 *in fine* ustawy ooO. Ma on przymiot środka zaskarżenia o charakterze niedewolutywnym, a jego istota polega na ponownej kontroli orzeczenia organu pierwszoinstancyjnego. Tego rodzaju weryfikacja intrerioryzacyjna ma miejsce w sytuacji, gdy w strukturze Sił Zbrojnych RP nie występuje organ drugoinstancyjny, ponieważ w sprawie w pierwszej instancji orzekał organ zajmujący najwyższe miejsce w hierarchii służbowej (Minister Obrony Narodowej lub Naczelnny Dowódca Sił Zbrojnych). *Natura rerum* procedura ta może w ramach autoweryfikacji przyczynić się do realizacji zasady sprawiedliwości proceduralnej i trafnej reakcji dyscyplinarnej.

## 2 | Eksterioryzacyjny etap wojskowego postępowania dyscyplinarnego

Model organizacyjny postępowania w sprawach dyscyplinarnych żołnierzy ma także etap eksterioryzacyjny. W płaszczyźnie ogólnoteoretycznej jest to przejaw jurydyzacji odpowiedzialności dyscyplinarnej żołnierzy w świetle konstytucyjnego prawa do sądu (art. 45 ust. 1 i 77 ust 2 Konstytucji RP.). Ten pierwszy przepis statuuje imperatywną dyrektywę, zgodnie z którą prawo do sądu przysługuje w każdej sprawie – *lege non distinguente* – także dyscyplinarnej. Droga sądowa na mocy art. 77 ust. 2 polskiej ustawy zasadniczej pozostaje otwarta dla tego rodzaju spraw, ponieważ odnoszą się one do praw i wolności obywatelskich, również żołnierzy. Kontrola orzecznictwa

w sprawach dyscyplinarnych żołnierzy zawodowych sprawowana jest przesz sądownictwo administracyjne (art. 184 Konstytucji RP skorelowany z art. 1 ppsa). Nie wyklucza jej art. 122 ustawy ooO. W doktrynie postępowania administracyjnego akcentuje się, że powinna ona przebiegać w trzech płaszczyznach: oceny zgodności rozstrzygnieć z prawem materialnym, dochowania wymaganej procedury i respektowania reguł kompetencji<sup>[16]</sup>. Tego rodzaju mechanizmy kontroli są koherentne z konstytucyjną zasadą demokratycznego państwa prawa.

### 3 | Podsumowanie

Podsumowując wywody na temat holistycznie pojmowanego modelu rozstrzygania spraw dyscyplinarnych żołnierzy konstatuję, że ma on charakter heterogeniczny, konkretnie rzecz ujmując interioryzacyjno-eksterioryzacyjny. Na etapie wewnętrznym funkcjonuje typowy dla służb zmilitaryzowanych submodel gabinetowy, w którym władztwo dyscyplinarne sprawują podmioty wewnętrzne zwane przełożonymi służbowymi. Spełniają one w postępowaniu interioryzacyjnym rolę *dominus litis*. Z punktu widzenia funkcjonowania Sił Zbrojnych RP etap ten ma poważne zalety, pozwala bowiem w sposób relatywnie szybki rozstrzygnąć o odpowiedzialności żołnierza za przewinienie dyscyplinarne. Z kolei etap sądowy jest ukierunkowany na kontrolę legalności wojskowego orzecznictwa dyscyplinarnego i tworzy normatywną tarczę przed voluntarymem działań przełożonych dyscyplinarnych.

<sup>16</sup> Bogusław Banaszek, Krzysztof Wygoda, „Funkcjonowanie sądownictwa administracyjnego w zderzeniu z problemami współczesności- wybrane zagadnienia” *Studia Iuridica Lublinensia* nr 22 (2014): 175-176.

## Bibliografia

- Banaszek Bogusław, Krzysztof Wygoda, „Funkcjonowanie sądownictwa administracyjnego w zderzeniu z problemami współczesności- wybrane zagadnienia” *Studia Iuridica Lublinensia* nr 22 (2014): 165-178.
- Ceglerska-Piłat Katarzyna, „Pojęcie i cechy charakterystyczne odpowiedzialności dyscyplinarnej w prawie polskim” *Studia Prawnicze*, nr 2 (2015): 99-139.
- Cieślak Marian, *Polska procedura karna. Podstawowe założenia teoretyczne*. Warszawa: Państwowe Wydawnictwo Naukowe 1971.
- Klawiter Andrzej, Krzysztof Łastowski, „Leszek Nowak i jego koncepcje nauki, filozofii społecznej i metafizyki” *Studia Metodologiczne*, nr 31 (2013): 25-41.
- Murzynowski Andrzej, *Istota i zasady procesu karnego*. Warszawa: Państwowe Wydawnictwo Naukowe, 1994.
- Nowak Leszek, *Wstęp do idealizacyjnej teorii nauki*. Warszawa Państwowe Wydawnictwo Naukowe, 1977.
- Słownik wyrazów obcych i zwrotów obcojęzycznych*, red. Władysław Kopaliński. Warszawa: Wiedza Powszechna, 1975.
- System prawa karnego procesowego. Zasady procesu karnego*, t. III, cz. 1, red. Paweł Wiliński, Warszawa: Lexis Nexis, 2014.
- Waltoś Stanisław, *Model postępowanie przygotowawczego na tle prawnoporównawczym*. Warszawa: Państwowe Wydawnictwo Naukowe, 1968.
- Wielki słownik angielsko-polski. English-Polish Dictionary*, t. I, Jadwiga Linde-Usiek-niewicz. Warszawa: Wydawnictwo Naukowe PWN, 2004.
- Wróblewski Jerzy, *Sądowe stosowanie prawa*. Warszawa: Państwowe Wydawnictwo Naukowe, 1988.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

RENATA KUSIAK-WINTER

# Badanie związków polityki i prawa jako przedmiot nauki administracji

## The Study of the Relationship Between Politics and Law as a Subject of the Science of Administration

By abolishing the science of administration as a separate scientific discipline within the field of legal sciences, the legislator undermined the legitimacy of the hitherto very rich research perspective on the various and heterogeneous conditions in which public administration functions. After the reform, everything that did not fall within the scope of administrative law was assigned to the newly created science of politics and administration. As a result of this division, there is a danger of „underdeveloped research areas” in which, according to the author, the question of the relationship between politics and law can be included. On the one hand, there is a temptation for lawyers to overlook phenomena in public administration that are related to politics and at the same time are not directly related to administrative law. On the other hand, one should be aware that the analysis of the research conducted so far in political science shows a notorious tendency to marginalize the legal threads that condition the functioning of public administration. This study is another voice in the discussion on the restoration of the science of administration as a separate scientific discipline.

**KEYWORDS:** public administration,  
science of administration,  
administrative law

**SŁOWA KLUCZOWE:** administracja  
publiczna, nauka administracji,  
prawo administracyjne.

**RENATA KUSIAK-WINTER**, doktor habilitowana nauk prawnych,  
Uniwersytet Wrocławski, ORCID – 0000-0002-8202-1360,  
e-mail: renata.kusiak-winter@uwr.edu.pl

## 1 | Wprowadzenie

W ramach reformy systemu nauki i szkolnictwa wyższego, realizowanej pod nazwą Konstytucji 2.0, z dniem 1 października 2018 r., nastąpiło zniesienie nauki o administracji jako odrębnej dyscypliny naukowej w obrębie dziedziny nauki prawne. Podstawę prawną likwidacji tworzy rozporządzenie Ministra Nauki i Szkolnictwa Wyższego z dnia 20 września 2018 r. w sprawie dziedzin nauki i dyscyplin naukowych oraz dyscyplin artystycznych<sup>[1]</sup>. Poszczególne zakresy formalnie wchodzące dotychczas w skład nauki o administracji zostały przypisane tylko do dwóch nowych dyscyplin, a mianowicie do dyscypliny nauki prawne oraz dyscypliny nauki o polityce i administracji. W uzasadnieniu do ww. rozporządzenia czytamy, że w odniesieniu do przedmiotów dotychczasowych dyscyplin – nauka o administracji (w zakresie prawa administracyjnego) weszła w skład dyscypliny nauki prawne, a nauka administracji (z wyłączeniem zakresu dotyczącego prawa administracyjnego) weszła w skład dyscypliny nauki o polityce i administracji<sup>[2]</sup>. W ten sposób prawodawca podważył zasadność istnienia dotychczasowej, bardzo bogatej perspektywy badawczej, gdyż pogłębione badania administracji prowadzone były nie tylko na gruncie nauk prawnych i politologii, ale również w ramach nauki organizacji i zarządzania, socjologii, psychologii społecznej, statystyki, informatyki czy cybernetyki.

Po reformie wszystko to, co nie jest objęte zakresem prawa administracyjnego zostało przypisane do nowo utworzonej nauki o polityce i administracji. W konsekwencji tak dokonanego binarnego podziału istnieje prawdopodobieństwo powstawania „niezagospodarowanych obszarów badawczych”, czyli takich, którymi nie będą zainteresowani ani naukowcy prowadzący badania w ramach nauk prawnych, ani nauki o polityce i administracji. Chodzi o to, że badania prowadzone wśród pracowników dotyczące zjawisk w administracji publicznej, które wykazują związki z polityką, ale które jednocześnie będą pozbawione bezpośrednich odniesień do prawa administracyjnego, mogą spotkać się z zarzutem niedopełnienia obowiązków pracownika uczelni wynikających z przypisania się do określonej dziedziny i dyscypliny naukowej<sup>[3]</sup>. Jeszcze inaczej przedstawia się sytuacja

<sup>1</sup> Dz. U. poz. 1818.

<sup>2</sup> Podaję za: Jarosław Dobkowski, „W obronie nauki administracji” *Prawo i Więź*, nr 1 (2022): 70.

<sup>3</sup> Obowiązek pracownika naukowo-dydaktycznego uczelni wynika z art. 343 ust. 7–10 ustawy z dnia 20 lipca 2018 r. *Prawo o szkolnictwie wyższym i nauce*.

wśród naukowców reprezentujących naukę o polityce i administracji. Otóż analiza badań prowadzonych dotychczas w politologii praktycznie od samego początku wykazuje notoryjną tendencję do marginalizowania wątków prawnych, warunkujących funkcjonowanie administracji publicznej, co wynika już z chociażby z metodologii i systematyki przyjętej w naukach politycznych<sup>[4]</sup>. W związku z tym, celem niniejszych rozważań jest próba ukazania, jak w kontekście dotychczasowego rozwoju nauki administracji i wielości nurtów badawczych należy ocenić możliwość pogłębiania związków polityki i prawa. W szczególności analizie poddany zostanie nurt badań w ramach historycznej triady nauk administracyjnych oraz znacznie szerszego nurtu nauk społecznych, w skład którego wchodzi m.in. politologia. Niniejsze opracowanie to kolejny głos w sprawie przywrócenia nauki administracji jako odrębnej dyscypliny naukowej w obrębie nauk prawnych<sup>[5]</sup>.

## 2 | Badanie związków polityki i prawa na gruncie triady nauk administracyjnych

Badanie związków polityki i prawa jako przedmiot nauki administracji sugeruje rozważania bliskie perspektywie triady nauk administracyjnych, określonej również mianem „trójpodziału” wiedzy administracyjnej, w obrębie której zakres, tematyka i cele nauki administracji są ustalane w odniesieniu do nauki prawa administracyjnego oraz polityki administracyjnej. Co znamienne jednak, triada od samego początku wykazywała określoną asymetrię, polegającą na przypisywaniu nauce administracji silniejszych związków z nauką prawa administracyjnego niż z polityką. Wytlumaczeniem takiego stanu rzeczy może być fakt, że omawiane podejście zostało wypracowane w dogmatyce prawa, a konkretnie w literaturze niemieckiej końca XIX w. W tym miejscu należy przykładowo wymienić nazwiska ówczesnych prawników administratywistów Ignaza Jastrowa,

<sup>4</sup> Szerzej na ten temat Jarosław Dobkowski, „Status nauki administracji”, [w:] *Założenia nauki administracji*, red. Joanna Smarż, Sławomir Fundowicz, Paweł Śwital (Warszawa: Wolters Kluwer, 2024), 21.

<sup>5</sup> Dobkowski, „W obronie”, 70; Dobkowski, „Status nauki”, 19; Helena Kisilowska, „Kierunki rozwoju nauki”, [w:] *Założenia nauki administracji*, red. Joanna Smarż, Sławomir Fundowicz, Paweł Śwital (Warszawa: Wolters Kluwer, 2024), 27-37.

opowiadającego się na rzecz samodzielności nauki administracji w obrębie nauk prawnych<sup>[6]</sup>, oraz Fritza Stier-Somlo, który wprowadził szczegółowe rozgraniczenie w zakresie wiedzy o administracji publicznej<sup>[7]</sup>. Ostatni z wymienionych naukę administracji określił mianem nauki opisowej, której zadaniem jest przedstawianie urządzeń administracyjnych, działań administracji, jej historii oraz dostarczanie naukowej krytyki. W tym ujęciu realizuje ona zarówno cele badawcze, jak i praktyczne<sup>[8]</sup>. W ramach tzw. „wiedzy administracyjnej” triada dotyczyła „czystego faktu” administracji: czym jest, czym była i czym prawdopodobnie będzie. Zdaniem czołowego niemieckiego prawnika tamtych czasów, Waltera Jellinka:

administrację przedstawia się tak, jak się ją widzi, porównuje się ją z państwowym i gminnym życiem zagranicy albo z przeszłością, bada gospodarcze, społeczne i duchowe przyczyny i skutki instytucji i dochodzi w rozmaitości zjawisk z pomocą statystyki ogólnych, socjologicznych reguł, choćby o sposobie doboru burmistrzów w wyborach bezpośrednich przez obywateli w przeciwnieństwie do wyboru przez zgromadzenie miejskich elektorów<sup>[9]</sup>.

W ramach triady od samego początku wskazywano na szczególne związki nauki administracji z nauką prawa administracyjnego, że nie ma możliwości przeprowadzenia ścisłej i nieprzekraczalnej linii demarkacyjnej pomiędzy ww. naukami w optyce trójpodziału wiedzy administracyjnej. W szczególności związki te widoczne są w określaniu przedmiotu nauki administracji, który powinien polegać na uzupełnieniu nauki prawa administracyjnego<sup>[10]</sup>. W takiej optyce nauka administracji uzyskuje status zjurydyzowanej nauki pomocniczej wobec nauki prawa administracyjnego,

<sup>6</sup> Ignaz Jastrow, *Sozialpolitik und Verwaltungswissenschaft. Aufsätze und Abhandlungen* (Berlin: G. Reimer, 1902).

<sup>7</sup> Fritz Stier-Somlo, „Die Zukunft der Verwaltungswissenschaft“ *Verwaltungssarchiv*, nr 25 (1917), 89. Szerzej na temat poglądów ww. administratywisty zob. Karol Dąbrowski, „Recepja idei triady nauk administracyjnych Fritza Stier-Somlo w polskiej literaturze naukowej“ *Acta Iuridica Resoviensia* seria Prawo, nr 110 (2020): 43.

<sup>8</sup> Zbigniew Leoński, *Nauka administracji* (Warszawa: C.H. Beck, 2010), 6.

<sup>9</sup> Zob. Walter Jellinek, *Verwaltungsrecht* (Berlin: Springer, 1928) 93; Dąbrowski, „Recepja“, 44.

<sup>10</sup> Tak uczynił Klaus Stern, „Verwaltungslehre – Notwendigkeit und Aufgabe im heutigen Sozialstaat“, [w:] *Gedächtnisschrift Hans Peters*, red. Hermann Conrad, Hermann Jahrreiß, Paul Mikat, Hemann Mosler, Hans Carl Nipperdey, Jürgen Salzwedel (Berlin-Heidelberg: Springer, 1967), 228.

nawet jeśli jej metodą badawczą nie jest przeprowadzanie egzegezy norm prawnych<sup>[11]</sup>. Dodajmy, że inni autorzy niemieccy, jak przykładowo Ferdinand Schmidt, preferowali szerszą perspektywę, twierdząc, że nauka administracji posiada zdecydowanie obszerniejszy zakres niż nauka prawa administracyjnego i wykorzystuje dorobek wielu dziedzin wiedzy. Wedle tego ujęcia nauka administracji obok prawa sięga do historii, ekonomii, statystyki czy nawet nauki o moralności, w celu ukazywania i oceny aspektów działania administracji o charakterze historycznym, politycznym czy technicznym i w tym sensie nauka prawa administracyjnego nie jest w stanie sprostać takim zamierzeniom<sup>[12]</sup>.

Na gruncie doktryny polskiej ukonstytuowania nauki administracji jako odrębnej dyscypliny naukowej dokonał Franciszek Longchamps w przełomowym dziele *Założenia nauki administracji*<sup>[13]</sup> i wzorem niemieckich autorów przedmiot badań został tu również określony z wyraźnym nawiązaniem do trójpodziału wiedzy administracyjnej. Zdaniem tego autora nauka prawa administracyjnego jest nauką o normach, a nauka administracji – nauką empiryczną, o tym jaka „jest” administracja, a nie jaka „winna być”, ponieważ to ostatnie byłoby już przedmiotem badań polityki administracyjnej<sup>[14]</sup>. W takim ujęciu nauce administracji przypada rola badania całej rzeczywistej administracji publicznej<sup>[15]</sup>.

<sup>11</sup> Stern, „Verwaltungslehre“, 330.

<sup>12</sup> Ferdinand Schmidt, „Über die Bedeutung der Verwaltungslehre als selbständige Wissenschaft“ *Zeitschrift für die gesamte Staatswissenschaft*, z. 2 (1909): 193-223.

<sup>13</sup> Franciszek Longchamps, *Założenia nauki administracji* (Wrocław: Wrocławskie Towarzystwo Naukowe, 1949, passim).

<sup>14</sup> Longchamps, „Założenia nauki“, 36.

<sup>15</sup> Na marginesie dodajmy, że sformułowany w tej sposób przedmiot okazał się nie do zaakceptowania w warunkach ustroju socjalistycznego, o czym świadczy chociażby próba unicastwienia wspomnianego dzieła F. Longchamps, ponieważ większość nakładu władze PRL-u skierowałały na makulaturę, wyrażając w ten sposób brak akceptacji dla szerzenia zaprezentowanych w nim poglądów jako szkodliwych dla ideologii panującego reżimu (zob. Zbigniew Kmieciak, *Franciszek Longchamps de Bérier. Pisma wybrane z lat 1934-1970* (Warszawa: Wolters Kluwer, 2019), 21. Na tej podstawie można wysnuć przypuszczenie, że nauka administracji jako nauka opisowa została uznana za taką, w ramach której będzie następowało systematyczne identyfikowanie wszystkich zjawisk zachodzących w administracji publicznej, a zatem również nieprawidłowości i dysfunkcji, polegających przykładowo na ukazaniu nadmiernej polityzacji procesów obserwowań w strukturach administracyjnych.

Co znamienne, również i polscy administratywiści samodzielność nauki administracji uzasadniali koniecznością sytuowania jej w bezpośrednim, ścisłym związku z nauką prawa administracyjnego. Świadczy o tym już chociażby związła i do dziś powszechnie cytowana definicja zaproponowana przez Longchamps, wedle którego administracja publiczna to „układ normatywny zanurzony w rzeczywistości”<sup>[16]</sup>. Chodzi tu o palmę pierwszeństwa i kolejność, że najpierw pojawiają się aprioryczne przepisy prawne, kreujące administrację publiczną, a dopiero wokół tych norm, w procesie stosowania prawa, następuje owo zanurzenie administracji w otaczającą rzeczywistość. Również spór znamienitych profesorów prawa administracyjnego Wacława Dawidowicza oraz Jerzego Starościaka z lat siedemdziesiatych XX w. w sprawie potrzeby tworzenia nauki administracji jako odrębnej dyscypliny naukowej w ramach nauk prawnych świadczy o wiodącej roli prawa i prawników dla ukonstytuowania i rozwoju omawianej dziedziny badawczej<sup>[17]</sup>.

W związku z powyższym należy w tym miejscu zadać pytanie, czy w ramach triady nauk administracyjnych uzasadnione jest twierdzenie, że przedmiotem zainteresowań nauki administracji może lub powinno być badanie związków polityki i prawa, rozumianych jako identyfikacja i ocena zależności powstających na styku tych zjawisk, ich natury oraz wzajemnych oddziaływań? Otóż na tak postawione pytanie należy odpowiedzieć zdecydowanie twierdząco. Wspomniany już wcześniej Fritz Stier-Somlo, twierdził, że wszystkie trzy dyscypliny naukowe powinny być uprawiane odrębnie, ale ze świadomością, że we wzajemnym wykorzystaniu wyników badawczych następuje wz bogacenie każdej z nich<sup>[18]</sup>. Skoro zatem przedmiotem nauki prawa administracyjnego jest analiza norm prawnych, to badanie zależności i zjawisk powstających na styku polityki i prawa nie mieści się w optyce egzegezy prawniczej. Również analiza związków polityki i prawa, która nie jest nakierowana na ustalenie celów administracji nie mieści się w powyżej przedstawionym zakresie

<sup>16</sup> Longchamps, „Założenia nauki”, 12.

<sup>17</sup> Zob. Wacław Dawidowicz, „O nieporozumieniu zwanym „nauką administracji” *Organizacja-Metody-Technika*, nr 11 (1972): 11-12.; Jerzy Starościak, „O opracowywaniu zagadnień administracji” *Organizacja-Metody-Technika*, nr 2 (1973): 14-16.

<sup>18</sup> Podaję za: Jan Jeżewski, „Administracja publiczna jako przedmiot badań”, [w:] *Nauka administracji*, red. Adam Błaś, Jan Boć, Jan Jeżewski (Wrocław: Kolonia Limited, 2013): 358.

badania polityki administracyjnej wchodzącej w skład triady wyżej wymienionych nauk. Inaczej jest w przypadku nauki administracji – jako nauka opisowa ma za zadanie ukazać administrację realnie działającą w danym miejscu i czasie, a wszakże uwikłanie działań administracji jako konstruktu prawnego w kontekst wpływu polityki i polityków jest predestynowanym i nieodzownym wręcz przedmiotem badań, dzięki któremu uzyskujemy obraz administracji rzeczywistej. W tym celu nauka administracji zdana jest na sięganie do dorobku pozostałych dziedzin wiedzy wchodzących nie tylko w skład triady, ale również wszystkich innych, które wykraczają poza naukę polityki i naukę prawa, po to by ukazać i ocenić różnorodne aspekty funkcjonowania administracji.

### 3 | Badanie związków polityki i prawa na gruncie nauk społecznych

W wielu podręcznikach akademickich, które jeszcze nie uwzględniają zmian dokonanych w wyniku reformy o nazwie „konstytucja dla nauki”, wprowadzonej tzw. „ustawą 2.0”<sup>[19]</sup>, nauki prawne są traktowane odrębnie, tj. jako samoistna dziedzina nauki, nie zaliczana od tradycyjnych nauk społecznych. Niniejsze rozważania będą prowadzone w takim właśnie historycznym ujęciu, gdyż odnoszą się do nurtu zainicjowanego z początkiem XX w. w Stanach Zjednoczonych, a następnie w Europie, którego podstawową cechą wyróżniającą był szeroki i zmiennie ujmowany zakres badań administracji, prowadzonych na gruncie politologii<sup>[20]</sup>, nauki organizacji

<sup>19</sup> Zob. ustawa z dnia 20 lipca 2018 r. Prawo o szkolnictwie wyższym i nauce, t. j. Dz. U. z 2023 r., poz. 742 ze zm.

<sup>20</sup> Szerzej na ten temat zob. Jeżewski, „Administracja publiczna”, 359.

i zarządzania<sup>[21]</sup>, socjologii<sup>[22]</sup>, psychologii społecznej<sup>[23]</sup>, cybernetyki czy informatyki z pominięciem nauk prawnych.

Z punktu widzenia zagadnienia związków polityki i prawa na szcze- gólną uwagę zasługuje perspektywa badań prowadzonych w aspekcie politologicznym, w którym poczesne miejsce zajmuje analiza wpływu polityki na strukturę i funkcjonowanie administracji publicznej. Dużą popularnością i zainteresowaniem cieszą się liczne teorie odnoszące się wprost do administracji. Należy do nich m.in. teoria politycznej kontroli biurokracji zaproponowana przez Woodrowa Willsona, która się zasadza na postulacie strukturalnego i funkcjonalnego rozróżnienia i podporządkowania administracji czynnikowi politycznemu (*Politics-administration dichotomy*)<sup>[24]</sup>. Następnie warto wymienić teorię polityki biurokratycznej (*Political-Administrative-System*) autorstwa Davida Eastona, która wychodzi z przeciwnego założenia o niemożności funkcjonalnego rozróżnienia pomiędzy administracją a polityką<sup>[25]</sup>. Oprócz teorii odnoszących

<sup>21</sup> Znaczenie nauk o zarządzaniu w nauce administracji przejawia się w poszukiwaniu sposobów racjonalizacji procesów usługowych w instytucjach publicznych czy metod kształtowania indywidualnych postaw produkcyjnych. W ramach nauk o zarządzaniu prowadzone były badania administracji z uwzględnieniem perspektywy naukowej organizacji pracy na czele z F.W. Taylorem czy K. Adamieckim jako polskim prekursorem, następnie z perspektywy szkoły administracyjnej zaprezentowanej w pracach I. H. Gulicka, L. Urwicka oraz H. Fayola, którego koncepcja została określona mianem „administracyjnej Ewangelii” – podaję za: Jeżewski, „Administracja publiczna”, 360.

<sup>22</sup> W tym miejscu należy podkreślić wpływ prac Maxa Webera, którego metody badawcze oraz modele pojęciowe wywarły znamienny wpływ na sposób badania administracji, zob. Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Tübingen: Johannes Winckelmann, 1980), passim.

<sup>23</sup> Na szczególną uwagę zwraca rozwój szkoły stosunków międzyludzkich, w której dostrzeżono znaczenie badań socjologicznych i psychologicznych dla lepszego poznania organizacji, w tym instytucji publicznych. Kierunek psychologiczny został zaprezentowany m.in. w pracach E. Mayo, A.H. Maslowa czy D. McGregora. Charakterystykę i znaczenie poglądów ww. prekursorów dla nauki administracji zaprezentował w literaturze polskiej m.in. Leoński, „Nauka administracji”, 9; Jeżewski, „Administracja publiczna”, 360.

<sup>24</sup> Woodrow Wilson, „The Study of Administration” *Political Science Quarterly*, No. 2 (1887): 197–232.

<sup>25</sup> David Easton, *A Systems Analysis of Political Life* (New York: John Wiley, 1965), passim. Szerzej na ten temat zob. Jerzy Supernat, „Teoria polityki biurokratycznej”, [w:] *Miedzy tradycja a przyszloscią w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi*, red. Jerzy Supernat (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 689 i n.

się bezpośrednio do zjawisk zaobserwowanych w instytucjach publicznych istnieje szereg innych koncepcji, pozwalających na lepsze poznanie fenomenu administracji publicznej. Przykładem może być teoria agencji (*Principal-Agent-Theory*), wypracowana jeszcze w latach siedemdziesiątych XX w. celem zobrazowania relacji panujących w sferze biznesu pomiędzy stronami kontraktu, które mają różne preferencje i dostęp do informacji<sup>[26]</sup>. Co znamienne, w licznych analizach optyka menedżerów i właścicieli zostaje zamieniona na perspektywę polityki i biurokracji, ukazując określone spektrum zależności zachodzących w urzędach i agencjach publicznych<sup>[27]</sup>.

Na uwagę zwraca, że teorie wypracowane na gruncie tak rozumianych nauk społecznych nie poświęcają szczególnej uwagi uwarunkowaniom prawnym, w jakich funkcjonuje administracja oraz tym bardziej zależnościom zachodzącym na styku polityki i prawa, które determinują działanie administracji. Wytlumaczenie zjawiska może być *prima facie* dosyć prozaiczne i polegać na słabym zainteresowaniu samych prawników, ponieważ prowadzenie pogłębianych studiów w ramach omawianego tu nurtu nauk społecznych zawęża w pewnym sensie perspektywę prawniczej kariery naukowej w ścisłym tego słowa znaczeniu<sup>[28]</sup>. Mowa tu przede wszystkim o obowiązku pracownika uczelni do składania oświadczeń o przypisaniu się do określonej dziedziny i dyscypliny naukowej, wynikającego z art. 343 ust. 7–10 ustawy Prawo o szkolnictwie wyższym i nauce, o czym była już wcześniej mowa. To z kolei skutecznie zniechęca do podejmowania badań interdyscyplinarnych.

Inna przyczyna może polegać na tym, że szeroki front analiz porównawczych we współczesnej administratywistyce jest prowadzony na bazie uniwersalnych pojęć nauk społecznych, wypracowanych w politologii, socjologii, ekonomii czy w naukach o zarządzaniu<sup>[29]</sup>. Inaczej przedstawia

<sup>26</sup> Stephen A. Ross, „The Economic Theory of Agency: The Principal’s Problem” *American Economic Review*, nr 63 (1973): 134–139.

<sup>27</sup> Zob. Jan-Erik Lane, *Public Administration and Public Management: The Principal-Agent Perspective* (London: Routledge, 2005) i zacytowana tam literatura.

<sup>28</sup> Veith Mehde, „Verwaltungswissenschaft, Verwaltungspraxis und die Wissenschaft vom öffentlichen Recht – Eine Bestandsaufnahme”, [w:] *Staat, Verwaltung, Information. Festschrift für Hans Peter Bull zum 75. Geburtstag*, red. Veith Mehde, Ulrich Ramsauer, Margrit Seckelmann (Berlin: Duncker&Humblot GmbH, 2011), 686.

<sup>29</sup> Co ciekawe, w latach 80. ubiegłego wieku brak uniwersalnego języka badawczego w naukach administracyjnych był postrzegany jako jedna z podstawowych przeszkód w integracji wyników badań prowadzonych na skalę światową. Ponadto jako ważną barierę wskazywano deficyt wspólnych analiz empirycznych prowadzonych w instytucjach publicznych oraz różnice wynikające ze złożoności

się sytuacja z nurtem prawnoustrojowym – jest on zdany na wąską aparaturę pojęciową, obowiązującą na gruncie jednego porządku prawnego. Innym i prawdopodobnie najbardziej rozpowszechnionym źródłem marginalizacji wątków prawnych i prawniczych w administratywistyce uprawianej w ramach nauk społecznych stał się postulat konieczności racjonalizowania procesów i struktur w administracji w dobie współczesnych kryzysów. Unikatowość i różnorodność administracji krajowych, wywodząca się w dużej mierze z uwarunkowań prawnych, zaczęła podlegać masowej redukcji w niezmiernie popularnych badaniach komparatywnych<sup>[30]</sup>. Ich podstawowym celem stała się konieczność poszukiwania adekwatnych metod reformowania administracji publicznej w jednocześnie się Europie i w zglobalizowanym świecie<sup>[31]</sup>. W szczególności niezmiernie popularne są rankingi organizacji międzynarodowych, za pomocą których dokonywany jest pomiar efektywności i które notoryjnie ignorują istnienie uwarunkowań prawnych<sup>[32]</sup>.

---

i unikatowości krajowych administracji, zob. Brainard Guy Peters, *Comparing Public Bureaucracies. Problems of Theory and Method* (Tuscaloosa: University of Alabama Press, 1988), 1-25.

<sup>30</sup> Jako przykład niech posłużą badania prowadzone przez politologów, którzy analizując określone zjawiska w administracji publicznej uwzględniają szereg rozmaitych czynników, pomijając przy tym najczęściej uwarunkowania prawne. Świadczy o tym przykładowo opracowanie, poświęcone postępowi informatyzacji w administracji publicznej w różnych krajach, zawierające systematyczny przegląd literatury przedmiotu, zob. Caroline Fischer, Moritz Heuberger, Moreen Heine, „The Impact of Digitalization in the Public Sector: a Systematic Literature Review” *Zeitschrift für Public Policy, Recht und Management*, Vol. 14 (2021): 3-23.

<sup>31</sup> Szerzej na ten temat zob. Renata Kusiak-Winter, „W sprawie marginalizacji wątków prawnych w nauce administracji” *Samorząd Terytorialny*, nr 4 (2016): 5-13.

<sup>32</sup> Przykłady rankingów przygotowywanych periodycznie przez instytucje europejskie i międzynarodowe w odniesieniu do postępów digitalizacji w administracji publicznej zob. Renata Kusiak-Winter, „Kierunki i etapy rozwoju e-administracji publicznej”, [w:] *Ewolucja elektronicznej administracji publicznej*, red. Renata Kusiak-Winter, Jerzy Korczak (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2021), 22-23.

## 4 | Związki polityki i prawa jako element uwarunkowań administracji publicznej

Badanie związków polityki i prawa jest predestynowanym przedmiotem badań nauki administracji z uwagi na złożony i kompleksowy charakter omawianej tu dyscypliny naukowej. Uzasadnienie powyższego twierdzenia nastąpi z odniesieniem do poglądów Jana Jeżewskiego i jego autorskiej propozycji, by przedmiotu nauki administracji upatrywać w złożonych uwarunkowaniach usytuowanych poza samą administracją<sup>[33]</sup>. Przede wszystkim ważne jest podkreślenie, że wyżej wymieniona złożoność jest następstwem komplikowania się przedmiotu, ponieważ sama administracja w ujęciu podmiotowym i funkcjonalnym zmienia się w układzie historycznym i jest uwikłana w rozmaite determinacje polityczne, ustrojowe, ekonomiczne i społeczne, która jest oceniana wedle różnych kryteriów wartości, zmiennych historycznie i kulturowo<sup>[34]</sup>. Jest to tak ogromny obszar rzeczywistości, że nie sposób objąć go badaniem jednaczesnym, z zastosowaniem względnie spójnej aparatury pojęciowej, jednorodnymi metodami, aby można do niego odnieść wyniki badań powszechnie ważne i uniwersalne, nie obarczone walorem oczywistości, pozbawiającej jakiegokolwiek waloru poznawczego<sup>[35]</sup>. Zdaniem Jeżewskiego uniknięcie tak nakreślonych niebezpieczeństw zostanie osiągnięte poprzez podejmowanie cząstkowych badań administracji, w różnych fragmentach i aspektach struktur i funkcji administracji i w odrębnych zadaniach badawczych<sup>[36]</sup>. Takim odrębnym zadaniem może być analizowanie zjawisk sytuowanych na granicy polityki i prawa, determinujących funkcjonowanie administracji publicznej, przy czym owa graniczna natura przedmiotu badania nakazuje skonstruowanie założeń badawczych z wyodrębnieniem zadań tyczących się raz polityki, a raz prawa, czyli z wykorzystaniem aparatury odpowiednio dobranej nauki – nauki prawa oraz politologii. Koniecznym

<sup>33</sup> Zob. Jan Jeżewski, „Problematyka przedmiotu i wyników badań w nauce administracji (komunikat)”, [w:] Nauka administracji wobec wyzwań współczesnego państwa prawa. Międzynarodowa konferencja naukowa, Cisna 2–4 czerwca 2002, red. Jan Łukasiewicz (Rzeszów: TNOiK, 2002), 34–35; Jan Jeżewski, „Administracja publiczna jako przedmiot badań”, [w:] Adam Błaś, Jan Boć, Jan Jeżewski, Nauka administracji (Wrocław: Kolonia Limited 2013), 366 i n.

<sup>34</sup> J. Jeżewski, „Administracja publiczna”, 362.

<sup>35</sup> Ibidem.

<sup>36</sup> Ibidem.

warunkiem jest przyjęcie założenia, że badanie i jego wyniki będą się zawierać w obszarze nauki administracji. To z kolei łączy się ściśle ze swoistą strukturą nauki administracji, która zdaniem Jeżewskiego została historycznie ukształtowana jako interdyscyplinarna synteza problemów, wyników i metod należących do innych nauk społecznych, ale tylko w takim zakresie, w jakim odnoszą się one do administracji publicznej<sup>[37]</sup>, czyli nie tylko do samego prawa i samej polityki. W tym znaczeniu zadaniem nauki administracji jest pełnić rolę integrującą, a zatem nie dążyć jedynie do artykułowania różnic dzielących politykę i prawo, odzwierciedlonych już chociażby w odmiennej aparaturze pojęciowej i w odrębnych metodach badawczych wykorzystywanych w nauce prawa i w politologii. Jako ilustrację można w tym miejscu przywołać występowanie różnic aksjologicznych, polegających na odmiennym akcentowaniu w naukach podstawowych wartości przypisywanych administracji publicznej. W tym znaczeniu należy podkreślić konkurencyjną naturę podejścia aksjologicznego reprezentowanego w naukach prawnych i w politologii<sup>[38]</sup>. O ile pierwsza z wymienionych nauk będzie akcentować wartości wynikające z zasady demokratycznego państwa prawa, o tyle ta druga podkreśli znaczenie zasady skuteczności, korzystności i ekonomiczności<sup>[39]</sup>, by sprawnie przeprowadzić reformy administracji publicznej dla realizacji założonych z góry celów politycznych. Rzeczną dystynkcję w dużej mierze odzwierciedla linia napięcia pomiędzy zagadnieniem legalności a legitymizacji<sup>[40]</sup>. Uwypuklanie fenomenu konkurencyjności odmiennych założeń aksjologicznych w różnych naukach społecznych, badających zjawisko administracji publicznej,

<sup>37</sup> Ibidem.

<sup>38</sup> W takim znaczeniu wypowiada się Zofia Duniewska: „Na tym właśnie gruncie, zwłaszcza w okresie przełomowych zmian, obserwować można na co dzień współistnienie dwóch odmiennych obiektów kultury społecznej: prawa i polityki, z których jeden powinien być utożsamiany z pewnością, powagą, wspólnym dobrem i względną stabilnością, drugi natomiast – dla kontrastu – identyfikowany jest z chwiejnością zapatrywań, rozproszaniem konkurujących ze sobą interesów, zaangażowaniem w spory i kontrowersje oraz nawałnicą namiętności i emocji. Pogodzenie tych związanych ze sobą „ żywiołów” nie jest prostym zadaniem”. Zob. Zofia Duniewska, „Prawo administracyjne – wprowadzenie”, [w:] *System Prawa Administracyjnego*, t. I, *Instytucje prawa administracyjnego*, red. Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, wyd. 2 (Warszawa: C.H. Beck, 2015), 118.

<sup>39</sup> Zob. Paweł Cabała, „Prakseologiczna analiza działania” *Prakseologia*, nr 147 (2007): 9 i n.

<sup>40</sup> Jürgen Habermas, „Legitimationsprobleme im modernen Staat” *Merkur*, nr 332 (1976): 39–60; Philipp Harfst, Claudia Wiesner, *Legitimität und Legitimation. Vergleichende Politikwissenschaft* (Wiesbaden: Springer, 2019), 5 i n.

doprowadza zdaniem Jeżewskiego do ideologizacji nauki administracji, co oczywiście nie jest równoznaczne z ideologizacją przedmiotu badania<sup>[41]</sup>. Dla zapobieżenia tym niekorzystnym zjawiskom należy przyjąć w badaniu nad administracją postawę nie wartościującą, co w swoim czasie postulował Franciszek Longchamps, „pozostawiając oceny politykom administracji, podejmowane z nieporównanie przykładowo dłuższego dystansu i z właściwą im skłonnością do ryzyka”<sup>[42]</sup>.

## 5 | Zakończenie

Historycznie ukształtowana „nauka administracji”, inaczej niż zaproponowana w ministerialnym rozporządzeniu z 2018 r. „nauka o polityce i administracji”, nie zawęża pola badań do perspektywy jednej z nauk społecznych. Zawiera ona bowiem optykę eksploracji zjawisk obserwowanych w administracji publicznej w kontekście wszechstronnych warunków i uwarunkowań działania administracji publicznej i z dążeniem do ukazania stanu istniejącego w danym miejscu i czasie oraz do formułowania wynikających z niego dyrektyw praktycznych oraz konstruowania uogólnień teoretycznych<sup>[43]</sup>. W odniesieniu do tytułowego zagadnienia oznacza to potraktowanie polityki i prawa jako czynników zewnętrznych, umiejscowionych w otoczeniu administracji publicznej oraz konieczność przeprowadzenia analizy nie tylko każdego uwarunkowania z osobna, w jaki sposób determinuje strukturę i funkcjonowanie administracji, ale również jak współzależności i linie napięcia w relacjach pomiędzy polityką i prawem oddziałują na zjawiska zachodzące w administracji. Jednocześnie istotne jest założenie metodologiczne o przyjęciu zewnętrznych uwarunkowań i zachodzących między nimi zależności jako przedmiotu badań nauki administracji. Takie założenie nakazuje bowiem uwzględnienie w dalszej kolejności innych istotnych uwarunkowań, przykładowo społecznych i kulturowych, które determinują rzeczywistość administracyjną z uwagi na stwierdzoną wcześniej architekturę związków polityki i prawa. Należy podkreślić, że niepowtarzalnym rysem tak rozumianych badań jest

<sup>41</sup> Jeżewski, „Administracja publiczna”, 263.

<sup>42</sup> Longchamps, „Założenia nauki”, 127.

<sup>43</sup> Jeżewski, „Administracja publiczna”, 366.

równoczesność i brak priorytetowości w uwzględnieniu poszczególnych uwarunkowań, co oczywiście nie zamyka drogi do diagnozowania uwarunkowań prymarnych czy wiodących w badanej okoliczności.

Zasadniczym argumentem na rzecz formułowania postulatu *de lege ferenda* o przywrócenie nauki administracji jako odrębnej dyscypliny naukowej w obrębie dziedziny nauki prawne jest natura wielopłaszczyznowego i stale komplikującego się przedmiotu badań, czyli zjawiska administracji publicznej. W związku z tym istnieje pilna potrzeba prowadzenia badań złożonych i kompleksowych. Tym wymogom nie są w stanie sprostać badania „zamknięte” w ramy metodologiczne określonej dyscypliny badawczej. Atrakcyjność historycznie ukształtowanej nauki administracji polega na dążeniu do ukazania administracji publicznej w możliwie najszerszym kontekście i przy wykorzystaniu wyników badań prowadzonych na gruncie szeroko pojętych nauk administracyjnych, do których należą bez wątpienia nauka prawa i politologia.

## Bibliografia

- Cabała Paweł, „Prakseologiczna analiza działania” *Prakseologia*, nr 147 (2007): 9-17.
- Dawidowicz Wacław, „O nieporozumieniu zwanym „nauką administracji” *Organizacja-Metody-Technika*, nr 11 (1972): 11-12.
- Dąbrowski Karol, „Recepcja idei triady nauk administracyjnych Fritza Stier-Somlo w polskiej literaturze naukowej” *Acta Iuridica Resoviensia* seria Prawo, nr 110 (2020): 40-50.
- Dobkowski Jarosław, „Status nauki administracji”, [w:] *Założenia nauki administracji*, red. Joanna Smarż, Sławomir Fundowicz, Paweł Śwital. 19-26. Warszawa: Wolters Kluwer 2024.
- Dobkowski Jarosław, „W obronie nauki administracji” *Prawo i Więź*, nr 1 (2022): 53-79.
- Duniewska Zofia, „Prawo administracyjne – wprowadzenie”, [w:] *System Prawa Administracyjnego*, t. I, *Instytucje prawa administracyjnego*, red. Hauser Roman, Niewiadomski Zygmunt, Wróbel Andrzej, wyd. 2. 118. Warszawa: C.H. Beck, 2015.
- Easton David, *A Systems Analysis of Political Life*. New York: John Wiley 1965.
- Fischer Caroline, Heuberger Moritz, Heine Moreen, „The Impact of Digitalization in the Public Sector: a Systematic Literature Review” *Zeitschrift für Public Policy, Recht und Management*, Vol. 14 (2021): 3-23.

- Habermas Jürgen, „Legitimationsprobleme im modernen Staat“ *Merkur*, nr 332 (1976): 39-60.
- Harfst Philipp, Wiesner Claudia, *Legitimität und Legitimation. Vergleichende Politikwissenschaft*. Wiesbaden: Springer, 2019.
- Jastrow Ignaz, *Sozialpolitik und Verwaltungswissenschaft. Aufsätze und Abhandlungen*. Berlin: G. Reimer, 1902.
- Jellinek Walter, *Verwaltungsrecht*. Berlin: Springer 1928.
- Jeżewski Jan, „Administracja publiczna jako przedmiot badań”, [w:] *Nauka administracji*, red. Błaś Adam, Boć Jan, Jeżewski Jan. Wrocław: Kolonia Limited, 2013.
- Jeżewski Jan, „Problematyka przedmiotu i wyników badań w nauce administracji (komunikat)”, [w:] *Nauka administracji wobec wyzwań współczesnego państwa prawa. Międzynarodowa konferencja naukowa, Cisna 2-4 czerwca 2002*, red. Jan Łukasiewicz. 34-35. Rzeszów: TNOiK, 2002.
- Kisilowska Helena, „Kierunki rozwoju nauki”, [w:] *Założenia nauki administracji*, red. Joanna Smarż, Sławomir Fundowicz, Paweł Śwital. 27-37. Warszawa: Wolters Kluwer, 2024.
- Kmiecik Zbigniew, Franciszek *Longchamps de Bérier. Pisma wybrane z lat 1934-1970*. Warszawa: Wolters Kluwer, 2019.
- Kusiak-Winter Renata, „Kierunki i etapy rozwoju e-administracji publicznej”, [w:] *Ewolucja elektronicznej administracji publicznej*, red. Renata Kusiak-Winter, Jerzy Korczak. 22-23. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2021.
- Kusiak-Winter Renata, „W sprawie marginalizacji wątków prawnych w nauce administracji” *Samorząd Terytorialny*, nr 4 (2016): 5-13.
- Lane Jan-Erik, *Public Administration and Public Management: The Principal-Agent Perspective*. London: Routledge, 2005.
- Leoński Zbigniew, *Nauka administracji*. Warszawa: C.H. Beck, 2010.
- Longchamps Franciszek, *Założenia nauki administracji*. Wrocław: Wrocławskie Towarzystwo Naukowe, 1949.
- Mehde Veith, „Verwaltungswissenschaft, Verwaltungspraxis und die Wissenschaft vom öffentlichen Recht – Eine Bestandsaufnahme”, [w:] *Staat, Verwaltung, Information. Festschrift für Hans Peter Bull zum 75. Geburtstag*, red. Veith Mehde, Ulrich Ramsauer, Margrit Seckelmann. 686. Berlin: Duncker&Humblot GmbH, 2011.
- Peters Brainard Guy, *Comparing Public Bureaucracies. Problems of Theory and Method*. Tuscaloosa: University of Alabama Press, 1988.
- Ross Stephen A., „The Economic Theory of Agency: The Principal’s Problem” *American Economic Review*, nr 63 (1973): 134-139.

- Schmidt Ferdinand, „Über die Bedeutung der Verwaltungslehre als selbständige Wissenschaft“ *Zeitschrift für die gesamte Staatswissenschaft*, z. 2 (1909): 193-223.
- Starościak Jerzy, „O opracowywaniu zagadnień administracji“ *Organizacja-Metody-Technika*, nr 2 (1973): 14-16.
- Stern Klaus, „Verwaltungslehre – Notwendigkeit und Aufgabe im heutigen Sozialstaat“, [w:] *Gedächtnisschrift Hans Peters*, red. Conrad Hermann, Jahrreiß Hermann, Mikat Paul, Mosler Hermann, Nipperdey Hans Carl, Salzwedel Jürgen. 228. Berlin-Heidelberg: Springer 1967.
- Stier-Somlo Fritz, „Die Zukunft der Verwaltungswissenschaft“ *Verwaltungsarchiv*, nr 25 (1917): 89-142.
- Supernat Jerzy, „Teoria polityki biurokratycznej“, [w:] *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi*, red. Jerzy Supernat. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009.
- Weber Max, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*. Tübingen: Johannes Winckelmann, 1980.
- Wilson Woodrow, „The Study of Administration“, *Political Science Quarterly*, No. 2 (1887): 197-232.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

BARTOSZ NOWAKOWSKI

# Polityka państwa dotycząca dostępu osób cywilnych do broni w kontekście wojny na Ukrainie i pandemii Covid-19

## State Policy on Civilian Access to Weapons in the Context of the War in Ukraine and the Covid-19 Pandemic

The aim of this article is to present the impact of state policy on civilians' access to weapons in the context of the war in Ukraine and Covid-19 pandemic. In the context of the above mentioned research objective, the article examines all currently possible forms of civilian access to weapons in the Republic of Poland: sport, hunting, collecting, personal protection, protection of persons and property, historical reconstructions, commemoration, training and others. In the first part of the discussion, the statistical data of the Police Headquarters on the access of civilians to weapons were analyzed. Then, the shortcomings of the current law were pointed out and de lege ferenda proposals for the most urgent and necessary legislative changes were made. The need for urgent legislative and administrative changes in the area of the current law was pointed out, with special emphasis on its adaptation to EU directives. It was recommended that there was an urgent need to introduce an electronic system for the collection and analysis of data on weapons permits, as required by the EU Directive; the need to adapt the categories of weapons contained in the EU Directive to the UoBiA; to move away from "to-target" permits to four levels of permits and to move away from specifying the number and type of weapons in the administrative decision; and finally, to regulate at the legislative level the rules for the storage of weapons, which are currently regulated by an implementing regulation.

**KEYWORDS:** weapons, law, administration, state policy, act on weapons and ammunition

**SŁOWA KLUCZOWE:** broń, prawo, administracja, polityka państwa, ustawa o broni i amunicji

**BARTOSZ NOWAKOWSKI**, doktor habilitowany nauk prawnych, profesor Uniwersytetu w Siedlcach, ORCID – 0000-0002-7182-4600, e-mail: bartosz.nowakowski@uws.edu.pl

## 1

## Wprowadzenie – kontekst geopolityczny

24 lutego 2022 Federacja Rosyjska dokonała militarnej inwazji na Ukrainę, która stanowiła eskalację wojny trwającej od 2014 roku. Została ona poprzedzona rosyjskim żądaniem wykluczenia możliwości dalszego poszerzania NATO i redukcji potencjału militarnego sojuszu w Europie Środkowo-Wschodniej do stanu sprzed 1997<sup>[1]</sup>. Już na przełomie października i listopada 2021 Rosja zaczęła gromadzić swoje wojska wzdłuż granicy z Ukrainą. W lutym 2022 przeprowadzone zostały ćwiczenia wojskowe na terenie Białorusi wspólne z siłami zbrojnymi tego kraju, po których wojska rosyjskie nie wróciły już do Rosji, ale przeszły do ofensywy militarnej na Ukrainę<sup>[2]</sup>. *Ipsò factò* Rzeczpospolita Polska stała się państwem bezpośrednio graniczącym z krajem, na terenie którego toczy się wojna<sup>[3]</sup> ze wszystkimi konsekwencjami takiego stanu rzeczy. W kontekst niepokojów we wschodniej części Europy, wywołanych powyższą sytuacją militarną, bez cienia wątpliwości wpisała się również wcześniejsza, globalna pandemia Covid-19, która w znaczny sposób zachwiała dotychczasowymi fundamentami światowego bezpieczeństwa. W Polsce pierwszy przypadek zakażenia koronawirusem stwierdzono 4 marca 2020<sup>[4]</sup>. W okresie od 14 do 20 marca 2020 obowiązywał w Polsce stan zagrożenia epidemicznego<sup>[5]</sup>,

<sup>1</sup> Polska Agencja Prasowa, *Rosja opublikowała propozycje „gwarancji bezpieczeństwa”, których chce od zachodu*, <https://www.pap.pl/aktualnosci/news%2C1030926-2Crosja-opublikowala-propozycje-gwarancji-bezpieczenstwa-ktorych-chce-od>.

<sup>2</sup> Polska Agencja Prasowa, *Ukraiński MSW: rozpoczęła się inwazja, doszło do ataków rakietowych na Kijów i Charków*, <https://www.pap.pl/aktualnosci/news%2C1089875-2Cukrainskie-msw-rozpoczela-sie-inwazja-doszlo-do-atakow-rakietowych-na>; Andrzej Wilk, *Rosyjska demonstracja siły na Białorusi i oceanie światowym*, Ośrodek Studiów Wschodnich, <https://www.osw.waw.pl/pl/publikacje/analizy/2022-01-24/rosyjska-demonstracja-sily-na-bialorusi-i-oceanie-swiatowym>.

<sup>3</sup> W artykule pominięta zostanie dyskusyjna kwestia terminologii inwazji zbrojnej Federacji Rosyjskiej na Ukrainę, która zarówno w polityce międzynarodowej, jak i w dyskusjach ekspertów określana jest w zróżnicowany sposób. Przykładowo prezydent Rosji nazywa ją „специальная военная операция” – por. TACC, Путин объявил о начале военной операции на Украине, <https://tass.ru/politika/13825671>.

<sup>4</sup> Por. Ministerstwo Zdrowia, *Pierwszy przypadek koronawirusa w Polsce*, <https://web.archive.org/web/20200304112521/https://www.gov.pl/web/zdrowie/pierwszy-przypadek-koronawirusa-w-polsce>.

<sup>5</sup> Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego, Dz. U. z 2020 r., poz. 433.

a od 15 marca 2020 wprowadzono na granicach Polski kordon sanitarny, znacząco ograniczający ruch graniczny<sup>[6]</sup>. Od 20 marca 2020 do 15 maja 2022, zgodnie z rozporządzeniem Ministra Zdrowia, obowiązywał w Polsce stan epidemii<sup>[7]</sup>, a od 16 maja 2022 ponownie stan zagrożenia epidemicznego<sup>[8]</sup>, który rozporządzeniem Ministerstwa Zdrowia został odwołany dopiero z dniem 1 lipca 2023<sup>[9]</sup>.

Nie ulega wątpliwości, że powyższe sytuacje związane tak z zagrożeniem zdrowia, jak i bezpieczeństwa militarnego państwa wywołały szereg zmian w dostępie osób cywilnych do broni palnej zarówno na płaszczyźnie działań politycznych skoncentrowanych w zasadniczej mierze na pracach legislacyjnych, jak i zmian na płaszczyźnie społecznej. Na nowo zintensyfikowały się dyskusje wokół art. 85 ust. 1 Konstytucji RP<sup>[10]</sup>, dotyczącego obywatelskiego obowiązku obrony ojczyzny i to nie tylko w politycznej przestrzeni zinstytucjonalizowanej obrony narodowej państwa<sup>[11]</sup>, ale również w szerskiej debacie społecznej, szkoleniach oraz w zjawisku wzrastającej liczby

<sup>6</sup> Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r. w sprawie przywrócenia tymczasowo kontroli granicznej osób przekraczających granicę państwową stanowiącą granicę wewnętrzną, Dz. U. z 2020 r., poz. 434; Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r. w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych, Dz. U. z 2020 r., poz. 435.

<sup>7</sup> Obwieszczenie Ministra Zdrowia z dnia 1 lutego 2022 r. w sprawie ogłoszenia jednolitego tekstu rozporządzenia Ministra Zdrowia w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii, Dz. U. z 2022 r., poz. 340.

<sup>8</sup> Rozporządzenie Rady Ministrów z dnia 13 maja 2022 r. zmieniające rozporządzenie w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, Dz. U. z 2022 r., poz. 1025.

<sup>9</sup> Rozporządzenie Ministra Zdrowia z dnia 14 czerwca 2023 r. w sprawie odwołania na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego, Dz. U. z 2023 r., poz. 1118.

<sup>10</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. 1997 r., nr 78 poz. 483.

<sup>11</sup> Sztandarowym przykładem tego procesu może być: Ustawa z dnia 11 marca 2022 r. o obronie Ojczyzny, Dz. U. z 2022 r., poz. 655.

uzyskiwanych pozwoleń na broń przez osoby cywilne<sup>[12]</sup>. Czy jednak – poza samymi decyzjami resortowymi – polityka państwa przełożyła się na skuteczną realizację art. 85 ust. 1 Konstytucji RP w przestrzeni obywatelskiej? Jakich zmian na poziomie ustawowym należałoby dokonać, aby te działania zintensyfikować? Jakie wnioski płyną z oceny dostępnych danych i badań dotyczących osób cywilnych posiadających broń?

## 2 | Badania i analiza danych dotyczących dostępu osób cywilnych do broni w latach 2017-2022

Od przynajmniej kilkunastu lat Komenda Główna Policji (dalej: KGP) publikuje statystyki dotyczące dostępu osób cywilnych do broni za rok ubiegły<sup>[13]</sup>. Dane te warto poddać analizie, gdyż mają lub mogą mieć w najbliższej przyszłości niebagatelny wpływ na politykę państwa polskiego dotyczącą dostępu osób cywilnych do broni oraz realizację obywatelskiego obowiązku obrony państwa w kontekście art. 85 ust. 1 Konstytucji RP. Aby jasno sprecyzować symetrię czasową, w analizie tych danych przyjmiemy jako pierwsze zestawienie za lata 2017-2019, czyli trzyletni okres stabilizacji politycznej Polski oraz drugie zestawienie za lata 2020-2022, czyli trzyletni czasokres obejmujący pandemię Covid-19 i wojnę na Ukrainie.

<sup>12</sup> Paulina Nowosielska i Patrycja Otto, *Polacy ruszyli po broń palną. Kolekcjonerzy i sportowcy uzbrojeni po zęby*, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8661048,bron-palna-pozwolenie-na-bron-kolekcjonerska-sportowa.html>; Wiktor Ferfecki, *Polacy zbroją się na potęgę. Liczba pozwoleń na broń wystrzelila*, <https://www.rp.pl/spoleczenstwo/art35744532-polacy-zbroja-sie-na-potege-liczba-pozwolen-na-bron-wystrzelila>; Justyna Sobolak, *Polacy zbroją się na potęgę. Liczba pozwoleń na broń wystrzelila. Mamy nowe dane*, <https://businessinsider.com.pl/wiadomosci/jak-uzyskac-pozwolenie-na-bron-polacy-coraz-czesciej-sie-zbroja/508gf3q>; Frag Out! Magazine - firearms, military, tactical, *Broń palna w Polsce - policyjne statystyki AD 2022*, <https://www.youtube.com/watch?v=xUkx5wdwB9Q>.

<sup>13</sup> Komenda Główna Policji [dalej KGP], *Broń - pozwolenia*, <https://statystyka.policja.pl/st/wybrane-statystyki/bron/186394,Bron-pozwolenia.html>.

## 2.1. Dane statystyczne – prezentacja i sumaryczna analiza

Tabela 1<sup>[14]</sup>

	Liczba pozwoleń w danym celu					
	2017	2018	2019	2020	2021	2022
sportowy	25 940	30 792	35 045	39 205	45 895	58 784
łowiecki	125 326	127 768	129 347	130 448	132 501	134 765
kolekcjonerski	11 556	18 064	24 031	30 256	39 529	59 240
ochrona osobista	40 928	36 499	33 528	32 184	31 419	30 877
ochrona osób i mienia	9	9	9	9	9	10
rekonstrukcji historycznych	60	64	68	72	86	94
pamiątkowy	1691	1668	1727	1742	1738	1730
szkoleniowy	435	575	723	826	940	1082
inny	179	163	173	174	182	169
ogółem	206 124	215 602	224 651	234 916	252 299	286 751

Przywołane w powyższej tabeli dane bez cienia wątpliwości wskazują, że w społeczeństwie utrzymuje się tendencja wzrostowa nasycenia Polski i Polaków bronią różnych typów i rodzajów<sup>[15]</sup>. Na 31 grudnia 2022 mamy już 7,58 pozwolenia oraz nieco ponad 20 sztuk broni w przeliczeniu na 1000 mieszkańców, czyli średnio 2 sztuki broni na 100 obywateli. Zdecydowanie najszybciej rośnie liczba posiadaczy pozwoleń na broń wydawanych do celów kolekcjonerskich. Na dzień 31 grudnia 2022 było ich 59 240<sup>[16]</sup>, natomiast 31 grudnia 2017, czyli w pierwszym, przyjętym przez nas roku analitycznym – 11 556. W ciągu 6 lat nastąpił zatem przyrost o 47 684 pozwoleń na broń do celów kolekcjonerskich. Daje to 412,63% przyrostu tego rodzaju pozwoleń. W perspektywie przyjętych czasokresów wygląda to jeszcze bardziej interesująco; mianowicie w latach 2017–2019 nastąpił „skok” przedmiotowych pozwoleń z liczby 6 762 do liczby 24 031, czyli wzrost o 17 269 pozwoleń. Natomiast już w latach 2020–2022, czyli

<sup>14</sup> KGP, Broń – pozwolenia.

<sup>15</sup> Maciej Rozwadowski, *Pozwolenia na broń oraz broń w Polsce w latach 2014–2022 – analiza statystyk Policji*, <https://trybun.org.pl/2023/02/26/pozwolenia-na-bron-oraz-bron-w-polsce-w-latach-2014-2022-analiza-statystyk-policji/>; Redakcja Milmag.pl, *Broń w Polsce w 2022: Wzrost w roku wojny*, <https://milmag.pl/bron-w-polsce-w-2022-wzrost-w-roku-wojny/>.

<sup>16</sup> Jarosław Lewandowski, „Statystycznie jest coraz lepiej” *Strzałpl. Pro libertate*, 3 (2023): 6.

w czasie pandemii Covid-19 i konfliktu na Ukrainie, liczby tych pozwoleń zwiększyły się z 24 031 do 59240 czyli o 35209 pozwoleń<sup>[17]</sup>. Dokonując zatem matematycznego przeliczenia z liczb faktycznych wydanych pozwoleń na wskaźnik procentowy, między tymi przyjętymi czasokresami nastąpił 103,88% wzrost.

Podobny wzrost nastąpił również w odniesieniu do pozwoleń wydawanych na broń do celów sportowych. Na dzień 31 grudnia 2022 było ich 58 784, natomiast 31 grudnia 2017, czyli w pierwszym, przyjętym przez nas roku analitycznym – 25 940. W ciągu sześciu lat nastąpił zatem przyrost o 32 844 pozwoleń na broń do celów sportowych, co daje 126,62% przyrost tego rodzaju pozwoleń. Jest to równie widoczne, gdy weźmie się pod uwagę różnice pomiędzy wskazanymi czasokresami: w latach 2017-2019 nastąpił „skok” przedmiotowych pozwoleń z liczby 20 960 do liczby 35 045, czyli o 14 085 pozwoleń, natomiast w latach 2020-2022 liczba tych pozwoleń zwiększała się z 35 045 do 58 784, czyli o 23 739 pozwoleń<sup>[18]</sup>. Przeliczając zatem liczby faktyczne wydanych pozwoleń na wskaźnik procentowy, mamy wzrost o 68,54%.

Niestety policyjne statystyki nie podają tzw. części wspólnej tych dwóch rodzajów pozwoleń, czyli strzelców sportowych posiadających również pozwolenie na broń do celów kolekcjonerskich. Niektórzy analitycy tego zagadnienia – jak chociażby Jarosław Lewandowski – stoją na stanowisku (i słusznie), że liczba osób dysponujących pozwoleniem sportowym lub kolekcjonerskim nie jest równa prostej sumie tych pozwoleń, bo wielu obywateli posiada oba. Czyli nie jest to grupa licząca 118 024 osób, co wynika z sumowania liczby obu pozwoleń z danych statystycznych za rok 2022, ale z pewnością liczba znacznie niższa. Co więcej, statystyki KGP nie zawierają danych dotyczących liczby pozwoleń wydawanych przez Żandarmerię Wojskową (dalej: ŽW)<sup>[19]</sup>.

Mając na uwadze, że w powyższych dwóch grupach przyrost liczby wydanych pozwoleń na broń był najbardziej dynamiczny<sup>[20]</sup>, można skonstatować, że przy ogólnym przyroście liczby wszystkich wydanych pozwoleń na broń wielkości 39,12%, w odniesieniu do pozwoleń sportowych sięgnął on między 2017 a 2022 – 126,62%, a w odniesieniu do pozwoleń kolekcjonerskich aż 412,63%.

<sup>17</sup> KGP, *Broń – pozwolenia*.

<sup>18</sup> Ibidem.

<sup>19</sup> Lewandowski, „Statystycznie”, 6-7.

<sup>20</sup> Rozwadowski, *Pozwolenia na broń*; Redakcja Milmag.pl, *Broń w Polsce w 2022*.

Jednocześnie należy wskazać, iż zarysuje się widoczny spadek pozwoleń na broń do celów ochrony osobistej<sup>[21]</sup> i bardzo niewielki przyrost pozwoleń na broń do celów łowieckich<sup>[22]</sup>. Na koniec granicznego roku 2022 liczba pozwoleń na tego rodzaju broń stanowiła 47% wszystkich pozwoleń będących w obiegu<sup>[23]</sup>. Mimo, iż pod względem liczby nowych pozwoleń, pozwolenia do celów łowieckich znalazły się na trzecim miejscu w rocznym bilansie za 2022, to jednak wydano ich trzykrotnie mniej niż pozwoleń do celów sportowych. Warto zauważyć, iż liczba pozwoleń łowieckich w grudniu 2022 stanowiła 134 765. Jak zauważa przywołany już powyżej Lewandowski, przekłada się to na liczbę uzbrojonych osób fizycznych w wartości prawie 135 tys. myśliwych, co może stanowić pewną siłę militarną państwa polskiego<sup>[24]</sup>.

Wracając jednak do danych statystycznych KGP, na dzień 31 grudnia 2022 pozwoleń na broń do celów łowieckich było 134 765, natomiast 1 stycznia 2017 – 122 425. W ciągu sześciu lat nastąpił przyrost zaledwie o 12 340 tego rodzaju pozwoleń, co daje niewielki 10,08% przyrost. Co więcej, gdy porównuje się analizowane czasokresy, widoczny jest również niewielki spadek: mianowicie w latach 2017-2019 nastąpił wzrost o 6 922 pozwoleń, zaś w okresie 2020-2022 – o 5 418 pozwoleń<sup>[25]</sup>. Przeliczając liczby faktyczne wydanych pozwoleń na wskaźnik procentowy, między przyjętymi czaso- okresami nastąpił spadek o 21,73%.

Potencjalna możliwość posiadania kilku rodzajów pozwoleń na broń (np. kolekcjonerskie czy do ochrony osobistej) i przełożenie jej na stan faktyczny, w przypadku tej grupy jest raczej marginalny. Zdecydowanie odwrotnie niż w przypadku strzelców sportowych, z których większość posiada także pozwolenia kolekcjonerskie, szkoleniowe czy pamiątkowe<sup>[26]</sup>.

<sup>21</sup> Por. tabela nr 1.

<sup>22</sup> Por. tabela nr 1.

<sup>23</sup> Por. tabela nr 1.

<sup>24</sup> Lewandowski, „Statystycznie”, 7.

<sup>25</sup> KGP, Broń – pozwolenia,

<sup>26</sup> Lewandowski, „Statystycznie”, 7.

**Tabela 2**<sup>[27]</sup>

Liczba sztuk zarejestrowanej broni						
	2017	2018	2019	2020	2021	2022
sportowy	62 595	76 761	88 777	102 588	123 076	162 368
łowiecki	312 068	322 451	339 320	347 284	356 595	374 079
kolekcjonerski	38 780	59 318	78 006	92 942	132 982	176 836
ochrona osobista	44 882	40 641	37 860	36 689	35 841	35 441
ochrona osób i mienia	10	10	10	10	10	10
rekonstrukcji historycznych	224	240	281	296	327	361
pamiątkowy	2447	2444	2508	2547	2535	2542
szkoleniowy	2601	3418	4474	5337	6844	8425
inny	161	146	174	160	169	156
ogółem	463 768	505 429	551 410	587 853	658 379	760 218

Poza kwestią administracyjnych pozwoleń na broń dla osób cywilnych warto poddać analizie statystykę odnoszącą się do ilości sztuk zarejestrowanej broni palnej, gdyż oba te wskaźniki ani procentowo, ani liczbowo się nie pokrywają. I tak liczba sztuk broni zarejestrowanej do celów kolekcjonerskich w okresie styczeń 2017–grudzień 2019 wzrosła z 22 242 do 78 006 sztuk; jest to przyrost o 55 764, procentowo – 250,71%. Natomiast pomiędzy styczniem 2020 a grudniem 2022 wzrost osiągnął wartość 98 830 sztuk broni<sup>[28]</sup>, która wynika z różnicy pomiędzy 78 006 sztukami broni w styczniu 2020, a 176 836 sztukami zarejestrowanymi w 2022, procentowo 126,70%.

Liczba sztuk broni do celów sportowych w okresie styczeń 2017–grudzień 2019 wzrosła z 47 577 do 88 777; jest to przyrost o 41 200, procentowo – 86,70%. Natomiast pomiędzy styczniem 2020 a grudniem 2022 wzrost osiągnął wartość 73 591 sztuk broni, która wynika z różnicy pomiędzy 88 777 sztukami broni w styczniu 2020, a 162 368 sztukami zarejestrowanymi w 2022<sup>[29]</sup>, procentowo 82,90%.

Pozostaje jeszcze liczba zarejestrowanej i posiadanej legalnie broni do celów łowieckich. Jak to już wyżej zaznaczono, jest to zarówno najliczniejsza grupa osób, jak i liczbowo wydanych pozwoleń, co tym samym przekłada się na liczbę sztuk posiadanej broni w tej kategorii. Wskaźnik na grudzień 2022 wykazywał 374 079 sztuk broni. Liczba ta nadal przekracza

<sup>27</sup> KGP, Broń – pozwolenia,

<sup>28</sup> Por. tabela nr 2.

<sup>29</sup> Por. tabela nr 2.

o 34 875 sztuk sumę ilości broni będących w rękach polskich obywateli na podstawie pozwolenia do celów sportowych i kolekcjoneruskich, która łącznie wynosi 339 204 sztuk<sup>[30]</sup>. W pozostałych kategoriach przyrosty są marginalne, a w niektórych przypadkach odnotowuje się wahania między spadkami, a wzrostem ilości sztuk broni w poszczególnych latach<sup>[31]</sup>.

Reasumując warto przyjrzeć się także różnicom liczbowym i procentowym, jakie zachodzą między krańcowymi datami dwóch przyjętych czasookresów, zarówno w poszczególnych kategoriach, jak i uwzględniając sumaryczną liczbę posiadanej broni przez obywateli: na grudzień 2019 oraz na grudzień 2022. Niezaprzeczalny jest tutaj dodatni skok liczby broni będącej w rękach obywateli<sup>[32]</sup> o prawie 209 tys. sztuk ( $\approx 38\%$ ). W odniesieniu jednak zarówno do całkowitej populacji naszego kraju, jak i wzmacnienia potencjału obronnego obywatelskiego w kontekście art. 85 ust. 1 Konstytucji RP, jest to przyrost znikomy.

**Tabela 3**<sup>[33]</sup>

<b>Porównanie liczby zarejestrowanej broni w roku 2019 i 2022</b>				
	<b>2019</b>	<b>2022</b>	<b>zmiana liczby</b>	<b>Zmiana %</b>
sportowy	88 777	162 368	+ 73 591	+ 82,89%
łowiecki	339 320	374 079	+ 34 759	+ 10,24%
kolekcjonerksi	78 006	176 836	+ 98 830	+ 126,70%
ochrona osobista	37 860	35 441	- 2419	- 6,39%
ochrona osób i mienia	10	10	0	0%
rekonstrukcji historycznych	281	361	+ 80	+ 28,47%
pamiątkowy	2 508	2 542	+ 34	+ 1,36%
szkoleniowy	4 474	8 425	+ 3 951	+ 88,31%
inny	174	156	-18	- 10,34%
ogółem	551 410	760 218	208 808	+ 37,87%

Analizując dane statystyczne dotyczące ilości sztuk broni będącej w posiadaniu obywateli można zauważyć, że kolekcjonerzy posiadają średnio 2,99 sztuk broni na osobę, sportowcy – 2,76, a myśliwi – 2,75. Uśredniając zatem wszystkie rodzaje pozwoleń w odniesieniu do ilości sztuk broni

<sup>30</sup> KGP, Broń – pozwolenia.

<sup>31</sup> Por. tabela nr 3.

<sup>32</sup> Redakcja Milmag.pl, Broń w Polsce w 2022.

<sup>33</sup> KGP, Broń – pozwolenia.

legalnie zarejestrowanej i posiadanej przez osoby cywilne w kraju (bez danych ŻW), czyli 760 218 sztuk, można skonstatować, iż statystyczny obywatel posiadający pozwolenie na broń jest właścicielem 2,65 sztuki broni<sup>[34]</sup>. Co zatem z pozostałą częścią społeczeństwa polskiego w kontekście zagrożeń, które przyniosły ostatnie trzy lata?

## 2.2. Dane statystyczne w kontekście wpływu polityki państwa na dostęp obywateli do broni palnej

Analiza powyższych statystyk, działań rządu oraz opinii społecznej jednoznacznie wskazuje na wolę i potrzebę wzmacnienia potencjału obronnego Polski. Nie ulega wątpliwości, że kontrakty wojskowe, jakie były zawierane na poziomie Ministerstwa Obrony Narodowej<sup>[35]</sup>, przyczyniły się do tego wzrostu. Jednak jest to wzrost nieznaczny, biorąc pod uwagę, że wiele z nich jest dopiero w fazie realizacji. Niemniej na zdolności obronne kraju nie wpływa wyłącznie samo wojsko zawodowe, o czym świadczą chociażby mocno rozwijane formacje Wojsk Obrony Terytorialnej. Nie należy jednak przy tym zapominać – i tu odwołam się do powyższych danych statystycznych i przeprowadzanych analiz – że również potencjał obronny skorelowany wokół osób cywilnych posiadających broń palną oraz u znakomitej większości z nich wysokie zdolności posługiwania się nią, stanowi o sile militarnej państwa<sup>[36]</sup>. Współczesna historia przynosi w tej materii niekwestionowane dowody, jak chociażby sytuacja militarna Finlandii czy Szwajcarii w czasie drugiej wojny światowej<sup>[37]</sup>.

<sup>34</sup> Lewandowski, „Statystycznie”, 9.

<sup>35</sup> Łukasz Stach, *Wojna na Ukrainie i rozbudowa Sił Zbrojnych RP: perspektywa Włoch i Hiszpanii*, <https://defence24.pl/sily-zbrojne/wojna-na-ukrainie-i-rozbudowa-sil-zbrojnych-rp-perspektywa-wloch-i-hiszpanii>.

<sup>36</sup> Bartosz Nowakowski, „Administrative seizure of firearms. Legislative policy of the state in relation to citizens legally possessing firearms” *Roczniki Administracji i Prawa*, z. 1 (2020): 184; Michał Drewniak, *Wpływ broni palnej na bezpieczeństwo państwa i obywateli*, <http://www.nowastrategia.org.pl/wplyw-broni-palnej-na-bezpieczenstwo-panstwa-i-obywateli/>.

<sup>37</sup> Tomasz Borejza, *Wojna zimowa. Finlandia obroniła się przed sowiecką Rosją robiąc jej żołnierzom piekło*, <https://krowoderska.pl/wojna-zimowa-finlandia-obronila-sie-przed-sowiecka-rosja/>; Joanna Lampka, Szymon Orzechowski, *Dlaczego Hitler nie zaatakował Szwajcarii w trakcie II wojny światowej?*, <https://www.blabliblu.pl/2016/12/18/dlaczego-hitler-nie-zaatakowal-szwajcarii-w-trakcie-ii-wojny-swiatowej/>.

Priorytetem polityki państwa powinny stać się konieczne, szybkie i skuteczne działania legislacyjne zmieniające obecny stan prawnego, który blokuje powyższy potencjał obywatelski i wielopłaszczyznową realizację art. 85 ust. 1 Konstytucji RP. Wprawdzie na przestrzeni ostatnich dwóch lat wypracowano i wprowadzono kilka zmian legislacyjnych, ale są one co najwyżej kosmetyczne, a znaczna ich część budzi wątpliwości natury prawnej i faktycznej.

W kontekście regulacji, które mimo znikomego potencjału wydają się małym krokiem naprzód, można wskazać ustawę z 26 stycznia 2023 o zmianie ustaw w celu likwidowania zbędnych barier administracyjnych i prawnych<sup>[38]</sup>, która nowelizuje art. 10 UoBiA. Ustawodawca w/w nowelizacją uznał za ważną przyczynę posiadania broni do celów ochrony osobistej, osób i mienia chęć wzmacnienia potencjału obronnego RP zadeklarowaną przez m.in. żołnierza zawodowego Sił Zbrojnych RP, jeżeli posiada przydzieloną mu broń służbową (art. 10 ust. 3a UoBiA). Drugą pozytywną zmianą (modyfikacja art 15 ust. 4 UoBiA) było odstąpienie od obowiązku przeprowadzania przez myśliwych okresowych badań lekarskich i psychologicznych<sup>[39]</sup>, który to obowiązek został wprowadzony w 2019 r. do UoBiA<sup>[40]</sup> i miał zacząć obowiązywać od 31 marca 2023 r., czyli od chwili zniesienia obostrzeń pandemicznych.

Bez cienia wątpliwości, sytuacja geopolityczna, w szczególności wojna na Ukrainie, wpłynęła również na zmiany w podstawie programowej przedmiotu edukacja dla bezpieczeństwa. Dnia 1 września 2022 wprowadzono nowe treści nauczania, m.in. szkolenie strzeleckie. W szkołach podstawowych jest to teoria bezpiecznego obchodzenia się z bronią, ze stopniowym wprowadzaniem elementów praktycznych. Z kolei w szkołach ponadpodstawowych szkolenie obejmuje podstawy strzelania z częścią praktyczną prowadzoną z wykorzystaniem bezpiecznych narzędzi do ćwiczeń strzeleckich, jak np. broń kulowa, pneumatyczna, repliki broni strzeleckiej (ASG), strzelnice wirtualne albo laserowe. Szkoły, które na terenie swojego powiatu nie mają obecnie dostępu do strzelnic, nie muszą realizować ćwiczeń praktycznych w tym zakresie. Niestety szybkość realizacji tych

<sup>38</sup> Ustawa z dnia 26 stycznia 2023 r. o zmianie ustaw w celu likwidowania zbędnych barier administracyjnych i prawnych, Dz. U. z 2023 r., poz. 803.

<sup>39</sup> Regina Skibińska, Sejm zniósł obowiązek cyklicznych badań lekarskich myśliwych, także okulistycznych, <https://www.prawo.pl/samorzad/obowiazek-badan-lekar-skich-i-psychologicznych-mysliwych,518751.html>.

<sup>40</sup> Obowiązek ten wprowadzono mocą Ustawy z dnia 22 marca 2018 r. o zmianie ustawy – Prawo łowieckie oraz niektórych innych ustaw, Dz. U. z 2018 r., poz. 651, art. 4.

zmian programowych budzi wątpliwości, ponieważ obowiązek prowadzenia szkoleń strzeleckich będzie dotyczył wszystkich szkół dopiero od roku szkolnego 2024/2025<sup>[41]</sup>.

Z wyżej zasygnalizowanym zagadnieniem *implicite* wiąże się polityczny program wspierania jednostek samorządu terytorialnego w zakresie budowy i rozwoju infrastruktury strzeleckiej „Strzelnica w powiecie”<sup>[42]</sup>. Określa on możliwości zwiększenia infrastruktury do wykorzystania w realizacji zadań przez Ministerstwo Obrony Narodowej, poprzez dofinansowywanie zadań jednostek samorządu terytorialnego szczebla gminnego, powiatowego i wojewódzkiego, związanych z budową, remontami i utrzymaniem strzelnic oraz rozwijaniem sportu strzeleckiego, w szczególności wśród dzieci i młodzieży oraz organizacji proobronnych. Główne cele, jakie sobie postawiono, to m.in.: zwiększenie infrastruktury strzeleckiej, co umożliwia propagowanie i rozwój sportu strzeleckiego w społeczeństwie, a przez to wzrost sprawności fizycznej obywateli, zwiększenie potencjału bezpieczeństwa militarnego RP, wzrost liczby wyszkolonych pod względem strzeleckim obywateli, stanowiących bazę zasobów rezerw osobowych dla Sił Zbrojnych RP, zwiększenie możliwości prowadzenia szkolenia strzeleckiego przez dzieci i młodzież w wieku szkolnym, organizacje proobronne, a także formacje uzbrojone niewchodzące w skład Sił Zbrojnych RP. Natomiast ideą przedmiotowego programu, z punktu widzenia obronności państwa, ma być pobudzenie zainteresowania i pasji do strzelectwa sportowego dzieci i młodzieży, w szczególności uczniów klas o profilu wojskowym, a także członków organizacji proobronnych, rozwijania ich umiejętności strzeleckich w kierunku możliwości zwiększenia ilości wyszkolonych i świadomych obywateli, którzy mogliby w przyszłości

<sup>41</sup> Rozporządzenie Ministra Edukacji i Nauki z dnia 1 sierpnia 2022 r. zmieniające rozporządzenie w sprawie podstawy programowej kształcenia ogólnego dla liceum ogólnokształcącego, technikum oraz branżowej szkoły II stopnia, Dz.U. z 2022 r., poz. 1705; Rozporządzenie Ministra Edukacji i Nauki z dnia 1 sierpnia 2022 r. zmieniające rozporządzenie w sprawie podstawy programowej wychowania przedszkolnego oraz podstawy programowej kształcenia ogólnego dla szkoły podstawowej, w tym dla uczniów z niepełnosprawnością intelektualną w stopniu umiarkowanym lub znacznym, kształcenia ogólnego dla branżowej szkoły I stopnia, kształcenia ogólnego dla szkoły specjalnej przysposabiającej do pracy oraz kształcenia ogólnego dla szkoły policealnej, Dz. U. z 2022 r., poz. 1717.

<sup>42</sup> Por. Rozporządzenie Ministra Obrony Narodowej z dnia 6 lipca 2018 r. w sprawie dofinansowania z budżetu państwa zadań związanych z budową, remontami i utrzymaniem strzelnic oraz rozwijaniem sportu strzeleckiego Dz. U. poz. 1335); Ustawa z dnia 13 listopada 2003 r. o dochodach jednostek samorządu terytorialnego, Dz. U. z 2018 r., poz. 1530.

wstąpić do Wojsk Obrony Terytorialnej, wojsk operacyjnych, czy też sta- nowić wyszkolone rezerwy<sup>[43]</sup>.

### 3

## Propozycje zmian *de lege ferenda* jako konieczność polityki państwa w umocnieniu potencjału obronnego RP w przestrzeni obywatelskiej

Jakie zatem zmiany legislacyjne należałyby poczynić, aby zwiększyć potencjał obronny państwa polskiego w przestrzeni obywatelskiej? Poniżej zamieszczam kilka propozycji *de lege ferenda* w tej materii z pełną świadomością, że nie wyczerpują one kompleksowo wszystkich potrzeb. Wydają się jednak priorytetowe, a nawet więcej – palące. Jako punkt wyjścia należy przyjąć fundamentalną zasadę, iż prawo do posiadania broni palnej nie należy w Polsce do bezwzględnych praw obywatelskich gwarantowanych w Konstytucji RP, ani w przepisach prawa międzynarodowego, w tym przede wszystkim wspólnotowego<sup>[44]</sup>. Podstawę prawną regulującą aktualnie dostęp do broni dla obywateli cywilnych stanowią dwie ustawy oraz jedna dyrektywa UE: kilkakrotnie przywołana już powyżej UoBiA, ustanowiona z 13 sierpnia 2019 o wykonywaniu działalności gospodarczej w zakresie wytwarzania i obrotu materiałami wybuchowymi, bronią, amunicją oraz wyrobami i technologią o przeznaczeniu wojskowym i policyjnym (dalej: UKon.)<sup>[45]</sup> oraz dyrektywa Parlamentu Europejskiego i Rady (UE) z 24 marca 2021 w sprawie kontroli nabywania i posiadania broni (dalej dyrektywa UE)<sup>[46]</sup>.

<sup>43</sup> Por. Bartosz Nowakowski, „Kompetencje organu administracji publicznej w zakresie zatwierdzania regulaminu strzelniczy. Propozycje zmian *de lege ferenda*” *Zeszyty Prawnicze BAS*, nr 4 (2020): 43-58; Wojsko Polskie, *Strzelnica w powiecie*, <https://www.wojsko-polskie.pl/zostanzolnierzem/strzelnica-w-powiecie/>.

<sup>44</sup> Bartosz Nowakowski, „Administracyjne cofnięcie pozwolenia na broń. Polemika na kanwie przypadków regulowanych art. 18 ustawy o broni i amunicji” *Roczniki Administracji i Prawa*, z. specjalny nr 19 (2019): 186.

<sup>45</sup> Ustawa z dnia 13 czerwca 2019 r. o wykonywaniu działalności gospodarczej w zakresie wytwarzania i obrotu materiałami wybuchowymi, bronią, amunicją oraz wyrobami i technologią o przeznaczeniu wojskowym lub policyjnym, Dz.U. 2019 poz. 1214.

<sup>46</sup> Dyrektywa Parlamentu Europejskiego i Rady (UE) 2021/555 z dnia 24 marca 2021 r. w sprawie kontroli nabywania i posiadania broni (tekst jednolity),

W pierwszej kolejności należy odnieść się do stanu prawnego i faktycznego implementacji dyrektywy UE jako takiej. Obowiązujące przepisy wdrażają jej zapisy, ale dzieje się to opieszałe, w niewielkim zakresie i niekonsekwentnie. Co ciekawe, większość została wdrożona do UKon., ze swojej definicji dotyczącej wyłącznie przedsiębiorców, a nie do UoBiA, zatem oddziaływanie tych wdrożeń na zwykłych posiadaczy broni jest niejednoznaczne i znikome. Od podpisania przez RP traktatu akcesyjnego, stanowiącego prawną podstawę przystąpienia naszego kraju do UE i jego realizacji poprzez członkostwo Polski z dniem 1 maja 2004, UoBiA wciąż nie jest zgodna z dyrektywą. Zatem palącą wręcz koniecznością powinno stać się kompleksowe dostosowanie UoBiA na zgodną z dyrektywą UE, tak aby przede wszystkim nową „cyfrową” ustawą zastąpić starą „analogową”<sup>[47]</sup>. Brak funkcjonowania w obrębie RP elektronicznego systemu gromadzenia i analizowania danych dotyczących pozwoleń, nakazanego dyrektywą UE, jest problematyczne m.in. w płaszczyźnie sprawnego pozyskiwania precyzyjnych danych w tym obszarze. Czy jednak jest to możliwe w kontekście wręcz przeciwnych działań państwa, czego przykładem może być rozporządzenie z dnia 11 sierpnia 2023 w sprawie wzorów dokumentów związanych z posiadaniem broni<sup>[48]</sup>, które *de facto* oznacza, że administracja rządowa utrwała niezgodny z dyrektywą UE stan faktyczny, pozostając nadal przy dokumentach papierowych?

Po drugie, w odniesieniu do tego, co zostało powyżej zasygnalizowane, szczegółowo dotyczy to broni kategorii A6 (samopowtarzalnej, wytworzonej z podzespołów broni samoczynnej) oraz kategorii A7 (broni samopowtarzalnej centralnego zapłonu, z magazynkami o większej pojemności) – dyrektywa UE dość szczegółowo reguluje warunki dostępu do takiej broni, a polskie przepisy w ogóle jej nie uwzględniają. Przy czym w/w warunki dyrektywy UE nie są wcale bardziej rygorystyczne niż obecne polskie kryteria uzyskania pozwolenia na broń do celów sportowych.Więcej, kategorie dyrektywy UE są już wprowadzone do UKon., ale nie są wprowadzone do

---

Dz. Urz. UE L 115/1. Na marginesie należy zauważyć, że choć w nazwie zapisano „tekst jednolity” jednak nie wyczerpuje tego pojęcia w polskim rozumieniu tego terminu choćby dlatego, że w swoim art. 26 uchyła w całości poprzednią dyrektywę 91/477/EWG, wraz z jej obiema nowelizacjami (z lat 2008 i 2017).

<sup>47</sup> Jarosław Lewandowski, „20. Rok w Unii Europejskiej: z bronią, czy bez broni?” *Strzałpl. Pro libertate*, 5 (2023): 6-8.

<sup>48</sup> Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 28 czerwca 2023 r. w sprawie wzorów dokumentów związanych z posiadaniem broni, Dz.U. 2023 poz. 1316. Por. także Wyrok WSA w Warszawie z dnia 24.01.2013 r., II SA/Wa 2042/12, LEX nr 1325998.

UoBiA – co daje niekompatybilny stan prawny i powoduje wątpliwości, choćby w przypadku wpisów do Europejskiej Karty Broni Palnej. Pomijam już kwestię licznych i zbędnych komplikacji administracyjnych w obrocie bronią na terenie kraju. Rodzi to też poważne niebezpieczeństwo utrudnień przy rejestracji broni kategorii A6 i A7 w przyszłości. Postulowane jest zatem pilne wprowadzenie do UoBiA wszystkich kategorii dyrektywy UE – przez co możliwe stałoby się określenie zasad dostępu nie tylko do broni kategorii C i B, ale także do broni kategorii A, w sposób tak przyjazny dla posiadaczy broni, jak to jest określone w ramach dyrektywy UE<sup>[49]</sup>.

Po trzecie, pozwolenia na broń są nadal klasyfikowane według deklarowanego celu użycia. Skutkiem tego jest konieczność uzyskania przez jedną osobę kilku pozwoleń, o ile chce mieć dostęp do broni różnego rodzaju. Konieczne wydaje się zatem jak najpilniejsze odejście od pozwoleń „do celu”<sup>[50]</sup> na rzecz czterech poziomów pozwolenia – na broń kategorii C; B + C; A6 + A7 + B + C i na wszystkie kategorie A + B + C. W efekcie takiego rozwiązania jedna osoba będzie mogła posiadać jedno pozwolenie z możliwością podwyższenia jego kategorii po spełnieniu określonych prawem przesłanek<sup>[51]</sup>.

Po czwarte, pożądane jest odejście od określenia w decyzji administracyjnej liczby sztuk i rodzaju broni, a tym samym obligatoryjności posiadania zaświadczenia do zakupu broni<sup>[52]</sup>. Liczba sztuk i rodzaj broni wynikałyby zatem *ipso facto* z rodzaju pozwolenia, czyli odpowiadałyby danej kategorii broni. Tym samym zakup broni byłby realizowany na podstawie uzyskanego pozwolenia na broń, a nie zaświadczenia.

<sup>49</sup> Rzadowolski, *Pozwolenia na broń*.

<sup>50</sup> Aleksander Herzog, „Ustawa o broni i amunicji po nowelizacji”, *Prokuratura i Prawo* 10 (2011): 71. Por. także: wyrok NSA z 29.09.2022 r., II OSK 2846/19, LEX nr 3434807; wyrok NSA z 07.04.2022 r., II GSK 265/22, LEX nr 3452208; wyrok WSA w Warszawie z 15.11.2021 r., VI SA/Wa 2449/21, LEX nr 3291528; wyrok WSA w Lublinie z 12.10.2021 r., III SAB/Lu 16/21, LEX nr 3267535; wyrok WSA w Warszawie z 23.11.2021 r., VI SA/Wa 1660/21, LEX nr 3294485; wyrok WSA w Warszawie z 10.08.2021 r., VI SA/Wa 1639/21, LEX nr 3310920; wyrok WSA w Warszawie z 21.05.2021 r., II SAB/Wa 794/20, LEX nr 3313270; wyrok WSA w Warszawie z 11.05.2021 r., II SA/Wa 2438/20, LEX nr 3279801; wyrok WSA w Warszawie z 23.04.2021 r., II SA/Wa 2432/20, LEX nr 3265916; wyrok WSA w Warszawie z 03.02.2021 r., II SA/Wa 778/20, LEX nr 3195703.

<sup>51</sup> Jarosław Lewandowski, „O co chodzi w sprawie ustawy?” *Strzałp. Pro libertate*, 5 (2022): 8.

<sup>52</sup> Lewandowski, „O co chodzi w sprawie ustawy”, 8. Por. także: Wyrok WSA w Opolu z 05.03.2020 r., II SA/Op 18/20, LEX nr 2939092.

Wreszcie po piąte, zasady przechowywania broni, aktualnie określane w drodze rozporządzenia wykonawczego<sup>[53]</sup>, powinny być regulowane w drodze ustawy legislacyjnie mającej wyższą rangę niż rozporządzenie i bardziej uniwersalny zakres. Sprecyzowałoby to jasno wymogi przechowywania broni i tym samym wykluczyłoby liczne wątpliwości dotyczące obowiązywalności norm technicznych. Natomiast przypadki faktyczne krótkotrwałego przechowywania broni, np.: w zamkniętej przestrzeni bagażowej pojazdu, zabezpieczonego przed otwarciem przez osoby trzecie (co umożliwia np. tankowanie samochodu), w ogóle nie są regulowane prawnie w UoBiA<sup>[54]</sup>.

## 4 | Podsumowanie

Reasumując, w kontekście omawianego zagadnienia należy mieć na uwadze, że obowiązujące przepisy UoBiA weszły w życie 20 marca 2000, czyli prawie ćwierć wieku temu. Część z nich swój rodowód czerpie jeszcze z peereloskiej UoBiA z 1961<sup>[55]</sup>. Obecna UoBiA, pomimo kilku kosmetycznych nowelizacji, w swojej zasadniczej i faktycznej warstwie zmieniła się tylko raz – w 2011, co w praktyce otworzyło nieco szerszy dostęp obywateli do broni. Nowelizacja ta zniosła bowiem uznanowość organów administracji państwej, co w nieznacznym stopniu mogło wskazać politykę państwa jako działania mające na celu zwiększenie potencjału obronnego RP. Biorąc ponadto przywołane wyżej badania i dane statystyczne oraz

<sup>53</sup> Rozporządzenie Ministra Spraw Wewnętrznych z dnia 26 sierpnia 2014 r. w sprawie przechowywania, noszenia oraz ewidencjonowania broni i amunicji, Dz.U. 2014 poz. 1224; Cezary Kąkol, *Ustawa o broni i amunicji. Komentarz* (Warszawa: Wolters Kluwer, 2021), 254–262; Rafał Mikowski, „Kilka uwag o podstawach prawnych ograniczeń dostępu do broni palnej w Polsce” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji*, CVX (2018): 168; Sebastian Maj, *Ustawa o broni i amunicji. Komentarz*, LEX nr 587551762. Por. także: postanowienie NSA z 08.01.2014 r., II GSK 2311/13, LEX nr 1426690; wyrok NSA z 06.05.2008 r., I OSK 785/07, LEX nr 471497; wyrok NSA z 04.09.2014 r., II OSK 538/13, LEX nr 1664482; wyrok WSA w Krakowie z 23.07.2012 r., II SA/Kr 745/12, LEX nr 1228983; wyrok WSA w Warszawie z 29.04.2021 r., II SA/Wa 1704/20, LEX nr 3265912; wyrok WSA w Warszawie z 29.04.2021 r., II SA/Wa 1706/20, LEX nr 3265775.

<sup>54</sup> Jarosław Lewandowski, „Nowa ustawa o broni i amunicji – co przyniosłaby dla posiadaczy broni?”, *Strzałpl. Pro libertate*, 7-8 (2023): 8.

<sup>55</sup> Ustawa z dnia 31 stycznia 1961 r. o broni, amunicji i materiałach wybuchowych, Dz.U. 1961 nr 6 poz. 43.

nieznaczne działania polityczne, legislacyjne i resortowe w przedmiocie zagadnienia, można byłoby skonstatować bardzo ostrożnie, że wzrasta potencjał obronny państwa w warstwie obywatelskiej. W kontekście jednak potencjalnej polityki państwa w tym zakresie byłoby to niestety twierdzenie zbyt daleko idące. Przyjmując to, co wyżej zostało powiedziane (że w rękach polskich obywateli znajduje się ponad 760 tysięcy sztuk broni), dodając do tego zapasy rządowe, czyli uzbrojenie strzeleckie 164 tys. żołnierzy, 105 tys. funkcjonariuszy Policji oraz agencji i służb uzbrojonych (np. SOP, SW), nie wliczając zapasów mobilizacyjnych, których stan jest bliżej nieznany, a zapewne po wybuchu wojny na Ukrainie znacznie uszczuplony, mamy średnio 2,75 sztuk broni na 100 obywateli. Ponadto, wyłączając statystycznie z tego zestawienia osoby niezdolne do posługiwania się bronią (np. osoby chore i dzieci) oraz broń zasadniczo nie nadającą się do walki (karabinki i pistolety sportowe chociażby na nabój .22 lr. czy .32 S&W), statystycznie otrzymamy około 3 sztuki broni na 100 obywateli polskich zdolnych do posługiwania się bronią. A *contrario*, ujmując rzecz czysto matematycznie, w przypadku ewentualnego konfliktu zbrojnego, pozostałe 97 osób nie stanowi żadnego czynnika odstraszającego dla ewentualnego agresora, a przecież w ostateczności taki jest cel polityki państwa we wzmacnianiu potencjału obronnego RP<sup>[56]</sup>. Ponadto, należy mieć jeszcze na uwadze, o czym była mowa powyżej, że osoby mające po kilka pozwoleń (do różnych celów) są w tych statystykach ujęte kilkakrotnie – na przykład wielu posiadaczy pozwoleń do celów sportowych ma dziś jednocześnie pozwolenie do celów kolekcjonerskich. Czyli podane wartości świadczą wyłącznie o liczbie wydanych decyzji administracyjnych, a nie o liczbie osób posiadających broń, a to bardzo duża różnica.

Po drugie, na powyższe nakłada się „bałagan” legislacyjny w szerokim tego słowa znaczeniu. Zaproponowane powyżej propozycje zmian *de lege ferenda* to tylko kropla w morzu już nie tylko potrzeb, ale wręcz konieczności. Co więcej, są one nie tylko pilne, ale wręcz palące po to, aby usunąć z praktycznej przestrzeni stosowania przedmiotowego prawa wadliwe zapisy, jak chociażby zapis z ustawy z dnia 26 stycznia 2023 o zmianie ustaw w celu likwidowania zbędnych barier administracyjnych i prawnych, łączący dwa różne cele posiadania broni: ochronę osobistą oraz ochronę osób i mienia, pomijając już absurdalność koncepcji wzmacniania potencjału obronnego kraju za pomocą pozwoleń wydanych na broń krótką<sup>[57]</sup>.

<sup>56</sup> Lewandowski, „Statystycznie”, 9-10.

<sup>57</sup> Ustawa z dnia 26 stycznia 2023 r. o zmianie ustaw w celu likwidowania zbędnych barier administracyjnych i prawnych, Dz.U. 2023 poz. 803.

Wreszcie trzecia konkluzja – jak ma rozwijać się potencjał obronny kraju w warstwie obywatelskiej, gdy po 25 latach obecności Polski w NATO nadal niewydolny pozostaje argument nadrzędny, czyli przemysł obronny państwa i nie ma cienia wątpliwości, iż przyczyn takiego stanu rzeczy należy szukać w wadliwej polityce państwa w tym zakresie. Przykładowo 13 grudnia 2023 zakończył się nabór wniosków w unijnym programie finansowania amunicji ASAP. Z Polski wnioski złożyły tylko trzy firmy: Zakłady Metalowe Dezamet z Nowej Dęby, Mesko ze Skarżyska-Kamiennej i Zakłady Chemiczne Nitro-Chem z Bydgoszczy. Z wniosków, które wpłynęły z całej UE, Komisja Europejska zatwierdziła 31 projektów w zakresie produkcji materiałów wybuchowych, materiałów pędnich i prochów, naboi artyleryjskich, pocisków rakietowych oraz w zakresie testowania. Polsce przypadł tylko jeden pozytywnie rozpatrzony wniosek – dla Zakładów Metalowych Dezamet z Nowej Dęby i to wyłącznie w wysokości 20% dotacji do proponowanej przez Dezamet kwoty. Niemcy natomiast otrzymały osiem pozytywnie zaopiniowanych wniosków, Francja – pięć, nawet ośmiokrotnie mniejsza od Polski Słowacja otrzymała trzy pozytywnie zaopiniowane wnioski, a ponad czterokrotnie mniejsze Czechy – dwa<sup>[58]</sup>. Niestety, kierunek zarządzania potencjałem obronnym RP zmieniających się na scenie politycznej ugrupowań pozostaje taki sam – upaństwowienie przemysłu zbrojeniowego – w przeciwieństwie chociażby do przywołanych przykładowo powyżej państw UE. Wciąż mylone są bowiem zasadnicze pojęcia „polski”, „państwowy” i „polityczny”, a to skutkuje – mimo zagrożeń geopolitycznych – powolnymi i zazwyczaj słabymi, a niekiedy wadliwymi legislacyjnie zmianami w obrębie poruszanej zagadnienia.

## Bibliografia

Borejza Tomasz, *Wojna zimowa. Finlandia obroniła się przed sowiecką Rosją robiąc jej żołnierzom piekło*. <https://krowoderska.pl/wojna-zimowa-finlandia-obronila-sie-przed-sowiecka-rosja/>.

<sup>58</sup> Por. Rafał Muczyński, *Program ASAP: 2 mld EUR dla europejskiego przemysłu na produkcję amunicji*, <https://milmag.pl/program-asap-2-mld-eur-dla-europejskiego-przemyslu-na-produkcje-amunicji/>.

- Drewniak Michał, *Wpływ broni palnej na bezpieczeństwo państwa i obywateli.* <http://www.nowastrategia.org.pl/wplyw-broni-palnej-na-bezpieczenstwo-panstwa-i-obywateli/>.
- Perfecki Wiktor, *Polacy zbroją się na potege. Liczba pozwoleń na broń wystrzeliła.* <https://www.rp.pl/spoleczenstwo/art35744532-polacy-zbroja-sie-na-potege-liczba-pozwolen-na-bron-wystrzeliла.>
- Frag Out! Magazine – firearms, military, tactical. *Broń palna w Polsce - policyjne statystyki AD 2022.* <https://www.youtube.com/watch?v=xUkx5wdwB9Q>.
- Herzog Aleksander, „Ustawa o broni i amunicji po nowelizacji” *Prokuratura i Prawo*, 10 (2011): 64-82.
- Kąkol Cezary, *Ustawa o broni i amunicji. Komentarz.* Warszawa: Wolters Kluwer, 2021.
- Komenda Główna Policji, *Broń – pozwolenia,* <https://statystyka.policja.pl/st/wybранe-statystyki/bron/186394,Bron-pozwolenia.html>.
- Lampka Joanna, Szymon Orzechowski, *Dlaczego Hitler nie zaatakował Szwajcarii w trakcie II wojny światowej?* <https://www.blabliblu.pl/2016/12/18/dlaczego-hitler-nie-zaatakowal-szwajcarii-w-trakcie-ii-wojny-swiatowej/>.
- Lewandowski Jarosław, „20. Rok w Unii Europejskiej: z bronią, czy bez bronii?” *Strzałpl. Pro libertate*, 5 (2023): 6-8.
- Lewandowski Jarosław, „Nowa ustanowiona o broni i amunicji – co przyniosłaby dla posiadaczy broni?” *Strzałpl pro libertate*, 7-8 (2022): 6-10.
- Lewandowski Jarosław, „O co chodzi w sprawie ustawy?” *Strzałpl. Pro libertate*, 5 (2022): 6-9.
- Lewandowski Jarosław, „Statystycznie jest coraz lepiej” *Strzałpl. Pro libertate*, 3 (2023): 6-10.
- Maj Sebastian, *Ustawa o broni i amunicji. Komentarz.* LEX nr 587551762.
- Mikowski Rafał, „Kilka uwag o podstawach prawnych ograniczeń dostępu do broni palnej w Polsce” *Acta Universitatis Wratislaviensis, Przegląd Prawa i Administracji*, CVX (2018): 163-174.
- Ministerstwo Zdrowia, *Pierwszy przypadek koronawirusa w Polsce.* <https://web.archive.org/web/20200304112521/https://www.gov.pl/web/zdrowie/pierwszy-przypadek-koronawirusa-w-polsce>.
- Muczyński Rafał, *Program ASAP: 2 mld EUR dla europejskiego przemysłu na produkcję amunicji.* <https://milmag.pl/program-asap-2-mld-eur-dla-europejskiego-przemyslu-na-produkcje-amunicji/>.
- Nowakowski Bartosz, „Administracyjne cofnięcie pozwolenia na broń. Polemika na kanwie przypadków regulowanych art. 18 ustawy o broni i amunicji” *Roczniki Administracji i Prawa*, z. spec. Nr 19 (2019): 185-202.

Nowakowski Bartosz, „Administrative seizure of firearms. Legislative policy of the state in relation to citizens legally possessing firearms” *Roczniki Administracji i Prawa*, z. 1 (2020): 183-199.

Nowakowski Bartosz, „Kompetencje organu administracji publicznej w zakresie zatwierdzania regulaminu strzelniczy. Propozycje zmian de lege ferenda” *Zeszyty Prawnicze BAS*, nr 4 (2020): 43-58.

Nowosielska Paulina, Otto Patrycja, *Polacy ruszyli po broń palną. Kolekcjonerzy i sportowcy uzbrojeni pozęby*. <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8661048,bron-palna-pozwolenie-na-bron-kolekcjonska-sportowa.html>.

Polska Agencja Prasowa, Rosja opublikowała propozycje „gwarancji bezpieczeństwa”, których chce od zachodu, <https://www.pap.pl/aktualnosci/news%2C1030926%-2Crosja-opublikowala-propozycje-gwarancji-bezpieczenstwa-ktorych-chce-od>.

Polska Agencja Prasowa, Ukraiński MSW: rozpoczęła się inwazja, doszło doataków rakietowych na Kijów i Charków, <https://www.pap.pl/aktualnosci/news%2C1089875%-2Cukrainskie-msw-rozpoczela-sie-inwazja-doszlo-do-atakow-rakietowych-na>.

Redakcja Milmag.pl, Broń w Polsce w 2022: Wzrost w roku wojny, <https://milmag.pl/bron-w-polsce-w-2022-wzrost-w-roku-wojny/>.

Rozwadowski Maciej, Pozwolenia na broń oraz broń w Polsce w latach 2014-2022 - analiza statystyk Policji, <https://trybun.org.pl/2023/02/26/pozwolenia-na-bron-raz-bron-w-polsce-w-latach-2014-2022-analiza-statystyk-policji/>.

Skibińska Regina, Sejm zniósł obowiązek cyklicznych badań lekarskich myśliwych, także okulistycznych, <https://www.prawo.pl/samorzad/obowiazek-badan-lekarskich-i-psychologicznych-mysliwych,518751.html>.

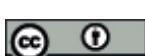
Sobolak Justyna, Polacy zbroją się na potęgę. Liczba pozwoleń na broń wystrzeliła. Mamy nowe dane, <https://businessinsider.com>.

Stach Łukasz, Wojna na Ukrainie i rozbudowa Sił Zbrojnych RP: perspektywa Włoch i Hiszpanii, <https://defence24.pl/sily-zbrojne/wojna-na-ukrainie-i-rozbudowa-sil-zbrojnych-rp-perspektywa-wloch-i-hiszpanii>.

TACC, Путин объявил о начале военной операции на Украине, <https://tass.ru/politika/13825671>.

Wilk Andrzej, Rosyjska demonstracja siły na Białorusi i oceanie światowym, Ośrodek Studiów Wschodnich, <https://www.osw.waw.pl/pl/publikacje/analizy/2022-01-24/rossyjska-demonstracja-sily-na-bialorusi-i-oceanie-swiatowym>.

Wojsko Polskie, Strzelnica w powiecie, <https://www.wojsko-polskie.pl/zostanzolnierzem/strzelnica-w-powiecie/>.



# Polish Film Institute: Legal Status, Organisation and Tasks

The paper contains an analysis of legal matters concerning the Polish Film Institute. In analysing the Institute's legal status, the authors have focused primarily on the provisions of the Constitution of the Republic of Poland, the Public Finance Act, the Cinematography Act and the Institute's Statute. The Institute, being a state legal person, is a unit of the public finance sector. The authors examine issues relating to the organisation of the Institute and the tasks it performs.

**KEYWORDS:** unit of the public finance sector, state legal person, Polish Film Institute, culture, national heritage

**KRZYSZTOF CZARNECKI**, PhD in law, State University of Applied Sciences in Włocławek, ORCID – oooo-ooo2-8664-7627,  
e-mail: krzysztof.czarnecki@pans.wloclawek.pl

**JACEK WANTOCH-REKOWSKI**, associate professor, Nicolaus Copernicus University in Toruń, ORCID – oooo-ooo2-1606-7790, e-mail: rekowski@umk.pl

## 1 | Introduction

Article 5 of the Constitution of the Republic of Poland of 2 April 1997<sup>[1]</sup> stipulates, inter alia, state protection of its national heritage. In turn, Article 6 refers to the state creating conditions for the dissemination of and equal access to cultural heritage, which is the source of the identity of the Polish nation, its duration and development<sup>[2]</sup>. The preservation and dissemination of cultural heritage is a complex issue of major importance for the

<sup>1</sup> Journal of Laws 1997, No. 78, item 483, as amended.

<sup>2</sup> On the content of Articles 5 and 6 of the Polish Constitution, in the context of national heritage and cultural goods, see Anna Frankiewicz, „Znaczenie prawne

future of the nation; hence, it is necessary to define the principles of state action in this field at the level of constitutional regulation<sup>[3]</sup>.

Tangible and intangible cultural heritage is an important factor in shaping human identity. The term „cultural heritage” covers a range of cultural phenomena consisting of language, customs, rituals, everyday objects, artistic artefacts, architecture and all aspects of human activity<sup>[4]</sup>.

Kamil Zeidler pointed out that ‘among the six most important constitutional values that should be protected by the state in the first place, we find „guarding the national heritage”. At the same time, the principle of guarding the national heritage requires a certain corrective interpretation, as its linguistic interpretation leads *ad absurdum* (it is literally mandatory to guard the national heritage; whatever definition of a nation we adopt – political, ethnic, etc. – there is *a contrario* no obligation to guard heritage that is not national heritage). Thus, it should be recognised that the principle that I call the principle of protection of cultural heritage finds its interpretative basis in Article 5 of the Constitution; however, its content requires correction in the process of interpreting the law, taking into account the content of other provisions of the Constitution, as well as a broader systemic approach’<sup>[5]</sup>. It should be noted that in relation to the protection of cultural heritage, a number of general principles characterising the whole system of Polish law (principles derived from the Constitution itself), as well as principles specific to its individual branches, such as the Code of the Administrative Procedure, are applicable. They must then be interpreted in the context specific to the law on the protection of cultural heritage<sup>[6]</sup>.

Caring for the development of culture and the preservation of cultural heritage is an important task for the state to perform. It is carried out by maintaining public cultural institutions, subsidising cultural initiatives of

---

regulacji dziedzictwa narodowego i dóbr kultury w rozdziale I Konstytucji RP” *Przegląd Prawa i Administracji*, No. 88 (2012): 9-22.

<sup>3</sup> Wiesław Skrydło, „Konstytucja Rzeczypospolitej Polskiej. Komentarz” (Warszawa: Wolters Kluwer, 2009), 16.

<sup>4</sup> Anna Musiał-Gąsiorowska, „Prawne i organizacyjne aspekty popularyzacji dziedzictwa kulturowego – pryncypia” *Przegląd Prawa Publicznego*, No. 3 (2019): 27.

<sup>5</sup> Kamil Zeidler, „Zasady prawa ochrony dziedzictwa kulturowego – propozycja katalogu” *Ruch Prawniczy, Socjologiczny i Ekonomiczny*, No. 4 (2018): 150.

<sup>6</sup> Małgorzata Joanna Wegrzak, Kamil Zeidler, „The Principles of Cultural Heritage Law Based on the Polish Law as an Example” *Brazilian Journal of International Law*, No. 3 (2020): 296, DOI: 10.5102/rdi.v17i3.7028.

private entities, covering the costs of historical preservation and providing financial incentives for cultural productions, publishers or creators<sup>[7]</sup>.

Cinematographic activity is part of the cultural heritage and national culture. Pursuant to Article 3(1) of the Cinematography Act of 30 June 2005<sup>[8]</sup>, the state exercises patronage over cinematographic activities, in particular by supporting the production and promotion of films, the dissemination of film culture and the protection of cultural heritage in the field of film. Cinematography encompasses film creation, production, services, distribution and dissemination, including the operation of cinemas, dissemination of film culture, promotion of Polish film creation and the collection, protection and dissemination of film art resources (Article 3(2) of the Cinematography Act).

One of the key concepts in the field of cinematography is „film”. Pursuant to Article 4(1) of the Cinematography Act, a film is a work of any length, including a documentary or animated work, consisting of a series of consecutive images with or without sound recorded on any medium enabling repeated reproduction, giving the impression of movement and forming an original whole, expressing the action (content) in an individual form, and furthermore, with the exception of documentary and animated works, intended to be shown in cinemas as the first field of exploitation within the meaning of the provisions on copyright and related rights. A film is also a work that has not been shown in cinemas due to circumstances beyond its control.

A specific type of film is a Polish film<sup>[9]</sup>. According to Article 4(2) of the Cinematography Act, a film is considered to be a Polish film if its producer or co-producer is an entity based in the territory of the Republic of Poland and at least one of the following conditions is met:

1. the author of the screenplay or of the adapted literary work, the director and the actor in one of the main roles are Polish citizens, he share of the financial resources of the producer established on the territory of the Republic of Poland in the production costs of the film is 100%,

<sup>7</sup> Małgorzata Cilak, „Problem stosowania przepisów o pomocy publicznej do działalności kulturalnej” *Studia Prawnicze KUL*, No. 3 (2021): 68.

<sup>8</sup> Consolidated text: Journal of Laws 2022, item 1066, as amended.

<sup>9</sup> The introduction of the concept of ‘Polish film’ and the criteria defining it into the law were modelled on solutions operating in other European countries such as France, and they met with approval; see Rafał Golat, *Podstawy prawa kultury* (Poznań: Wydawnictwo Poznańskie, 2006), 208.

these resources, up to 80% of the production costs of the film, are spent on the territory of the Republic of Poland and, moreover, the master copy is made in Polish;

2. the author of the screenplay or of the adapted literary work, or the director or the actor in one of the main roles are Polish citizens, the share of financial resources of the co-producer based in the territory of the Republic of Poland in the film production costs is at least 20% in the case of a film being a bilateral co-production or at least 10% in the case of a film being a multilateral co-production, these resources, up to the amount of 80% of the film production costs, are spent in the territory of the Republic of Poland and, moreover, the main language version is in Polish.

To support the development of cinematography, the Polish Film Institute was established on the basis of Article 7(1) of the Cinematography Act<sup>[10]</sup>. Although this entity has been in operation for several years, there are still few scientific studies devoted to it. The aim of this study is to examine the legal status of the Institute and to analyse its organisation and tasks. In it, the authors use a research method characteristic of legal science, namely the dogmatic-legal method, based on an analysis of legal acts.

## 2 | Legal status of the Polish Film Institute

Article 7(1) of the Cinematography Act states that the Polish Film Institute is a state legal person, and its seat is in Warsaw (Article 7(2)). It is clear from Article 7(1) that the Institute is an entity functioning at the state level and not at the local government level. In turn, the granting of legal personality to the Institute indicates the independence of the entity in legal transactions—it is not an internal (organisational) unit of the state; rather, it is a separate entity. In turn, it follows from Article 8 of the Cinematography Act that the tasks performed by the Institute are of a public nature. All this allows for the thesis that the Polish Film Institute is an entity of the

<sup>10</sup> Hereinafter also referred to as the „Institute”.

public finance sector as defined in Article 9, point 14 of the Public Finance Act of 27 August 2009<sup>[11]</sup>.

Pursuant to Article 9(14) of the Public Finance Act, the public finance sector consists, inter alia, of ‘other state or local government legal persons established on the basis of separate acts in order to perform public tasks, excluding enterprises, research institutes, banks and commercial law companies’. The public finance sector comprises entities with a diverse legal form and different objects of activity and applies to a different extent the principles of financial management specified in the Public Finance Act<sup>[12]</sup>. The entities listed in Article 9(14) are not created (as e.g. budget units or local government budget establishments) according to the principles set out in the Public Finance Act. State and local government legal persons are created on the basis of separate acts, and the Public Finance Act qualifies them only as units of the public finance sector<sup>[13]</sup>. The activity of state legal persons is based on state property, thanks to which they can be fully responsible for their liabilities<sup>[14]</sup>.

The fact that the Polish Film Institute is a state legal person established and operating on the basis of the provisions of the Cinematography Act means that it is not a state cultural institution within the meaning of the Act of 25 October 1991 on the Organisation and Conduct of Cultural Activities (state and local government cultural institutions are also units of the public finance sector listed in Article 9(13) of the Act). In this context, the assignment of the Polish Film Institute to the category of ‘specialised national cultural institutions’, which can be found in the literature<sup>[15]</sup>, is of a functional nature and cannot be referred to the organisational and

<sup>11</sup> Consolidated text: Journal of Laws 2022, item 1634.

<sup>12</sup> Małgorzata Cilak, „Komentarz do art. 9”, [in:] *Ustawa o finansach publicznych. Komentarz*, ed. Zbigniew OfiarSKI (Warszawa: Wolters Kluwer, 2019), 130.

<sup>13</sup> For analyses of state and local government legal persons as units of the public finance sector, see Jacek Wantoch-Rekowski, Małgorzata Cilak, Tomasz Brzezicki, Maciej Serowaniec, Martyna Wilmanowicz-Słupczewska, *Public Finance Sector Entities in Poland* (Toruń: TNOiK, 2021), 169-174.

<sup>14</sup> Małgorzata Wróblewska, „Komentarz do art. 9”, [in:] *Ustawa o finansach publicznych. Komentarz prawno-finansowy*, ed. Henryk Dzwonkowski, Grzegorz Gołębowski (Warszawa: Wydawnictwo Sejmowe, 2014), SIP Lex, <https://sip.lex.pl>.

<sup>15</sup> Katarzyna Jagodzińska, „Charakterystyka działalności kulturalnej w Polsce po transformacji ustrojowej”, [in:] *Kultura a rozwój*, ed. Jerzy Hausner, Anna Karwińska, Jacek Purchla (Warszawa: Narodowe Centrum Kultury, 2013), 128.

legal form in which this entity functions<sup>[16]</sup>. The exclusion of the Institute from the scope of application of the Act on the Organisation and Conduct of Cultural Activities means that the principles of its functioning, including its financial management, may be regulated by the legislator in a different manner from that of state cultural institutions.

The financial plans of state legal entities, including the Polish Film Institute, are an element of the annual Budget Act. In the Budget Act for 2022 of 17 December 2021<sup>[17]</sup>, Article 33 indicates that the financial plans of state legal persons referred to in Article 9 point 14 of the Public Finance Act of 27 August 2009 are established in accordance with Annex No. 14. The Polish Film Institute is listed in item 11, and its financial plan in Annex No. 14 is included in Table No. 11.

The definition of a state legal entity is contained in Article 3 of the Act of 16 December 2016 on the Principles of State Property Management<sup>[18]</sup>. Article 3(1)(1) indicates that a state legal person is an organisational unit with legal personality established by or pursuant to a law or in the execution of a law by a government administrative body to perform public tasks, in which,

1. provided for in the provisions of the law governing the organisation of that legal person, the right to confer and amend the Statutes shall be vested in a government administrative body, or those provisions shall provide that the right to participate in the constituent body of the legal person, including the right to amend the Statutes, shall be vested entirely in the State Treasury, and
2. provided for in the statutory provisions governing the constitution of that legal person, the right to the surplus between the income and the expenses of that legal person, if disposable, shall vest in full in

---

<sup>16</sup> However, the existence of film institutions that are state or local government cultural institutions is provided for in the Act on the Organisation and Conduct Cultural Activities itself, placing them in an exemplary catalogue of these entities in Article 2. The example may be used here of local government film institutions established under the Cinematography Act of 16 July 1987 (original text: Journal of Laws No. 22, item 127), which, under Article 38 of the 2005 Cinematography Act, became self-governmental cultural institutions within the meaning of the Act of October 25 1991 on the organisation and pursuit of cultural activity.

<sup>17</sup> Journal of Laws 2022, item 270.

<sup>18</sup> Consolidated text: Journal of Laws 2021, item 1933, as amended.

the State Treasury unless those provisions provide for a method of disposing of it other than the right to the surplus, and

3. in the event of the dissolution or other loss of legal existence of that legal person, the rights to its assets, including the right to dispose of those assets, shall vest exclusively in the State Treasury.

In the following paragraphs of Article 3, state legal persons are „named”, including in para. 6 the Polish Film Institute.

The Act on the Principles of State Property Management provides, as the title of the Act indicates, the principles of management of state property, unless specific provisions provide otherwise. Thus, the Polish Film Institute operates on the basis of the provisions of the Cinematography Act, and in matters not regulated concerning state property, it operates on the basis of the Act on Principles of State Property Management.

As indicated in Article 11(1) of the Cinematography Act, the Institute operates on the basis of this Act and its Statute. The Statute is granted to the Institute by the competent minister by means of an ordinance, which specifies the following in particular:

1. the detailed scope of the Institute's activities,
2. the Institute's internal organisation,
3. the specific tasks of the Institute's bodies and their modus operandi.

Statute of the Institute was granted by the Ordinance of the Minister of Culture of 2 September 2005 on Granting the Statute of the Polish Film Institute<sup>[19]</sup>. The Statute is annexed to the Ordinance and regulates in detail the tasks of the Institute, the Institute's bodies and their powers, as well as the internal organisation of the Institute and its financial management.

As a legal person, the Institute is not only independent but also subject to supervisory procedures. Pursuant to Article 10 of the Cinematography Act, the Minister responsible for culture and national heritage protection supervises the Institute's activities. Within the scope of his supervision, the Minister:

---

<sup>19</sup> Official Journal of the Republic of Poland (*Monitor Polski*) of 2005, No. 52, item 722, as amended. Amendments to the statutes may be made by the Minister on his own initiative with the consent of the Council, at the request of the Director with the consent of the Council or at the request of the Council itself.

1. shall, within 30 days, examine the resolutions adopted by the Council of the Institute with regard to their legality and sent to it without delay by that body and shall declare the resolution wholly or partly invalid if it infringes the law or poses the risk of a negative financial result,
2. approves the annual activity plan and the Institute's draft annual financial plan and forwards the latter to the minister responsible for public finance in accordance with the procedure laid down in the provisions on work on the draft of Budget Law,
3. considers and approves the Institute's annual activity report and annual accounts,
4. identifies the auditor to audit the annual accounts.

As a consequence of its legal personality, the Institute has the right to manage its property independently and to operate independently within the limits of its resources, subject to the principle of their efficient use. A certain restriction on the Institute's independence is the prohibition in Article 9(2) on the exercise of economic activity by the Institute. This solution is correct, as the Institute carries out tasks of state policy in the field of cinematography. Conducting economic activities could interfere with the proper course of the tasks carried out, which are important from the perspective of the state<sup>[20]</sup>.

### 3 | Organisational issues of the Polish Film Institute

According to Article 12 of the Cinematography Act the Institute has two bodies, namely the Director and the Council of the Institute.

The Director heads the Institute and represents it externally. The tasks of the Director are set out by way of example (construction: „in particular”) in Article 13(2) and are as follows:

<sup>20</sup> In this respect, see more broadly three opinions on the consequences of the Polish Film Institute conducting full or partial business activity or not conducting this activity at all, as well as the organisational and legal form of the Polish Film Institute allowing for the full realisation of the tasks ascribed to this Institute by draft acts constituting Sejm prints 2055 and 2598, Parliamentary Research Bureau (Biuro Analiz Sejmowych), Works of the Sejm of 4th cadence, <https://orka.sejm.gov.pl/rexdomk4.nsf/Openddr?OpenPage&nr=2598> [accessed: 7.11.2022].

1. drawing up an annual activity plan and a draft annual financial plan for the Institute, as well as making proposals to the Minister on the amount of subsidies for the implementation of the Institute's tasks;
2. drawing up an annual report on the Institute's activities and annual accounts;
3. co-financing of undertakings in the field of preparation of film projects, production, distribution and dissemination and the promotion of filmmaking and dissemination of film culture after consultation with experts designated by the Minister from among the representatives of film circles;
4. managing the Institute's assets;
5. managing the Institute's finances.

The statutory catalogue of the tasks of the Director of the Institute is further specified in § 15 of the Statute, which stipulates that the Director's tasks include the following in particular: publishing operational and multi-annual programmes in the form of an ordinance and seeking their approval by the Council; adopting internal regulations and instructions, including the experts' work regulations<sup>[21]</sup>; cooperating with governmental and local administration units and other entities in all matters concerning the Institute and cinematography; performing any other tasks necessary for the Institute's functioning.

To perform legal acts on behalf of the Institute, the Director may grant general and special powers of attorney.

In practice, a problem has arisen as to whether the Director of the Institute is the competent authority to issue a written interpretation of the provision of Article 19(6) of the Cinematography Act (this provision is currently inapplicable, as it has been repealed, but a similar regulation to that in the earlier paragraph 6 appears in paragraph 6a added to the Act). There is no doubt that the Supreme Administrative Court made a correct statement in this regard in its judgment of 10 May 2012<sup>[22]</sup>, according to which the Director of the Institute, on the basis of the Act of 6 March 2018 – the Entrepreneurs' Law<sup>[23]</sup> – is obliged to issue an individual interpretation

<sup>21</sup> The use of the phrase „enacting” in relation to a monocratic body such as the Director should be considered inaccurate, as this activity, understood as ‘deciding something as a result of a deliberation of a competent assembly’ (see *Słownik języka polskiego*, ed. Witold Doroszewski. <https://sjp.pwn.pl/slowniki/uchwalanie.html>. [accessed: 7.11.2022]), is appropriate for collegial bodies.

<sup>22</sup> II GSK 542/11, LEX No. 1451915.

<sup>23</sup> Consolidated text: Journal of Laws 2021, item 162 as amended.

with regard to the payments regulated in Article 19 of the Cinematography Act. Indeed, in accordance with Article 34(1) of the Act (Entrepreneurs' Law), an entrepreneur may submit an application to a competent authority or state organisational unit for an explanation as to the scope and manner of application of the provisions from which the entrepreneur's obligation to pay public tribute or social or health insurance contributions arises in his/her individual case (individual interpretation). Currently, the Director of the Institute issues interpretations with regard to the application of the provisions of the Cinematography Act concerning payments to the Polish Film Institute<sup>[24]</sup>.

The Director is appointed by the Minister following a competition. The Competition Commission is appointed by the Minister from candidates specifically proposed by the film world, including film creators and producers, and from trade unions active in cinematography. The Director's term of office lasts five years, and its function may be held for no more than two terms. The Director is assisted in the performance of his or her duties by the Deputy Director, who is appointed and dismissed by the Minister on the recommendation of the Director. Therefore, in the case of the Deputy Director, there is no competitive procedure for his or her appointment. The Director and the Deputy Director are employed by appointment.

The method of the announcement, organisation and procedure of the competition, as well as the composition, method of appointment and tasks of the selection board, taking into account in particular the need for the efficient conduct of the competition and a comprehensive assessment of the candidates' qualifications, must be determined by the competent minister by regulation.

While directing the Institute, the Director may not engage in any other activity related to cinematography, and in particular may not be employed by, hold shares in or be a member of the organs of cultural institutions or bodies engaged in the business of film production and film distribution.

The Minister may dismiss the Director, after consulting the Council, before the expiry of the Director's term of office in the following strictly defined cases:

1. acting in breach of the law,
2. relinquishment of his or her functions,

<sup>24</sup> See, for example, Decision No. 1/2022 of the Director of the Polish Film Institute of 19 February 2022.

3. illness preventing him or her from exercising his or her functions,
4. conviction by a final judgment for an intentional crime or an intentional fiscal crime,
5. failure to approve the Institute's annual accounts,
6. negative opinion of the Council.

The existence of the legal possibility for the Minister to dismiss the Director is not in doubt. The Minister's appointment of the Director, on the basis of the provisions of the Cinematography Act, results in an employment relationship for the term of office. It has been pointed out in case law that

Both the act of appointing the Director of the Institute and the act of dismissing him, although they come from an administrative body, which undoubtedly is the Minister of Culture and National Heritage, do not constitute administrative decisions within the meaning of the Code of Administrative Procedure. Therefore, a letter dismissing the Director from a position does not have to contain a factual justification characteristic of an administrative decision. According to the Labour Code, it is sufficient here to cite the legal basis for the dismissal<sup>[25]</sup>.

The second body of the Institute is the Institute Council, which, according to Article 15 of the Cinematography Act, consists of 11 members appointed for a period of three years by the Minister. The Minister appoints the following members of the Council: three members proposed by filmmakers, one member proposed by film producers, one member proposed by trade unions operating in the sphere of cinematography, five members proposed by the entities referred to in Article 19(1) to (5) and one member representing the Minister.

No remuneration is payable for serving as a Council member, who may not serve more than two consecutive terms of office. The work of the Council will be directed by a chairperson elected by the Council from among its members by secret ballot by simple majority in the presence of at least six members. The Council may, during its term of office, change its chairperson by following the same procedure.

<sup>25</sup> Decision of the WSA in Warsaw of 25 April 2018, II SA/Wa 2046/17, LEX No. 2746547; the cassation appeal against the decision of the WSA was dismissed by the decision of the NSA of 28 September 2018, I OSK 2558/18, LEX No. 2562221.

The Minister may dismiss a member of the Council before the end of the term of office in the event of his or her resignation from the function, illness making him or her impossible to perform the function or conviction by a final sentence for an intentional crime, including an intentional fiscal crime. If a Council member is dismissed before the end of the term of office, the Minister will appoint a new Council member for the period until the end of that term of office.

The tasks of the Council of the Institute are indicated by way of example (construction: „in particular”) in Article 17 of the Cinematography Act. According to this provision, the Council’s tasks include the following, in particular:

1. setting the direction of the Institute’s activities,
2. providing its opinion on the Institute’s annual activity plan and draft annual financial plan,
3. providing an opinion on the Institute’s annual activity report and accounts,
4. providing an opinion on amendments to the Statutes.

In addition, the Council may submit positions, opinions or proposals to the Minister, other public administration bodies and the Director on all matters concerning the Institute and cinematography.

The details of the functioning of the Council of the Institute are regulated in the Institute’s Statute. That stipulate, among other things, that the Council performs its activities collectively (§ 7(1)) and that Council meetings are held as necessary, at least quarterly (§ 9(1)).

The Institute’s Council makes decisions at its meetings in the form of resolutions (§ 10(1)), which are passed by a simple majority of votes in the presence of at least half of the Council. In the event of a tie, the Chairperson of the Council has the casting vote (§ 10(2)). In accordance with § 11 para. 1 of the Statute, voting is open.

The Statute of the Institute regulate in detail the internal organisation of the Institute, which is headed by the Director with the assistance of his or her Deputy. The Institute, in light of § 17(2), comprises the following:

1. Literary section,
2. Film Production and Project Development Department,
3. Film Dissemination and Promotion Department,
4. International Cooperation Department,

5. Media Communications Department,
6. Legal Department,
7. Development Department,
8. Finance and Accounting Department,
9. Administration and Economic Department,
10. Chief Accountant,
11. Independent HR post,
12. Independent audit post.

There is no doubt that the internal structure of the Institute is very extensive. The detailed organisation and working procedures of the Institute and the scope of tasks of the organisational units comprising it, pursuant to § 17(4) of the Statute, are defined by the Director in the organisational regulations.

## 4 | Tasks of the Polish Film Institute

The Institute's tasks are specified in Article 8 of the Cinematography Act and § 2 of the Institute's Statute. The provisions of the Act and the Statute are identical; the Statute do not specify the tasks set out in the Act. The Institute performs tasks within the scope of state policy in the field of cinematography—this is stipulated both by Article 8(1) of the Cinematography Act and §2 of the Statute. This is a very general formulation, which is why the Act (and the Statute) indicate how the tasks are to be carried out. The catalogue contained in the Act and the Statute is exemplary, as the construction 'in particular' is used.

In accordance with the aforementioned provisions, the Institute carries out tasks of state policy in the field of cinematography, in particular by the following:

1. creating conditions for the development of Polish film production and film co-production;
2. inspiring and supporting the development of all genres of Polish filmmaking, in particular art films, including the preparation of film projects, production and dissemination;

3. supporting activities aiming to create conditions for universal access to the achievements of Polish, European and world cinematography;
4. supporting film debuts and the artistic development of young filmmakers;
5. promoting Polish filmmaking;
6. co-financing projects concerning the preparation of film projects, production, distribution and dissemination and the promotion of Polish filmmaking and the dissemination of film culture, including the production of films undertaken by Polish communities;
7. providing expert services to public administrations;
8. supporting the maintenance of film archives;
9. supporting the development of Poland's independent film industry's potential, in particular small- and medium-sized film entrepreneurs;
10. supporting audio-visual production under the terms of the Act of 9 November 2018 on Financial Support for Audio-Visual Production;
11. giving each film screened in a cinema an individual identifier published in the Public Information Bulletin on the Institute's website;
12. supporting solutions that make it easier for people with visual and hearing disabilities to enjoy cinematographic heritage;
13. preparing, for its own needs and those of the public administration, in particular for the Minister, annual reports on the field covered by the Institute's activities (the subject matter and scope of the annual reports are to be agreed with the Minister);
14. initiating and carrying out research projects, preparing and commissioning analyses and expert opinions for diagnosing and forecasting the development of the Institute's field of activity.

The full and proper performance of the Institute's tasks is not possible without cooperation with other entities. Article 8(2) explicitly indicates that the Institute, in fulfilling its tasks, cooperates with government administration bodies and local government units.

## 5 | Completion

Pursuant to Article 6(1) of the Constitution of the Republic of Poland, the state creates conditions for the dissemination of and equal access to cultural goods, which are the source of the identity of the Polish nation, its continuity and its development. This value is directly referred to, both by the content of the explanatory memorandum to the Cinematography Act and by the provisions of this Act itself, which in Article 3(1) states that the state exercises patronage over cinematographic activity as part of national culture, consisting in particular of supporting and promoting film, disseminating film culture and protecting the cultural heritage in the field of film<sup>[26]</sup>.

The main entity within the scope regulated by the Cinematography Act is the Polish Film Institute, which is a state legal person. The establishment of the Institute constituted a significant system change in terms of supporting Polish film art<sup>[27]</sup>. The Institute's legal status derives mainly from the Cinematography Act and its Statute, which were granted by the minister competent for culture and national heritage protection. As a legal person, the Institute is a fully autonomous entity, and its independence is not limited by the fact that the minister competent for culture and national heritage protection supervises it.

An analysis of the Institute's legal status makes it possible to conclude that it is a unit of the public finance sector and that its financial plan is part of one of the annexes to the Budget Act.

The Institute has an elaborate organisational structure that is governed by the Statute, while the detailed organisation and working procedures of the Institute and the scope of tasks of the organisational units that comprise it are defined by the Director in the organisational regulations. The Institute's bodies are the Director and the Council.

The Institute performs tasks within the framework of state policy in the field of cinematography. The detailed scope of its activities is set out in the Act and the Statute. The Polish Film Institute indicates on its website that „The aim of the Institute is to restore the importance and position of Polish film in the world by creating conditions similar to those of internationally

<sup>26</sup> Thus, in the judgment of the WSA in Warsaw of 4 April 2007, III SA/Wa 17/07, Lex No. 337041.

<sup>27</sup> Golat, „Podstawy prawa kultury”, 208.

successful cinematographers”<sup>[28]</sup>. Such a goal is very ambitious, but this does not mean that it is not achievable.

## Bibliography

- Cilak Małgorzata, „Komentarz do art. 9 [Commentary to Article 9]”, [in:] *Ustawa o finansach publicznych. Komentarz [Public Finance Act. Commentary]*, ed. Zbigniew Ofiarski. Warszawa: Wolters Kluwer, 2019.
- Cilak Małgorzata, „Problem stosowana przepisów o pomocy publicznej do działalności kulturalnej [The Problem of Applying the Provisions on Public Aid to Cultural Activities]” *Studia Prawnicze KUL [KUL Legal Studies]*, No. 3 (2021): 67-81.
- Słownik języka polskiego [The Dictionary of Polish Language], ed. Witold Doroszewski. <https://sjp.pwn.pl/słowniki/uchwalanie.html>.
- Frankiewicz Anna, „Znaczenie prawne regulacji dziedzictwa narodowego i dóbr kultury w rozdziale I Konstytucji RP [Legal Significance of the Regulation of National Heritage and Cultural Goods in Chapter I of the Constitution of the Republic of Poland]” *Przegląd Prawa i Administracji [Law and Administration Review]*, No. 88 (2012): 9-22.
- Golat Rafał, *Podstawy prawa kultury [Fundamentals of Cultural Law]*. Poznań: Wydawnictwo Poznańskie, 2006.
- Jagodzińska Katarzyna, „Charakterystyka działalności kulturalnej w Polsce po transformacji ustrojowej [Characteristics of Cultural Activities in Poland after the System Transformation]”, [in:] *Kultura a rozwój [Culture and Development]*, ed. Jerzy Hausner, Anna Karwińska, Jacek Purchla. Warszawa: Narodowe Centrum Kultury, 2013.
- Musiał-Gąsiorowska Anna, „Prawne i organizacyjne aspekty popularyzacji dziedzictwa kulturowego - pryncypia [Legal and Organisational Aspects of Cultural Heritage Popularisation - Principles]” *Przegląd Prawa Publicznego [Public Law Review]*, No. 3 (2019): 27-37.
- Skrzydło Wiesław, *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Commentary on the Constitution of the Republic of Poland]*. Warszawa: Wolters Kluwer, 2009.
- Węgrzak Małgorzata Joanna, Kamil Zeidler, „The Principles of Cultural Heritage Law Based on the Polish Law as an Example” *Brazilian Journal of International Law*, No. 3 (2020): 292-302, DOI: 10.5102/rdi.v1i3.7028.

<sup>28</sup> <https://pisf.pl/informacje-prawne> [accessed: 28.10.2022].

Wróblewska Małgorzata, „Komentarz do art. 9 [Commentary to Article 9]”, [in:] *Ustawa o finansach publicznych. Komentarz prawno-finansowy [Public Finance Act. Legal and Financial Commentary]*, ed. Henryk Dzwonkowski, Gołębiowski Grzegorz, Warszawa: Wydawnictwo Sejmowe, 2014, SIP Lex, <https://sip.lex.pl>.

Zeidler Kamil, „Zasady prawa ochrony dziedzictwa kulturowego – propozycja katalogu[Principles of Cultural Heritage Protection Law – A Proposal for a Catalogue]” *Ruch Prawniczy, Socjologiczny i Ekonomiczny [Legal, Sociological and Economic Movement]*, No. 4 (2018): 147-154.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>



PETRO KORNIEIEV, TOMASZ BRZEZICKI

# Monetary Public Levies in Poland and Ukraine: the Comparative Analysis\*

The aim of this paper is a comparative analysis of the legal regulations that established public tributes in Poland and Ukraine, the doctrine of tax and public law, and an attempt to define the concept of public tributes. This study aimed to examine the legislator's approach, in particular on the grounds of the Constitution, to the issue related to public tributes. Determining the difficulties and growth of public levies in Poland and Ukraine was especially crucial. The analyses conducted for this study should support the idea that a systemic definition of public tributes is needed.

**KEYWORDS:** public levy, „державні збори”, Poland, Ukraine, taxes, fees, public finance

**PETRO KORNIEIEV**, PhD Student of Interdisciplinary Doctoral School of Social Sciences, Nicolaus Copernicus University in Toruń,

ORCID: 0000-0003-4683-242X, email: p.kornieiev@doktorant.umk.pl

**TOMASZ BRZEZICKI**, associate professor, Nicolaus Copernicus University in Toruń,  
Uniwersytet Mikołaja Kopernika, ORCID – 0000-0003-1048-1402,  
e-mail: brzoza@umk.pl

---

\* The publication covers the legal status as of March 01, 2024.

## 1 | Introduction

The existence of public tributes is closely linked to the creation of states. It is difficult to determine the specific time of the emergence of tributes; one can only conjecture about the sustained process that led to the existence of public tributes of a monetary nature in their present form. It is explicitly accepted in literature that:

The tribute power is a category belonging to the internal sovereignty of the State and, in particular, is connected with territorial and personal sovereignty and implies, in principle, the unlimited possibility of the state to impose public tribute, primarily for fiscal purposes, on entities located on the territory of the state or otherwise connected with it<sup>[1]</sup>.

An effective and efficient financial system is essential for the functioning of any state, especially a democratic one. In order for public authorities to perform their functions, they must have adequate financial resources, the amount of which is determined by the relevant legislation. Extensive administrative systems have required a move towards mandatory payments to develop the state and maintain the administrative apparatus itself. Historically<sup>[2]</sup>, most states abandoned the ad hoc system of imposing fiscal burdens on citizens, turning them into a permanent burden, which led to the emergence of public tributes as we know them today<sup>[3]</sup>. The most important category of sources of state revenue is, therefore, public tributes of a monetary nature<sup>[4]</sup>.

It should be noted that from the point of view of financial law, different forms of public tribute have their own characteristics and forms. Taxes, fees, contributions, and administrative fines represent different categories of public tributes. Looking at the development of public tributes (within

<sup>1</sup> Agnieszka Bień-Kacała, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.* (Toruń: Dom Organizatora TNOiK, 2005), 31.

<sup>2</sup> Stanisław Owsiaik, „Z historii daniny publicznej i podatku” *Zeszyty Naukowe. Akademia Ekonomiczna w Krakowie*, No. 542 (2000): 5-15. <https://docplayer.pl/5324804-Z-historii-daniny-publicznej-i-podatku.html>.

<sup>3</sup> More: Sylwester Bogacki, „Ewolucja danin publicznych a zasada sprawiedliwości podatkowej” *International Journal of Legal Studies*, 7 (2020): 249-274. <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ceon.element-541aa261-1e-85-3960-b4d7-4b78e987fc80/c/pdf-01.3001.0014.3119.pdf>.

<sup>4</sup> Bień-Kacała, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.*, 138-139.

the category of taxes) through a historical prism, it is clear that the functioning of tributes depended on the developmental direction chosen by the state. A great example is continental Europe. It emphasised direct taxes as one of the key categories of tributes in its system, which resulted in the impossibility of hiding the objects of taxation. On the contrary, indirect taxes were primarily formed in the societies of Northern and Southern Americas, historically known as the New World, as a result of the substantial amount of undeveloped territory and the subpar level of economic growth. Based on the current conditions of the economic development of countries, the category of direct taxes is the basis for the functioning of developed countries with a market economy<sup>[5]</sup>. The main advantages of direct taxes are that they do not affect the price and demand (both consumer and competitive), which allows the economy to develop to a large extent and gives the state the opportunity to solve the problem of (tax) equity through progressive rates.

It is therefore worth noting that the existence of the tribute authority is closely linked to the state sovereignty. Those who are obliged to pay public tributes are everyone (who have been obliged to do so by law), and the beneficiary is the state or its subsidiaries (i.e., broadly understood, public-sector entities). The institution of public tributes is very important both from the point of view of the state as a whole and from the point of view of the entity itself, which is burdened with this obligation.

This paper compares the systemic solutions adopted in Poland and Ukraine. These neighbouring Central European countries were chosen because they share common turning points in their history and their systemic transformation was directly linked to the collapse of the Soviet Union. We limited our comparison to basic monetary public tributes such as taxes and fees and omitted the detailed issues of insurance contributions (social and health) and administrative fines. The dogmatic method used is limited to the analysis of constitutional and statutory acts, which allows us to identify not only the main similarities but also the differences between the systems existing in these countries.

Analysing particular legal acts, as well as the literature on the subject, one may come to the conclusion that public tributes should be included in the normative category due to the various ways in which the Polish legislature uses this notion. In observing the Polish tax doctrine, it should be

<sup>5</sup> More: Viktor Melnyk, H. Peniakova. „Mekhanizm priamoho opodatkovannia u finansovii teorii” *Finansy Ukrayni*, 5 (2009): 66-77.

noted that public tributes, as an aggregate category, can also be classified as public law institutions due to the characteristic features of a given group constituting the notion of public tributes. In our opinion, public tributes can be broadly understood as important universal instruments of the state apparatus for achieving its various goals.

For the sake of completeness, it should be noted that tributes count as public revenue because the entity that sets and collects them is the public authority. It should also be emphasised that given our monetary economy, the fulfilment of this benefit takes place in the form of money. When characterising public tributes, it can be clearly stated that they are generally prospective and non-refundable in nature (perhaps with the exception of the administrative levy, where its equivalence and insurance premiums). Although public tributes are the main sources of public revenue, the Polish legislature still chose to merely enumerate this category instead of defining it. Bartosz Gryziak noted that nowadays, in the conditions of mass treasury, an effective tax system is largely based on the so-called tax morale, which leads to correct, voluntary fulfilment of the obligation<sup>[6]</sup>. It is difficult to disagree with the position that a key factor shaping tax morale is the creation and consolidation of faith in the fairness of the functioning fiscal system<sup>[7]</sup>. It is commonly accepted that:

[...] The historically formed system of sources of financial law is based on the conviction that the principles of public finance should be normalised in the constitution of the state, while the legal and financial powers and obligations and the procedure for their implementation must be normalised in acts originating from the parliament (in laws)<sup>[8]</sup>.

<sup>6</sup> Bartosz Gryziak, „Is it only taxes and fees? On the chargeability of public tributes. Legal and comparative analysis” *Doradztwo Podatkowe – Bulletin of the Institute of Tax Studies*, No. 5 (2021): 26. <https://isp-modzelewski.pl/wp-content/uploads/2021/06/Czy-tylko-podatki-i-oplaty.pdf>.

<sup>7</sup> Bartosz Gryziak, „Tax contracts in the state of law – the draft of the new Tax Ordinance against the background of the Italian experience. Mass Treasury” *Doradztwo Podatkowe – Bulletin of the Institute of Tax Studies*, No. 6 (2019): 6-7. <https://isp-modzelewski.pl/wp-content/uploads/2019/07/Umowy-podatkowe-w-pa%C5%84stwie-prawa-%E2%80%93-projekt-nowej-Ordynacji-podatkowej-na-tle-do%C5%9Bwiadcze%C5%84-w%C5%82oskich-cz.-1.-Skarbowo%C5%9B%C4%87-masowa.pdf>.

<sup>8</sup> Cezary Kosikowski, *Prawo finansowe: część ogólna* (Warsaw: Dom wydawniczy ABC, 2003), 110.

## 2 | Public levies in the Polish and Ukrainian Constitutions

The nature of the problem of collecting public tributes in Poland is demonstrated by the fact that the aforementioned issue has been regulated at the constitutional level. Article 217 of the Constitution of the Republic of Poland<sup>[9]</sup> introduces the principles of levying public tributes (including taxes). Pursuant to the aforementioned provisions, „the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute”. (It should be noted that the concept of public contributions is not commonly found in the language of laws.) At the statutory level, the notion of public tributes was introduced, for example, in the Environmental Protection Law.<sup>[10]</sup> Article 272 of the aforementioned law defines the financial and legal means of environmental protection as: (1) a fee for the use of the environment; (2) an administrative fine; and (3) differentiated rates of taxes and other public tributes serving the purposes of environmental protection. In this respect, the law seems to separate the environmental user fee from other public tributes related to environmental protection.

A similar use of the notion of public tributes is found in Article 63(2) of the Law on the Nationwide Referendum<sup>[11]</sup>. It states that a referendum initiated by citizens may not concern: (1) expenditures and revenues, in particular, taxes and other public tributes; (2) state defence; and (3) amnesty. The aforementioned law distinguishes taxes from other public tributes, although taxes also constitute a group of public tributes.

It should be noted that the concept of public tributes by the Ukrainian legislature will be understood as *державні збори*. The Constitution of Ukraine<sup>[12]</sup> does not explicitly use the concept of public tributes; however,

<sup>9</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended), hereinafter, the Constitution of the Republic of Poland.

<sup>10</sup> Act of 27 April 2001. Environmental Protection Law (i.e., Journal of Laws 2021, item 1973, as amended).

<sup>11</sup> Act of 14 March 2003 on the nationwide referendum (i.e., Journal of Laws of 2020, item 851).

<sup>12</sup> Verkhovna Rada of Ukraine, *Constitution of Ukraine*, <https://zakon.rada.gov.ua/laws/show/254%Do%BA/96-%Do%B2%D1%80#Text> [accessed: 28.06.1996].

the country has regulations on taxes and fees. Article 92 of such Constitution explicitly states that only the laws of Ukraine establish: (1) the state budget and budgetary system; the taxation system, taxes and fees; the rules for the formation and functioning of the financial, money, credit and investment market; the status of the national currency and of foreign currencies in the territory of Ukraine; the procedure for incurring and repaying internal and foreign state debts; and the procedure for issuing and trading state securities and their types and forms. On the other hand, according to Article 74 of the Constitution, a referendum is not allowed for draft laws on taxes, budgets and amnesty. Thus, the concept of public tributes does not appear in Ukraine's Constitution, but taxes and fees are distinguished. The introduction of constitutional requirements related to the introduction of tribute legislation means that it will always be the legislature that decides on the nature and amount of the public burden to be introduced.

### 3 | Public tributes in legal literature

It should be noted that the concept of public tributes, as a collective category, is not used in the Ukrainian legal order. At the outset, it is worth noting that no classical definition of public tributes can be found in Ukrainian literature. Looking at the notion of public tributes from the perspective of linguistic interpretation, it must be noted that this notion does not have a Ukrainian translation, unlike in Poland, where the notion of public tributes has existed in Polish legislation and literature for many years. Trying to translate the concept of public tributes into Ukrainian, we come to the conclusion that it can be proposed as the concept of *державні збори* (eng. *public levies*). Therefore, it can be unambiguously concluded that the term *public levies* that is used in the Constitution of the Republic of Poland or in its Law on Public Finance embraces the concept of the legislature providing the categories of levies covered by the term, in contrast to Ukrainian legislation, under which the term *державні збори* is used to cover all possible budget revenues without distinguishing such an important group as public levies. Thus, it is crucial to conduct a detailed analysis to determine the individual parts of the general concept of public tributes in Ukrainian legislation. The starting point will be the provisions of The Budget Code

of Ukraine (BCU)<sup>[13]</sup>, particularly of Article 2, paragraph 1, item 23 of the code, which defines budget revenues as tax, non-tax and other non-refundable revenues, the collection of which is provided for by the legislation of Ukraine (together with transfers, fees for the provision of administrative services and revenues of budget institutions). Another important element of the BCU is its Article 9, which classifies budget revenues as follows:

1. tax revenues (receipts; defined by Ukrainian tax law as state taxes and fees as well as local taxes and fees);
2. non-tax revenues (receipts; property and business income, administrative fees and charges, income from non-commercial economic activities, revenues of budgetary institutions and other non-tax revenues);
3. capital gains; and
4. transfers (funds received from other public authorities, the authorities of the Autonomous Republic of Crimea, local authorities, other states and international organisations on a non-refundable and irrevocable basis).

From the above-mentioned categories it follows that *державні збори* is a collection of all state revenue receipts, in contrast to the Polish concept of *public tributes*, within which the legislature has, in a sense, standardised those groups that will be included in the category of tributes. This leads to the conclusion that the Ukrainian constitution-maker did not introduce this terminology at the constitutional level, but instead left it to the ordinary legislator. Therefore, a comparative study is crucial for a successful approach to this problem. The key to such analysis will be Article 5(2)(1) of the Law on Public Finance of Poland, under which the legislature enumerated the classes of public tributes as taxes; contributions; fees; payments from profits of state enterprises, one-person companies of the State Treasury and state banks; and other monetary benefits that must be paid for the benefit of the state, local government units, state purpose funds and other units of the public finance sector, as stipulated by separate laws<sup>[14]</sup>.

<sup>13</sup> Verkhovna Rada of Ukraine, *Budget Code of Ukraine*. <https://zakon.rada.gov.ua/laws/show/2456-17#Text> [accessed: 08.07.2010].

<sup>14</sup> Act of 27 August 2009 on public finance (i.e., Journal of Laws 2022, item 1634, as amended).

Bogumił Brzezinski defined the types of public tributes for the Polish legal order as follows:

Historically, three basic forms of public tributes have developed: personal tributes, in-kind tributes and monetary tributes. The latter appeared the latest; however, due to their usefulness, they are the most widespread nowadays. Among monetary contributions, taxes are the most important, followed by fees and surcharges<sup>[15]</sup>.

Translating this into the Ukrainian legal order, one can agree with Brzezinski that among the categories of *державні збори*, monetary tributes have historically been the most widespread in Ukraine. It is worth noting that the Ukrainian legislature devoted its attention to individual taxes, fees and other categories of *державні збори* and omitted the collective concept of *public tributes*. When analysing the Polish definition of public tributes in literature, it is worth distinguishing the word *public*, with which the legislator emphasised the public-legal character of tributes. In this respect, it is worth highlighting the view of D. Antony that it is important to identify the features of public tributes, including *de lege lata* conclusions as well as *de lege ferenda* conclusions, to build a completely different doctrinal concept<sup>[16]</sup>. Thus, it is crucial to identify the individual elements that make up the general concept of public tributes. Despite the fact that these aspects are explicitly stated in the Polish law, this does not pose significant questions in the Constitution of the Republic of Poland (i.e., the obligation to introduce public tributes by means of a law, which determines the subject, object, rate, principles of granting reliefs and remissions, and categories of exempt entities), the Constitution of Ukraine does not state such principles for the introduction of taxes and fees but indicates only the statutory way, and such Constitution does not allow the holding of a referendum to settle this issue.

To achieve the aim of this study, we will focus on tax revenue. Based on Article 9(1), para. 1 of the PBU, we can presume that the part counted as public tributes actually refers to tax revenues. The key legal act for the

<sup>15</sup> Bogumił Brzeziński, Teresa Dębowska-Romanowska, Marek Kalinowski, *Prawo finansowe*, red. Wanda Wójtowicz (Warszawa: C.H. Beck, 1997), 153.

<sup>16</sup> Dobrosława Antonow, „Cechy danin publicznych w polskim systemie prawa” *Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)*, Vol. LXIII (2016): 18. <https://journals.umcs.pl/g/article/download/2763/2953>.

purposes of tax revenues is the Tax Code of Ukraine (TCU)<sup>[17]</sup>. It follows from Article 9.3 of the BCU that state taxes and fees are paid to the state budget and local budgets, in accordance with the BCU. It must be noted from Article 8 of the TCU that the Ukraine legislature has implemented the division of taxes and fees into national and local taxes and fees. In Ukraine, a tax is understood as – a mandatory, unconditional payment to the state budget, collected from taxpayers (Article 6.1 of the TCU). Noteworthy is the position of Valentyn Vishnevsky that distinguishes the essence of taxes from the payment of taxes. The concept of *compulsory payment* used in the legislative definition is inherently a tax payment<sup>[18]</sup>. In summary, it can be stated that in Ukraine, a tax is a legally determined monetary amount due to the state budget for financing the individual needs of the state, and it is calculated and transferred or paid by taxpayers to the state or local budget within the prescribed period on the basis of the relevant reporting form. In the event of failure to pay this amount within the prescribed period, a penalty may be imposed. This approach is, in principle, consistent with the Polish view of a tax as a public, unpaid, compulsory and non-returnable monetary benefit to the State Treasury, voivodship, poviat or municipality resulting from a tax law, as stated in Article 6 of the country's Tax Ordinance<sup>[19]</sup>.

Article 6.2 of the TCU defines a fee (*зборы*) as an obligatory payment to the relevant budget or to a single account in order to obtain a specific benefit, such as a legally significant action taken in its favour by a state authority, local government or other authorised body or person<sup>[20]</sup>. On the contrary, Polish law defines a fee as:

[...] a public levy that has all the characteristics of a tax, except for one: a fee, unlike a gratuitous tax, is a chargeable levy. This means that in exchange for a monetary benefit, the entity paying it receives from the public-legal association to which the fee is paid a mutual benefit, usually in the form of a service, the value of which corresponds to the value of the monetary benefit. Thus, in theoretical terms, the fee is characterised by qualified

<sup>17</sup> Verkhovna Rada of Ukraine, *Tax Code of Ukraine*. <https://zakon.rada.gov.ua/laws/show/2755-17#Text> [accessed: 02.12.2010].

<sup>18</sup> Valentyn Vyshnevskyi, „Pryntsypy opodatkovuvannia: obgruntuvannia i empirichna perevirka” *Ekonomika Ukrayny*, 10 (2008): 55-72.

<sup>19</sup> Act of 29 August 1997. Tax Ordinance (i.e., Journal of Laws 2021, item 1540, as amended).

<sup>20</sup> Ibidem.

consideration, i.e., the equivalence of the fee and the non-monetary benefit received by the entity paying the fee<sup>[21]</sup>.

The above definition of a fee by the Ukrainian legislator is consistent with the Polish definition in that it defines each of the public tributes presented. In colloquial language and even in scientific studies, the terms *tax* (*налоги*) and *fee* (*зборы*) are sometimes used synonymously. It must be pointed out, though, that while these concepts are somewhat similar, they are not identical. The distinction between the concepts of taxes and fees is important. As pointed out in the preceding paragraph, according to the TCU, a levy is an obligatory payment to the budget, which is collected from the payers of the levy, provided that they obtain a specific benefit. It is precisely the obligatory benefit and the creation of a benefit that are the key elements by means of which these concepts can be delimited at the stage of interpreting Article 6.1 and Article 6.2 of the TCU. A tax is essentially an unconditional benefit that is payable as an obligation by the entities and in the manner specified in the TCU. Thus, a tax, unlike a fee, does not require the payer to obtain special benefits. M. Romanovskoho presented the view that taxes are imperative monetary relations in which a budgetary fund is created without giving any equivalent to the tax subject<sup>[22]</sup>. It is also worth mentioning that the distinction between a tax and a fee is not only a theoretical problem, but rather a practical one. Taxes are, first of all, unconditional and non-target payments. According to Mykola Kucheriavenko, taxes are mainly obligatory, compulsory and non-objective in character<sup>[23]</sup>. Nevertheless, the important thing to note is that once taxes are received into the budget, there is no possibility for the taxpayer to trace the fund into which the taxes flowed as well as the purposefulness of the use of such taxes<sup>[24]</sup>. Another important aspect is that taxes are credited to the budget but fees may create earmarked funds. Therefore, the distinction mentioned at the start of this discussion is important: for

<sup>21</sup> More: Bogumił Brzeziński, *Introduction to Tax Law* (Toruń: Dom Organizatora TNOiK, 2008): 38; also Zbigniew Ofiarski, *Ogólne prawo podatkowe. Zagadnienia materialno prawne i proceduralne* (Warszawa: Lexis Nexis, 2013): 25.

<sup>22</sup> Mykhailo Romanovskyi, *Fynansy, denezhnoe obrashchenye y kredit*, red. Olha Vrublevska, Borys Sabanty, (Moskva: Yurait, 2001), 279.

<sup>23</sup> Mykola Kucheriavenko, „Podatok yak pravova katehoriiia: problemy definitssi” *Pravo Ukrayny*, No. 12 (2002): 70-74.

<sup>24</sup> Artur Statsenko, *Pravove rehuliuvannia mistsevykh podatkov ta zboriv* (PhD diss., Kharkiv, 2010), 18.

the state to function, it must have budget revenue without first presenting to the taxpayer the purpose of such tax. Taxes provide stability in revenue because they do not have to be initially earmarked for a specific purpose. If there is a need to ensure a stable link between the payment and the source as well as the purpose of the appropriation, fees (зборы) must be used instead. According to the Constitution of Ukraine, the power to establish, amend and abolish taxes is vested only in the public authority designated by law and can be exercised only by law. In contrast, it is argued in literature that the institution of a levy is more within the competence of the executive, which directly affects the conduct of the policy of decentralisation<sup>[25]</sup>. The concept of compulsory payment encompasses the entire set of dues, including taxes and fees, which is a general category for the aforementioned parts. Taxes and fees constitute a category of *державних зборів* compulsory payments of a tax nature. Analysing Polish practice, it is difficult not to agree with E. Chojna-Duch that public tributes should be understood as public revenues that are paid to public entities by obligation<sup>[26]</sup>. It is worth repeating that taxes are not the only source of budget revenues, but they determine the stability of budget revenues, which is essential for the creation of financial plans and for forecasting possible budget changes. Ivan Holovach proposed the perception of taxes as cash flows for the creation of a monetary fund.<sup>[27]</sup> The correct position is that of Oleh Mozenkov – that taxes are the most effective tool for the indirect regulation of economic processes in the state<sup>[28]</sup>. By analysing public tributes, one can reach the conclusion that taxes constitute one of the key categories of state income. Taxes are also a key feature of the functioning of the market economy. Moreover, taxes are, in a certain sense, levers for regulating and preventing the emergence of negative socio-economic trends. It should also be mentioned that taxes create a certain interdependence between the two most important groups: between the state (public) and individual economic agents. On the other hand, it should also be noted that the tax itself is one of the categories of non-economic coercion of the state, but

<sup>25</sup> Vasyl Bordeniuk, „Detsentralizatsiia derzhavnoi vlad i mistseve samovriaduvannia: poniattia, sut ta formy (vydy)“ *Pravo Ukrayiny*, 1 (2005): 21-22.

<sup>26</sup> Elżbieta Chojna-Duch, *Podstawy finansów publicznych i prawa finansowego* (Warszawa: Lexis Nexis, 2012), 154.

<sup>27</sup> Ivan Holovach, „Poniattia «podatok»: istoriia vyniknennia ta rozvytku“ *Ekonomika, finansy, prawo*, 9 (2002): 18-23.

<sup>28</sup> Oleh Mozenkov, „Zmist i rol podatkovoi polityky u derzhavnomu rehuliuvanni“ *Finansy Ukrayiny*, 4 (1997): 92-97.

not only by means of it the budget is ensured. It should be considered that the concepts of taxes and fees coincide doctrinally in Poland and Ukraine, despite some differences in terms of legal regulation.

Indirect taxes currently dominate in Ukraine due to the country's internal problems, including a low tax culture and a low level of legal personal income, which makes it impossible for the direct tax system to dominate the indirect tax system at this stage. The structure of the Ukrainian tax system is similar to the systems of developed European countries, considering that its tax system was established in cooperation with international partners, which, to some extent, allowed consideration of the norms of European legislation and tax policy. Unlike other European countries, however, the tax system of Ukraine is not used as a tool for increasing the competitiveness of the state in the international arena and does not significantly contribute to the development of domestic entities, through which the transition from the system of indirect taxation to the system of direct taxation should take place. In a certain view, the key is the optimal combination of direct and indirect taxes, which will allow to get out of the tax regress. Krysovatum argued that if in a period of economic recession the role of indirect taxes increases in order to allow for consolidation and stabilisation of the tax base, then, on the contrary, in a period of economic growth the dominant fiscal influence should be acquired by direct taxes. However, this is not happening at present. Thus, it is important to examine other receipts that play an important role in the functioning of the state budget. The great diversity of fiscal receipts necessitates their delineation and division into those that are directly fiscal in nature and those that are nontax payments. It is worth noting that for the purposes of this study, the concept of the tax system is also important. In the latest Ukrainian dictionary, the term *cucmema* is understood as a structure that consists of regularly arranged and functioning parts or as a form of organisation and ordering of something<sup>[29]</sup>. A tax system is a collection of taxes, fees and other charges set up in a country that are interrelated and organically complementary, but, at the same time, have completely different purposes. According to B. Buriakovskiy, a tax system should be understood as a set of taxes set by the legislature and collected by the executive department

<sup>29</sup> Ivan Zabiiaka, *Tlumachnyi slovnyk suchasnoi ukrainskoi movy*, Blyzko 50000 sl. (K.: Arii, 2007), 512.

of the government based on the methods and principles of the tax structure<sup>[30]</sup>. Accordingly, it can be concluded that the tax system constitutes the general requirements for a set of taxes, fees, contributions and duties in the organised overall financial system of the state and its interaction with taxpayers through the administrative mechanism of tax authorities. It is important to distinguish between the above-mentioned categories, which cause problems when interpreting individual provisions on the basis of the above-mentioned nomenclature<sup>[31]</sup>. According to Ukrainian legislation, the tax system includes all taxes, fees, other compulsory payments and contributions to the state budget, as well as trust funds, which are imposed and implemented in the manner prescribed by law.

## 4 | Conclusion

Our analysis indicated that the notion of public tributes, as a collective category, is, to some extent, included in the framework of other systemic notions, as well as in the components of the categories of public tributes, whereas the classical definition of public tributes was not created by the Polish and Ukrainian legislatures, which causes certain problems at both the practical and theoretical levels. This study analysed the notion of public tributes in Polish and Ukrainian legislation. We attempted to show the differences between the two financial systems in operation, paying particular attention to the historical significance of the notion of public tributes and its role in Polish legislation. It was also noted that in the Ukrainian legal system there is no collective concept of public tribute. For the purposes of this study, we assumed that the Ukrainian equivalent of the Polish concept of *public tributes* is *державні збори*. To construct the notion of *державних зборів*, the BCU was analysed, as well as the TCU. Detailed attention was given to tax revenues, particularly by describing the various elements resulting from the TCU. It was also emphasised that *державних зборів* not only include tax receipts but also non-tax receipts, capital gains and

<sup>30</sup> More: Vadym Buriakovskiy, et al., *Podatky: Uchbovyi posibnyk* (Dnipropetrovsk: Porohy, 1998).

<sup>31</sup> Liudmyla Trofimova, „Podatkova polityka i podatkova sistema” *Forum prava*, 1 (2010): 364-370.

transfers resulting from the BCU. It can be unequivocally stated that public tributes in both Poland and Ukraine are part of public law. This leads to the conclusion that the introduction or amendment of public tributes can take place only on a constitutional basis. It could also be concluded that in both Poland and Ukraine, the legislature has provided that public tributes can only be introduced by way of legislation.

The aforesated considerations lead to the conclusion that the separation and creation of a systemic concept of public tributes is a necessary element of a well-functioning public apparatus and a developing economy. It can also be concluded that the possible emergence of a statutory definition of public tributes should not only consider the individual categories of tributes but also directly adapt to the synthesis of their normative features resulting from the already created concept of these benefits. The key is for the collective concept to lay the groundwork for existing conceptual concepts and consolidate them into a single collective definition. In the current situation, as the existing concepts are based only on the enumeration of individual categories of public tributes without analysing their characteristics, a problem occurs when another category is included or rejected as a public tribute. One can agree with M. Kuśmirski that a classic normative definition of the categories of public tributes must be created on the basis of their features and not the name of the individual benefits, which are public tributes. This would significantly develop the system of the functioning of public tributes for obliged entities<sup>[32]</sup>.

## Bibliography

- Antonow Dobrosława, „Cechy danin publicznych w polskim systemie prawa” *Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)*, Vol. LXIII (2016): 7-22.  
<https://journals.umcs.pl/g/article/download/2763/2953>.
- Bień-Kacała Agnieszka, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.* Toruń: Dom Organizatora TNOiK, 2005.

<sup>32</sup> Kuśmirski Michał, „Charakter prawny danin publicznych w polskim prawie podatkowym” *Studia Administracyjne*, No. 1 (2021): 29-42. <https://wnus.edu.pl/sa/file/article/download/19329.pdf>.

- Bogacki Sylwester, „Ewolucja danin publicznych a zasada sprawiedliwości podatkowej”, *International Journal of Legal Studies*, 7 (2020): 249-274. <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ceon.element-541aa261-1e85-3960-b4d7-4b78e987fc80/c/pdf-01.3001.0014.3119.pdf>.
- Bordeniuk Vasyl, „Detsentralizatsiia derzhavnoi vlady i mistseve samovriaduvannya: poniattia, sut ta formy (vydy)” *Pravo Ukrayny*, 1 (2005).
- Brzeziński Bogumił, Dębowska-Romanowska Teresa, Kalinowski Marek, *Pravo finansowe*, red. Wanda Wójtowicz. Warszawa: C.H. Beck, 1997.
- Brzeziński Bogumił, *Introduction to Tax Law*. Toruń: Dom Organizatora TNOiK, 2008.
- Buriakovskiy Vadym et al., *Podatky: Uchbovyi posibnyk*. Dnipropetrovsk: Porohy, 1998.
- Chojna-Duch Elżbieta, *Podstawy finansów publicznych i prawa finansowego*. Warszawa: Lexis Nexis, 2012.
- Gryziak Bartosz, „Is it only taxes and fees? On the chargeability of public tributes. Legal and comparative analysis” *Doradztwo Podatkowe – Bulletin of the Institute of Tax Studies*, No. 5 (2021): 25-36. <https://isp-modzelewski.pl/wp-content/uploads/2021/06/Czy-tylko-podatki-i-oplaty.pdf>.
- Gryziak Bartosz, „Tax contracts in the state of law – the draft of the new Tax Ordinance against the background of the Italian experience. Mass Treasury” *Doradztwo Podatkowe – Bulletin of the Institute of Tax Studies*, No. 6 (2019): 6-7. <https://isp-modzelewski.pl/wp-content/uploads/2019/07/Umowy-podatkowe-w-pa%C5%84stwie-prawa-%E2%80%93-projekt-nowej-Ordynacji-podatkowej-na-tle-do%C5%9Bwiadcze%C5%84-w%C5%82oskich-cz.-1.-Skarbowo%C5%9B%C4%87-masowa.pdf>.
- Holovach Ivan, „Poniattia «podatok»: istoriia vynyknennia ta rozvytku” *Ekonomika, finansy, prawo*, 9 (2002).
- Kosikowski Cezary, *Pravo finansowe: część ogólna*. Warszawa: Dom wydawniczy ABC, 2003.
- Kucheravenko Mykola, „Podatok yak pravova katehoriia: problemy definitsii” *Pravo Ukrayny*, No 12 (2002): 70-74.
- Kuśmirski Michał, „Charakter prawny danin publicznych w polskim prawie podatkowym” *Studia Administracyjne*, No. 1 (2021): 29-42. <https://wnus.edu.pl/sa/file/article/download/19329.pdf>.
- Melnik Viktor, H. Peniakova, „Mekhanizm priamoho opodatkuvannia u finansovii teorii” *Finansy Ukrayny*, 5 (2009): 66-77.
- Mozenkov Oleh, „Zmist i rol podatkovoi polityky u derzhavnomu rehuliuvanni” *Finansy Ukrayny*, 4 (1997): 92-97.
- Ofiarski Zbigniew, *Ogólne prawo podatkowe. Zagadnienia materialno prawne i proceduralne*. Warszawa: LexisNexis, 2013.

- Owsiak Stanisław, „Z historii daniny publicznej i podatku” *Zeszyty Naukowe/ Akademia Ekonomiczna w Krakowie*, No. 542 (2000): 5-15. <https://docplayer.pl/5324804-Z-historii-daniny-publicznej-i-podatku.html>.
- Romanovsyi Mykhailo, *Fynansy, denezhnoe obrashchenye y kredyt*, red. Olha Vrublevska, Borys Sabanty. Moskva: Yurait, 2001.
- Statsenko Artur, *Pravove rehuliuвannia mistsevykh podatkov ta zboriv*. PhD diss., Kharkiv, 2010.
- Trofimova Liudmyla, „Podatkova polityka i podatkova sistema” *Forum Prava*, 1 (2010): 364-370.
- Vyshnevskyi Valentyn, „Pryntsypy opodatkuvannia: obgruntuvannia i empirychna perevirka” *Ekonomika Ukrayny*, 10 (2008): 55-72.
- Zabiiaka Ivan, *Tlumachnyi slovnyk suchasnoi ukrainskoi movy*. Blyzko 50000 sl. K.: Arii, 2007.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

MARTYNA ŁASZEWSKA-HELLRIEGEL, CHRISTOPH-ERIC MECKE

# Kobiety w procesie

## cz. I. Kobiety przed sądem

### Women on Trial Part I: Women Before the Court

This paper is the first part of the topic on the position of women in the judicial process in Poland and Germany. It examines the legal position of women in court in Polish and German legal history from the 16th to the 20th century. The study distinguishes between criminal and civil proceedings, between unmarried and married women and merchant women, and between land, town and village law in Poland and ius commune, special and local law in Germany. While women were treated similarly to men in criminal proceedings at the beginning of the sixteenth century, there were major differences in civil proceedings. In both Poland and Germany, the unequal treatment of men and unmarried women ended around 1800 as a result of European codification. In contrast, married women had to wait until the 20th century for equal rights, even in court.

SŁOWA KLUCZOWE: kobiety przed sądem, równouprawnienie, proces sądowy

KEYWORDS: women on trial, gender equality, judicial process

**MARTYNA ŁASZEWSKA-HELLRIEGEL**, doktor habilitowany nauk prawnych, profesor Uniwersytetu Zielonogórskiego, ORCID – 0000-0002-2212-371X, e-mail: laszewska@gmx.de

**CHRISTOPH-ERIC MECKE**, doktor habilitowany nauk prawnych, profesor Uniwersytetu Zielonogórskiego, ORCID – 0000-0002-3273-782X, e-mail: c.mecke@wpa.uz.zgora.pl

## 1 | Wprowadzenie

W pierwszym wieku przed naszą erą Karfania (Arfania) żona senatora Licencjusza Bukcjonisa stawiła się przed sądem we własnej sprawie a również i później w sprawach innych osób. Ta odwaga nie została jednak doceniona i od tego momentu badacze<sup>[1]</sup> datują wprowadzenie przez prawo rzymskie zakazu samodzielnego występowania kobiet przed sądem. Zakaz ten przeszedł do Digestów Justyniańskich<sup>[2]</sup> a wraz z recepcją prawa rzymskiego zaczął obowiązywać na terenie Europy, zgodnie z zasadą iż „każda kobieta z powodu słabości umysłu znajduje się pod władzą opiekuna”<sup>[3]</sup>. Ta reguła utrzymała się w Europie przez następne wieki a w Polsce aż do 1919 r. Wynikało to między innymi z braku pełnej zdolności do czynności prawnych kobiet a w związku z powyższym koniecznością zastępstwa przez mężczyznę. Również prawo dziedziczenia, a co za tym idzie posiadanie majątku, było zwykle związane z męską linią sukcesji, co oznaczało, że majątki rodzinne przechodziły na męskich spadkobierców<sup>[4]</sup>. Kobiety zazwyczaj miały dużo trudniejszy dostęp do edukacji formalnej. Te ograniczenia widzimy również w procesie sądowym. Jednak pewne wyjątki i indywidualne przypadki mogły wpływać na udział kobiet w poszczególnych rolach w procesach sądowych.

Również w Niemczech ostatnie regulacje ograniczające ogólną zdolność występowania przed sądem oraz zawierania transakcji przez kobiety, w tym również przez kobiety niezamężne, zniknęły na początku XIX wieku, a lokalnie dopiero w drugiej połowie XIX wieku. W przeciwnieństwie do tego, nawet do 1953 r. stan opieki małżeńskiej nad żonami utrzymywał się dla zdecydowanej większości tych żon, które ze swoimi mężami w umowie

<sup>1</sup> Adam Redzik, „Droga kobiet do zawodu adwokata” *Głos Prawa Przegląd Prawniczy Allerhanda*, nr 1-2 (2018): 164.

<sup>2</sup> Digesta 3. 1. 1. 5., por. na temat tego słynnego fragmentu Digest, który jest często cytowany w tym kontekście. Elisabeth Koch, *Maior dignitas est in sexu virili. Das weibliche Geschlecht im Normensystem des 16. Jahrhunderts* (Frankfurt am Main: Vittorio Klostermann, 1991), 86.

<sup>3</sup> Ciceron cyt. za Adam Redzik, „Droga kobiet do zawodu adwokata” *Głos Prawa Przegląd Prawniczy Allerhanda*, nr 1-2 (2018): 164.

<sup>4</sup> Ta reguła tłumaczona jest przez niektórych badaczy pragmatycznym podejściem do przetrwania masy majątkowej w rodzinie. Długość życia kobiet w XVI-XVIII była krótsza od długości życia mężczyzn, co związane było z dużą śmiertelnością kobiet przy porodzie oraz w związku z powikłaniami po nim. Por. Franciszek Ignacy Fortuna, „Status prawny i społeczny kobiet w XVII wieku w świetle testamentów szlachty Prus Królewskich” *Civitas et Lex*, nr 2 (2022): 96.

małżeńskiej nie ustanowiły rozdzielnosci majątkowej. Nawet uzyskanie ogólnej zdolności do czynności procesowych przed sądem w 1879 r. nie zmieniło ich sytuacji ze względu na pośredni efekt patriarchalnych przepisów materialnego prawa rodzinnego w licznych niemieckich ustawach szczegółowych obowiązujących do 1900 r. oraz w kodeksie cywilnym (BGB) obowiązującym już w całych Niemczech od 1900 r.

## 2 | Kobieta przed sądem w XVI-XVIII w.

### 2.1. Regulacje prawne

W XVI-XVIII w. wieku polskie prawo pozostawało pod dużym wpływem prawa rzymskiego<sup>[5]</sup>. Dla dawnego procesu polskiego charakterystyczna jest jego różnorodność procedur<sup>[6]</sup>. Kierując się organizacją sądów stanowych możemy wyróżnić w tym czasie proces ziemski, proces miejski i proces wiejski<sup>[7]</sup>. Proces ziemski był normowany przez Formula Processus z 1523 r. Ta ważna kodyfikacja, uważana za duży postęp w historii polskiego procesu skargowego, była jedynym kodeksem postępowania sądowego aż do rozbiorów<sup>[8]</sup>. Dokonała ona odformalizowania procesu, wprowadziła instytucję apelacji oraz uproszczenia egzekucji wyroków. Przeniosła również ciężar z ruchomości na dobra nieruchomości<sup>[9]</sup>. W procesie miejskim widzimy przejmowanie procesu inkwizycyjnego oraz recepcję niemieckiej Constitutio

<sup>5</sup> Janusz Sondel, „Prawo rzymskie jako podstawa projektów kodyfikacyjnych w dawnej Polsce” *Zeszyty Prawnicze UKSW*, nr 1 (2001): 51.

<sup>6</sup> Janusz Bardach, Bogusław Leśniodorski, Michał Pietrzak, *Historia ustroju i prawa polskiego* (Warszawa: Lexis Nexis, 2009), 297.

<sup>7</sup> W sądownictwie szlacheckim istniały jeszcze procesy specjalne (np. proces graniczny o zbiegtych poddanych, proces o czary), własne procedury posiadały również sądy wspólnot etyczno-wyznaniowych (żydowskie i ormiańskie), por. Janusz Bardach, Bogusław Leśniodorski, Michał Pietrzak, *Historia ustroju i prawa polskiego* (Warszawa: Lexis Nexis, 2009), 297; Adam Moniuszko, *Prawo sądowe Rzeczypospolitej szlacheckiej(XVI-XVIII w.): Zarys wykładu*, (Warszawa: Campidoglio, 2017), 11, 14.

<sup>8</sup> Sondel, „Prawo rzymskie jako podstawa projektów kodyfikacyjnych w dawnej Polsce”, 51.

<sup>9</sup> Bardach, Leśniodorski, Pietrzak, *Historia ustroju i prawa polskiego*, 297.

Criminalis Carolina z 1532 r. Proces inkwizycyjny charakteryzował się upowszechnieniem stosowania specyficznych środków dowodowych jakimi między innymi były tortury. Prawo miejskie miało również wpływ na prawo ziemskie, jednak nie doszło tu do wyodrębnienia procesu karnego i przeważał proces skargowy zarówno w sprawach prywatnych jak i karnych<sup>[10]</sup>. Proces wiejski za to charakteryzowała przede wszystkim ustność postępowania.

Sytuacja prawa na terytorium Świętego Cesarstwa Rzymskiego (Sacrum Imperium Romanum) była nie mniej złożona. Dotyczy to przede wszystkim pozycji kobiet w prawie postępowania cywilnego w okresie od XVI do XIX wieku, którą można zrozumieć w pełni tylko wówczas, gdy weźmie się pod uwagę materialne prawo rodzinne. W dziedzinie prawa cywilnego i prawa postępowania cywilnego w Niemczech od średniowiecza do końca XIX wieku ścierały się ze sobą dwie zasadniczo różne tradycje prawne, to jest rzymsko-kanoniczna tradycja prawa ogólnego z jednej strony i germanńska tradycja praw partykularnych z drugiej<sup>[11]</sup>. W tradycji prawnej rzymskiej starożytności *ius commune*, ogólne prawo cywilne, które od XV wieku przyjmowane było w Niemczech stopniowo przez praktykę prawną, a poza miastami stosowane było jedynie subsydiarnie, opierało się na prawie rzymskim w kształcie Kodeksu Justyniana z VI wieku naszej ery. Prawo rzymskie dawało już od III wieku naszej ery wszystkim kobietom, tj. także żonom, niemal nieograniczoną zdolność prawną w materialnym prawie cywilnym.<sup>[12]</sup> Z kolei ogólne prawo procesowe, które w Niemczech miało charakter subsydiarny tak jak ogólne materialne prawo cywilne pochodzenia rzymskiego, wywodziło się z tradycji prawnej prawa kanonicznego, to jest nie miało korzeni w justyniańskim *Corpus iuris*, lecz w średniowiecznej doktrynie prawa procesowego prawników kanonicznych. W późnym średniowieczu znalazło się również w kodeksach prawa procesowego przed sądami świeckimi, w tym w prawie postępowania Sądu Kameralnego Rzeszy (Reichskammergericht)

<sup>10</sup> Ibidem, 297.

<sup>11</sup> Ernst Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck, 1997), 401.

<sup>12</sup> Stephan Meder, *Familienrecht. Von der Antike bis zur Gegenwart* (Köln-Weimar-Wien: Böhlau 2013), 52 jak również dla *ius commune* w XIX wieku (Bernhard Windscheid, Theodor Kipp, *Lehrbuch der Pandekten*, t. II, wyd. 9, Frankfurt nad Menem, 1906), § 54.

z roku 1495 oraz w nowelizacjach z lat 1521 i 1548/55.<sup>[13]</sup> Oba systemy prawne, zarówno pierwotne starożytne rzymskie prawo cywilne, jak i sekularne, nowożytnie cywilne prawo procesowe stojące pod wpływem rzymskokatolickiego prawa kanonicznego, były wyjątkowo korzystne dla pozycji prawnej kobiet. Jednak oba ogólne porządki prawne miały zastosowanie jedynie subsydiarne, tj. ich ważność była derogowana w przypadku istnienia regionalnych i lokalnych szczególnych porządków prawnych. W przeciwnieństwie do innych dziedzin prawa cywilnego (prawo zobowiązań, prawo rzeczowe, prawo spadkowe), obowiązywanie subsydiarne oznaczało, zwłaszcza w dziedzinie materialnego prawa rodzinnego<sup>[14]</sup> oraz w kwestiach dotyczących pozycji kobiet w postępowaniu cywilnym, że przez cały okres nowożytny aż do końca XIX wieku owe dwa porządki prawa powszechnego (*ius commune*) w jednym przypadku pochodzenia rzymskiego, a w drugim pochodzenia kościoelnego były często derogowane przez szczególne prawa pochodzenia germanickiego. Według starego prawa germanickiego kobiety nie były jednak zdolne do prowadzenia spraw sądowych, a także nie posiadały zdolności procesowych i kompetencji prawnych, ponieważ nie były „zdolne do obrony” (*wehrfähig*).<sup>[15]</sup> I tak na przykład zbiór praw Sachsenpiegel (Zwierciadło Saksonii), który obowiązywał jako prawo zwyczajowe, stanowił: „Dziewczęta i kobiety muszą mieć opiekunów do każdego powództwa”<sup>[16]</sup>. Pod względem prawa procesowego nieletnie dziewczęta i dorosłe kobiety były przy tym traktowane na równi. Również prawo miejskie Hamburga z roku 1270 r. nie brzmiało inaczej, przy czym kobietom przynajmniej wyraźnie przyznano prawo wybierania własnego opiekuna przed sądem:

Ani księża, ani kobiety, ani mężczyźni poniżej 18 roku życia nie mogą pozywać, odpowiadać i przekazywać lub przenosić nieruchomości przed sądem

<sup>13</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, 416.

<sup>14</sup> Ponadto, w przeciwnieństwie do innych części justyniańskiego *Corpus iuris civilis*, akurat przepisy dotyczące praw rodzinnych najmniej podlegały praktycznej recepcji prawa rzymskiego w Niemczech (Meder, *Familienrecht*, 43), ponieważ partykularne prawa rodzinne pochodzenia germanickiego, zakorzenione w tradycyjnych przekonaniach, prawdopodobnie wydawały się bardziej przekonujące w ówczesnej praktyce prawnej właśnie ze względu na jej patriarchalną strukturę.

<sup>15</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, 408.

<sup>16</sup> Marianne Weber, *Ehefrau und Mutter in der Rechtsentwicklung* (Tübingen: Mohr, 1907), 211. Por. również Peter Ketsch, *Frauen im Mittelalter*, t. II, *Frauenbild und Frauenrechte in Kirche und Gesellschaft. Quellen und Materialien*, red. Annette Kuhn, (Düsseldorf: Schwann, 1984), 162.

bez opiekuna. Ten, kto potrzebuje opiekuna, może wybierać sobie opiekuna przed radą [miasta]<sup>[17]</sup>.

Jeszcze w XVI i XVII wieku niezamężne kobiety potrzebowaly zwykle męskiego opiekuna, zwłaszcza jeśli chciły występować w sądzie jako powódki<sup>[18]</sup>. Brak uprawnień kobiet do prowadzenia postępowań sądowych, a tym bardziej brak uprawnień kobiet do prowadzenia obcych spraw innych osób w sądzie, współcześni uważali wówczas za tak oczywiste, że zwykle nie był on w ogóle wyraźnie nadmieniany we współczesnych porządkach prawnych aż do XIX wieku<sup>[19]</sup>. Od średniowiecza jedynie opatki<sup>[20]</sup>, a od XVI wieku kobiety zajmujące się kupiectwem (Handelsfrau), posiadały pełną zdolność do czynności prawnych i były zdolne do prowadzenia sporów sądowych, o ile dotyczyło to czynności prawnych i sądowych ze względu na ich działalność handlową wykonywaną za zgodą męża, ale nie w zakresie transakcji w sferze prywatnej. Na przykład żony zajmujące się za zgodą męża samodzielną działalnością handlową potrzebowaly poza zakresem tej działalności – jak każda żona – w dalszym ciągu męskiego opiekuna, z reguły męża<sup>[21]</sup>. Zdolność do czynności prawnych i procesowych żon zajmujących się kupiectwem w mieście istniała zatem tylko częściowo, czyli ograniczona była do ich działalności handlowej, a nie ogólnie – w odniesieniu do wszystkich ich czynności prawnych. Lokalne rozporządzenia rzemieślnicze i statuty miejskie przewidywały również przywileje wdowie – choć z reguły na czas ograniczony, które umożliwiały wdowie po rzemieślniku kontynuowanie działalności zmarłego męża przynajmniej tak długo, jak leżało to w interesie publicznym, na przykład w odniesieniu do synów, którzy byli jeszcze nieletni i nie mogli jeszcze samodzielnie przejąć działalności ojca<sup>[22]</sup>.

<sup>17</sup> Cytowane za Roswitha Rogge, *Zwischen Moral und Handelsgeist. Weibliche Handlungsräume und Geschlechterbeziehungen im Spiegel des hamburgischen Stadtrechts vom 13. bis zum 16. Jahrhundert* (Frankfurt am Main: Vittorio Klostermann, 1998), 87.

<sup>18</sup> Koch, *Maior dignitas est in sexu virili*, 84-90.

<sup>19</sup> Prawo miejskie Hamburga z roku 1270, cytowane za: Rogge, *Zwischen Moral und Handelsgeist*, 87.

<sup>20</sup> Heide Wunder, „Herrschaft und öffentliches Handeln von Frauen in der Gesellschaft“, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck 1997), 41, 43-45.

<sup>21</sup> Barbara Dölemyer, „Frau und Familie im Privatrecht des 19. Jahrhunderts“, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck, 1997), 658. Holthöfer, 418.

<sup>22</sup> Koch, *Maior dignitas est in sexu virili*, 77 i nast.

Zgodnie z subsydiarnie stosowanym powszechnym prawem procesowym, które znajdowało się pod wpływem prawa kanonicznego, kobieta była uznawana – podobnie jak w przypadku zawarcia związku małżeńskiego – za nosicielkę indywidualnej własnej woli, ale jej zeznania w sądzie, podobnie jak w rzymskokatolickim prawie kanonicznym, miały wyłącznie mniejszą wartość dowodową<sup>[23]</sup>, ponieważ kobietom generalnie insynuowano takie cechy, jak nieszczerość i obłudę, a przynajmniej kapryśność i podatność na emocje<sup>[24]</sup>. Również kodeks *Constitutio Criminalis Carolina* z roku 1532, wynegocjowany między Cesarzem Karolem V a przedstawicielami stanów Rzeszy i będący już jednym z ostatnich ważnych aktów legislacyjnych na szczeblu Rzeszy, mimo że Święte Cesarstwo Rzymskie przestało istnieć dopiero w 1806 r.<sup>[25]</sup>, odzwierciedla jedynie niewielką część rzeczywistości prawnej w dziedzinie prawa postępowania karnego. Po pierwsze, partykularne prawa regionalne i lokalne wyparły w poszczególnych księstwach prawo cesarskie zgodnie z obowiązującą wówczas zasadą subsydiarności. „[Lokalny] statut łamie [regionalne] prawo ziemskie, a [regionalne] prawo ziemskie łamie prawo cesarskie” (*Statut bricht Landrecht, Landrecht bricht Reichsrecht*)<sup>[26]</sup>. Po drugie, feudalny system *Ancien Régime* obejmował nie tylko państwo i kościół, ale także wielu innych władców niepaństwowych, takich jak szlacheckich wasali (*Lehnsherrn*) i właścicieli ziemskich

<sup>23</sup> *Decretum Gratiani*, C. III q. VII cap. 2 § 2.

<sup>24</sup> Elisabeth Koch, „Die Frau im Recht der Frühen Neuzeit. Juristische Lehren und Begründungen”, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: Verlag C.H. Beck 1997), 85.

<sup>25</sup> Niezależnie od rozwiązania Świętego Cesarstwa Rzymskiego za rządów Napoleona w 1806 r., „Carolina” nadal znajdowała subsydiarne zastosowanie w Niemczech, aż do wejścia w życie Kodeksu postępowania karnego Cesarstwa Niemieckiego w 1879 roku.

<sup>26</sup> Subsydiarne obowiązywanie „Carolinie” i prymat przepisów partykularnych dotyczących prawa karnego i postępowania karnego były wyrazem kompromisu osiągniętego po długich negocjacjach między cesarzem Karolem V a stanami Rzeszy. Jedyna obligatoryjnie wiążąca w całym cesarstwie regulacja, którą cesarz był w stanie egzekwować, dotyczyła surowości kar. Nie mogły one przekraczać poziomu określonego w „Carolinie”. Jednak sama „Carolina” często odstępowała od określenia konkretnej miary kary. W takich przypadkach władcy w księstwach mieli całkowitą swobodę w określaniu wymiaru kary w poszczególnych porządkach prawnych. [Helga Schnabel-Schüle, „Frauen im Strafrecht vom 16. bis zum 18. Jahrhundert”, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck, 1997), 187.

(Grundherrn), jak również wolne miasta lub cechy z własnymi jurysdykcjami i kodeksami postępowania<sup>[27]</sup>.

Jeśli chodzi o pozycję kobiet w prawie karnym i w prawie postępowania karnego, to zarówno w kodyfikacji *Constitutio Criminalis Carolina*, jak i w prawie postępowania Sądu Kameralnego Rzeszy oraz w niemal wszystkich prawach partykularnych księstw ustalenia są odmienne niż w przypadku prawa cywilnego i prawa postępowania cywilnego. Z jednej strony, w przeciwieństwie do ówczesnych regulacji cywilnego prawa procesowego, w całym prawie karnym procesowym „Caroliny” nie ma ani jednej regulacji, zgodnie z którą mężczyźni i kobiety byliby traktowani odmiennie. Nawiąsem mówiąc dotyczy to również, niemal bez wyjątku, licznych praw partykularnych obowiązujących w dawnych Niemczech<sup>[28]</sup>. Z drugiej strony, regulacje zawarte w różnych aktach prawnych na poziomie cesarstwa i księstw Świętego Cesarstwa Rzymskiego nie odzwierciedlają całej praktyki prawnej. Przykładowo, przepisy Caroliny nie wprowadzają formalnego rozróżnienia pomiędzy mężczyznami a kobietami w zakresie możliwości składania zeznań w sądzie. Zgodnie z art. 66 jedynym decydującym czynnikiem jest to, że świadek jest „dobrym świadkiem”, a w szczególności nie ma złej reputacji społecznej w miejscu zamieszkania<sup>[29]</sup>. Również odnośnie osób oskarżonych decydujące znaczenie dla przebiegu postępowania karnego miały dobrą opinię, tj. pozycja społeczna oskarżonego i jego dotychczasowy tryb życia<sup>[30]</sup>. W indywidualnych przypadkach znaczenie tu mogło mieć jednak również to, czy kobieta występująca przed sądem w charakterze oskarżonej lub świadka prowadziła tryb życia zgodny z normami społecznymi, tj. czy podporządkowywała się mężowi, zwłaszcza w małżeństwie, czego oczekiwano wówczas od każdej żony.

Głównym powodem, dla którego wśród 40 000 osób straconych za czary w Świętym Cesarstwie Rzymskim w XVI i XVII wieku 80% stanowiły kobiety, nie jest ani prawo karne, ani prawo postępowania karnego<sup>[31]</sup>. Jednak w dziedzinie prawa postępowania karnego, przejście od tradycyjnego postępowania wszczętego przez oskarżyciela prywatnego do

<sup>27</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, 577.

<sup>28</sup> Schnabel-Schüle, „Frauen im Strafrecht vom 16. bis zum 18. Jahrhundert“, 190–192.

<sup>29</sup> Ibidem, 191.

<sup>30</sup> Ibidem, 194.

<sup>31</sup> Ingrid Ahrend-Schulte, „Hexenprozesse“, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck, 1997), 205.

postępowania inkwizycyjnego z urzędu najpierw w sprawach przed sądami kościelnymi, później również w sprawach przed sądami państwowymi doprowadziło nagle do gwałtownego wzrostu liczby procesów karnych o czary. O ile przestępstwo czarów, znane już w starożytności rzymskiej<sup>[32]</sup>, odgrywało jedynie marginalną rolę w średniowiecznej procedurze oskarżenia, gdyż każdy oskarżyciel prywatny, który nie przedstawił wystarczających dowodów, sam musiał liczyć się z postępowaniem karnym przeciwko sobie, w najgorszym wypadku nawet zgodnie ze starotestamentową zasadą taliona (*ius talionis*) z wyrokiem, który groziłby pierwotnemu oskarżonemu, o tyle ryzyko to zostało wyeliminowane wraz z wprowadzeniem procesu inkwizycyjnego z urzędu. Każdy mógł teraz, wnosząc oskarżenie do sądu, a nawet po prostu rozpowszechniając plotki lub zeznając w sądzie, zobowiązać sądy do podjęcia działań z urzędu, bez konieczności samodzielnego przedstawiania dowodów domniemanego przestępstwa i obawiania się ryzyka własnej kary<sup>[33]</sup>. Fakt, że to głównie kobiety były oskarżane za czary, nie może być jednak tłumaczony prawem proceduralnym, lecz ówczesnymi przekonaniami w społeczeństwie, a tym samym w ówczesnym wymiarze sprawiedliwości, które podsycane były przez mizoginistyczne traktaty teologiczne i generalnie insynuowały kobietom słabość charakteru, złośliwość i lubieżność<sup>[34]</sup>. Co znamienne, motyw „kobiecej słabości”, który przetrwał aż do XX wieku, był z jednej strony wykorzystywany w praktyce prawa karnego materialnego aż do XVIII wieku w celu uwiarodnienia predyspozycji każdej kobiety do związku z diabłem. Z drugiej jednak strony, „kobieca słabość” nie była brana pod uwagę w praktyce prawa karnego procesowego w sprawach o czary jako powód do stosowania łagodniejszych metod tortur w celu uzyskania przyznania się oskarżonej do winy. W procesach o czary „kobieca słabość” była mianoście wypierana przez siłę diabła, który wedle ówczesnych przekonań instrumentalizował kobiety<sup>[35]</sup>. Zakładana „kobieca słabość” co prawda uprzywilejowywała kobiety w postępowaniu karnym jako powód do złagodzenia kary<sup>[36]</sup>, ale takie złagodzenia były wykluczone w sprawach sądowych przeciwko tak zwanym czarownicom. Natomiast w innych procesach karnych przeciwko kobietom, zgodnie z ówczesną ogólną opinią (*communis opinio*), pod uwagę była brana ciąża kobiety,

<sup>32</sup> Digesta 48.8. („Ad legem Corneliam de sicariis et veneficis“) oraz Codex Justyniana 9.18 („De maleficiis et mathematicis et ceteris similibus“).

<sup>33</sup> Ahrend-Schulte, „Hexenprozesse“, 215.

<sup>34</sup> Ibidem, 209 i nast.

<sup>35</sup> Ibidem, 215 i nast.

<sup>36</sup> Koch, *Maior dignitas est in sexu virili*, 162–165.

a tortury w celu ustalenia prawdy były odkładane do 40 dnia po urodzeniu dziecka. To samo dotyczyło wykonania wyroków na kobiecie<sup>[37]</sup>.

Poza tym w Niemczech nawet w postępowaniu cywilnym pozew kobiety w sporach spadkowych lub w sporach z powodu niewywiązania się z płatności w transakcjach pieniężnych lub z powodu złamania obietnic małżeńskich mógł prowadzić do niebezpiecznego dla niej kontroskarżenia ze strony pozwanego, że właśnie owa kobieta zawarła pakt z diabłem. W konkretnych wiadomych nam dzisiaj przypadkach z tamtych czasów zniechęcało to kobiety do składania własnych pozów, nawet jeśli – ze wsparciem lub bez wsparcia mężczyzny – byłyby one teoretycznie uprawnione do wniesienia sprawy do sądu<sup>[38]</sup>.

## 2.2. Wszczęcie i prowadzenie postępowania

Również w Polsce prawa kobiet do samodzielnego występowania w sądzie były ograniczone. Były one zazwyczaj reprezentowane przez mężów, ojców lub braci<sup>[39]</sup>. W procesach sądowych kobiety rzadko pełniły role świadków lub oskarżycieli. Nie rozróżniano jeszcze zdolności procesowej od zdolności sądowej<sup>[40]</sup>. Mężakom zabroniono występować w sądzie bez asysty męża lub osoby przez niego wyznaczonej. Również kobiety niezamężne, choć mogły zarządzać własnym majątkiem ziemskim, w sądzie musiały stawać w asyście mężczyzny – kuratora, który współdziałał w sporządzanych przez kobiety aktach prawnych. Dotyczyło to zarówno szlachcianek, jak i mieszkańców, choć praktyka poszła w innym kierunku. Wdowy po rzemieślnikach i kupcach oraz żony samodzielnie prowadzące handel same zawierały transakcje i dokonywały wielu czynności sądowych<sup>[41]</sup>. Prawna pozycja kobiety wiejskiej była najsłabsza, podlegała ona opiece nie tylko męża, ale też kontroli zarówno społeczności wiejskiej, jak i urzędników pańskich<sup>[42]</sup>.

<sup>37</sup> Ibidem, 159-162.

<sup>38</sup> Ahrend-Schulte, „Hexenprozesse“, 218.

<sup>39</sup> Zbigniew Naworski, „Kryminalne sprawy małżeńskie w księgarach sądowych dawnej Polski“, [w:] Regulacje prawne dotyczące małżeństwa w rozwoju historycznym, red. Tomasz Dolata (Wrocław: Wrocławskie Wydawnictwo Oświatowe, 2018), 83.

<sup>40</sup> Marian Mikołajczyk, Proces kryminalny w miastach Małopolski w XVI-XIII wieku (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2013), 89.

<sup>41</sup> Ibidem, 91.

<sup>42</sup> Naworski, „Kryminalne sprawy małżeńskie w księgarach sądowych dawnej Polski“, 86.

Z pozwem występowali przede wszystkim osoby prywatne. Nie wszyscy jednak mogli brać udział w postępowaniu jako powodowie<sup>[43]</sup>. Obok powoda w procesie występował również współdziałający z nim delator. Zarówno w prawie miejskim, jak i w prawie ziemskim był on uważany za uczestnika postępowania występującego po stronie powodowej, w stosunku do delatora stosowano podobne ograniczenia jak w stosunku do powoda<sup>[44]</sup>. Zasadniczo kobietom nie pozwalano na samodzielne prowadzenie spraw sądowych: „Niewiasty w prawie rzeczy mówić nie mogą ani same przez się nic czynić, jedno przez opiekuna”<sup>[45]</sup>. Wyjątek stanowiły sprawy przeciwko nieuczciwym opiekunom, które mogła wytaczać „dziecinna matka, baba, ciotka i każda inna białogłowa, która by to dobrym umysłem czyniła”<sup>[46]</sup>. Wnoszące oskarżenie kobiety występowali przed sądem „cum assistenta” mężczyzny zazwyczaj swojego męża lub kremowego.

Powodem nie mogła być osoba wyklęta, „o krzywdę” męża i ojca nie mogła występować „żona ani dzieci” ponieważ to on był ich opiekunem<sup>[47]</sup>. Nie dotyczyło to jednak spraw o zabójstwo. „Jednakże o krzywdę i zelżywość [...] uczynioną kobicie mógl oskarżać jej mąż także ojciec i ona sama”<sup>[48]</sup>. Jakub Czechowicz obok ekskomunikowanych wyliczał infamistów, nie-wolników, kobiety i małoletnich, rozrzutników, osoby dotknięte defektem umysłu jako osoby niezdolne do bycia powodem<sup>[49]</sup>. Kobieta również nie mogła skarzyć o cudzołóstwo swojego męża jednak ten dyskryminujący kobiety przepis został zniesiony przez Carolinę<sup>[50]</sup>. W praktyce sytuacja

<sup>43</sup> Por. Danuta Janicka, „Wszczęcie postępowania karnego w świetle trzech rewizji prawa chełmińskiego z XVI wieku” *Zeszyty Naukowe UMK. Prawo*, nr 35 (1996): 96-97.

<sup>44</sup> Ryszard Łaszewski, *Wymiar sprawiedliwości we wsiach województwa chełmińskiego w XVII i XVIII wieku. Organizacja sądownictwa i postępowanie sądowe* (Toruń: UMK, 1974), 45.

<sup>45</sup> Bartłomiej Groicki, „Artykuły prawa majdeburskiego w Koronie Polskiej”, [w:] *Artykuły prawa majdeburskiego. Postępek sądów około karania na gardle. Ustawa płacej u sądów*, red. Karol Koranyi (Warszawa: Wydawnictwo prawnicze, 1954), 15.

<sup>46</sup> Groicki, „Artykuły prawa majdeburskiego w Koronie Polskiej”, 15.

<sup>47</sup> Jakub Czechowicz, *Praktyka kryminalna to jest wzór rozważnego i porządnego spraw kryminalnych sądzenia* (Chełmno 1639): 3-4, cytowane za Mikołajczyk, *Proces kryminalny*, 90.

<sup>48</sup> Paweł Szczerbiec, „Ius municipale to jest prawo miejskie majdeburskie z łacińskiego i z niemieckiego na polski język z pilnością i wiernie przełożone” (Warszawa 1646): 146, cytowane za Mikołajczyk, *Proces kryminalny*, 90.

<sup>49</sup> Czechowicz, *Praktyka kryminalna to jest wzór rozważnego i porządnego spraw kryminalnych sądzenia*, 3-4, cytowane za Mikołajczyk, *Proces kryminalny*, 90.

<sup>50</sup> Mikołajczyk, *Proces kryminalny*, 90.

przedstawiała się trochę inaczej<sup>[51]</sup>. W roli powodów występowali często kobiety. Z reguły nie działały one jednak same, lecz wspólnie z męskimi opiekunami lub były przez nich całkowicie zastępowane<sup>[52]</sup>. Zdarzało się również, że kobietom, które nie miały męskiego wsparcia sąd dawał takiego opiekuna z urzędu<sup>[53]</sup>.

Można się zastanawiać, czy taka asystencja oznaczała automatycznie ograniczenie swobody działania powódki, czy też była raczej formą pomocy prawnej. Identyczne zastępstwa zdarzały się również w przypadku do mężczyzn. Przykładowo w 1649 r. w Bieczu oskarżycielem był chłop Bartłomiej Ziarno, działający jednak cum assistenta szlachcica Walentego Małskiego<sup>[54]</sup>. Dość liczne wypadki samodzielnego działania kobiet pojawiających się przed sądem jako oskarżycielki prywatne lub delatorki obserwujemy zwłaszcza w XVIII w. Można z tego faktu wysnuć wniosek, że zastępstwa nie traktowano jako warunku dopuszczenia ich do wniesienia i popierania skargi. Zastępstwo pełniło raczej funkcję fachowego wsparcia niż było rodzajem ograniczenia swobody działania powódki. Asystujący kobiecie mężczyzna w prawie ziemskim, miejskim i również w prawie wiejskim<sup>[55]</sup> miał ją tylko wspomagać i służyć radą. Wspomaganie skargi przez dodatkowe osoby dotyczyło przecież nie tylko kobiet. Może po prostu należy wyodrębnić osobną kategorię osób doradców czy pomocników w procesie? Są znane również sprawy, w których kobiety samodzielnie stawały przed sądem jako oskarżycielki<sup>[56]</sup>. W 1690 w Krakowie strona pozwana zarzuciła

<sup>51</sup> Por. Naworski, „Kryminalne sprawy małżeńskie w księgach sądowych dawnej Polski”, 84.

<sup>52</sup> W 1613 r. w Miechowie niejaki Filipowski „skarzył się imieniem matki swojej [...] wdowy” (BJ 86, k. 42–42v); W 1686 r. sąd z Nowej Góry zjechał do Czubrowic „na instancję uczciwej paniej Blecharki ze wsi Filipowic, a teraz przez szlachetnego pana Stanisława Landeckiego, teraźniejszego małżonka jej, jako też przez pana Wojciecha Tomzę, zięcia jej ze wsi Wolej spod Krakowa”. Anna Blecharka jak wynika z protokołu w dalszej części sprawy występowała samodzielnie (APKr. IT 229 b, 116) cytowane za Mikołajczyk, *Proces kryminalny*, 92.

<sup>53</sup> W 1589 r. w Krakowie zgwałcona kobieta samodzielnie rozpoczęła proces, jednak w dalszych fazach postępowania działała już „przez opiekuna, którego miała danego z urzędu” (APKr. AMKr. 865, s. 36–37) cytowane za Mikołajczyk, *Proces kryminalny*, 92.

<sup>54</sup> APKr./W. AD 6, s. 155 cytowane za Mikołajczyk, *Proces kryminalny*, 92.

<sup>55</sup> Por. Łaszewski, *Wymiar sprawiedliwości we wsiach województwa chełmińskiego w XVII i XVIII wieku. Organizacja sądownictwa i postępowanie sądowe*, 49–50.

<sup>56</sup> W 1597 r. w Nowym Sączu skargę wygłaszała Dorota, żona Heliasza Mularza (APKr. AD 67, s. 77–78); w 1674 r. w Bieczu prawdopodobnie sama Małgorzata, wdowa po Filipie Zdyńskim, sołtysie wsi Zdynia, oskarżała w sprawie o zabójstwo

„incompetentiam actoris”, twierdząc, że „consors sine assistentia mariti agere non potest”. Sąd oddalił ten zarzut, mimo tego, że sama oskarżycielka zadeklarowała, iż jej mąż potwierdzi jej zeznania<sup>[57]</sup>.

Asystowanie mężczyzn miało również miejsce w przypadku oświadczeń składanych przez oskarżone kobiety. Zofia Kulejewska-Topolska twierdzi, że w małych miastach w Wielkopolsce kobieta „zawsze występowała w asystencji mężczyzny jako opiekuna”<sup>[58]</sup>.

W Niemczech nie tylko zamężne, ale także dorosłe niezamężne kobiety pozostawały na ogół zależne od męskiego opiekuna, przez co w późnym średniowieczu w rozwijających się gospodarczo miastach pierwotnie pełna opieka pochodzenia germanńskiego (munt), w której wola kobiety nie miała żadnego znaczenia, została osłabiona przez kuratę, w której męski opiekun (Vogt) musiał przynajmniej wziąć pod uwagę wolę kobiety podczas prowadzenia postępowania (cura sexus), aby nie musiała ona śledzić postępowania sądowego hilari vultu, tj. ze łzawiącymi oczami. Sędzia musiał również zapewnić przestrzeganie tej zasady<sup>[59]</sup>.

Szczególnie na początku XVIII wieku, a częściowo nawet wcześniej, w niektórych regionach Niemiec nastąpiły pierwsze zmiany w prawach procesowych na rzecz większej niezależności kobiet w wykonywaniu czynności sądowych. Dotyczyło to jednak tylko samotnych, niezamężnych kobiet i ograniczało się początkowo do obszarów lokalnych lub poszczególnych regionów. Na przykład, zgodnie z patentem wydanym w 1706 r. przez arcybiskupa Moguncji, najwyższego elektora Świętego Cesarstwa Rzymskiego, niezamężne kobiety w mieście Erfurt, które należało do elektoratu Moguncji, mogły „działać i chodzić bez interwencji kuratora”, tj. występować niezależnie w sądzie w sporach z zakresu prawa prywatnego. To samo dotyczyło Księstwa Bawarii<sup>[60]</sup>. Kolejnym ważnym krokiem na tej drodze były trzy europejskie kodyfikacje prawa naturalnego na przełomie XVIII i XIX wieku: Ogólne Prawo Ziemskie dla Państw Pruskich, tak zwany pruski Landrecht (1794), francuski Code civil (1804) i austriacki

swego męża (APKr./W. AD 6, s. 395); w 1725 r. w Krakowie Katarzyna Maniszowska oskarżała o kradzieże niejakiego Macieja Natkańskiego (APKr. AMKr. 874, s. 233–234, 247), cytowane za Mikołajczyk, *Proces kryminalny*, 119.

<sup>57</sup> Mikołajczyk, *Proces kryminalny*, 91.

<sup>58</sup> Zofia Kulejewska-Topolska, *Nowe Lokacje miejskie w Wielkopolsce od XVI do końca XVII wieku: studium historyczno-prawne* (Poznań: Wydawnictwo Naukowe UAM, 1964), 113.

<sup>59</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess”, 411.

<sup>60</sup> Ibidem, 411 i nast.

ABGB (1811), które nie przewidywały już ogólnej opieki nad pełnoletnimi niezamężnymi kobietami<sup>[61]</sup>. Tak więc w XIX wieku rozbieżność między sytuacją prawną niezamężnych dorosłych kobiet z jednej strony<sup>[62]</sup> i zamężnych kobiet z drugiej strony pogłębiła się w coraz większej mierze. W przypadku tych ostatnich zależność prawną od męża nawet jeszcze wzrosła w XIX wieku, na przykład na obszarach niemieckich, gdzie – częściowo aż do roku 1899 – obowiązał francuski *Code civil*<sup>[63]</sup>.

### 2.3. Bycie świadkiem i biegłą

Również pewne wymogi formalne dotyczyły uczestnictwa w procesie w charakterze świadka. Od składania świadectwa wyłączone były osoby pozbawione czci, w sprawach swojego pana nie mogli świadczyć jego słudzy, a z kolei w sprawach kremnego jego bliscy. Przeciwko chrześcijanom nie mogli występować żydzi i poganie. Przyczyną niemożności bycia świadkiem mogło być też ubóstwo lub skłonność do alkoholu czy gry w kości ze względu na możliwość przekupstwa<sup>[64]</sup>. Najczęściej jako osoby nie-mogące być świadkiem wymieniano osoby niewielkie, starców powyżej 70 lat, duchownych, oraz kobiety jak to zostało określone „odmienne w słowiech”<sup>[65]</sup>. Jak jeszcze można wytłumaczyć pierwszą kategorię zakazów jako racjonalną ze względu na rzetelność udzielanych informacji i dobro prawdy materialnej, to kobiety najwyraźniej z samej racji płci traktowane były jako mniej wiarygodne. Większość tych ograniczeń jednak nie dotyczyła procesów o czary. Tu świadkami mogły być kobiety, zastępcy procesowi, osoby ekskomunikowane, banici i infamiści<sup>[66]</sup>. Samo przesłuchanie kobiety czy małoletniego nie musiało jeszcze oznaczać, że ich zeznania w każdej sytuacji miały pełną moc dowodową. Często sięgano do instytucji potwierdzenia zeznań kobiety, np. przez przesłuchiwanego

<sup>61</sup> Ibidem, 427.

<sup>62</sup> Koch, *Maior dignitas est in sexu virili*, 69.

<sup>63</sup> Stephan Meder, Christoph-Eric Mecke, „Einführung“, [w:] *Reformforderungen zum Familienrecht international*, t. I, *Westeuropa und die USA (1830-1914)*, red. Stephan Meder, Christoph-Eric Mecke, (Köln-Weimar-Wien: Böhlau, 2015), 14-19.

<sup>64</sup> Mikołajczyk, *Proces kryminalny*, 341.

<sup>65</sup> Groicki, „Artykuły prawa majdeburskiego w Koronie Polskiej”, 132, 135.

<sup>66</sup> Zbigniew Zdrójkowski, „*Praktyka kryminalna*” Jakuba Czechowicza. Jej źródła i system na tle rozwoju współczesnego prawa karnego zachodniej Europy (Toruń: Towarzystwo Naukowe, 1949), 56.

później jej męża<sup>[67]</sup>. W praktyce jednak reguły te nie były konsekwentnie przestrzegane. Przede wszystkim jako świadkowie w sprawach kryminalnych bardzo często występowały kobiety<sup>[68]</sup>. Również kobiety mogły samodzielnie składać przysięgę jak pisze Paweł Szczerbic: „A gdzieby im przysięgę skazano, tam nie opiekun, ale sama ma przysięgać”<sup>[69]</sup>.

Pewną niekonsekwencją w nieuznaniu kompetencji kobiet do składania zeznań i braku ich wiarygodności było powszechnie stosowane w sądownictwie korzystanie z ich fachowej wiedzy i powoływanie kobiet jako biegłych sądowych<sup>[70]</sup>. Były to przede wszystkim położne i starsze doświadczone kobiety – „baby”. Występujące w charakterze biegłych kobiety stwierdzały ciążę i badały czy dana kobieta rzeczywiście została zgwałcona. Uczestniczyły również jako biegłe w sprawach o dzieciobójstwo<sup>[71]</sup>. Stojące przed sądem biegłe przekazywały swoją opinię w formie relacji, czasami poprzedzonej przysięga co sugeruje podobieństwo do instytucji świadka<sup>[72]</sup>.

<sup>67</sup> Żona krakowskiego kupca Fryderyka Klimki – Julianna, pod przysięgą zeznała o przyjęciu przyjezdnego na stację, opisując posiadane przez niego rzeczy itp., następnie przed sądem stanął jej mąż i również pod przysięgą złożył oświadczenie: „Świadectwo przez żonę mojej, jako wyżej zeznane, widziałem, czytałem i to wszystko potwierdzam. (APKr. AMKr. 890, s. 96-97).

<sup>68</sup> Mikołajczyk, *Proces kryminalny*, 341.

<sup>69</sup> Paweł Szczerbic, *Speculum saxonum albo Prawo saskie i majdeburskie porządkiem obiecadła z łacińskich i niemieckich egzemplarzów zebrane a na polski język z pilnością i wiernie przełożone* (Lwów: 1581), 23.

<sup>70</sup> Witold Maisel, *Sądownictwo Miasta Poznania do końca XVI wieku* (Poznań: Państwowe Wydawnictwo Naukowe, 1961), 230-231.

<sup>71</sup> Por. APKr. AMKr. 867,134. AJZR, cz. V, T. I, s. 238 cytowane za Mikołajczyk, *Proces kryminalny*, 93.

<sup>72</sup> Adam Chmiel, *Sądy ratuszne hetmańskie: kartka z życia mieszkańców krakowskich w 16. Wieku* (Kraków: nakładem autora, 1907), 30.

## 3 | Kobieta przed sądem XIX-XX w.

### 3.1. Droga do zdolności procesowej żon w postępowaniu cywilnym w Niemczech

Panujące w Niemczech od średniowiecza partykularne rozdrobnienie prawa procesowego zakończyło się wkrótce po powstaniu Niemieckiej Rzeszy w 1871 r. wraz z wejściem w życie w dniu 1 października 1879 r. ustawy o ustroju sądowym<sup>[73]</sup>, kodeksu postępowania cywilnego<sup>[74]</sup> i kodeksu postępowania karnego<sup>[75]</sup>, które obowiązują do dziś. Kodyfikacje te stanowiły ważny punkt zwrotny w niemieckiej historii prawa, ponieważ w przeciwieństwie do wszystkich wcześniejszych kodyfikacji, takich jak Constitutio Criminalis Carolina (1532) lub pruski Landrecht (1794), nie obowiązały one już tylko subsydiarne, a zatem już nie można było od nich odstąpić na mocy prawa lokalnego lub regionalnego. Szczególnie w odniesieniu do praw sądowych kobiet, było to tym bardziej znaczące, że nowy Kodeks postępowania cywilnego był w tamtym czasie bezprecedensowym aktem wyzwolenia w odniesieniu do pozycji kobiet w postępowaniu cywilnym<sup>[76]</sup>. Paragraf 51 kodeksu postępowania cywilnego (Civilprozessordnung – skrócie CPO) z roku 1877 uzależniał początkowo zdolność do dokonywania skutecznych czynności procesowych od zdolności do czynności prawnych w zakresie prawa cywilnego materialnego – tak jak ma to miejsce w obowiązującym do dziś paragrafie 51 kodeksu postępowania cywilnego: „1. Osoba ma zdolność do czynności procesowej w zakresie, w jakim może związać się umową”<sup>[77]</sup>.

Zgodnie z tym przepisem tylko niezamężne kobiety miałyby zdolność do czynności procesowej w 1879 r. Natomiast żony byłyby niezdolne do postępowania sądowego, ponieważ ich zdolność do czynności prawnych pozostawała ograniczona w wielu partykularnych prawach rodzinnych aż do wejścia w życie kodeksu cywilnego (Bürgerliches Gesetzbuch, w skrócie

<sup>73</sup> Gerichtsverfassungsgesetz, ogłoszony dnia 27.01.1877, Reichsgesetzblatt (RGBl.), 41

<sup>74</sup> Civilprozessordnung, ogłoszony dnia 30.01.1877, Reichsgesetzblatt (RGBl.), 83.

<sup>75</sup> Strafprozessordnung, ogłoszony dnia 1.02.1877, Reichsgesetzblatt (RGBl.), 253.

<sup>76</sup> Tak właściwie Recht Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess”, 401.

<sup>77</sup> Civilprozessordnung (ZPO), nowo ogłoszony dnia 5.12.2005, Bundesgesetzblatt (BGBl.) I, 3202.

---

BGB) w dniu 1 stycznia 1900 roku. Niemniej niemiecki kodeks postępowania cywilnego z 1879 r. stanowił w § 51 ust. 2:

2. Zdolność procesowa osoby pełnoletniej nie jest ograniczona faktem pozostawiania pod władzą ojcowską, a zdolność procesowa kobiety nie jest ograniczona faktem pozostawiania w związku małżeńskim.

Tym samym rozdzielono zatem zależność między zdolnością żony do wniesienia pozwu a jej materialno-prawną zdolnością do czynności prawnych na korzyść pozycji żony w sądzie, innymi słowy, prawo postępowania cywilnego było od 1879 r. bardziej przyjazne kobietom niż ówczesne materialne prawo cywilne. Poza tym paragraf 51 CPO w ówczesnym brzmieniu ustępu trzeciego podkreślał wyraźnie: „3. Do prawa postępowania [cywilnego] nie stosuje się przepisów o cura sexus nad kobietami [poza związkiem małżeńskim]”. Przepis ten przestał jednak mieć jakiekolwiek praktyczne znaczenie już w dniu jego wejścia w życie w dniu 1 października 1879 r., ponieważ w tym czasie opieka nad pełnoletnimi niezamężnymi kobietami nie była już obowiązującym prawem w żadnym miejscu w Niemczech. Kiedy w końcu pełna zdolność do czynności prawnych żon została ustanowiona w całych Niemczech wraz z wejściem w życie kodeksu cywilnego („BGB”) w dniu 1 stycznia 1900 r., również ust. 2 paragrafu 51 CPO w wersji z 1879 r. stracił swoje praktyczne znaczenie. Żony miały teraz również pełną zdolność do czynności prawnych zgodnie z prawem formalnym, a zatem były już również zdolne do podejmowania działań sądowych zgodnie z § 51 ust. 1 CPO.

Niemniej, dwa ważne ograniczenia relatywizują ówcześnie postępowe regulacje zdolności do czynności prawnych i procesowych kobiet w Niemczech; pierwsze ograniczenie ma charakter prawno-praktyczny, drugie prawno-historyczny. Z prawno-praktycznego punktu widzenia, nawet po 1900 r., pełna zdolność do czynności prawnych rozszerzona na żony nie zmieniała faktu, że zdecydowana większość wszystkich żon w Niemczech żyących ze swoimi mężami w ustawowym ustroju majątkowym<sup>[78]</sup>, który w tradycji rzymskiej ustalił podział majątku męża i żony, nie miała uprawnień do rozporządzania własnym majątkiem nabytym przed zawarciem związku małżeńskiego lub nabytym przez żonę w trakcie

---

<sup>78</sup> §§ 1363-1431 BGB w wersji obowiązującej od roku 1900.

małżeństwa<sup>[79]</sup>. W tym zakresie materialne prawo do rozporządzania przedmiotami należącymi do żony, a tym samym prawo do prowadzenia postępowania sądowego w tych sprawach, należało według prawa rodzinnego do męża, niezależnie od paragrafu 51 CPO i niezależnie od ogólnej zdolności do czynności prawnych zdobytej przez żony w roku 1900<sup>[80]</sup>. To samo odnosiło się tym bardziej do wszystkich żon, które uzgodniły z mężem w drodze notarialnej umowy małżeńskiej ustrój małżeńskiej wspólnoty majątkowej, który – podobnie jak ustawowy małżeński ustrój majątkowy obowiązujący obecnie w polskim prawie – stanowił częściową lub całkowitą wspólnotę majątkową męża i żony. Zgodnie z niemieckim kodeksem cywilnym (BGB) w wersji obowiązującej w latach 1900–1953, jedynie mąż uprawniony był do rozporządzania i pozywania majątku wspólnego. Tylko te żony, które w drodze notarialnej umowy majątkowej uzgodniły całkowitą rozdzielnosć majątkową bez żadnych uprawnień męża w stosunku do majątku żony małżeńskiej, korzystały *de facto* z pełnej zdolności do czynności prawnych i procesowych w okresie od 1900 do 1953 roku.

Żony nieposiadające takiej umowy miały prawa do samodzielnego rozporządzania tylko w odniesieniu do takich przedmiotów własnego majątku, które pozostawały do osobistej swobodnej dyspozycji żon na mocy ustawy (BGB) lub za wyraźną zgodą męża<sup>[81]</sup>. Ograniczenia te, wynikające z wciąż patriarchalnego prawa rodzinnego, które do 1953 r. dotyczyły praktycznie większości żon bez małżeńskiej umowy o rozdzielnosci majątkowej, a tym samym ograniczały również uprawnienia sądowe tychże żon, choć nie w odniesieniu do całego ich majątku, ale do najważniejszych przedmiotów majątku żony, nie były wyrazem rzymskiej, ale germanńskiej myśli prawnej.

Prowadzi to do drugiego ograniczenia, które należy dostrzec z prawno-historycznego punktu widzenia, a mianowicie jedynie względnej postępowości regulacji dotyczących zdolności do czynności sądowej kobiet zgodnie z kodeksem postępowania cywilnego (CPO) w wersji obowiązującej od 1879 r. oraz przepisów dotyczących zdolności do czynności prawnych kobiet zgodnie z kodeksem cywilnym (BGB) w wersji obowiązującej od 1900 r. Zarówno kodeks postępowania cywilnego (CPO) przyjęty przez niemiecki parlament (Reichstag) w 1877 r., jak i kodeks cywilny (BGB)

<sup>79</sup> Por. tylko § 1376 BGB w wersji obowiązującej od roku 1900: „1. Bez zgody żony mąż może: 1. rozporządzać pieniędzmi żony i innym majątkiem podlegającym zużyciu [...].”

<sup>80</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, 591.

<sup>81</sup> Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess“, 592.

przyjęty w 1896 r. od patriarchalnych przepisów prawa rodzinnego uwolniony został w Republice Federalnej Niemiec ostatecznie dopiero w 1953 r dzięki zapisom konstytucji, czyli Ustawy Zasadniczej<sup>[82]</sup>. Pod omawianym względem niemieckie prawo powróciło wówczas w zasadzie do obowiązującego onegdaj jedynie pomocniczo (subsydiarnie) prawa powszechnego (*ius commune*) pochodzenia niegermańskiego, które w dziedzinie materialnego prawa cywilnego już w starożytności rzymskiej oraz w dziedzinie prawa postępowania cywilnego pod wpływem prawa rzymsko-kanonicznego już od czasów średniowiecznych zrównywało w dużej mierze prawa żon z prawami mężów. Fakt, że niezależnie od szczególnie szerokiej recepcji rzymskiego prawa cywilnego w Niemczech i niezależnie od dużego znaczenia kanonicznego prawa postępowania dla świeckiego prawa postępowania, liczne partykularne porządkie prawne pochodzenia germanickiego często lokalnie i regionalnie derogowały *ius commune* pochodzenia niegermańskiego, oznaczał, że pozycja prawnego kobiet w dziedzinie prawa cywilnego i cywilnego prawa procesowego była silnie patriarchalna przez prawie całą epokę nowożytną. Tak więc w dziedzinie prawa postępowania cywilnego do roku 1879 oraz w dziedzinie małżeńskiego prawa majątkowego „całkiem odmienny porządek rzymski” prawa justyniańskiego i kanonicznego pozostały „martwą literą” aż do roku 1953. Evidentnie, w Niemczech „czas renesansu i humanizmu, reformacji i kontrreformacji, absolutyzmu i państwa policyjnego [nowoczesnego państwa administracyjnego] [...] najwyraźniej jeszcze do tego nie dojrzał”<sup>[83]</sup>.

### **3.2. Pozycja procesowa kobiet w zaborze pruskim na tle ich pozycji procesowej w pozostałych zaborach i w czasie międzywojennym**

Ustanowienie zdolności do czynności procesowych kobiet poprzez niemiecki kodeks postępowania cywilnego, który wszedł w życie w 1879 r., jako prawo obowiązujące w całej Rzeszy Niemieckiej już nie tylko subsydiarnie, lecz obligatoryjnie, dotyczyło również terytorium zaboru pruskiego. Co prawda obowiązujący wcześniej pruski Landrecht z 1794 r. oraz Powszechna Ordynacja Sądowa dla Państw pruskich z 1793 r. uchylone

<sup>82</sup> Por. Art. 117 ust. 1 Ustawy Zasadniczej („Grundgesetz”) z 23-go maja 1949 r.

<sup>83</sup> Tak słusznie Holthöfer, „Die Rechtsstellung der Frau im Zivilprozess”, 415.

zostały ostatecznie dopiero w 1879 r. przez ustawy nowo powstałej Rzeszy Niemieckiej o ustroju sądownictwie, prawie karnym i postępowaniu karnym, a w 1900 r. o prawie cywilnym, to przyniosły już zdecydowaną poprawę sytuacji prawnej kobiet. W zakresie swego obowiązywania, a więc także w pruskim zaborze, poza nielicznymi wyjątkami, jak np. transakcje intercesyjne (poręczenia kobiet za osoby trzecie itp.), wprowadzały one nieograniczoną zdolność prawną i zdolność sądową kobiet niezamężnych. Ten postęp w zakresie niezależności prawnej niezamężnych kobiet został jednak zdecydowanie zrelatywizowany przez fakt, że również pruski Landrecht miał zastosowanie jedynie subsydiarne, tj. był zastępowany przez odmienne prawa lokalne w prowincjach pruskich<sup>[84]</sup>. Co więcej, wszystkie zamężne kobiety pozostawały niezdolne do prowadzenia sporów sądowych według pruskiego Landrechtu, chyba że działały za zgodą męża<sup>[85]</sup>. Tak czytamy w Powszechnym Prawie Krajowym dla Państw Pruskich:

§ 184. Mąż jest głową związku małżeńskiego. [...] § 186. Jest on zobowiązany do zapewnienia żonie utrzymania zgodnie z jej stanem. [...] § 187. Utrzymanie żony obejmuje również koszty postępowania sądowego w sprawach z nią związanych. § 188. Mąż jest zobowiązany i uprawniony do obrony osobowości, honoru i majątku żony w sądzie i w pozasądowych sprawach. § 189. Co do zasad żona nie może zatem wszczynać postępowań sądowych z innymi osobami bez udziału i zgody męża<sup>[86]</sup>.

Regulacje te wpisują się w nowożytnych europejskich porządkach prawnych w tradycyjny schemat prawnego podporządkowania żony mężowi z jednoczesnym obowiązkiem męża do również procesowej ochrony prawnej żony („ochrona w zamian za posłuszeństwo”). Aczkolwiek pruski Landrecht w § 189 nawet w przypadku żony nie zakładał już jednak całkowitej niezdolności sądowej, a jedynie wymagał współdziałania i zgody męża na czynności sądowe żony. Z kolei żadnej zgody męża żona nie potrzebowała jedynie w sporach sądowych dotyczących przedmiotów majątkowych wyraźnie zastrzeżonych dla żony zgodnie z notarialną lub sądową

<sup>84</sup> Ibidem, 428.

<sup>85</sup> Ibidem, 428.

<sup>86</sup> Allgemeines Landrecht für die Preußischen Staaten von 1794. Mit einer Einführung von Hans Hattenhauer, Dritte, erweiterte Auflage, Berlin: Luchterhand, 1996), 357 (ALR II 1, 184–189).

umową majątkową małżeńską zawartą z mężem („vorbehaltens Vermögen”, „Vorbehaltsvermögen”) <sup>[87]</sup>:

§ 230. Żona może skutecznie wszczęć postępowanie sądowe dotyczące majątku zastrzeżonego w umowie nawet bez udziału męża <sup>[88]</sup>.

Co prawda w ówczesnej praktyce prawnej jedynie niewiele żon miało takie umowy małżeńskie, niemniej poczyniono tu pierwsze kroki na długiej drodze do uzyskania przez żony w 1879 r. zdolności do czynności sądowych.

Z perspektywy prawa postępowania sądowego według pruskiego Landrechtu również warto zwrócić uwagę na paragraf 200, który przewiduje możliwość sporu sądowego między mężem a żoną, ale wymaga przy tym:

§ 200. Nawet w przypadku rozpraw sądowych żony z mężem wymagany jest udział obrońcy tej pierwszej [- żony], wybranego przez nią samą lub wyznaczonego przez sędziego <sup>[89]</sup>.

Paragraf 200 reguluje zatem niezwykłą konstelację, według której równość interesów męża i żony – zakładana przez ustawodawcę domyślnie we wszystkich innych przypadkach występowania żony przed sądem – w przypadku sporu męża i żony w drodze wyjątku nie istnieje, a – co za tym idzie – żona wymaga neutralnej pomocy w sądzie w celu ochrony własnych interesów w stosunku do męża. Wyrazem tradycyjnego patriarchalizmu pozostaje jednak fakt, że pomoc ta jest obowiązkowa dla żony, tj. może mieć miejsce nawet wbrew jej własnej woli, a że odwrotnie, mąż może swobodnie decydować, czy potrzebuje pomocy prawnej w sporze sądowym z żoną.

W przypadku zamężnych kobiet zajmujących się działalnością kupiecką (Handelsfrau) ograniczenia nie miały zastosowania w odniesieniu do ich działalności handlowej. Niezależnie od małżeńskiego ustroju majątkowego, w którym żyły ze swoim mężem, miały one nie tylko nieograniczoną zdolność do czynności prawnych, ale także mogły podejmować działania

<sup>87</sup> Allgemeines Landrecht für die Preußischen Staaten von 1794. Mit einer Einführung von Hans Hattenhauer, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996), 358 (ALR II 1, 208-209).

<sup>88</sup> Allgemeines Landrecht für die Preußischen Staaten von 1794. Miteiner Einführung von Hans Hattenhauer, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996), 358 (ALR II 1, 230).

<sup>89</sup> Allgemeines Landrecht für die Preußischen Staaten von 1794. Miteiner Einführung von Hans Hattenhauer, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996), 357 (ALR II 1, 200).

sądowe<sup>[90]</sup>. Jednakże, o ile spory prawne zamężnych kobiet prowadzących działalność kupiecką nie dotyczyły ich działalności handlowej, o tyle podlegały one tym samym wyżej wymienionym ograniczeniom proceduralnym, co wszystkie żony<sup>[91]</sup>.

W porównaniu z pozycją sądową kobiet w zaborze pruskim, pozycja sądowa kobiet w zaborze austriackim była w efekcie końcowym korzystniejsza. Wprawdzie paragraf 91 austriackiego kodeksu cywilnego (ABGB) nie brzmi inaczej niż ALR:

Mąż jest głową rodziny. W tym charakterze ma on szczególne prawo do zarządzania gospodarstwem domowym; ale jest również zobowiązany do odpowiedniego utrzymania małżonki swoim majątkiem i reprezentowania jej we wszystkich sprawach<sup>[92]</sup>.

Jednak austriacki kodeks cywilny (ABGB), w przeciwnieństwie do Landrechtu pruskiego (ALR), nie znał już opieki męża nad żoną. Powyższy przepis, w przeciwnieństwie do prawa pruskiego, nie był już zatem rozumiany jako ograniczenie zdolności żony do pozywania, ale raczej jako dodatkowe uprawnienie męża do jej reprezentacji. W praktyce sądowej żony w zaborze austriackim również mogły występować przed sądem samodziennie bez wsparcia męża. Musiały jedynie akceptować fakt, że teoretycznie również mąż mógł korzystać ze swojego uprawnienia do jej reprezentacji zgodnie z § 91 ABGB. Pod tym względem pozycja sądowa żon w zaborze austriackim była już korzystniejsza niż w zaborze pruskim do czasu wejścia w życie nowego kodeksu postępowania cywilnego w 1879 roku w całych Niemczech.

W zakresie stosowania francuskiego kodeksu cywilnego (*Code civil* lub *Code Napoléon*) pozycja sądowa żon była porównywalna z zaborem pruskim<sup>[93]</sup>. Nie zmieniło tego częściowe zastąpienie francuskiego kodeksu cywilnego przez kodeks cywilny Królestwa Polskiego, który w interesujących nas tu regulacjach dotyczących reprezentacji żony przed sądem

<sup>90</sup> *Allgemeines Landrecht für die Preußischen Staaten von 1794. Mit einer Einführung von Hans Hattenhauer*, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996), 474 (ALR II 8, 488).

<sup>91</sup> *Allgemeines Landrecht für die Preußischen Staaten von 1794. Mit einer Einführung von Hans Hattenhauer*, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996), 474 (ALR II 8, 489).

<sup>92</sup> § 91 Allgemeines Bürgerliches Gesetzbuch. [http://repertorium.at/qu/1811\\_oestabgb.html](http://repertorium.at/qu/1811_oestabgb.html).

<sup>93</sup> Por. Paweł Rawczyński, *Zdolność procesowa w sądowym postępowaniu rozpoznawczym w sprawach cywilnych* (Warszawa: C.H. Beck, 2018), Rozdział I, § 3 i 4.

w 1825 r. poszedł kompletnie w ślady francuskiego kodeksu cywilnego. Jeszcze wyraźniej niż pruski Landrecht, Kodeks cywilny Królestwa Polskiego umieszcza obowiązek męża, ale także prawo, do sądowej i poza sądowej obrony żony w kontekście ogólnego obowiązku żony do posłuszeństwa mężowi:

§ 213. Mąż winien obronę dla żony, a żona posłuszeństwo dla męża<sup>[94]</sup>.

Ochrona żony w zamian za jej posłuszeństwo oznaczała w dziedzinie prawa sądowego, że według francuskiego kodeksu cywilnego żona nie mogła występować przed sądem bez wyraźnego upoważnienia, chyba że chodziło o spory majątkowe z powodu samodzielnej działalności handlowej jako „marchande publique” lub z powodu jej własnego majątku, o ile mogła nim dysponować bez zgody męża<sup>[95]</sup>.

215. Żona stawać w sądzie nie może, bez upoważnienia od męża swoiego, chociażby się trudniła kupiectwem publicznym, albo nie była w spółności majątku, albo swóй oddzielnny miała<sup>[96]</sup>.

Niemal identyczne sformułowanie występowało w Kodeksie cywilnym Królestwa Polskiego od 1825 roku:

182. Żona nie może stawać w Sądzie bez upoważnienia męża, chociażby się trudniła kupiectwem publicznie, i chociażby sprawą tyczyła się majątku, pod ją administracyją zostającego<sup>[97]</sup>.

Natomiast w przeciwnieństwie do pruskiego Landrechtu, w prawie francuskim i polskim w przypadku, kiedy mąż odmawiałby żonie zgody na występowanie przed sądzie, żona mogła uzyskać zgodę męża w drodze powództwa przeciwko mężowi w celu wykluczenia czysto arbitralnych

<sup>94</sup> Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 213.

<sup>95</sup> Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 217, od 1825r.

<sup>96</sup> Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 215.

<sup>97</sup> Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825). Objaśniony motywami do prawa i jurysprudencją, red. Juliusz Walęski. Księga I., Warszawa: Drukarnia Józefa Bergera 1872: 61 (art. 182).

działan męża. Miało to na celu uniemożliwienie mężowi odmówienia żonie upoważnienia z czystej arbitralności<sup>[98]</sup>.

185. [...] Jeżeli mąż odmawia żonie upoważnienia do stawania w Sądzie, lub do zawarcia jakowego aktu, żona może zapozwać męża przed Sąd, w którego okręgu jest wspólne małżonków zamieszkanie. Sąd wysłuchawszy męża, lub zaocznie, jeżeli ten przyzwoicie zapozwany nie stawa, może udzielić lub odmówić upoważnieni<sup>[99]</sup>.

Przepis ten oznaczał, po pierwsze, ustawowe potwierdzenie, że żona, przynajmniej w tej konkretnej konstelacji, mogła być powodem przed sądem oraz skutecznie podejmować czynności sądowe nie tylko niezależnie od męża, lecz nawet wbrew wyraźnej woli męża. Po drugie, przepis ten stanowił ustawowe ograniczenie zasadniczo nieograniczonego obowiązku posłuszeństwa żony wobec męża do miary niezbędnej dla jej ochrony prawnej.

Ponadto Kodeks Napoleona, a od 1825 r. Kodeks cywilny Królestwa Polskiego, wyjaśniał, że ograniczenia dotyczące zdolności żony do stawania przed sądem nie miały zastosowania „w sprawach kryminalnych albo policyjnych”<sup>[100]</sup>, czyli w sprawach karnych i administracyjnych.

183. [...] Upoważnienie od męża nie jest potrzebne, gdy żona pociągana jest do Sądu w materyi karnej.

---

<sup>98</sup> Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 219 oraz od roku 1825 Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825). Objasniony motywami do prawa i jurysprudencja, red. Juliusz Walęski. Księga I., Warszawa: Drukarnia Józefa Bergera 1872: 62 (art. 185).

<sup>99</sup> Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825). Objasniony motywami do prawa i jurysprudencja, red. Juliusz Walęski. Księga I., Warszawa: Drukarnia Józefa Bergera 1872: 62 (art. 185). Już przed 1825 r. brzmiało to podobnie we francuskim kodeksem cywilnym: „218. Gdyby mąż odmawiał upoważnienia żonie do stawienia się w Sądzie, Sędziu takie upoważnienie dać może. 219. Jeżeli mąż odmawia upoważnienia żony do zawarcia aktu, żona może pozwać męża prosto do Trybunału pierwszej instancji okręgu, w którym wspólnie ich jest zamieszkanie [...].” [Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 218, 219].

<sup>100</sup> Kodeks Napoleona z przypisami. Xiąg trzy, Warszawa: Drukarnia XX, Piarów 1810, art. 216 oraz od roku 1825 Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825). Objasniony motywami do prawa i jurysprudencja, red. Juliusz Walęski. Księga I., Warszawa: Drukarnia Józefa Bergera 1872: 61 (art. 183).

Również dorosłe niezamężne kobiety nie znajdowały się już pod męską kuratelą i tym samym mogły samodzielnie występować w sądzie od czasu wprowadzenia prawa francuskiego, austriackiego i pruskiego<sup>[101]</sup>. To samo dotyczy prawa karnego w tych obszarach zaboru rosyjskiego, w których obowiązywało prawo rosyjskie. Chociaż tutaj istniały złagodzenia dla kobiet w odniesieniu do tak zwanej „kobiecej słabości” w niektórych karach w odstępcie od zachodnioeuropejskich porządków prawnych<sup>[102]</sup>. Tak stanowi rosyjskie prawo małżeńskie z 1836 roku:

Żona musi być posłuszna swojemu mężowi, żyje z nim w miłości, szacunku i nieograniczonym posłuszeństwie [...] i okazuje mu życzliwość i uczucie jako władcy domu<sup>[103]</sup>.

Zwłaszcza na wsi w środowiskach chłopskich posłuszeństwo żony wobec męża nie знаło żadnych granic, które mogłyby zostać kontrolowane przez sąd<sup>[104]</sup>. Występowanie żony przed sądem wbrew woli jej męża było tutaj faktycznie wykluczone, chociaż w stosunkach między żoną a mężem – podobnie jak w prawie pruskim – obowiązywała rozdzielnosc majątkowa, więc żona mogła mieć własne prawa majątkowe<sup>[105]</sup>. Warto zauważyć, że – w przeciwnieństwie do prawa pruskiego, a później niemieckiego w zaborze pruskim – w 1864 r. w celu ujednolicenia stosowania prawa nowo utworzony Sąd Kasacyjny Rosji wzmacnił prawa majątkowe żony wobec męża, odmawiając mężowi prawa do zarządzania majątkiem żony wbrew jej woli.

<sup>101</sup> Ernst Holthöfer, „Die Geschlechtsvormundschaft. Ein Überblick von der Antike bis ins 19. Jahrhundert“, [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard (München: C.H. Beck, 1997), 427.

<sup>102</sup> Catherine Fleichitz-Doubossarsky, „Russe. Rapport“, [w:] *Women's Position in the Laws of the Nations. A Compilation of the Laws of different countries*, red. International Council of Women (Karlsruhe im Breisgau: G. Braunsche Hofdruckerei 1912), 179.

<sup>103</sup> *Zhenskoe pravo. Svod uzakonenii i postanovlenii otnosiashchikhsia do zhenskago pola* (St Petersburg, 1895), 110, zitiert nach Christine Johanson, *Women's Struggle for Higher Education in Russia, 1855-1900* (Kingston: McGill-Queen's University Press, 1987), 4.

<sup>104</sup> Richard Stites, *The Women's Liberation Movement in Russia. Feminism, Nihilism, and Bolshevism 1860-1930*, (Princeton-New Jersey: Princeton University Press, 1991), 7; William G. Wagner, „Civil Law, Individual Rights, and Judicial Activism in late Imperial Russia“, [w:] *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order*, red. Peter H. Salomon, Jr. (New York: M.E.Sharpe, 1997), 22, 26, 30.

<sup>105</sup> *Svod Zakonov Rossiiskoi Imperii X* (1835), art. 109 i nast.

<sup>106</sup> Stites, *The Women's Liberation Movement in Russia*, 7.

W 1870 r. Sąd Kasacyjny orzekł w sprawie Murashkovskaia przeciwko Murashkavskii, że

[n]ie tylko majątek żony nie staje się własnością jej męża, ale nawet nie nabywa on przez małżeństwo prawa do korzystania z niego lub zarządzania nim [...] Posag żony, podobnie jak każdy majątek nabyty przez nią w trakcie małżeństwa [...] jest uważany za jej majątek odrębny, a małżonkowie mają równe prawo do rozporządzania własnym majątkiem niezależnie od siebie<sup>[107]</sup>.

Nawet jeśli powyższe i inne<sup>[108]</sup> porównywalne orzeczenia Sądu Kasacyjnego w sprawie majątku żony nie odzwierciedlają całej, ogólnej rzeczywistości prawnej w Rosji, a w szczególności w zaborze rosyjskim poza byłym Królestwem Polskim, można jednak tu zauważyc dwie ważne sprawy. Po pierwsze, żona była zdolna do prowadzenia spraw sądowych, to znaczy mogła skutecznie pozwać męża do sądu<sup>[109]</sup>, tym bardziej mogła pozwać osoby trzecie. Po drugie, zgodnie z tym orzecznictwem, pozycja majątkowa żony – o ile miała ona majątek – była lepsza w zaborze rosyjskim w drugiej połowie XIX wieku niż pozycja kobiet wynikająca ze wszystkich wymienionych zachodnioeuropejskich kodeksów, które obowiązywały również w Polsce zaborowej i nawet jeszcze pozaborowej. Na przykład, mimo że w okresie międzywojennym na terenie byłego Królestwa Polskiego wspomniany art. 182 Kodeksu cywilnego<sup>[110]</sup> został co prawda w 1921 r. zastąpiony przepisem:

Art. 5. art. 182 Kod. Cyw. Pol. otrzymuje brzmienie następujące: Żona może stawać w sądzie bez upoważnienia męża<sup>[111]</sup>.

<sup>107</sup> Polnyi Svod Reshenii Grazhdanskago Kassatsionnago Departamenta Pravitel' stvuiushchago Senata, 1866-1910, cytowany za William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Oxford: Clarendon Press, 1994), 207.

<sup>108</sup> Por. Wagner, *Marriage, Property, and Law in Late Imperial Russia*, 207-210.

<sup>109</sup> Wagner, „Civil Law, Individual Rights, and Judicial Activism in late Imperial Russia”, 31.

<sup>110</sup> Przyp. 97.

<sup>111</sup> Dz. U. nr. 64, poz. 397, Ustawa z dnia 1 lipca 1921 r. w przedmiocie zmiany niektórych przepisów obowiązującego w b. Królestwie Polskiem prawa cywilnego, dotyczących praw kobiet.

Ale już w następnym zdaniu ta nowa zasada jest ponownie ograniczona w odniesieniu do tego majątku żony, który jest „pod zarządem i użytkowaniem męża”.

Jeżeli jednak sprawa dotyczy majątku, pozostającego podług prawa lub umów, między małżonkami zawartych, pod zarządem i użytkowaniem męża, potrzebne jest upoważnienie lub przypozwanie męża [...]<sup>[112]</sup>.

Podczas, gdy w byłym zaborze rosyjskim poza obszarem byłego Królestwa Polskiego własność żony była nie tylko formalną pozycją prawną, jak w innych byłych zaborach, zatem również na terenie byłego zaboru pruskiego do końca drugiej wojny światowej, a w samej Republice Federalnej Niemiec nawet aż do 1953 r. główne przedmioty własności żony były pod zarządem i użytkowaniem męża. W tym zakresie własność żony przynosiła więc korzyści przede wszystkim mężowi, a żona w sprawie jej własności nie mogła przed sądem wykonywać czynności procesowych niezależnie od męża. Tylko dorosłe, niezamężne kobiety nie były już pod morską kuratą ojca – zarówno w zaborze rosyjskim<sup>[113]</sup>, jak i według kodeksów zachodnioeuropejskich, i mogły wnosić pozwy do sądu.

Sytuacja ta nie uległa też zmianie w okresie międzywojennym w pierwszej połowie XX wieku ani w Niemczech, ani w Polsce, niezależnie od faktu, że w Polsce wszystkie obce kodeksy postępowania cywilnego z byłych zaborów zostały w dużej mierze zastąpione<sup>[114]</sup> jednolitym polskim kodeksem postępowania cywilnego obowiązującym w całej niepodległej Polsce od 1 stycznia 1933 r.<sup>[115]</sup>. Dopiero po zastąpieniu również ustawowych małżeńskich ustrojów majątkowych pochodzenia niemieckiego, austriackiego, francuskiego oraz rosyjskiego, które po 1919r. nadal obowiązywały w byłych zaborach, jednolitymi polskimi przepisami prawa rodzinnego po drugiej wojnie światowej, zniesiono również ostatnie ograniczenia dla żon.

<sup>112</sup> Dz. U. nr. 64, poz. 397, Ustawa z dnia 1 lipca 1921 r. w przedmiocie zmiany niektórych przepisów obowiązującego w b. Królestwie Polskiem prawa cywilnego, dotyczących praw kobiet, art. 5.

<sup>113</sup> Janet Phyllis Cummings, *The Status of Women in Russia and the USSR 1860's to 1980's* (Edmonton Alberta, 1993), 7.

<sup>114</sup> Dz. U. 1930 nr 83 poz. 652, Rozporządzenie Prezydenta Rzeczypospolitej z dnia 29 listopada 1930 r. – Przepisy wprowadzające Kodeks Postępowania Cywilnego.

<sup>115</sup> Dz. U. 1930 nr 83 poz. 651, Rozporządzenie Prezydenta Rzeczypospolitej z dnia 29 listopada 1930 r. – Kodeks Postępowania Cywilnego.

## 4 | Podsumowanie i zakończenie

Podsumowując, można stwierdzić, że kobiety w polskim i niemieckim postępowaniu karnym już we wczesnym okresie nowożytnym podlegały jedynie nielicznym ograniczeniom związanym z ich płcią. Niemiecki kodeks *Constitutio Carolina Criminalis* (1532), który stanowił ostatni już, znaczący akt ustawodawstwa cesarskiego w Niemczech aż do XIX wieku, podlegał recepcji również w Polsce, podobnie jak poszczególne niemieckie prawa miejskie. Kobiety mogły już na podstawie tego kodeksu samodzielnie bronić się w sądzie i być przesłuchiwanie w charakterze świadków lub zeznawać, choć wartość dowodowa ich zeznań w sądzie była często uznawana za mniejszą niż wartość zeznań mężczyzn. Poza procesami czarownic w XVII i XVIII wieku, kobiety oskarżone w postępowaniu karnym były w większości przypadków nawet nieco „uprzywilejowane” pod względem tortur w procesie inkwizycyjnym i ustalenia kar cieslesnych w porównaniu z oskarżonymi mężczyznami.

Całkiem inaczej wyglądała sytuacja w postępowaniu cywilnym, które w Polsce było regulowane w procesie ziemskim przez słynną, jedyną istniejącą aż do rozbiorów kodyfikację *Formula Processus* (1523), a w procesie miejskim i wiejskim według innych lokalnych praw. W Świętym Cesarstwie Rzymskim sytuacja prawną była jeszcze bardziej złożona ze względu na przeliczne duże i małe księstwa, przeogromną liczbę lokalnie odbiegających od siebie praw zwyczajowych oraz *ius commune* dla prawa cywilnego i postępowania cywilnego, które w przeciwieństwie do *Formula Processus* w Polsce obowiązywało jedynie subsydiarnie (pomocniczo) na szczeblu cesarskim.

Ta subsydiarność zarówno powszechnego prawa cywilnego pochodzenia rzymsko-starożytnego, jak i powszechnego prawa procesowego zgodnego z zasadami procesu inkwizycyjnego pochodzenia rzymskokatolickiego (kanonicznego) uniemożliwiała nawet tylko przybliżoną równość kobiet z mężczyznami w postępowaniach cywilnych przez wiele stuleci w czasach nowożytnych. Poza kilkoma wyjątkami, które istniały od XVI wieku, na przykład dla kobiet zajmujących się w lokalnym handlu działalnością kupiecką na własny rachunek, zgodnie z lokalnym prawem niemieckim i polskim nawet niezamężne kobiety mogły początkowo występować w sądzie tylko z pomocą i za zgodą mężczyzn. Zmieniło się to najpóźniej około 1800 roku wraz z kodyfikacją pruską, francuską i austriacką oraz ustawodawstwem rosyjskim (*Zvod zakonov*) z 1835 roku. Teraz przy najmniej niezamężne, dorosłe kobiety mogły występować samodzielnie

w sądzie w postępowaniu cywilnym i dokonywać skutecznych czynności sądowych zarówno w Niemczech, jak i w zaborach w Polsce. Natomiast prawa sytuacja większości żon w Niemczech i w Polsce nadal wyglądała zupełnie inaczej. Nawet po tym, kiedy w 1877 r. wszystkie kobiety w Niemczech i w zaborze pruskim formalnie uzyskały zdolność sądową, większość żon, czyli wszystkie żony bez umów małżeńskich ustalających rodzinę majątków żony i męża i bez uprawnienia męża do administracji oraz do sądowej i pozasądowej obrony majątku żony, pozostała prawnie zależna od swoich mężów w sporach dotyczących ich własnego majątku aż do połowy XX wieku ze względu na przepisy dotyczące małżeńskiego ustroju majątkowego według prawa rodzinnego. Tylko w zaborze rosyjskim poza obszarem obowiązywania prawa francusko-polskiego w byłym Królestwie Polskim, począwszy od końca XIX wieku, sytuacja żon w szczególnym zakresie prawa majątkowego, a tym samym również w zakresie odpowiednich sporów sądowych, była nawet lepsza niż ich pozycja wynikająca z prawa polskiego, niemieckiego, austriackiego i francuskiego.

## Bibliografia

- Ahrend-Schulte Ingrid, „Hexenprozesse”. W *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard. 199-220. München: C.H. Beck, 1997.
- Allgemeines Landrecht für die Preußischen Staaten von 1794. Mit einer Einführung von Hans Hattenhauer*, wyd. 3 rozszerzone, Berlin: Luchterhand, 1996.
- Bardach Janusz, Bogusław Leśnodorski, Michał Pietrzak, *Historia ustroju i prawa polskiego*. Warszawa: Lexis Nexis, 2009.
- Chmiel Adam, *Sądy ratuszne hetmańskie: kartka z życia mieszkańców krakowskich w 16. Wieku*. Kraków: nakładem autora, 1907. <https://fbc.pionier.net.pl/details/nnqs4mV>.
- Cummings Janet Phyllis, *The Status of Women in Russia and the USSR 1860's to 1980's*, Edmonton Alberta, 1993. DOI:10.7939/R31R6N91D.
- Dziadzio Andrzej, Dorota Malec, *Historia prawa, proces i wymiar sprawiedliwości w świetle źródeł*. Kraków: Księgarnia akademicka, 2000.
- Fleichtz-Doubossarsky Catherine, „Russe. Rapport”. W *Women's Position in the Laws of the Nations. A Compilation of the Laws of different countries*, red. International

- Council of Women. 176-180. Karlsruhe im Breisgau: G. Braunsche Hofdruckerei, 1912.
- Fortuna Franciszek Ignacy, „Status prawny i społeczny kobiet w XVII wieku w świetle testamentów szlachty Prus Królewskich” *Civitas et Lex*, nr 2 (2022): 87-97. doi: <https://doi.org/10.31648/cetl.7259>.
- Groicki Bartłomiej, „Artykuły prawa majdeburskiego w Koronie Polskiej”. W *Artykuły prawa majdeburskiego. Postępek sądów około karania na gardle. Ustawa płacej u sądów*, red. Karol Koranyi. Warszawa: Wydawnictwo prawnicze, 1954.
- Groicki Bartłomiej, *Porządek sądów i spraw miejskich prawa majdeburskiego w Koronie Polskiej*. Warszawa: Wydawnictwo Prawnicze, 1953.
- Holthöfer Ernst, „Die Geschlechtsvormundschaft. Ein Überblick von der Antike bis ins 19. Jahrhundert”. W *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard, 390-451. München: C.H. Beck, 1997.
- Holthöfer Ernst, „Die Rechtsstellung der Frau im Zivilprozess”. W *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard. 575-599. München: C.H. Beck, 1997.
- Janicka Danuta, „Wszczęcie postępowania karnego w świetle trzech rewizji prawa chełmińskiego z XVI wieku” *Zeszyty Naukowe UMK. Prawo*, nr 35 (1996): 89-114.
- Johanson Christine, *Women's Struggle for Higher Education in Russia, 1855-1900*. Kingsdon: McGill-Queen's University Press, 1987.
- Ketsch Peter, „Frauen im Mittelalter, t. II, Frauenbild und Frauenrechte in Kirche und Gesellschaft. W *Quellen und Materialen*”, red. Annette Kuhn. Düsseldorf: Schwann, 1984.
- Koch Elisabeth, *Maior dignitas est in sexu virili. Das weibliche Geschlecht im Normensystem des 16. Jahrhunderts*. Frankfurt am Main: Vittorio Klostermann, 1991.
- Koch Elisabeth, „Die Frau im Recht der Frühen Neuzeit. Juristische Lehren und Begründungen”. W *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard. 73-93. München: C.H. Beck, 1997.
- Kulejewska-Topolska Zofia, *Nowe Lokacje miejskie w Wielkopolsce od XVI do końca XVIII wieku: studium historyczno-prawne*. Poznań: Wydawnictwo Naukowe UAM, 1964.
- Łaszewski Ryszard, *Wymiar sprawiedliwości we wsiah województwa chełmińskiego w XVII i XVIII wieku. Organizacja sądownictwa i postępowanie sądowe*. Toruń: Wydawnictwo UMK, 1974.
- Maisel Witold, *Sądownictwo Miasta Poznania do końca XVI wieku*. Poznań: Państwowe Wydawnictwo Naukowe, 1961.
- Meder Stephan, Christoph-Eric Mecke, „Einführung”. W *Reformforderungen zum Familienrecht international*, t. I, *Westeuropa und die USA (1830-1914)*, red. Stephan Meder, Christoph-Eric Mecke. 11-105. Köln-Weimar-Wien: Böhlau, 2015.

- Meder Stephan, *Familienrecht. Von der Antike bis zur Gegenwart*. Köln-Weimar-Wien: Böhlau, 2013.
- Mikołajczyk Marian, *Proces kryminalny w miastach Małopolski w XVI-XIII wieku*. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2013.
- Moniuszko Adam, *Prawo sądowe Rzeczypospolitej szlacheckiej (XVI-XVIII w.): Zarys Wykładu*. Warszawa: Campidoglio, 2017.
- Naworski Zbigniew, „Kryminalne sprawy małżeńskie w księgach sądowych dawnej Polski”. [w:] *Regulacje prawne dotyczące małżeństwa w rozwoju historycznym*, red. Tomasz Dolata. 81-103. Wrocław: Wrocławskie Wydawnictwo Oświatowe, 2018.
- Rawczyński Paweł, *Zdolność procesowa w sądowym postępowaniu rozpoznawczym w sprawach cywilnych*, Warszawa: C.H. Beck, 2018.
- Redzik Adam, „Droga kobiet do zawodu adwokata” *Głos Prawa Przegląd Prawniczy Allerhanda*, nr 1-2 (2018): 164-171. <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-bo5de367-a454-4c11-9621-73368dbd1d66>.
- Rogge Roswitha, *Zwischen Moral und Handelsgenst. Weibliche Handlungsräume und Geschlechterbeziehungen im Spiegel des hamburgischen Stadtrechts vom 13. bis zum 16. Jahrhundert*. Frankfurt am Main: Vittorio Klostermann, 1998.
- Schnabel-Schüle Helga, „Frauen im Strafrecht vom 16. bis zum 18. Jahrhundert”. [w:] *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard. 185-198. München: C.H. Beck, 1997.
- Sondel Janusz, „Prawo rzymskie jako podstawa projektów kodyfikacyjnych w dawnej Polsce” *Zeszyty Prawnicze UKSW*, 1 (2001): 47-69. [https://bazum.muzhp.pl/media/files/Zeszyty\\_Prawnicze/Zeszyty\\_Prawnicze-r2001-t1-n1/Zeszyty\\_Prawnicze-r2001-t1-n1-s47-69/Zeszyty\\_Prawnicze-r2001-t1-n1-s47-69.pdf](https://bazum.muzhp.pl/media/files/Zeszyty_Prawnicze/Zeszyty_Prawnicze-r2001-t1-n1/Zeszyty_Prawnicze-r2001-t1-n1-s47-69/Zeszyty_Prawnicze-r2001-t1-n1-s47-69.pdf).
- Stites Richard, *The Women's Liberation Movement in Russia. Feminism, Nihilism, and Bolshevism 1860-1930*. Princeton-New Jersey: Princeton University Press, 1991.
- Szczerbic Paweł, *Speculum saxonum albo Prawo saskie i majdeburskie porządkiem obiecadła z łacińskich i niemieckich egzemplarzów zebrane a na polski język z pełnością i wiernie przełożone*, Lwów: kosztem y nakładem [...] Pawła Szczerbica, 1581): 23 <https://www.sbc.org.pl/dlibra/publication/12157/edition/60332/content>.
- Weber Marianne, *Ehefrau und Mutter in der Rechtsentwicklung*. Tübingen: Mohr, 1907.
- Wagner William G., „Civil law, individual rights, and judicial activism in late Imperial Russia”. W *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order*, red. Peter H. Salomon, Jr. 21-43. New York: M.E. Sharpe, 1997.
- Wagner William G., *Marriage, Property, and Law in Late Imperial Russia*. Oxford: Clarendon Press, 1994.
- Wunder Heide, „Herrschaft und öffentliches Handeln von Frauen in der Gesellschaft.” W *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*, red. Ute Gerhard. 27-54. München: C.H. Beck, 1997.

Zdrójkowski Zbigniew, „*Praktyka kryminalna*” Jakuba Czechowicza. Jej źródła i system na tle rozwoju współczesnego prawa karnego zachodniej Europy. Toruń: Towarzystwo Naukowe, 1949. <https://kpbc.ukw.edu.pl/dlibra/plain-content?id=26276>.



This article is published under a Creative Commons Attribution 4.0 International license.  
For guidelines on the permitted uses refer to  
<https://creativecommons.org/licenses/by/4.0/legalcode>

# Prosta Pożyczka

## RRSO 8,29%

Szybka

NAWET W KILKA  
MINUT

Wygodna

WEź W PLACÓWCE,  
ONLINE LUB PRZEZ  
TELEFON

Korzystna  
0 zł  
PROWIZJI



Polecam!  
Paweł Tomowski

Wicemistrz świata w windsurfingu w klasie iQFoil

**kasastefczyka.pl**

**801 600 100**

(koszt wg taryfy operatora)

 **KASA** STEFCZYKA

Zawsze u siebie 

Decyzja kredytowa zależy od indywidualnej oceny zdolności kredytowej.

Przykład reprezentatywny z dnia 26.09.2023 r. dla Prostej Pożyczki: Całkowita kwota kredytu wynosi 3000 zł. Zmienna roczna stopa oprocentowania dla całkowitej kwoty kredytu wraz z kredytowanymi kosztami ( prowizją 0 zł / 0% ) wynosi 7,99%. Rzeczywista roczna stopa oprocentowania (RRSO): 8,29%. Czas obowiązywania umowy – 23 miesiące, 22 miesięczne raty równe: 141,12 zł oraz ostatnia, 23. rata: 141,09 zł. Całkowita kwota do zapłaty: 3245,73 zł, w tym odsetki: 245,73 zł.

## Ubezpieczenie mieszkaniowe



- **Szeroki zakres ochrony gwarantuje** wypłatę odszkodowania w sytuacji pożaru, zalania, kradzieży z włamaniem, przepięcia i innych zdarzeń losowych
- **Ubezpieczenie domków letniskowych** i nagrobków
- **OC w życiu prywatnym**

Oferta dostępna w placówkach  
Spółdzielczych Kas.

*W ofercie również  
ubezpieczenia:  
zdrowotne, NNW,  
podrózne i na życie!*